THE PRIVATE DELEGATION DOCTRINE

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Abstract

Since its earliest days, Congress has delegated lawmaking authority to Executive Branch officials. Over time, a body of Supreme Court caselaw, known as the Delegation Doctrine, has grown up (ostensibly) to regulate Congress's ability to offload legislative authority to administrative agencies. Occasionally, however, Congress, like state legislatures and municipal councils, bypasses executive officials and directly delegates lawmaking power to private parties. The Supreme Court has addressed those delegations in only a few cases and struck down three of them, the last one in 1936 in *Carter v. Carter Coal Co*. In those cases, the Court did not rely on the Article I Vesting Clause or separation of powers principles, as it has in the case of delegations to administrative agencies. Instead, the Court held the delegations unconstitutional by invoking the Due Process Clauses of the Fifth and Fourteenth Amendments. Nonetheless, the Court did not explain why the Due Process Clauses played that role, and the Court has not offered a rationale for its rulings since 1936. Perhaps the reason for that omission is that the Court's contemporary "procedure vs. substance" dichotomy has obscured the original meaning of the Due Process Clause: namely, a guarantee that the government comply with "the law of the land" before trespassing on someone's life, liberty, or property. That guarantee, which reaches back to Chapter 39 of Magna Carta, means that the government cannot legislate around the Constitution by empowering a private party to act in a lawless fashion. Put differently, Congress cannot escape constitutional restraints by delegating government authority to private parties to accomplish indirectly what Congress cannot do directly. So viewed, the Private Delegation Doctrine continues to have vitality today

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in areas such as the constitutionality of the dynamic incorporation of private or foreign rules and private jails or prisons.

INTRODUCTION: OF DELEGATIONS PUBLIC AND PRIVATE

In 1876, Tom Sawyer taught readers some invaluable rhetorical techniques about how to palm off burdensome chores onto someone else.[1] Congress, however, did not need the advice. Since its earliest days, Congress has delegated to executive and judicial branch officials the lawmaking authority that Congress itself could have exercised[2] to create rules governing the internal operation of their departments and the activities of private parties.[3] That practice, like the growth in the number

1. MARK TWAIN, THE ADVENTURES OF TOM SAWYER 16–20 (Courage Books 1987) (1876) (recounting the fence-whitewashing episode).

2. Under the Necessary and Proper Clause. U.S. CONST. art. I, § 8, cl. 1, 18 ("Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

3. *See, e.g.*, An Ordinance for the Government of the Territory of the United States north-west of the river Ohio (1787), *reprinted in* An Act to Provide for the Government of the Territory North-west of the river Ohio, ch. 8, 1 Stat. 50, 51 n.(a) (1789) (authorizing the Congress to appoint officials to govern the Northwest Territory); Judiciary Act of 1789, ch. 20, § 17(b), 1 Stat. 73, 83 (authorizing the federal courts to issue rules for the "orderly" conduct of judicial business); An

of executive departments and agencies,[4] continued at a relatively leisurely pace until the advent of the New Deal.[5] Then, congressional delegations accelerated as Congress brought a host of new administrative agencies on stream to implement President Franklin Roosevelt's efforts to end the Great Depression.[6] The birth of new agencies has continued since then.[7] The result has been the creation of a fourth branch of government—an

Act providing for the payment of the Invalid Pensioners of the United States, ch. 24, 1 Stat. 95 (1789) (authorizing the President to issue regulations governing the payment of wounded and disabled Revolutionary War soldiers); An Act to establish the Post-Office and Post Roads within the United States, ch. 7, § 3, 1 Stat. 232, 234 (1792) (authorizing the Postmaster General to issue rules to subordinates that are necessary for the Service's business); An Act to regulate trade and intercourse with the Indian tribes, ch. 33, § 1, 1 Stat. 137, 137 (1790) (authorizing the President to prescribe rules governing licenses to trade with the Indian tribes); Embargo Act of 1807, ch. 5, 2 Stat. 451, 452 (authorizing the President to issue instructions to enforce the act); Non-Intercourse Act of 1809, ch. 24, § 11, 2 Stat. 528, 530–31 (authorizing the President to lift an embargo on trade with England or France if either country respects the neutrality of the United States); JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION 43–47 (2012); Harold J. Krent, *Delegation and Its Discontents*, 94 COLUM. L. REV. 710, 738–39 (1994) (reviewing DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY (1993)).

4. *See, e.g.*, Interstate Commerce Act of 1887, ch. 104, §§ 11–12, 24 Stat. 379, 383 (creating the Interstate Commerce Commission (ICC) to regulate the railroad industry); Federal Reserve Act, ch. 6, § 2, 38 Stat. 251, 251–52 (1913) (creating the Federal Reserve System to govern the banking industry).

5. For discussions of that history, see DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY 7–10 (2001); MATTHEW A. CRENSON, THE FEDERAL MACHINE 3–10 (1975); KIMBERLEY S. JOHNSON, GOVERNING THE AMERICAN STATE 5–11 (2007); WILLIAM E. NELSON, THE ROOTS OF AMERICAN BUREAUCRACY, 1830–1900, at 113–55 (1982); STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE 49–59 (1982).

6. *See* JOANNA L. GRISINGER, THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL 2 (2012) (noting that there were more than 100 federal agencies and commissions by 1940); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 424 n.9 (1987) ("[I]t was not until the New Deal that the modern agency became a pervasive feature of American government. Eleven agencies were created between the framing of the Constitution and the close of the Civil War; six were created from 1865 to the turn of the century; nine agencies date from 1900 to the end of World War I; nine more were created between 1918 and the Depression in 1929; and no fewer than 17 were created in the decade between 1930 and 1940."). Even more agencies came on board in World War II. *See, e.g.*, Emergency Price Control Act of 1942, ch. 26, § 201(a), 56 Stat. 23, 29 (making the Office of Price Administration into an independent agency).

7. The 1970s witnessed a third wave. This time Congress sought to regulate conditions inside and outside the nation's businesses through workplace safety and environmental laws. *See, e.g.*, Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651–78); Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended in scattered sections of 42 U.S.C.); Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended in scattered sections of 33 U.S.C.); Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended in scattered sections of 42 U.S.C.). The practice continued in this century. *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, tit. 10, § 1022, 124 Stat. 1376, 1980 (2010) (codified as amended at 12 U.S.C. § 5512).

administrative state that Justice Antonin Scalia once tartly described as "a sort of junior-varsity Congress"[8]—seemingly without stop and little dip in velocity since the New Deal.[9] The administrative state often enjoys authority to supervise virtually every aspect of American life that Congress itself could govern.[10]

There is a closely related doctrine—what this Article refers to as the "Private Delegation Doctrine"—that raises many of the same legal and policy concerns as the public version, as well as some of its own. The Private Delegation Doctrine stems from the practice that legislatures occasionally follow of bypassing the bureaucracy entirely and vesting governmental authority in private parties or organizations, in this nation or elsewhere.[11] Examples of privatization cover a broad spectrum from the use of publicly funded vouchers to attend non-public schools to the use of faith-based churches and organizations to offer mentorship programs for children whose parents are incarcerated, and from reliance on Medicare-funded private physicians to the engagement of private contractors for the physical and personal security of government officials.[12] What is more, some of the subjects that legislatures place in the hands of private actors include functions that were historically considered nondelegable or "core" government functions.[13]

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8. Mistretta v. United States, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

9. *See, e.g.*, DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–40, at 7 (2014); ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND 6–8, 121 (2010); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231–33, 1254 (1994).

10. The U.S. Supreme Court has occasionally described administrative rulemaking through the exercise of congressionally delegated powers as the exercise of "executive" authority, not "legislative" power, *see, e.g.*, INS v. Chadha, 462 U.S. 919, 953 n.16 (1983); United States v. Grimaud, 220 U.S. 506, 516–18 (1911), where it has also said Congress cannot delegate to the Executive, *see, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001). Yet, given that, as the Court has reminded us, agency rules properly issue pursuant to delegated authority "have the 'force and effect of law,'" Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 96 (2015) (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 302–03 (1979)), and the "Power" to create "Law" is the constitutionally specified role for Congress, U.S. CONST. art. I, § 7, cl. 2, § 8, cl. 1, it is difficult to take the Court's description seriously.

11. Lawmaking delegation to international organizations has become increasingly common. *See infra* note 259.

12. *See, e.g.*, Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1246–66 (2003).

13. As Professors Jody Freeman and Martha Minow have explained,

> [T]he scope of functions and services for which the government now relies on private (and primarily for-profit) actors has grown to encompass activities that fall closer to the "core" of what the public in the twentieth century has come to identify as the state's responsibility in a democratic society. . . . [P]rivate contractors are now supporting American military operations in Afghanistan and

Congressional delegation of lawmaking power, whatever status the recipient enjoys, rests uneasily within a democratic republic. As Chief Justice Warren Burger once wrote, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."[14] Articles I and II establish a democratic republic for the nation, and Article IV guarantees each state the same form of government.[15] The Framers spent most of the Convention of 1787 debating the structure of the new Congress, the powers that it should receive, and the manner by which its members should be elected.[16] In the Constitution that emerged from the Convention, the Article I Vesting Clause grants Congress "All legislative Powers,"[17] which appears to lodge lawmaking authority exclusively in that chamber. That was also the prevailing legal and political theory in 1787.[18] Moreover, the ability to elect their lawmakers mattered greatly to the Colonists. After all, the Colonists rebelled against governance by officials they had no hand in

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> Iraq, supplying security for American diplomats, reconstructing the Iraq oil infrastructure, handling domestic and international security and training services, conceptualizing and operating an elaborate American border security project, running prisons and detention centers, and certifying that hazardous waste cleanups conform to statutory requirements.

Jody Freeman & Martha Minow, *Introduction: Reframing the Outsourcing Debates*, *in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 1, 6 (Jody Freeman & Martha Minow eds., 2009).

14. *Chadha*, 462 U.S. at 944.

15. *See* U.S. CONST. art. IV, § 4 (the Guarantee Clause) ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . .").

16. *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996) (discussing in great detail the debates at the Constitutional Convention).

17. U.S. CONST. art. I, § 1.

18. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 381 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) ("The Power of the *Legislative* being derived from the People by a positive voluntary Grant and Institution, can be no other, than what that positive Grant conveyed, which being only to make *Laws*, and not to make *Legislators*, the *Legislative* can have no power to transfer their Authority of making Laws, and place it in other hands."). The Supreme Court later endorsed that principle when describing the relationship between the Article I and II branches. *See, e.g.*, Field v. Clark, 143 U.S. 649, 692–94 (1892) ("That Congress cannot delegate legislative power . . . is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. . . . 'The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion *as to its execution,* to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.'" (emphasis added) (quoting Cincinnati, Wilmington etc. R.R. v. Commissioners, 1 Ohio St. 88 (1852))); Shankland v. Mayor of Wash., 30 U.S. (5 Pet.) 390, 395 (1831) (mentioning that "the general rule of law is, that a delegated authority cannot be delegated").

choosing,[19] and the President and Vice President are the only members of the Executive Branch elected to office.[20] Accordingly, it is no surprise that the debate over the legitimacy and wisdom of congressional delegation has lasted for decades.[21]

Accompanying that debate has been litigation over the constitutionality of particular statutory delegations of lawmaking authority to executive agencies. That litigation occurred in three stages. The congressional delegations were quite modest in the first stage. Most authorized the President to make a finding, whose contours Congress had defined, that would trigger the activation or deactivation of a particular law.[22] The Supreme Court of the United States upheld those delegations[23]

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19. The Declaration of Independence denounced King George III for "subject[ing] us to a jurisdiction foreign to our constitution, and unacknowledged by our laws," and for "taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments." THE DECLARATION OF INDEPENDENCE paras. 15, 23 (U.S. 1776).

20. *See* U.S. CONST. art. 2, § 1 (declaring that the President and Vice President shall "be elected").

21. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 133–34 (1980); JAMES O. FREEDMAN, CRISIS AND LEGITIMACY 78–81, 90–94 (1978); MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 135–36 (1995); Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1297–99 (2003); Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1399–1400, 1402, 1406 (2000); Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 150–51, 167–68, 174, 177–78 (2017); Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 252, 263–64 (2010); Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807, 807–09, 819 (1999); Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619, 619, 623, 645 (2017); Dan M. Kahan, *Democracy Schmemocracy*, 20 CARDOZO L. REV. 795, 795–96 (1999); Krent, *supra* note 3, at 710–12; Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 328–30, 334 (2002); Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 513–14 (1988); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1721–24 (2002); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1224–26, 1228, 1236 (1985).

22. *See infra* notes 23–24.

23. The first case, decided in 1813 when the memories of the Convention of 1787 would still have been in the minds of congressmen and Supreme Court Justices, was *The Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813). There, the Court upheld the delegation to the President of the authority to lift the embargo imposed by the Non-Intercourse Act of 1809, ch. 24, § 11, 2 Stat. 528, 530–31, on England and France if he found that they had ceased to violate the declared neutrality of the United States in their war. *The Brig Aurora*, 11 U.S. at 388. Following *The Brig Aurora* came *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825). The Court, through Chief Justice John Marshall, upheld a delegation in the Judiciary Act of 1789, ch. 20, § 17(b), 1 Stat. 73, 83, to the federal courts to adopt rules for the "orderly" conduct of judicial business, on the ground that Congress may authorize the Executive and Judicial Branches "to fill up the details" of a general legislative plan. *Wayman*, 23 U.S. at 42, 43. Next was the

because they supplied the President with an "intelligible principle" to guide his decision-making.[24] During the New Deal, Congress granted the President or agencies broad, vaguely defined lawmaking authority in statutes such as the National Industrial Recovery Act of 1933 (NIRA).[25] That was the second stage, which lasted for only one year. In two 1935 cases—*Panama Refining Co. v. Ryan*[26] and *A.L.A. Schechter Poultry Corp. v. United States*[27]—the Court held that Congress's delegation went too far, effectively handing the President true lawmaking power. Then, the Court stopped, beginning the third stage, which has continued to the

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Court's 1892 decision in *Field v. Clark*, 143 U.S. 649 (1892). *Field* upheld a tariff act over the challenge that it unlawfully empowered the President to suspend the tariff-free importation of certain goods if he found that the exporting nation did not permit a tariff-free entry of those goods from the United States. *Id.* at 680, 694. Again, the Court concluded that the President would make only a factual judgment, not a "law" within Congress's exclusive jurisdiction. *Id.* at 693–94.

24. The "intelligible principle" standard came from *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1935), the most important of the early cases. At issue was a tariff act that empowered the President to waive customs duties on imported merchandise if their foreign production costs equaled those of like goods produced in this country. *Id.* at 400–03. In an opinion written by Chief Justice and former President William Howard Taft, the Court rejected a constitutional challenge to the delegation feature of the act. *Id.* at 412. The statute did no more than make the President "the mere agent of the lawmaking department to ascertain and declare the event upon which its expressed will was to take effect." *Id.* at 411. That declaration did not involve "the making of law" because it did not empower the President to decide "the expediency or just operation" of legislation on the public. *Id.* at 410–11. The act also contained adequate guidance for the President to use in making the necessary findings. *See id.* at 409. As Chief Justice Taft explained, Congress may delegate lawmaking power to federal officials if Congress has identified an "intelligible principle" controlling their discretion. *Id.* While it is unlikely that Chief Justice Taft intended that phrase to serve as the test for the legitimacy of all future delegations—his opinion certainly did not announce that it would serve as any such standard—the Court's recent decisions have treated the "intelligible principle" formulation as the measure of congressional delegations. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001); Loving v. United States, 517 U.S. 748, 771 (1996).

25. Ch. 90, § 2(a)–(b), 48 Stat. 195, 195, *invalidated by* Pan. Refin. Co. v. Ryan, 293 U.S. 388 (1953), *and* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

26. 293 U.S. 388 (1935). *Panama Refining* held unconstitutional an NIRA provision granting the President authority to prohibit the distribution of oil produced in excess of a production quota (so-called "hot oil"). *Id.* at 418, 433.

27. 295 U.S. 495 (1935). At issue in *Schechter Poultry* was Title I, section 3 of NIRA, a provision that delegated to trade or industrial groups the authority to define "unfair methods of competition" that would become law only when the President approved it. § 3(a)–(b), 48 Stat. at 196; *Schechter Poultry*, 295 U.S. at 521. As Professor Richard Epstein has noted, "This was no small operation." RICHARD A. EPSTEIN, THE CLASSIC LIBERAL CONSTITUTION 270 (2014). "In the eighteen months between August 1933 and February 1935, the frenzied activities of the Roosevelt administration generated some 546 codes, 185 supplemental codes, 685 amendments, and over 11,000 administrative orders." *Id.* The Supreme Court found that delegation unconstitutional. *Schechter Poultry*, 295 U.S. at 542.

present.[28] Since 1935, the Court has upheld every judgment that Congress has told an agency to make, even such policy-laden ones as the tradeoff between public health and private profit[29] or the presumptive amount of time that a convicted offender should spend imprisoned.[30] In so doing, the Court has deemed every formulation that Congress has whipped up to be "intelligible," even ones as vacuous as "the public interest"[31] or "excessive profits."[32] As long as Congress has written its statutory text in English with some remotely decipherable standard, the Court has upheld delegation of even large-scale lawmaking or policy making authority.[33]

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28. Why it stopped has been the subject of considerable parlor discussion. Perhaps, the Court feared that President Franklin Roosevelt's Court-packing plan could jeopardize the Court's legitimacy, the so-called switch in time that saved the Nine. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 466 (11th ed. 1985); Joseph L. Rauh, Jr., *Lawyers and the Legislation of the Early New Deal*, 96 HARV. L. REV. 947, 948 (1983) (book review). Perhaps, the Justices changed their minds on the substance of delegation law. *See* Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 HARV. J.L. & PUB. POL'Y 209, 251 (2016) ("The Supreme Court ceased its aggressive judicial review of economic legislation during the New Deal. A doctrinal explanation why the Court did an about face is that the Court finally realized that its decisions had created a Bermuda Triangle-like body of case law where federal and state legislative efforts to combat the Great Depression went to die."). Perhaps, there is another explanation.

29. *See Whitman*, 531 U.S. at 475–76 (upholding over a delegation challenge the EPA's authority to set ambient air quality standards allowing "an adequate margin of safety").

30. *See* Mistretta v. United States, 488 U.S. 361, 412 (1989) (upholding over a delegation challenge the U.S. Sentencing Commission's authority to promulgate (then-binding) federal Sentencing Guidelines). For an earlier, even more adventurous, delegation to the Secretary of the Interior authority to promulgate regulations whose violation would be a federal crime that the Court upheld, see United States v. Grimaud, 220 U.S. 506, 522–23 (1911).

31. *See* N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 20–21, 27–29 (1932) (upholding a provision in the Interstate Commerce Act authorizing the ICC to approve railroad acquisitions if it found that the transaction was "in the public interest").

32. *See* Lichter v. United States, 334 U.S. 742, 792–93 (1948) (upholding a provision in the Renegotiation Act allowing Congress to recover "excessive profits" from businesses selling goods to the federal government during World War II).

33. *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2122, *reh'g denied*, 140 S. Ct. 579 (2019); *Whitman*, 531 U.S. at 472, 475–76 (upholding over a delegation challenge the EPA's authority to set ambient air quality standards "allowing an adequate margin of safety"); Loving v. United States, 517 U.S. 748, 772–74 (1996) (upholding delegation to the President to prescribe aggravating factors for use at sentencing in capital murder cases); Touby v. United States, 500 U.S. 160, 164, 167 (1991) (upholding delegation to the Attorney General to designate new "controlled substances" whose distribution is a federal offense); Skinner v. Mid-Am. Pipeline Co., 490 U.S. 212, 214 (1989) (upholding delegation to the Secretary of Transportation to promulgate pipeline user fees); *Mistretta*, 488 U.S. at 371, 374, 412 (upholding delegation of authority to promulgate sentencing guidelines); *Lichter*, 334 U.S. at 746, 783, 787 (upholding delegation to the Under Secretary of War or the War Contracts Price Adjustment Board to decide whether a party made "excessive profits" and, if so, what amount); Am. Power & Light Co. v. SEC, 329 U.S. 90, 104 (1946) (upholding delegation of authority to Securities and Exchange Commission to prevent unfair or inequitable distribution of voting power among security holders); Yakus v. United States, 321 U.S. 414, 423, 426–27 (1944) (upholding delegation to Price Administrator to

Whatever promise *Panama Refining* and *Schechter Poultry* might have offered constitutional law and political theory as a means of forcing Congress to make both the lawmaking and policy making judgments that the Framers envisioned, the Supreme Court's caselaw has not worked out that way. As Professor Cynthia Farina rather colorfully put it, "If Academy Awards were given in constitutional jurisprudence, nondelegation claims against regulatory statutes would win the prize for Most Sympathetic Judicial Rhetoric in a Hopeless Case."[34] A majority of

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fix "fair and equitable" commodity prices); Fed. Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591, 600, 603, 605 (1944) (upholding delegation to Federal Power Commission to determine "just and reasonable" rates); Bowles v. Willingham, 321 U.S. 503, 506, 516 (1944) (upholding delegation to the Administrator of the Office of Price Administration to stabilize or reduce the rents for any defense area housing accommodations within a particular defense-rental area whenever he found it was "necessary and proper in order to effectuate the purposes of" the Emergency Price Control Act of 1942); Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943) (upholding delegation to Federal Communications Commission to regulate broadcast licensing as "public interest, convenience, or necessity" require); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 397, 400 (1940) (upholding delegation to set maximum prices for coal when "in the public interest"); United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 312, 328–29 (1936) (upholding delegation to the President to prohibit the arms sales to certain countries if he found that doing so would "contribute to the reestablishment of peace"). Professors Cary Coglianese, Tom Merrill, and Cass Sunstein believe that smaller-scale or modified versions of the Delegation Doctrine—ones that limit agencies' authority to what Congress has expressly authorized them to do (Merrill and Sunstein) or that take multiple factors into account (Coglianese)—would satisfy Vesting Clause concerns and avoid the arbitrary line drawing a strong version of the Delegation Doctrine invites. *See* Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849, 1851 (2019); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2113 (2004); Cass R. Sunstein, Foreword, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181, 1186 (2018); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316–17 (2000). How to define the Public Delegation Doctrine is beyond the scope of this Article.

34. Cynthia R. Farina, *Deconstructing Nondelegation*, 33 HARV. J.L. & PUB. POL'Y 87, 87 (2010). A parallel doctrine also emerged with respect to Article III. It contemplates only "Judges" who serve "during good Behavior" (which colloquially means for life) and whose salary "shall not be diminished during their Continuance in Office" may exercise the "judicial Power." U.S. CONST. art. III, § 1. Rather than always use life-tenured judges to adjudicate every dispute, however, Congress has established non-Article III courts in various contexts, such as in federal territories; in the District of Columbia; and, when a dispute involves the so-called "public rights" doctrine, in administrative agencies. The Supreme Court has upheld those delegations of the "judicial Power." *See, e.g.*, Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828) (upholding delegation in the territories); Palmore v. United States, 411 U.S. 389, 390 (1973) (upholding delegation in the District of Columbia); Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1377–78 (2018) (upholding delegation to the United States Patent and Trademark Office to decide on the validity of patents); Crowell v. Benson, 285 U.S. 22, 50, 54 (1932) (upholding delegation by applying the "public rights" doctrine to administrative agencies). One can define the contours of that body of law no better than the one supposedly limiting Congress's power to delegate lawmaking authority to executive branch agencies. *See, e.g.*, *Oil States*, 138 S. Ct. at 1373 ("In other words, the public-rights doctrine applies to matters 'arising

commentators have agreed with Professor Farina, concluding that the Delegation Doctrine is "as dead as a door-nail."[35]

Nonetheless, because hope springs eternal,[36] a small but growing minority has argued that the doctrine is only "mostly dead."[37] In 2019, the Supreme Court gave delegation's critics some hope that the Court might be willing to limit Congress's authority—depending on how one views the issue—"to fill up the details" of a general legislative scheme[38] or devise a corpus of rules from whole cloth. In separate opinions involving the same statute[39]—*Gundy v. United States*[40] and *Paul v. United States*[41]—five Justices signaled that they are interested in and willing to reconsider the Court's Delegation Doctrine caselaw.[42] The

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between the government and others, which from their nature do not require judicial determination and yet are susceptible of it.'" (quoting *Crowell*, 285 U.S. at 50)).

35. CHARLES DICKENS, A CHRISTMAS CAROL AND OTHER CHRISTMAS BOOKS 9 (Robert Douglas-Fairhurst ed., 2006) (1843). Like Charles Dickens, the Author does not understand why a door-nail has the pride of place in the gallery of the dead, when a "coffin-nail" would seem far more deserving of that honor (so to speak). *Id.* Nevertheless, the lingo predates and will outlast us all.

36. *See* Alexander Pope, *An Essay on Man: Epistle I*, POETRY FOUND., https://www.poetryfoundation.org/poems/44899/an-essay-on-man-epistle-i [https://perma.cc/MX5Z-HSHE] ("Hope springs eternal in the human breast: Man never is, but always to be blest: The soul, uneasy and confin'd from home, Rests and expatiates in a life to come.").

37. THE PRINCESS BRIDE 1:12:02 (Act III Communications 1987) ("Well, it just so happens that your friend here is only mostly dead. There's a big difference between mostly dead and all dead . . . . Mostly dead is slightly alive.").

38. Which is how Chief Justice John Marshall described a provision in the First Judiciary Act that empowered the federal courts to adopt rules for the "orderly" conduct of judicial business. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825).

39. The Sex Offender Registration and Notification Act (SORNA), 34 U.S.C. § 20901–20962.

40. 139 S. Ct. 2116, *reh'g denied*, 140 S. Ct. 579 (2019).

41. 140 S. Ct. 342 (2019) (mem.).

42. *Gundy* involved the question whether a provision of SORNA violated the Nondelegation Doctrine. *Gundy*, 139 S. Ct. at 2121 (plurality opinion). SORNA created a uniform sex offender registration system, requiring individuals convicted of specified sex crimes to provide certain identifying information (name, address, and so forth) in every state where they live, work, or study. 34 U.S.C. §§ 20913(a), 20914(a). The House of Representatives and the Senate disagreed over the issue whether the act's registration requirements should apply to someone convicted of a covered offense before the act went into effect, so they compromised by directing the United States Attorney General to resolve that dispute. *Id.* § 20913(d). The problem, however, was that SORNA did not expressly identify any findings that the Attorney General must make, nor did it specify any factors that he must consider in reaching a decision. *See Gundy*, 139 S. Ct. at 2126. Given that Congress articulated no principle for the Attorney General to use, the result was to pose the question whether there is any content to the "intelligible principle" standard that the Court had consistently invoked for eighty-plus years to uphold congressional delegations. *See id.* at 2123. In effect, *Gundy* was the Delegation Doctrine equivalent of the Court's Commerce Clause decision in *United States v. Lopez*, 514 U.S. 549 (1995), *superseded by statute*, Violent

upshot is it is unknown whether the Delegation Doctrine should receive long overdue last rites or additional CPR. It will not be long before entire swaths of the Pacific Northwest will be lost to the pages of law journals cheering or bemoaning the Justices' suggestions and launching or shooting down various ways of cabining Congress's willingness to offload its work.[43]

Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320904, 108 Stat. 1796, 2125–26 (codified as amended at 18 U.S.C. § 922(q)(1)). *Lopez* raised the issue whether Congress has the authority under the Commerce Clause to pass the Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4844, which banned the possession of handguns near school property, even though there was no requirement that the offense involve any facility of interstate commerce, that the crime affect interstate commerce, or that the gun travel in interstate commerce. *Lopez*, 514 U.S. at 551; *id.* at 615 (Breyer, J., dissenting). The argument was that, if Congress had the Commerce Clause power to enact the Gun-Free School Zones Act of 1990, then the Commerce Clause empowered Congress to pass any law. *Id.* at 564 (majority opinion). Much the same could be said about the relevant provision in SORNA with respect to the Delegation Doctrine.

In an opinion by Justice Elena Kagan, joined by Justices Ruth Bader Ginsburg, Stephen Breyer, and Sonya Sotomayor, a plurality of the Court in *Gundy* found an intelligible principle implicit in the structure of SORNA, the task that it demanded of the Attorney General, and the context in which that task appeared. *Gundy*, 139 S. Ct. at 2129. The plurality read the Act as requiring pre-Act offenders to register and the duty that the statute imposed on the Attorney General as being only the obligation "to apply SORNA's registration requirements to pre-Act offenders as soon as feasible." *Id.* Justice Samuel Alito concurred in the judgment on the ground that SORNA's delegation was no more "capacious" than ones the Court had sustained in the past. *Id.* at 2131 (Alito, J., concurring). The dissenting opinion by Justice Neil Gorsuch, joined by Chief Justice John Roberts and Justice Clarence Thomas, essentially accused the plurality of nothing less than performing "a remarkable job of plastic surgery upon the face of the [statute]," Shuttlesworth v. City of Birmingham, 394 U.S. 147, 153 (1969), to find in it any standard guiding the Attorney General's decision, *see Gundy*, 139 S. Ct. at 2132, 1246–47 (Gorsuch, J., dissenting). Justice Gorsuch would have found SORNA unconstitutional because it supplied the Attorney General with no principle to implement that statute, let alone an intelligible one. *Id.*

Like *Gundy*, *Paul* involved SORNA. *Paul*, 140 S. Ct. at 342. Justice Kavanaugh did not participate in *Gundy*. He wrote a statement respecting the denial of certiorari in *Paul* to say that Justice Gorsuch's "scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases." *Id.* (statement of Justice Kavanaugh respecting the denial of certiorari).

43. The deforestation has already begun. *See, e.g.*, Aditya Bamzai, Comment, *Delegation and Interpretive Discretion:* Gundy*,* Kisor*, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 164 (2019); Coglianese, *supra* note 33, at 1882; Aaron Gordon, *Nondelegation*, 12 N.Y.U. J.L. & LIBERTY 718, 726 (2019); Gary Lawson, *"I'm Leavin' It (All) Up to You":* Gundy *and the (Sort-of) Resurrection of the Subdelegation Doctrine*, 2018 CATO SUP. CT. REV. 31, 32; Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 873–74 (2020); David Schoenbrod, *Consent of the Governed: A Constitutional Norm that the Court Should Substantially Enforce*, 43 HARV. J.L. & PUB. POL'Y 213, 227–29 (2020); *cf.* Rebecca M. Kysar, *Dynamic Legislation*, 167 U. PA. L. REV. 809, 812, 833–34 (2019) (recommending dynamic legislation as a remedy for congressional dysfunction). With this Article, the Author might be guilty of contributing a tree or two.

There has also been debate in public policy centers and in academia about the practice of private delegations. Those discussions ordinarily take place under the rubric of the "outsourcing" or "privatization" of a government function—viz., the government's decision to rely on non-government parties and the private market to implement a federal program in lieu of having government officials do so pursuant to traditional, government-run programs.[44] There has been considerable debate over the wisdom of privatization,[45] as well as a fair amount of scholarship discussing its constitutionality.[46] The latter is particularly

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44. *See* Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1287, 1307 (2003).

45. *See, e.g.*, PHILLIP J. COOPER, GOVERNING BY CONTRACT 1–13 (2003); CATHERINE M. DONNELLY, DELEGATION OF GOVERNMENTAL POWER TO PRIVATE PARTIES 75–84 (2007); JOHN D. DONAHUE, THE WARPING OF GOVERNMENT WORK 106–18 (2008); MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD 19–25 (2002); E.S. SAVAS, PRIVATIZATION AND PUBLIC-PRIVATE PARTNERSHIPS 111–25 (2000); EDWARD PETER STRINGHAM, PRIVATE GOVERNANCE 193–204 (2015); PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY 1–9 (2007); James O. Freedman, *Review: Delegation of Power and Institutional Competence*, 43 U. CHI. L. REV. 307, 331–35 (1976); Paul Starr, *The Meaning of Privatization*, 6 YALE L. & POL'Y REV. 6, 19–20, 30 (1988). *See generally* Symposium, *New Forms of Governance: Ceding Public Power to Private Actors*, 49 UCLA L. REV. 1687 (2002) (analyzing the transition of government power to private actors); Symposium, *Redefining the Public Sector: Accountability and Democracy in the Era of Privatization*, 28 FORDHAM URB. L.J. 1307 (2001) (focusing on the debate about the movement toward privatization of activities that have previously been governmental in nature).

46. *See, e.g.*, DONNELLY, *supra* note 45, at 118–26; VERKUIL, *supra* note 45, at 102–12; Harold I. Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 HASTINGS CONST. L.Q. 165, 169 (1989); Ronald A. Cass, *Privatization: Politics, Law, and Theory*, 71 MARQ. L. REV. 449, 498 (1988); A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 142–43 (2000); Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 228, 248 (1937); Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 RUTGERS L. REV. 331, 333–34 (1998); Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 67 (1990); David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 648–50 (1986); George W. Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650, 652, 655, 711–12 (1975); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1411, 1437–44, 1480, 1486 (2003); Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 NOTRE DAME L. REV. 975, 1029, 1031 (2005); Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411, 457 n.199 (2000); Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 422 (2006); Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 940, 944 (2014); Note, *The Validity of Ordinances Limiting Condominium Conversion*, 78 MICH. L. REV. 124, 135–36 (1979); Note, *The Vagaries of Vagueness: Rethinking the CFAA as a Problem of Private Nondelegation*, 127 HARV. L. REV. 751, 762, 765 (2013) [hereinafter Note, *The Vagaries of*

important because, in some ways, handing governmental power over to private parties is an even greater threat to democracy and accountability than is the older, better known practice of delegating that authority to federal government officials. The basic legal issue that private delegation raises is whether Congress, states, and localities can delegate governmental power to parties who are neither legally nor politically accountable for their actions to an Executive Branch official or to the public.[47]

The last century has also witnessed litigation addressing the legality of private delegations, albeit far less than what has occurred regarding its public sibling. The Supreme Court dipped its toe in the private delegation water during the 1920s and early 1930s, but after the mid-1930s decided not to go any further.[48] The Court's reluctance to rigorously scrutinize private delegations could have been due to the Court's belief that the judiciary should not second-guess Congress's decisions on how to allocate decision-making responsibility for social and economic welfare judgments.[49] Yet, five years ago in *Department of Transportation v. Association of American Railroads* (*Amtrak II*),[50] Justices Clarence Thomas and Samuel Alito expressed their willingness to revisit the Private Delegation Doctrine and enforce the Court's precedents prohibiting that practice.[51] Justices Thomas and Alito found it unnecessary to resolve that issue in the case, however, because they agreed with the majority that, for this purpose at least, Amtrak was an arm of the federal government.[52] Nonetheless, the Justices gave notice that they did not believe that the Private Delegation Doctrine was either "mostly dead" or "all dead."

They were right to do so. As explained below, delegating lawmaking or law-implementing authority to private parties might not materially differ from immunizing government officials against legal challenges when they perform their assigned functions. To date, society has been

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Vagueness]; Note, *The State Courts and Delegation of Public Authority to Private Groups*, 67 HARV. L. REV. 1398, 1398 (1954).

47. *See* Verkuil, *supra* note 46, at 422.

48. *See* Liebmann, *supra* note 46, at 652; Note, *The Vagaries of Vagueness*, *supra* note 46, at 764.

49. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 731–32 (1963) ("We refuse to sit as a 'superlegislature to weigh the wisdom of legislation,' and we emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.'" (footnote omitted) (first quoting Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952); then quoting Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955))).

50. 575 U.S. 43 (2015).

51. *Id.* at 56–66 (Alito, J., concurring); *id.* at 66–90 (Thomas, J., concurring).

52. *Id.* at 66 (Alito, J., concurring).

reluctant to grant public officials such immunity, with good reason. That reluctance stems from the norm that a society committed to governance under the rule of law cannot exempt the people who make or execute those laws from the responsibility to comply borne by the rest of society. Government officials, therefore, must be held legally or politically accountable. There doubtless are benefits from enlisting private parties to provide numerous goods and services that the government could leave to those parties and the private market to generate. Yet, allowing private parties the final say when exercising the same coercion that government officials cannot exercise with impunity goes too far. It would, in fact, violate the Due Process Clause altogether to exempt someone exercising delegated government power from compliance with the law.

That is the thesis of this Article. Constitutionally speaking, Congress and the states may delegate public authority to private parties if they are accountable under the law to the people over whom they exercise it—that is, as long as affected parties can seek relief in the courts under the common law. Otherwise, Congress would violate the threshold guarantee of the Due Process Clauses and Magna Carta: all government officials are subject to the rule of law. The three occasions in which the Supreme Court has struck down a private delegation involved a type of authorized lawlessness. By contrast, every private delegation upheld by the Court has required a government official to sign off on what a private party decided. In that way, the Private Delegation Doctrine is a simple application and reinforcement of the rule of law. Congress and the states may decide the extent to which they will involve private parties in the process of governance, but neither the federal nor state government can do so by allowing a private party to take the law into its own hands.

Presidencies and Congresses come and go, but government is not likely to disappear any time soon. Privatization will remain only a matter of "molar to molecular motions"[53] for the foreseeable future. The questions of whether and, if so, how the United States should make marginal changes in the ratio between government and private responsibilities is a difficult one to answer and is beyond the scope of this Article. Besides, the question whether the government *may* and, if so, *how* it may grant state power to private parties is more than enough to chew on.

The discussion below proceeds as follows: Part I discusses the Private Delegation Doctrine. In private delegation cases, Congress—or a state or local body—has delegated rulemaking or adjudicatory power outside the legal framework governing the exercise of government power, which

53. S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting), *superseded by statute*, Longshoremen's and Harbor Workers' Compensation Act (LHWA), ch. 509, 44 Stat. 1424 (1927) (codified as amended at 33 U.S.C. §§ 902–950), *as recognized in* Director v. Perini N. River Assocs., 459 U.S. 297 (1983).

raises concerns that the Public Delegation Doctrine does not. Part II then discusses why Congress and states delegate governmental authority to public and private parties, as well as why the Supreme Court has refused to curtail such delegations. Part III explains why private delegation raises issues under the Due Process Clauses of the Fifth and Fourteenth Amendments. Those provisions serve a critical role in understanding the concerns underlying private delegations, as well as the restraints that the rule of law requires for their legality. Part IV uses the approach discussed in Part III to analyze two problem areas for private delegation: (1) the dynamic incorporation of private rules or foreign law and (2) the privatization of different features of the criminal justice system, such as the use of private jails and prisons.

I. THE SUPREME COURT'S PRIVATE DELEGATION DECISIONS

The Supreme Court has discussed the constitutionality of private delegations on far fewer occasions than it has addressed the vesting of similar authority in government officers. Moreover, although the Court has held some such delegations unconstitutional, those decisions are more than eighty years old.[54] Since then, the Court has upheld every statutory scheme involving private parties in the government's decision-making process in one capacity or another.[55] Consequently, courts cannot avoid answering the question whether the Supreme Court's early decisions are still "good law." The academy has debated that issue without reaching a unanimous conclusion. Accordingly, it makes sense to start at the beginning, with the Court's 1912 decision in *Eubank v. City of Richmond*.[56]

A. *The Early Decisions*

Eubank involved a municipal land use ordinance. Richmond passed an ordinance, enforceable by a fine, authorizing parties who owned two-thirds of the property on any street to establish a building line barring further house construction past the line and requiring modification of existing structures to conform to that line.[57] The Supreme Court ruled that the ordinance violated the Due Process Clause because it created utterly

54. *See* Eubank v. City of Richmond, 226 U.S. 137, 144 (1912); Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 122 (1928); Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).

55. *See, e.g.*, Currin v. Wallace, 306 U.S. 1, 11 (1939); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 393 (1940); New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 107–08 (1978); City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668, 677 (1976); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984).

56. 226 U.S. 137 (1912).

57. *Id.* at 141.

no standard for the property owners to use and permitted them to act for their self-interest or arbitrarily.[58]

The next case came shortly after *Eubank. Thomas Cusack Co. v. City of Chicago*[59] was the mirror image of *Eubank*. Chicago adopted a municipal ordinance prohibiting the erection and maintenance of commercial billboards in primarily residential neighborhoods unless a majority of the owners of the frontage property gave their written consent.[60] Relying on *Eubank*, an outdoor advertising company claimed that the Chicago ordinance was unconstitutional.[61] The Court rejected as

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58. In the Court's words:

> [The ordinance] leaves no discretion in the committee on streets as to whether the street line shall or shall not be established in a given case. The action of the committee is determined by two-thirds of the property owners. In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent. This we emphasize. One set of owners determine not only the extent of use but the kind of use which another set of owners may make of their property. In what way is the public safety, convenience or welfare served by conferring such power? The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest or even capriciously. Taste (for even so arbitrary a thing as taste may control) or judgment may vary in localities, indeed, in the same locality. There may be one taste or judgment of comfort or convenience on one side of a street and a different one on the other. There may be diversity in other blocks; and viewing them in succession, their building lines may be continuous or staggering (to adopt a word of the mechanical arts) as the interests of certain of the property owners may prompt against the interests of others. The only discretion, we have seen, which exists in the Street Committee or in the Committee of Public Safety, is in the location of the line, between five and thirty feet. It is hard to understand how public comfort or convenience, much less public health, can be promoted by a line which may be so variously disposed.

Id. at 143–44.

59. 242 U.S. 526 (1917).

60. *Id.* at 527–28.

61. *Id.* at 530–31 ("The plaintiff in error relies chiefly upon *Eubank v. Richmond*, 226 U.S. 137. A sufficient distinction between the ordinance there considered and the one at bar is plain. The former left the establishment of the building line untouched until the lot owners should act and then made the street committee the mere automatic register of that action and gave to it the effect of law. The ordinance in the case at bar absolutely prohibits the erection of any billboards in the blocks designated, but permits this prohibition to be modified with the consent of the persons who are to be most affected by such modification. The one ordinance permits two-thirds of the lot owners to impose restrictions upon the other property in the block, while the other permits one-half of the lot owners to remove a restriction from the other property owners. This is

"palpably frivolous" the company's argument that the ordinance unconstitutionally delegated governmental power to private parties, explaining that the company "cannot be injured, but obviously may be benefited by this provision, for without it the prohibition of the erection of such billboards in such residence sections is absolute."[62]

In 1928, the Court revisited the problem in *Washington ex rel. Seattle Title Trust Co. v. Roberge*.[63] In *Roberge*, a trustee of a home for the elderly poor sought a permit to enlarge the facility to house additional residents.[64] The trustee, however, faced an obstacle. A Seattle zoning ordinance limited buildings in the vicinity to single-family homes, public and certain private schools, churches, parks, and the like, but empowered the city to grant a zoning variance if at least one-half of the nearby property owners consented.[65] The city building superintendent denied the permit because the adjacent property owners had not consented, and the trustee sued.[66] Relying on *Eubank*, the Court held that, while zoning ordinances are generally valid, the Seattle ordinance was unconstitutional as applied in those circumstances because it enabled the nearby property owners to deny a variance for their own, capricious reasons.[67] The Court explained that Seattle, like Richmond, cannot hand zoning power to private parties.[68]

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not a delegation of legislative power, but is, as we have seen, a familiar provision affecting the enforcement of laws and ordinances.").

62. *See id.* at 527, 531.

63. 278 U.S. 116 (1928).

64. *Id.* at 117.

65. *Id.* at 118 n.*.

66. *Id.* at 119.

67. *See id.* at 122–23.

68. *Id.* at 121–22 ("The right of the trustee to devote its land to any legitimate use is properly within the protection of the Constitution. The facts disclosed by the record make it clear that the exclusion of the new home from the first district is not indispensable to the general zoning plan. And there is no legislative determination that the proposed building and use would be inconsistent with public health, safety, morals or general welfare. The enactment itself plainly implies the contrary. The grant of permission for such building and use, although purporting to be subject to such consents, shows that the legislative body found that the construction and maintenance of the new home was in harmony with the public interest and with the general scope and plan of the zoning ordinance. The section purports to give the owners of less than one-half the land within 400 feet of the proposed building authority—uncontrolled by any standard or rule prescribed by legislative action—to prevent the trustee from using its land for the proposed home. The superintendent is bound by the decision or inaction of such owners. There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice. The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment." (citation omitted)).

Eight years later came the last case to invalidate a private delegation, *Carter v. Carter Coal Co.*[69] *Carter Coal* involved a delegation challenge

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The *Thomas Cusack Co.* and *Roberge* cases point in opposite directions, and it is difficult to reconcile them. But several factors indicate that *Eubank* and *Roberge* are still good law: *Roberge*, which postdates *Thomas Cusack Co.*, expressly relies on *Eubank*. The Supreme Court expressly relied on *Eubank* in *Carter v. Carter Coal Co.*, 298 U.S. 238, 311–12 (1936), which held unconstitutional Congress's delegation of federal authority to private parties. *See infra* note 75 and accompanying text. Lastly, post-*Carter* Supreme Court decisions distinguished *Eubank* rather than jettison it. *See* cases cited *infra* notes 81–87.

69. 298 U.S. 238 (1936). After it decided *Roberge* but before it resolved *Carter Coal*, the Supreme Court decided another relevant case, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). *Schechter Poultry* involved a delegation challenge to the National Industrial Recovery Act (NIRA) of 1933, ch. 90, 48 Stat. 195. *Schechter Poultry*, 295 U.S. at 519. At issue was a provision—title I, section 3(a)–(b)—that delegated to trade or industrial groups the authority to define "unfair method[s] of competition" that would become law only when approved by the President under "such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared." *Id.* at 521 n.4, 534 (quoting § 3(a)–(b)). Untroubled by the breadth of a judgment holding the NIRA unconstitutional, the Supreme Court held that Congress's delegation went too far. *See id.* at 541–42.

The Court held the delegation unconstitutional. *Id.* at 542. The statement of purposes set forth elsewhere in the NIRA did not limit the scope of the delegation, the Court reasoned, because the NIRA empowered private parties to define that term for their own benefit by protecting themselves against competition by rivals. *Id.* at 537 ("But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? And, could an effort of that sort be made valid by such a preface of generalities as to permissible aims as we find in section 1 of title I? The answer is obvious. Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress."). Finally, the Court found of no moment the NIRA requirement that the President approve an unfair competition code before it could take effect. *See id.* at 538–42. (Of course, perhaps the Court gave no weight to that presidential approval requirement because, given the massive number of codes, amendments, and the like, the Court did not believe that the President had actually reviewed them. The *Schechter Poultry* opinion does not express that disbelief, of course, but that may be merely because the Justices thought it impolitic or impolite to call President Roosevelt a liar.) The Court implicitly assumed that the President would approve or reject each individual code presented to him but found that the NIRA did not supply him with an intelligible principle to use when making those decisions. *See id.* at 538–39. In the Court's view, the NIRA did not cabin the President's discretion because it left him free to "roam at will" to "approve or disapprove" a cartel's proposals "as he may see fit," *id.* at 538, over "a host of different trades and industries, thus extending the President's discretion to all the varieties of laws which he may deem to be beneficial in dealing with the vast array of commercial and industrial activities throughout the country," *id.* at 539. Congress's unprecedented delegation of authority, the Court concluded, exceeded Article I limitations. *Id.* at 541–42. *Schechter Poultry* sounds like a private delegation case, but the Court was careful to acknowledge that President Roosevelt had the final call.

to a federal law, the Bituminous Coal Conservation Act of 1935.[70] Among other things, the act authorized the district board in local coal districts to adopt a code that included agreed-upon minimum and maximum prices for coal that would automatically become law.[71] The Act also allowed an agreement between producers of more than two-thirds of the annual tonnage of coal and a majority of mine workers to set industry-wide wage and maximum working hour agreements.[72] Shareholders of coal producers outside of the agreements brought suit against the federal government, maintaining that the act unconstitutionally delegated congressional power to private parties.[73] Relying on *Eubank* and *Roberge*, the Supreme Court ruled that the Bituminous Coal Conservation Act unconstitutionally delegated federal governmental power.[74] Describing that act as "legislative delegation in its most obnoxious form," the Court held that it arbitrarily interfered with a coal producer's property rights by vesting governmental power in the hands of a party interested in the outcome of a business transaction.[75]

70. Ch. 824, 49 Stat. 991 (repealed 1937).
71. *See Carter Coal Co.*, 298 U.S. at 280–83.
72. *Id.* at 283–84.
73. *Id.* at 278–79.
74. *Id.* at 311–12.
75. *Id.* at 311. The Court explained,

> The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. The record shows that the conditions of competition differ among the various localities. In some, coal dealers compete among themselves. In other localities, they also compete with the mechanical production of electrical energy and of natural gas. Some coal producers favor the code; others oppose it; and the record clearly indicates that this diversity of view arises from their conflicting and even antagonistic interests. The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question.

Id. at 311–12 (citing A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935); Eubank v. City of Richmond, 226 U.S. 137, 143 (1912); Washington *ex rel*. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121–22 (1928)).

Like *Eubank* and *Roberge*, *Carter Coal* stands for the proposition that the legislature cannot vest government power in private parties who are neither legally nor politically accountable to other government officials or to the electorate.

An interesting feature of *Eubank*, *Roberge*, and *Carter Coal* is the lack of a detailed explanation of why those delegations were unconstitutional and the absence of a clear common denominator for all three decisions. In *Eubank* and *Roberge*, the Court held the challenged city ordinances unconstitutional under the Fourteenth Amendment Due Process Clause.[76] *Eubank* and *Roberge* were state cases, so the Article I Vesting Clause and Public Delegation Doctrine could not have restricted a state's discretion on whether and how to assign lawmaking power.[77] By contrast, the Court's public delegation cases involved Legislative Vesting Clause claims. *Schechter Poultry* involved a delegation by the NIRA to the President of the power to adopt as law codes of conduct proposed by private organizations, which clearly raised a Legislative Vesting Clause issue.[78] Moreover, the Court discussed the constitutionality of that delegation under the standard set forth in *J.W. Hampton*, which involved a Legislative Vesting Clause challenge to a federal tariff act.[79] Finally, in *Carter Coal* the Court found it unnecessary to discuss in any detail why the Constitution prohibited the private delegation that the Bituminous Coal Conservation Act of 1935 accomplished. In so finding, the Court simply cited its decisions in *Schechter Poultry*, *Eubank*, and *Roberge* as sufficient precedent to justify its decision, implying that both the Legislative Vesting and Due Process Clauses prohibited that delegation.[80] Thus, the implication from *Carter Coal* is that both clauses forbid a legislative grant of unreviewable lawmaking authority to public officials or private parties.

B. *The Later Decisions*

The Supreme Court has revisited the Private Delegation Doctrine on only a handful of occasions since *Carter Coal*. In each case, the Supreme Court upheld the vesting of state authority in private parties. The laws at

76. *See Roberge*, 278 U.S. at 122 ("The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment." (citing *Eubank*, 226 U.S. at 143)).

77. *See, e.g.*, Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 612–13 (1937) (rejecting a delegation challenge to a state milk marketing order because "[h]ow power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself" and "[n]othing in the distribution here attempted supplies the basis for an exception").

78. *See* 295 U.S. at 521–22.

79. *Id.* at 541–42.

80. *See Carter Coal*, 298 U.S. at 311–12.

issue in each of those cases, however, left final decision-making authority in the hands of a government official.

For example, in *Currin v. Wallace*[81] the Court upheld a regulatory program authorizing the Secretary of Agriculture to approve regional tobacco quality standards if two-thirds of the affected growers recommended them.[82] The Court's decision in *Sunshine Anthracite Coal Co. v. Adkins*[83] upheld a coal regulatory act that permitted local coal producers to recommend rules governing coal sales, but left to a government board the power to approve, disapprove, or modify the private recommendations.[84] *New Motor Vehicle Board v. Orrin W. Fox Co.*[85] rejected a due process delegation challenge to a state law directing a state agency to decide whether to delay the opening of a new motor vehicle franchise establishment or location when an existing dealer objected.[86] *Hawaii Housing Authority v. Midkiff*[87] rejected the argument that due process prohibits a state from allowing private parties to initiate the eminent domain condemnation process.[88] In each case, the Court reasoned that there was no true delegation of government authority. A private party could initiate the process leading to a government official deciding whether and how to exercise governmental authority, but only a government official had the final say.

So, where does that leave things? The bottom line is this: Relying on the Due Process Clause, the Supreme Court held three private delegations unconstitutional between 1912 and 1936, and each case suggested that only government officials may exercise governmental power. Since then, however, the Court has upheld every public–private government decision-making arrangement a legislature has adopted as long as a government official had the final word. The Court has followed that path without examining the type or amount of scrutiny that the responsible government official actually undertook to determine whether he performed a serious evaluation of the private decision submitted to him or just rubber-stamped it. Scholars could not be faulted for throwing clods of earth atop the Private Delegation Doctrine.[89]

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81. 306 U.S. 1 (1939).
82. *Id.* at 15–18.
83. 310 U.S. 381 (1940).
84. *Id.* at 388, 399.
85. 439 U.S. 96 (1978).
86. *Id.* at 106.
87. 467 U.S. 229 (1984).
88. *Id.* at 243 n.6.
89. *See* Metzger, *supra* note 46, at 1440–41 ("Yet while *Carter*'s constitutional prohibition on private delegations thus remains alive in theory, it is all but dead in practice. Almost all private delegations are upheld. Courts are satisfied by formal provision for government ratification, however perfunctory. The private delegations that have been sustained often involve substantial

Why has the Private Delegation Doctrine (apparently) flatlined? The reason is not known for certain, but two possibilities come to mind. One is that legislatures have learned lessons from *Eubank*, *Roberge*, and *Carter Coal* on how to delegate government power and have thus made sure that some government official must endorse whatever decision private parties reach. In cases like *Eubank*, the government had no discretion to reject or modify the decision made by private parties.[90] By contrast, the Court's recent decisions in cases like *Currin*, *Adkins*, *Fox*, and *Midkiff* involved a regulatory scheme in which a government official was ultimately responsible for exercising state authority. That distinction is formulistic, but is important nonetheless. Even where a public official engages in the "perfunctory" ratification of a private decision,[91] the presence of governmental action has benefits for both anyone injured and the public: It triggers federal constitutional protections that no legislature can evade, it provides political accountability for government decisions, and it identifies the responsible party against whom a plaintiff can seek judicial relief.[92] Maybe legislatures have so incorporated that principle into their own decision-making that the Private Delegation Doctrine has gone the way of the Third Amendment's ban on the quartering of soldiers in private homes[93]—it has become a principle so thoroughly accepted that no one would consider violating it today. Another explanation might be that the Court has decided to group *Eubank*, *Roberge*, and *Carter Coal* into other pre-New Deal Era decisions—*Lochner v. New York*[94] is the best example—that unlawfully intruded on a legislature's power to define

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direct control over third parties; even seemingly limited delegations that simply grant private entities the power to trigger government action, such as the ability to force an administrative hearing or commence a civil penalty action, can be quite significant. Interestingly, many decisions examining private delegations at the federal level use essentially the same framework as is applied to 'public' delegations—that is, legislative grants of power to the executive branch—thereby suggesting that the Court sees such private delegations as presenting nothing beyond ordinary separation of powers issues." (footnotes omitted)).

90. *See* Eubank v. City of Richmond, 226 U.S. 137, 143 (1912) ("[The Richmond ordinance] leaves no discretion in the committee on streets as to whether the street line shall or shall not be established in a given case.").

91. Metzger, *supra* note 46, at 1440.

92. At least, no legislature can evade if, for example, the Due Process Clause restrains the government from zoning out federal constitutional challenges to government action, an issue that scholars have debated for decades. *See*, *e.g.*, Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 899–900 (1984); Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 17–21 (1981). That issue is beyond the scope of this Article.

93. U.S. CONST. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.").

94. 198 U.S. 45 (1905), *abrogated by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

what is in the public interest.[95] Said differently, just as the Supreme Court has decided to leave the merits of economic and social judgments to the political decision-making process, so, too, has the Court chosen not to second-guess political decisions regarding the structure of that process.

Neither explanation, however, is completely satisfactory. Consider the first one. There is no desuetude doctrine in Anglo-American law.[96] A Supreme Court decision remains the law until the Court itself inters it.[97] Besides, legislatures occasionally forget (or conveniently ignore) the teaching of *Eubank*, *Roberge*, and *Carter Coal* by enacting regulatory schemes that do vest governmental power in private hands.[98] Several of those delegations have made their way into the courts, and some judges, state court judges in particular,[99] have found them constitutionally objectionable.[100]

The second explanation also leaves something to be desired. Recently, the Supreme Court has been quite willing to strictly enforce other, non-

95. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 147 (1938) ("Hence Congress is free to exclude from interstate commerce articles whose use in the states for which they are destined it may reasonably conceive to be injurious to the public health, morals or welfare, or which contravene the policy of the state of their destination." (citations omitted)).

96. *See* District of Columbia v. John R. Thompson Co., 346 U.S. 100, 113–14 (1953) ("The failure of the executive branch to enforce a law does not result in its modification or repeal. The repeal of laws is as much a legislative function as their enactment." (citations omitted)); THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 337–38 (Little, Brown & Co. 5th ed. 1956) (1929) (concluding that English common law never allowed "room for any theory that statutes might become obsolete"); Paul J. Larkin, Jr., *Finding Room in the Criminal Law for the Desuetude Principle*, RUTGERS L. REV. COMMENTS., Mar. 11, 2014, at 1, 7 ("[T]he desuetude doctrine has not garnered much support in America's legal system. Anglo-American law has rejected it for ages, and only one state appears to give it any weight today." (footnote omitted)).

97. *See, e.g.*, Bosse v. Oklahoma, 137 S. Ct. 1, 3 (2016) (per curiam) (Thomas, J., concurring) ("[I]t is this Court's prerogative alone to overrule one of its precedents . . . ." (quoting State Oil Co. v. Khan, 522 U.S. 3, 20 (1997))).

98. *See, e.g.*, Passenger Rail Investment and Improvement Act of 2008 (PRIIA), Pub. L. No. 110-432, Div. B, sec. 202, § 24302, 122 Stat. 4848, 4907, 4911 (codified at 49 U.S.C. § 24302) (establishing private control of Amtrak); Volokh, *supra* note 46, at 963–70 (discussing state law private delegation doctrines); *cf.* Dep't of Transp. v. Ass'n of Am. R.Rs. (*Amtrak II*), 575 U.S. 43, 46 (2015) (discussed *infra* at notes 105–110); *In re* President's Comm'n on Organized Crime Subpoena of Scarfo, 783 F.2d 370, 371, 380 (3d Cir. 1986) (finding that Congress could grant subpoena power to a presidential advisory commission created by an executive order).

99. *See* Volokh, *supra* note 46, at 963–70 (discussing state law private delegation doctrines).

100. *See, e.g.*, Ass'n of Am. R.Rs. v. U.S. Dep't of Transp. (*Amtrak III*), 821 F.3d 19, 31 (D.C. Cir. 2016) ("We conclude . . . that the due process of law is violated when a self-interested entity is 'intrusted with the power to regulate the business . . . of a competitor.'" (quoting Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936))), *supplemented as to remedy*, Ass'n of Am. R.Rs. v. U.S. Dep't of Transp. (*Amtrak IV*), 896 F.3d 539 (D.C. Cir. 2018).

Article I constitutional restraints on the structure of decision-making responsibility. Specifically, the Court has struck down as unconstitutional Congress's decisions that did not comply with the Article II Recognition and Appointments Clauses,[101] along with the Article III Judicial Power Clause,[102] on the ground that even a modern-day Congress must comply with the Framers' allocation of authority. If the Due Process Clause also poses a restraint on Congress's power to delegate authority to private parties, there is no reason to assume that the Court will refuse to apply it. Accordingly, the Court is likely to be asked to decide whether *Eubank*, *Roberge*, and *Carter Coal* remain good law. In fact, the Court almost did just that five years ago in the *Amtrak II* case.

C. *The Amtrak Decision*

In *Amtrak II*, an association representing railroads challenged the constitutionality of a provision of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA).[103] The provision directed the Federal Railroad Administration and the National Railroad Passenger Corporation, commonly known as Amtrak, in consultation with the Surface Transportation Board, rail carriers, and other private parties, to "develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations."[104] Those metrics and standards were not simply advisory. Rather, they were to become part of the access and service agreements Amtrak and its host rail carriers adopted and could play a role in investigations and enforcements actions the Surface Transportation Board undertook.[105] The railroad association alleged that the PRIIA was

101. *See, e.g.*, Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2197 (2020) (holding that the "[Consumer Financial Protection Bureau]'s leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers" under Article II of the Constitution); Lucia v. SEC, 138 S. Ct. 2044, 2049 (2018) (holding that the Article II Appointments Clause governs the appointment of SEC administrative law judges); Zivotofksy v. Kerry, 576 U.S. 1, 17–21 (2015) (holding that the Article II Reception Clause prohibits Congress from deciding whether to grant formal recognition to a foreign sovereign); Free Enter. Fund v. Public Co. Acct. Oversight Bd., 561 U.S. 477, 492–93 (2010) (holding that the Article II Appointments Clause prohibits the imposition of a dual-level for-cause removal requirement).

102. *See, e.g.*, Stern v. Marshall, 564 U.S. 462, 469 (2011) (holding that the Article III Judicial Power Clause prohibits Congress from empowering federal bankruptcy courts to decide certain state law counterclaims).

103. Pub. L. No. 110-432, Div. B, 122 Stat. 4848, 4907 (codified at 49 U.S.C. § 24302); *see Amtrak II*, 575 U.S. at 50. The PRIIA was a component of the Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848 (codified as amended in scattered sections of 49 U.S.C.).

104. Sec. 207(a), 122 Stat. at 4916.

105. *See Amtrak II*, 575 U.S. at 48–49.

unconstitutional because it delegated federal regulatory authority to Amtrak, a private entity.[106] The U.S. Court of Appeals for the D.C. Circuit agreed with the association, but the Supreme Court reversed.[107]

Writing for the majority, Justice Anthony Kennedy reasoned that Amtrak may be a private party for some purposes, but was a governmental entity for the standard-setting purposes of the PRIIA.[108] The majority therefore did not address the private delegation argument the D.C. Circuit endorsed because the Court decided that Amtrak was a public entity for that purpose. Justice Alito, however, addressed the Private Delegation Doctrine in a concurring opinion, concluding, without any apparent difficulty, that decisions such as *Carter Coal* are still good law and that Congress cannot delegate regulatory power to a private party.[109] Justice Thomas would have gone even further. Notably, he concluded that the Court's entire delegation jurisprudence was mistaken and that, in a proper case, the Court should reconsider it.[110]

Although the *Amtrak II* case did not resolve the question of whether the Private Delegation Doctrine remains vital, the issue is likely to resurface.[111] Government officials delegate decision-making authority to private parties to take advantage of supposed efficiencies that come from having private companies manage government projects and as a way of deflecting blame to the recipients of that authority should matters turn out badly. As explained below, however, the two doctrines are materially different from each other. The delegation of lawmaking, law-applying, or law-adjudicating power to a private party raises a variety of issues that do not come up when a federal official possesses that authority.

This Article argues that a private delegation is unconstitutional not because it violates Article I, II, or III, and not because it violates separation of powers principles that can be inferred from our three-part division of government. Nor is a private delegation unconstitutional because it poses an unacceptable risk of bias (although it certainly does). Instead, a private delegation is unconstitutional because it is an attempt to evade the structural, substantive, and procedural guarantees that

106. *Id.* at 45–46.

107. *Id.* at 46.

108. *Id.* at 55.

109. *Id.* at 61–64 (Alito, J., concurring).

110. *Id.* at 91 (Thomas, J., concurring in the judgment).

111. On remand from the Supreme Court's decision in *Amtrak II*, the D.C. Circuit held that the private delegation was unconstitutional under *Carter Coal* because it gave self-interested private parties the authority to adversely affect the interests of others. *Amtrak III*, 821 F.3d 19, 27–31 (D.C. Cir. 2016), *supplemented as to remedy*, *Amtrak IV*, 896 F.3d 539 (D.C. Cir. 2018). Following additional proceedings in the district court, the D.C. Circuit issued a final judgment in the summer of 2018 excising certain provisions in the PRIIA (dealing with binding arbitration) to remedy the constitutional flaw in the act. *Amtrak IV*, 896 F.3d at 551.

constitutional law imposes on officials who exercise governmental power.

II. RECONSIDERING THE LEGALITY OF PRIVATE DELEGATIONS

The civics answer to the legitimacy of private delegations might be: "Why not?" After all, the opening words of the Constitution reflect the theory that the people are the ultimate sovereign. The first seven words introduce the Constitution by identifying who is responsible for that charter's adoption as our nation's fundamental law: "We the People of the United States."[112] If the people are the ultimate source of governmental authority, the argument goes, a law that returns some of that authority from whence it came is doubtless constitutional. For that reason, the Supreme Court has twice rejected delegation challenges to state laws that reserve certain changes in the law to local referenda.[113] Public referenda, the Court explained, are not delegations of authority to private parties; they are a retention of decision-making authority by the public. As the Supreme Court has put it, public referenda are "a basic instrument of democratic government" and "an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest."[114] What is more, there are considerable benefits from privatizing government functions, such as increased efficiency and public participation in governance, so the decision to return power to private parties is not an arbitrary one. In any event, it is too late in the day, the argument concludes, to hold invalid long-standing, widely used practices like those.

Like most civics answers, however, that one does not reflect the political realities of contemporary society. To determine whether private delegation is a legitimate tool of self-governance and whether it benefits the public or simply empowers its recipients, it is necessary to understand why Congress and other governments delegate lawmaking power to private parties, as well as the risks and rewards private delegation poses. Section II.A provides this necessary understanding. It turns out that (at

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112. U.S. CONST. pmbl.; *see* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected."); MONTESQUIEU, THE SPIRIT OF LAWS 112 (David Wallace Carrithers ed., Univ. of Cal. Press 1977) (1748) (stating that, in a democracy, political power resides in the electorate).

113. *See* City of Eastlake v. Forest City Enters., 426 U.S. 668, 672 (1976) (upholding a referendum process challenged under *Eubank* on the ground that it was a "reservation" of power, rather than a "delegation"); *see also* City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188, 199 (2003) (relying on *City of Eastlake* to reject a similar challenge).

114. *City of Eastlake*, 426 U.S. at 678–79 (quoting S. Alameda Spanish Speaking Org. v. Union City, 424 F.2d 291, 294 (9th Cir. 1970)).

least) two factors encourage Congress to delegate problem-solving elsewhere. The first factor is the difficulty of resolving medical, scientific, or technical problems, coupled with the political risk from reaching the wrong initial decision. The second factor is the Supreme Court's reluctance to engage in the type of undirected line drawing that traditional delegation jurisprudence requires the Court to pursue when telling Congress that it has delegated too much lawmaking power.

A. *Why Congress Delegates Lawmaking Power*

A powerful justification for delegation is the increasing sophistication of contemporary scientific and technical challenges facing contemporary America. For example, the onset of artificial intelligence,[115] the outbreak of new forms of serious viral diseases or the movement of old ones beyond their historic borders,[116] and the study and exploitation of the microbiome[117]—those developments (and others yet to emerge) that no one could have anticipated in 1787—are only a few of the uncertainties society has already confronted in the twenty-first century. The successful negotiation of such problems demands far more knowledge, skill, and experience than the average person or legislator can muster.[118] At the same time, old problems—such as deciding what is a "drug" and what drugs are "safe" and "effective"—have not disappeared or become decidedly less difficult.[119] Indeed, the encouraging development of

115. *See, e.g.*, Steve Lohr, *How Do You Govern Machines That Can Learn? Policymakers Are Trying to Figure That Out*, N.Y. TIMES (Jan. 20, 2019), https://www.nytimes.com/2019/01/20/technology/artificial-intelligence-policy-world.html [https://perma.cc/7DK2-M9AM].

116. *See, e.g.*, Bridget M. Kuehn, *Lessons Learned from SARS Outbreak Prompt Rapid Response to New Coronavirus*, 309 JAMA 1576, 1576 (2013); Timothy M. Uyeki et al., *Clinical Management of Ebola Virus Disease in the United States and Europe*, 374 NEW ENG. J. MED. 636, 637 (2016).

117. That is, "the community of bacteria, fungi, and viruses in an environment." *See, e.g.*, Catriona P. Harkins et al., *Manipulating the Human Microbiome to Manage Disease*, 323 JAMA 303, 303 (2020).

118. The average American lacks a college degree, let alone the advanced medical or scientific education and training that research in those fields demands. CAMILLE L. RYAN & KURT BAUMAN, U.S. DEP'T OF COM., EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2015, at 1, 2 tbl.1 (2016).

119. *See* Federal Food, Drug, and Cosmetic Act of 1938 (FDCA), ch. 675, §§ 201(g), 505, 52 Stat. 1040, 1041, 1052 (codified as amended at 21 U.S.C. §§ 301–399g) (defining "drug" and explaining that new drugs must be "safe"); Federal Food and Drugs Act of 1906, ch. 3915, 34 Stat. 768 (prohibiting the manufacture or interstate shipment of adulterated or misbranded food and drugs); Drug Amendments of 1962, Pub. L. No. 87-781, § 102(a)(1), 76 Stat. 780, 781 (codified as amended at 21 U.S.C. § 321) (requiring a manufacturer also to prove that a drug is "effective" before the company can market it in interstate commerce); Savage v. Jones, 225 U.S. 501, 529–30 (1912) (explaining how the Food and Drugs Act of 1906 defined "food"). The FDCA completely revamped the 1906 regulatory scheme and vested in the Commissioner of Food and Drugs, with the aid of his lieutenants in the newly created Food and Drug Administration (FDA),

genetically specific medical treatments only complicates those decisions.[120] To manage problems such as those, the argument goes, legislators must have some authority to let qualified third parties choose the best answer.[121] The theoretical structure of the Constitution might not expressly permit tinkering along those lines, but, as Justice Oliver Wendell Holmes put it, "the machinery of government would not work if it were not allowed a little play in its joints."[122] If so, Congress is in a better position than the courts to decide what and how much authority it should hand off to experts. That conclusion is one of the principles that have undergirded the growth of agency governance, and it also has cogency when private parties have the necessary expertise.

Privatization offers the benefits of specialization and expertise, as well as the promise of greater efficiency.[123] Privatization also comes in many varieties. For instance, it could involve merely the off-the-shelf or special order purchase of goods and services—food, water, transportation, communications equipment, work apparel, and the like—from the private sector for use by federal officials, or it could entail the hiring of private contractors to supply services at federal buildings or military bases. Yet, privatization can also consist of outsourcing some functions ordinarily performed by government employees, such as engaging private companies to audit a government program, contracting with profit or nonprofit organizations to implement a government-funded program, hiring or underwriting private physicians to provide health care, or using private security companies for physical security of government facilities or officials.

Several justifications have traditionally been offered for the argument that privatization is superior to the public provision of goods and

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the responsibility to determine whether drugs are "safe." *See* CHARLES WESLEY DUNN, FEDERAL FOOD, DRUG, AND COSMETIC ACT: A STATEMENT OF ITS LEGISLATIVE RECORD 24 (1938). *See generally* David F. Cavers, *The Food, Drug, and Cosmetic Act of 1938: Its Legislative History and Its Substantive Provisions*, 6 L. & CONTEMP. PROBS. 2 (1939) (comparing the FDCA to the old Federal Food and Drugs Act of 1906). For a discussion of the evidence that led to the 1906 law, see JAMES HARVEY YOUNG, PURE FOOD: SECURING THE FEDERAL FOOD AND DRUGS ACT OF 1906 (1989).

120. *See, e.g.*, Ulrich Brinkmann & Roland E Kontermann, *The Making of Biospecific Antibodies*, 9 MABS 182, 182 (2017) (explaining biospecifc antibodies and their role in the pharmaceutical industry).

121. *See, e.g.*, Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 91–99 (1985) (describing how delegation to experts can lead to various benefits).

122. Bain Peanut Co. v. Pinson, 282 U.S. 499, 501 (1931).

123. Alex Kozinski & Andrew Bentz, *Privatization and Its Discontents*, 63 EMORY L.J. 263, 264 (2013).

services.[124] One justification is the belief that the government should rely on the market for goods and services where there is no market defect (such as externalities, public goods, or a natural monopoly) demanding public responsibility for an activity (such as national defense).[125] A second justification is that the private sector can deliver goods, services, and ideas to government officials more quickly and efficiently without suffering any loss in quality because of the benefits of competition.[126] There is the hope that engaging private individuals in governance enhances the ability of different groups to be a part of participatory democracy.[127] And then there is the belief that there are internal (profit-driven) and external (government oversight) accountability mechanisms that are absent in the case of bureaucracies—which is also often expressed as the fear that government civil servants would reluctantly implement policies (if at all) that they find unwise, mistaken, or immoral and might actively pursue guerilla warfare to torpedo them.[128] Those factors drive the belief that the private sector could become a Fifth Branch of government without the public suffering any adverse effect.

Yet, there are also reasons for concern.[129] Market imperfections, such as the free rider problem and natural monopolies, demand at least some minimal government involvement to protect private interests.[130] Privatization could weaken public norms such as the commitment to equality and concern for the vulnerable members of society.[131] Distrust of the willingness of large corporations to prefer the public good over private profit also makes people unwilling to allow Congress to hand the keys to the government over to Omni Mega Corp. That is particularly true with regard to historic government operations. There is a strongly held

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124. *See, e.g.*, Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 HARV. L. REV. 1422, 1423–30 (2003) (listing various benefits of privatization over public governance).

125. *See id.* at 1431–35.

126. *See* E.S. SAVAS, PRIVATIZATION: THE KEY TO BETTER GOVERNMENT 262–66 (1987); MICHAEL J. TREBILCOCK, THE PROSPECTS FOR REINVENTING GOVERNMENT 20–22 (1994).

127. *See* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 559–60 (2000).

128. *See, e.g.*, ROSEMARY O'LEARY, THE ETHICS OF DISSENT 145–55 (3d ed. 2020) (describing public employees that purposely frustrate legislation and policy that they disagree with); Trebilcock & Iacobucci, *supra* note 124, at 1448–49 (listing public accountability shortcomings). Events that have occurred during the Trump Administration prove the legitimacy of that concern. *See, e.g.*, Opinion, *I Am Part of the Resistance Inside the Trump Administration*, N.Y. TIMES (Sept. 5, 2018), https://www.nytimes.com/2018/09/05/opinion/trump-white-house-anonymous-resistance.html [https://perma.cc/YM8K-QX9Q].

129. *See, e.g.*, Minow, *supra* note 12, at 1246–55 (stating various shortcomings of privatization).

130. *See, e.g.*, Trebilcock & Iacobucci, *supra* note 124, at 1433–35.

131. *See* Minow, *supra* note 12, at 1230.

belief that only public officials should undertake certain "core" or "indispensable" government functions, such as operation of the criminal justice system. Protection of the public against violence by bandits and fraud by con artists is the foundational responsibility of a sovereign central government,[132] and the inability to protect against such depredations is a defining feature of so-called failed states, such as Libya and Yemen.[133] In fact, the Supreme Court once described the need for a state monopoly over violence through the criminal justice system as being "essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs."[134] There is little to no constituency for completely privatizing government, yet the centrifugal force of privatization certainly has not let up.

There are some dispiriting causes at work too. The Framers' architecture rested on the premise that each branch of government would protect its particular institutional interests against the tendency of the others toward aggrandizement of their individual spheres of authority.[135] That theory, however, no longer reflects governance today. The Framers did not anticipate the political parties that now dominate the Washington, D.C. landscape, which have scrambled the Framers' carefully constructed tripartite form of government.[136] Party loyalty, especially to its leadership, is critical if members are to have any success as legislators, particularly in the House of Representatives, because "reforms" accomplished over the last forty-plus years have consolidated power in

132. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion) ("The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law." (quoting Furman v. Georgia, 408 U.S. 238, 308 (1972) (Stewart, J., concurring))); LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 108 (1993) ("Perhaps the most primitive and basic rules in the criminal justice system were those that protected property rights. . . . The laws against theft, larceny, embezzlement, and fraud are familiar friends."); Paul J. Larkin, Jr. & GianCarlo Canaparo, *Are Criminals Bad or Mad? Premeditated Murder, Mental Illness, and* Kahler v. Kansas, 43 HARV. J.L. & PUB. POL'Y 85, 148 (2020) ("At early common law, local English clans sanctioned offenders to prevent the violent retaliation that would follow if murders, assaults, and thefts were left unpunished and uncompensated. . . . However 'unappealing' to some it might appear today to maintain that forestalling private vigilantism is a legitimate justification for punishment, that is the ground on which modern Anglo-American criminal law rested." (quoting *Gregg*, 428 U.S. at 183)).

133. Rosa Ehrenreich Brooks, *Failed States, or the State as Failure?*, 72 U. CHI. L. REV. 1159, 1160–62 (2005).

134. *Gregg*, 428 U.S. at 183.

135. *See, e.g.*, THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961).

136. *See, e.g.*, Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2313 (2006).

the Speaker of the House and Senate Majority Leader.[137] Representatives and Senators are more likely to defend their chief party officials, including the President, than the institutions to which they belong.

The birth of two major political parties, along with the shift of power from committee chairs to House and Senate leadership, did not alone scuttle the Framers' design. What also was needed was the loss of conservative and liberal wings, as well as middle-of-the-roaders, within each party. Compromise is possible when there are "fellow travelers" in each party, when there are members who straddle the line, and when some go back and forth depending on the issue. That feature, however, has largely disappeared from today's political landscape. Over the last few decades, there has been an increasing polarization of each major political party, with the middle having shrunk to the point of almost disappearing. Political "debates" now more closely resemble the "*Tastes great! Less filling!*" television beer advertisements once seen during commercials at professional football games,[138] or the inter-tribal bickering in *Lawrence of Arabia*,[139] than the sharp but nonthreatening ripostes in *Advise and Consent.*[140]

In addition, society has witnessed a fundamental change in the composition of the leading political parties. The Republican and Democratic Parties have realigned themselves into entities that are almost exclusively conservative or liberal. Congress now more closely resembles and acts as if it were the 2020 English Parliament than the First Congress. The legislature that the Framers envisioned in Philadelphia in 1787 has morphed into a legislature with a Conservative–Liberal Party alignment unanticipated at the nation's founding.[141] Members try to make

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137. For an insider's explanation of what has happened, see Mike Gallagher, *How to Salvage Congress*, ATLANTIC (Nov. 13, 2018), https://www.theatlantic.com/ideas/archive/2018/11/gallagher-congress/575689/ [https://perma.cc/SF9J-UZJR].

138. The Museum of Classic Chicago Television, *Miller Lite - "The First Lite Beer Open" (Commercial, 1986)*, YOUTUBE (Feb. 22, 2008), https://www.youtube.com/watch?v=1mnBmfimpNY [https://perma.cc/2PY8-5ANR].

139. niallkennedy, *Table of Damascus in Lawrence of Arabia*, YOUTUBE (Apr. 26, 2006), https://www.youtube.com/watch?v=YhBIPZCVj84 [https://perma.cc/5FBQ-AUGL].

140. adam28xx, '*Advise and Consent' - Charles Laughton's Last Movie*, YOUTUBE (Nov. 11, 2012), https://www.youtube.com/watch?v=G0IMvWhR6B0 [https://perma.cc/YVS9-YMPM].

141. Professors Daryl J. Levinson and Richard H. Pildes explain,

> The Framers had not anticipated the nature of the democratic competition that would emerge in government and in the electorate. Political competition and cooperation along relatively stable lines of policy and ideological disagreement quickly came to be channeled not through the branches of government, but rather through an institution the Framers could imagine only dimly but nevertheless despised: political parties. As competition between the legislative and executive branches was displaced by competition between two major parties, the machine

as few high-risk decisions as possible because each vote risks angering some portion of the electorate or their donors. In particular, no member wishes to antagonize a single-issue voting bloc, even a small one, because such groups can have a far greater effect on the political process than their numbers alone would suggest.[142] The members' fear of facing the voters' wrath at the next election for having compromised on principle makes accommodation and compromise increasingly difficult to come by. For proof, consider what has happened to the congressional budget and appropriations processes. They have degenerated to the point that Congress now regularly funds the government's operations via stopgap continuing resolutions simply to keep the three branches up and running rather than by passing regular appropriations bills.[143] The result is that the Republican and Democratic Parties now resemble the Allied and Central Powers during the Great War—two equally matched armies facing each other across No Man's Land, each one engaged in trench warfare, each one struggling to push forward, each one suffering heavy casualties in the process.

> that was supposed to go of itself stopped running.
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> . . . In the Madisonian simulacrum of democratic politics embraced by constitutional doctrine and theory, the branches of government are personified as political actors with interests and wills of their own, entirely disconnected from the interests and wills of the officials who populate them or the citizens who elect those officials. Acting on these interests, the branches purportedly are locked in a perpetual struggle to aggrandize their own power and encroach upon their rivals. The kinds of partisan political competition that structure real-world democracy and dominate political discourse, however, are almost entirely missing from this picture.

Levinson & Pildes, *supra* note 136, at 2313–14. Various commentators have attributed the current dysfunctional nature of Congress, at least in part, to that shift. *See, e.g.*, YUVAL LEVIN, THE FRACTURED REPUBLIC 103 (2016); KENNETH R. MAYER & DAVID T. CANON, THE DYSFUNCTIONAL CONGRESS? 3 (1999). That criticism has much to say for itself. Today, our congressional representatives appear to spend more time preening for cameras and railing at congressional dysfunction than working together to overcome it. *See, e.g.*, Yuval Levin, *Congress Is Weak Because Its Members Want It To Be Weak*, COMMENTARY (July/Aug. 2018), https://www.commentarymagazine.com/articles/congress-weak-members-want-weak/ [https://perma.cc/2WPT-7SPJ].

142. *See, e.g.*, DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 5–6, 13–17, 16 n.14 (1974) (arguing that participants in the political process will seek to further their own interests, rather than the "public interest" (quoting HAROLD D. LASSWELL, POWER AND PERSONALITY 38 (1948))); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 36 (rev. ed. 1971) (explaining why, according to collective action theory, a small coherent interest group with intensely held views on a single issue can have more legislative influence than a majority of the population).

143. *See, e.g.*, Extension of Continuing Appropriations Act, 2018, Pub. L. No. 115-120, Div. B, 132 Stat. 28, 29.

That consequence plays right into the hands of members of Congress who desire to avoid accountability. As a political self-defense mechanism,[144] members of Congress pass statutes that grant federal agencies broad or vaguely phrased authority to issue rules governing private conduct as substitutes for hard-fought legislative compromises.[145] In fact, members prefer that agencies resolve contentious disputes, at least initially, through rulemaking or adjudication because it allows them to avoid frontline responsibility for governance.[146] Leaving difficult policy decisions to agencies offers legislators a no-lose proposition. They can pass legislation without the burden of resolving difficult, contentions disputes, such as the trade-off between cleaner air and costlier widgets. Officeholders can then claim credit for improving the public's health without emptying the voters' wallets.[147] If the responsible agency, which now must make the choice that Congress avoided, discovers a solution that reduces hazardous air pollution without stalling the economy let alone putting it into reverse, members can take credit for having entrusted "expert administrators" with decision-making authority. By contrast, if the agency fails to improve public health and sends the economy into a ditch, the members have someone to blame: "Washington bureaucrats." For members of Congress, it is a win-win scenario. The upshot is that the most powerful of political forces—self-preservation—pushes legislators to delegate governing authority elsewhere and see how well the recipients exercise it.

Private delegations also give Congress the opportunity to weaken the presidency.[148] The Article II Executive Power and Appointments Clauses envision that the President will superintend the implementation of whatever responsibilities are required to make legislation work.[149] To do so, the President needs to be able to appoint as "assistants or deputies"[150]

144. *See* DANIEL FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 38–42 (1991); JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 122–23 (1962); Peter Bernholz, *A General Social Dilemma: Profitable Exchange and Intransitive Group Preferences*, *in* THE THEORY OF PUBLIC CHOICE—II 361, 361–62 (James M. Buchanan & Robert Tollison eds., 1984).

145. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7409(b)(1) (directing the Environmental Protection Agency to set primary air quality standards "requisite to protect the public health" with "an adequate margin of safety").

146. *See* R. Kent Weaver, *The Politics of Blame Avoidance*, 6 J. PUB. POL'Y 371, 372 (1986) (discussing how politicians primarily are interested in avoiding blame).

147. *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2144 (2019) (Gorsuch, J., dissenting) (noting that legislatures use delegation as an abdication of responsibility while still receiving credit for having ostensibly addressed a problem), *reh'g denied*, 140 S. Ct. 579 (2019); SCHOENBROD, *supra* note 3, at 10.

148. *See* Krent, *supra* note 46, at 73–74.

149. *See* U.S. CONST. art II, § 1, cl. 1, § 2, cl. 2.

150. THE FEDERALIST NO. 72, at 436 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

people who share his policy views. Vesting implementing power in private parties bars the President from ensuring that the "management [of] these different matters" is in the hands of people whom he trusts.[151] If Congress is under the control of a different political party and itself selects the recipients of delegated power, Congress can lodge decision-making authority in people entirely opposed to the President's agenda and willing to engage in precisely the type of guerilla warfare against the administration that the President does not want if he is to be successful. Either way, the public suffers whenever political gamesmanship weakens the effectiveness of legislation or erodes public confidence in the non-political aspects of government.

B. *Why the Supreme Court Has Not Curtailed Congress's Delegation of Lawmaking Power*

The inconsistency between the Constitution's accountability-guaranteeing architecture and legislators' accountability-evading delegation practices is a stark one. The constitutional text specifies the terms of office in the national government and identifies, separates, and limits federal power in part to ensure that the electorate can periodically hold officials accountable for missteps or abuse of their powers.[152] According to the Supreme Court, those structural features are designed to protect each branch from the aggrandizing impulses of the other two, as well as the public from the potentially overwhelming power of an all-powerful, three-in-one entity.[153] Moreover, the Court has been willing to enforce the Constitution's structural assignments of powers to the individual branches.[154] It therefore is surprising that the Supreme Court

151. *Id.*

152. *See infra* note 207 and accompanying text.

153. *See* THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."); Freytag v. Comm'r, 501 U.S. 868, 870 (1991) ("The leading Framers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government. James Madison put it this way: 'No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty.'" (quoting THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961))); Clinton v. City of New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty."); Buckley v. Valeo, 424 U.S. 1, 122 (1976) (stating that our tripartite system of government is a "safeguard against the encroachment or aggrandizement of one branch at the expense of [another]"), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (stating that the Framers separated power "the better to secure liberty").

154. *See, e.g.*, Lucia v. SEC, 138 S. Ct. 2044, 2049 (2018) (ruling that an SEC administrative law judge is an "Officer[] of the United States" who cannot be appointed by SEC staff (quoting

has been unwilling to rein in Congress's apparently insatiable desire to delegate its Article I lawmaking responsibility elsewhere. Why is that? Why has the Supreme Court not intervened to ensure that Article I's elected officials cannot escape their responsibility to make difficult decisions?

This Article argues that there are three reinforcing explanations. The first explanation is that the Supreme Court has decided delegation cases against a landscape reflecting the enormous breadth of Congress's contemporary legislative and oversight responsibilities, even though that background has evolved immeasurably beyond anything that the Founding Generation considered Congress's properly limited role in American governance. As the Supreme Court put it in *Mistretta v. United States*,[155] "[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[156] Rather than decide whether today's delegations are consistent with yesterday's plan of government, the Supreme Court has used the

U.S. CONST. art. II, § 2, cl. 2)); Stern v. Marshall, 564 U.S. 462, 503 (2011) (holding that the Article III Judicial Power Clause prohibits Congress from empowering federal bankruptcy courts to decide certain state law counterclaims); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 514 (2010) (holding unconstitutional dual for-cause limitations on the President's removal power); *Clinton*, 524 U.S. at 436–47 (holding unconstitutional the line item veto); Ryder v. United States, 515 U.S. 177, 184, 188 (1995) (rejecting the argument that application of the "de facto officer" doctrine can remedy a violation of the Article II Appointments Clause); Bowsher v. Synar, 478 U.S. 714, 736 (1986) (holding unconstitutional a statute vesting executive power in an official Congress appointed); INS v. Chadha, 462 U.S. 919, 959 (1983) (holding unconstitutional a legislative veto); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 63–76 (1982) (plurality opinion) (holding that the Article III Judicial Power Clause prohibits Congress from empowering federal bankruptcy courts to decide certain state law claims), *superseded by statute*, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, *as recognized in* Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665 (2015); *Buckley*, 424 U.S. at 143 (holding unconstitutional a statute empowering Congress to appoint Federal Election Commission officers); Myers v. United States, 272 U.S. 52, 176 (1926) (upholding the President's authority to remove an executive official without the Senate's advice and consent), *overruled in part by* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935); *cf.* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (holding unconstitutional state terms limits for U.S. Representatives and Senators). There are exceptions. *See* Wiener v. United States, 357 U.S. 349, 356 (1958) (upholding a for-cause restriction on the President's authority to remove a judge of a War Claims Commission); *Humphrey's Ex'r*, 295 U.S. at 626 (upholding a for-cause restriction on the President's authority to remove a Federal Trade Commissioner); *cf.* Morrison v. Olson, 487 U.S. 654, 696 (1988) (upholding a facial challenge to a limitation on the U.S. Attorney General's authority to remove the Independent Counsel). It is uncertain today which body of caselaw is the rule, and which is the exception. *See* Paul J. Larkin, Jr., *Agency Deference After* Kisor v. Wilkie, 18 GEO. J.L. & PUB. POL'Y 105, 141–42 (2020).

155. 488 U.S. 361 (1989).

156. *Id.* at 372.

contemporary work of Congress as the baseline for measuring permissible delegations. That is critical because there has been no increase in the number of hours in the day to correspond with the workload that Congress has assumed since then. That approach makes broad delegations inevitable. Just as it would be futile or unworkable for the President himself to perform every administrative task necessary to run the government,[157] it would be "impossible" or "impractical," the Court has said, for Congress to devise every detail necessary for effective implementation of a statutory program.[158] That practical understanding of Congress's modern-day role in governance requires that Congress be allowed to pass laws that do almost no more than recite broad policy judgments and articulate vague implementing directions.

An additional explanation is that, at least as the Court sees it, allowing a recipient merely "to fill up the details" of a general legislative scheme[159] does not threaten the interests of the other two branches or the liberty of the public—the two main concerns of separation of powers principles.[160] That is particularly true when the recipient of delegated authority merely adopts internal rules and practices it will follow to execute its duties, such as hours of operation, or forms and procedures that private parties must follow for that branch to conduct its business efficiently, including the

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157. *See, e.g.*, *Free Enter. Fund*, 561 U.S. at 483 ("In light of '[t]he impossibility that one man should be able to perform all the great business of the State,' the Constitution provides for executive officers to 'assist the supreme Magistrate in discharging the duties of his trust.'" (alteration in original) (quoting 30 WRITINGS OF GEORGE WASHINGTON 334 (J. Fitzpatrick ed., 1939))).

158. *See, e.g.*, Opp Cotton Mills, Inc. v. Adm'r of the Wage & Hour Div., 312 U.S. 126, 145 (1941) ("In an increasingly complex society Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy in fixing, for example, a tariff rate, a railroad rate or the rate of wages to be applied in particular industries by a minimum wage law. The Constitution, viewed as a continuously operative charter of government, is not to be interpreted as demanding the impossible or the impracticable. The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct. Those essentials are preserved when Congress specifies the basic conclusions of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is to be effective.").

159. Which is how Chief Justice John Marshall described a provision in the First Judiciary Act that empowered the federal courts to adopt rules for the orderly conduct of judicial business. *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825).

160. *See, e.g.*, Freytag v. Comm'r, 501 U.S. 868, 870 (1991) ("The leading Framers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government. James Madison put it this way: 'No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty.'" (quoting THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1961))); Buckley v. Valeo, 424 U.S. 1, 122 (1976) (expressing concern with "aggrandizement" by each branch), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

acceptable forms of pleading and writs.[161] The fear of aggrandizement is also lessened when the Constitution itself vests specific power in the recipient of delegated authority. For example, because the President has the primary responsibility for the management of foreign policy,[162] the Constitution allows Congress to assign him the responsibility to decide when a foreign nation is no longer engaged in hostile actions against this nation.[163] By so reifying what it means to exercise the legislative power, the Court has narrowed the Framers' concerns to an exceptionally small circle that one could label the Spike Lee Principle. Essentially, as long as Congress does a skosh more than merely tell an agency or private party to "Do the Right Thing," the Supreme Court will uphold its delegation.[164]

The third rationale for the Supreme Court's reluctance to intervene is the difficulty of deciding when Congress has delegated too much legislative power—that is, when Congress has gone too far. The difficulty of making that decision is due to the inherent problem with constitutional interpretation whenever there are no objective textual criteria to define the provision at issue. For example, before enumerating the rights a person enjoys, the Sixth Amendment begins with the phrase "[i]n all criminal prosecutions, the accused shall enjoy the right."[165] That phrase alerts the reader (including judges) that all of the provisions that follow are limited to that type of government–citizen interaction. For that reason, the Supreme Court was readily able to conclude that the rights it provides do not apply until the government has formally charged someone with a crime, because only then is there a "criminal prosecution" and an "accused."[166] Numerous other provisions—the Privileges and Immunities Clause (or its fraternal twin, the Privileges or Immunities Clause), the Due Process Clause, the Equal Protection Clause, the Free Speech Clause, to name a few—however, are more Delphic than precise in their meaning and do not admit of an easy interpretation. The Supreme Court has concluded that federal judges are institutionally incapable of divining objective criteria to define the precise line separating permissible and

161. *Wayman*, 23 U.S. at 43, is an example of the latter proposition. *See supra* note 23.

162. *See, e.g.*, Zivotofsky v. Kerry, 576 U.S. 1, 14 (2015); United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) (describing the President as "the sole organ of the federal government in the field of international relations").

163. Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 389 (1813), is an example of that proposition. *See supra* note 23.

164. DO THE RIGHT THING (40 Acres and a Mule Filmworks & Universal Pictures 1989).

165. U.S. CONST. amend. VI.

166. United States v. Marion, 404 U.S. 307, 313 (1971); *see also, e.g.*, Illinois v. Gates, 462 U.S. 213, 230–32, 238 (1983) (defining "probable cause" in the Fourth Amendment); *Ex parte* Wilson, 114 U.S. 417, 429 (1885) (construing the term "infamous crime" in the Fifth Amendment Indictment Clause to include an offense punishable by imprisonment).

impermissible delegations.[167] Drawing that line closely resembles the process courts undertake when deciding whether an act is the "actual" or "proximate" cause of an injury.[168] There, a court must ask whether the harm was foreseeable and whether holding the responsible party liable is fair, which can bedevil even the most talented legal minds.[169] As a result, answering those inquiries often deteriorates into the type of arbitrary line drawing exercise that the Supreme Court avoids like the plague.[170]

Those three reasons likely explain why the Public Delegation Doctrine has survived in name only.[171] The result is that the "intelligible principle" standard has become more an offer of advice than a rule of law. It has the same precautionary status for delegation purposes that a yellow-background off-ramp highway sign has for the motor vehicle code: A legislator, like a driver, should be careful, but the police cannot ticket the driver if he exceeds the recommended speed while exiting.

III. PRIVATE DELEGATIONS AND THE DUE PROCESS CLAUSE

Scholars have defended the Private Delegation Doctrine on the ground that it protects parties against corrupt decision-making by preventing the government from delegating lawmaking or law-interpreting power to someone with an interest in the outcome of a rule or case. That is a reasonable but incomplete defense of the doctrine. The doctrine also has purchase whenever the government seeks to empower someone to act without regard to the law—in effect, to act in a "lawless" manner. English legal history reveals that the Crown could not act in that manner, and the United States Constitution carried that restriction forward via the Fifth and Fourteenth Amendment Due Process Clauses.

A. *The Problem with Delegating Power to a Biased Decision Maker*

Several scholars have concluded that the delegations in cases like *Eubank*, *Roberge*, and *Carter* involved not a Vesting Clause problem but rather the ancient problem of a biased decision maker.[172] They are right

167. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001); Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting).

168. *See, e.g.*, Burrage v. United States, 571 U.S. 204, 210–11 (2014); PROSSER AND KEETON ON THE LAW OF TORTS 263–65 (W. Page Keeton ed., 5th ed. 1984).

169. *See* Palsgraf v. Long Island R.R., 162 N.E. 99, 101 (N.Y. 1928).

170. *See, e.g.*, Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 790 (2011) ("The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try.").

171. *See* Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1508 (2015).

172. *See* Froomkin, *supra* note 46, at 153; Lawrence, *supra* note 46, at 659–62, 694–95; Liebmann, *supra* note 46, at 664–67; James M. Rice, Note, *The Private Nondelegation Doctrine:*

to fault some private delegations on that ground. The principle of *nemo iudex in causa sua*—a Latin phrase that means "no one should be a judge in his own cause"—has deep roots in our law[173] and underlies the due process rule that no one can adjudicate a case in which he has a financial interest.[174] The neighbors in *Eubank* and *Roberge*, as well as the business rivals in *Carter Coal*, could use governmental power for their own financial or personal benefit. The risk that they would ignore their obligation to be impartial was as great as the risk that the judge in *Tumey v. Ohio*[175]—whose salary increased with a rise in the number of convictions—would tilt the balance in his favor.[176] That is true even if a particular individual could put his personal interest aside and decide a case on its merits. Due process disqualifies a party from acting as the decision maker if "a realistic appraisal of psychological tendencies and human weakness" poses an unacceptable risk of bias.[177]

The risk of a biased decision maker, however, is a case-specific problem that requires consideration of the potential disqualification of particular individuals. While that doctrine would require any court to set aside decisions made by potentially biased parties, it would not disturb judgments made by the College of Cardinals or other parties that have no financial, professional, or personal interest in the outcome. The Vesting Clause offers a broader challenge to private delegations because it could disqualify *all* private parties from exercising state power on the ground that separation of powers principles do not permit Congress to hand off its responsibilities to any non-governmental official. The Vesting Clause therefore remains relevant.

As it turns out, the Due Process Clause might play a role of equal importance to that of the Vesting Clause. Most discussions of due process involve either the procedural or substantive doctrines that the Court has developed. The Supreme Court has developed two very different bodies of due process caselaw—one focusing on the likelihood that a specific

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Preventing the Delegation of Regulatory Authority to Private Parties and International Organizations, 105 CALIF. L. REV. 539, 559–60 (2017); Volokh, *supra* note 46, at 942, 950.

173. *See, e.g.*, Dr. Bonham's Case (1608) 77 Eng. Rep. 638 (K.B.); THE FEDERALIST NO. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961); John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 611–12 (1947).

174. *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 876–77 (2009); Gibson v. Berryhill, 411 U.S. 564, 579 (1973); Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972); Tumey v. Ohio, 273 U.S. 510, 523 (1927).

175. 273 U.S. 510 (1927).

176. *See id.* at 519–20.

177. Withrow v. Larkin, 421 U.S. 35, 47 (1975) (stating that, for a claim of unconstitutional risk of bias to succeed, the claim must show that "conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented").

adjudicatory procedure will provide accurate outcomes versus one that asks whether certain types of private conduct should be completely or presumptively immune from government regulation.[178] This Article argues that the binary categorization of the Court's due process caselaw falls one category short. There is another categorization—one that is "structural"—that plays as important a role as the two better known categories. That category gives effect to the last two words in the Due Process Clause: "of law." Specifically, it guarantees that a state officer cannot deprive someone of life, liberty, or property unless his action is authorized by "law." That guarantee is actually older and more fundamental than the ones discussed most often today because it protects against adverse governmental action justified only by whim, caprice, chance, or spite. And its origin is Magna Carta.

B. *The Problem with Delegating Power to a Lawless Decision Maker*

Magna Carta is a historic and revered document of English legal history.[179] Sometimes called the Torah of English law or the Bible of the English Constitution,[180] Magna Carta has been treated as if it were a written constitution.[181] Ironically, Magna Carta began not as a statement of principle like our Declaration of Independence, or as a charter of governance like our Constitution, but as a mere peace treaty designed to end a rebellion.[182] King John's arbitrary exercise of royal power, expensive and unsuccessful French military campaigns, incessant political intrigue, and frequent personal cruelties drove the English barons to renounce their feudal obligations to the Crown and combine to overthrow John.[183] To quell the rebellion, in 1215 King John agreed in Runnymede meadow to the barons' demands in the Great Charter.[184]

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178. *See* Paul J. Larkin, Jr., *The Lost Due Process Doctrines*, 66 CATH. U. L. REV. 293, 294–95 (2016).

179. For the background and significance of Magna Carta, see generally DAVID CARPENTER, MAGNA CARTA (2015) (reprinting the text and adding commentary and historical background for the Magna Carta); J.C. HOLT, MAGNA CARTA (2d ed. 1992) (explaining the document's text and history); A. E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA (1968) (connecting the Magna Carta to the development of constitutional Anglo-American jurisprudence); R.H. Helmholz, *Magna Carta and the* ius commune, 66 U. CHI. L. REV. 297 (1999) (discussing the influences of Roman and canon laws on the charter).

180. DANNY DANZIGER & JOHN GILLINGHAM, 1215: THE YEAR OF MAGNA CARTA 277–78 (2003); DANIEL HANNAN, INVENTING FREEDOM 110 (2013).

181. *See* 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 173 (2d ed. 1911).

182. *See* DANZIGER & GILLINGHAM, *supra* note 180, at 277.

183. WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 377 & n.1 (2d ed. 1914); HANNAN, *supra* note 180, at 108–09.

184. *See* HANNAN, *supra* note 180, at 109.

The most relevant (and well-known) provision in Magna Carta is Chapter 39, which is "a plain, popular statement of the most elementary rights" of Englishmen.[185] In essence, the provision states that "no free man is to be imprisoned, dispossessed, outlawed, exiled or damaged without lawful judgement of his peers or by the law of the land."[186] Chapter 39 prohibited the king from acting in a wanton, lawless manner—to speak colloquially, from taking the law into his own hands.[187] It accomplished that result by guaranteeing that the Crown would be subject to the "rule of law."[188] And "the law of the land," according to Sir Edward Coke, judge and dean of seventeenth century English law, was "the Common Law, Statute Law, or Custome of England."[189]

It is difficult to overstate the significance of Chapter 39 as a fundamental law and statement of principle. Yet, Chapter 39 was also merely a restatement of the then-contemporary English law.[190] By 1215, English law was not whatever ukase the Crown would issue. Rather, the common law had come to be a corpus of rules applicable throughout England—a "law common to the whole land,"[191] a "set of rights and obligations immanent in the country, growing incrementally" that were "passed down as part of the patrimony of each new generation."[192] Moreover, the Crown was subject to the common law no less than any lord or vassal.[193] As sixteenth century legal commentator Richard Hooker put it, the King owed his sovereign power to the law, which meant "the supreme authority in political society was not that of the ruler, but that of the law."[194] The "value" of Magna Carta was "more than a mere sum of the values of its . . . terms of any or all of its provisions"; that value

185. Charles E. Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property*," 4 HARV. L. REV. 365, 373 (1891).

186. HOLT, *supra* note 179, at 2.

187. C.H. McIlwain, *Due Process of Law in Magna Carta*, 14 COLUM. L. REV. 27, 41 (1914) ("The main point in this [provision], the chief grievance to be redressed, was the King's practice of attacking his barons with forces of mercenaries, seizing their persons, their families and property, and otherwise ill-treating them, without first convicting them of some offence in his *curia*.").

188. *See* JOHN PHILLIP REID, RULE OF LAW 12 (2004); CONRAD RUSSELL, THE CAUSES OF THE ENGLISH CIVIL WAR 138 (1990).

189. Ellis Sandoz, *Editor's Introduction: Fortescue, Coke, and Anglo-American Constitutionalism*, *in* THE ROOTS OF LIBERTY: MAGNA CARTA, ANCIENT CONSTITUTION, AND THE ANGLO-AMERICAN TRADITION OF RULE OF LAW 1, 25 (Ellis Sandoz ed., 1993).

190. *See* Larkin, *supra* note 178, at 332.

191. F. W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 13 (1955).

192. HANNAN, *supra* note 180, at 65.

193. REID, *supra* note 188, at 12.

194. A. J. CARLYLE, POLITICAL LIBERTY 53 (1941).

resided in the fact that the agreement "enunciated a definite body of law, claiming to be above the King's will and admitted as such by John."[195] Over time, the phrase "the law of the land" became "due process of law," but that revision had no effect on its meaning, effect, or significance.[196]

Chapter 39 of Magna Carta became a foundational part of American constitutional law in the eighteenth century.[197] Familiar with Coke's legal theories,[198] the Founders saw Article 39 as exemplifying the tenet of English constitutionalism that a nation's chief executive and legislature were obligated to respect the "natural and customary rights recognized at common law."[199] The Framers' generation used the phrase "the law of the land" or "due process of law" in numerous important political documents, such as the Virginia Resolutions of 1769, the Declaration and Resolves of the First Continental Congress of 1774, the Declaration of Independence, later enacted state constitutions, and ultimately the Fifth Amendment.[200] They did not see any material difference in meaning

195. MCKECHNIE, *supra* note 183, at 123.

196. Coke thought that the terms "due process of law" and "the law of the land" were interchangeable. *See* 1 EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 50 (London, W. Clarke & Sons 1817); *see also* Nathan S. Chapman & Michael W. McConnell, Essay, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1679 (2012) ("Fundamentally, 'due process' meant that the government may not interfere with established rights without legal authorization and according to law, with 'law' meaning the common law as customarily applied by courts and retrospectively declared by Parliament, or as modified prospectively by general acts of Parliament.").

197. *See, e.g.*, Horne v. Dep't of Agric., 576 U.S. 351, 358 (2015) ("The colonists brought the principles of Magna Carta with them to the New World . . . ."); Kerry v. Din, 576 U.S. 86, 91 (2015) (plurality opinion) ("Edward Coke['s] . . . Institutes 'were read in the American Colonies by virtually every student of the law' . . . ." (quoting Klopfer v. North Carolina, 386 U.S. 213, 225 (1967))); Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 614 (2009) ("Because most of the American colonies were initially chartered and settled during the early seventeenth century, when Coke's career as a judge and member of Parliament was at its height, Coke exerted a strong influence on colonial law. A large number of seventeenth-century American lawyers studied law in England, where Coke's *Reports* and *Institutes* were a staple of legal education, just as they were in the American colonies until the publication of Blackstone's *Commentaries* in 1765." (footnotes omitted)).

198. *See, e.g.*, *Din*, 576 U.S. at 91 ("Edward Coke['s] . . . Institutes 'were read in the American Colonies by virtually every student of the law' . . . ." (quoting *Klopfer*, 386 U.S. at 225)).

199. Gedicks, *supra* note 197, at 619.

200. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2633 n.3 (2015) (Thomas, J., dissenting); *Din*, 576 U.S. at 91; Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1855); HOWARD, *supra* note 179, at 211–15; 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1789 (Boston, Little, Brown & Co., 3d ed. 1858); Gedicks, *supra* note 197, at 622–23; H. D. Hazeltine, *The Influence of Magna Carta on American Constitutional Development*, 17 COLUM. L. REV. 1, 22 (1917).

between the two phrases.[201]

The upshot of that history is that the government cannot enact a statute that exempts itself from complying with the rule of law. Any such statute would be not a law but a license to act lawlessly. That principle has a particular urgency in the United States. According to *Marbury v. Madison*,[202] no legislature can exempt itself from the Constitution.[203] A legislature can always exempt itself from a generally applicable statute, but it cannot render itself immune from whatever restraints the Constitution imposes because it is the supreme law. And if that is true, then it follows that the government also cannot empower a private party to operate in lieu of the government but outside of the Constitution.

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201. *See* Daniels v. Williams, 474 U.S. 327, 331 (1986); Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 368 (1911).

202. 5 U.S. (1 Cranch) 137 (1803).

203. As Chief Justice Marshall explained:

> This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.
>
> The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.
>
> Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.
>
> If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.
>
> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

Id. at 176–77.

The common denominator to *Eubank*, *Roberge*, and *Carter Coal* was that the law delegating the government's authority to private parties not only had the effect of vesting the latter with lawmaking power, but also gave someone injured by the designees' actions no recourse under the law. Each case made that point.[204] Ironically, the effect was to create a mirror image of the process of declaring someone an "outlaw" at common law. That declaration placed the named party outside the protection of the law, allowing anyone who came across him to kill him with impunity.[205] The delegation in *Eubank*, *Roberge*, and *Carter Coal* had the opposite effect. Specifically, these cases lifted the legal restraints that would have been in effect if the government had taken the actions at issue, instead of the designated private parties. The result was an attempt to evade the restraints that the Constitution placed on arbitrary government action by turning over to private parties a decision that the government could not make free from legal restraints.

The history of the birth and development of the Due Process Clause shows that such an attempt would be impermissible.[206] After all, the barons at Runnymede would hardly have acquiesced in a decision by King John, after signing Magna Carta, to delegate royal power to a party of his choosing to avoid the Chapter 39 requirement of governance according to law. The barons certainly would have objected to the king's attempt to nullify Chapter 39 by installing a puppet on the throne or by vesting an apparatchik with the Crown's authority, someone who would unhesitatingly carry out John's orders regardless of their compliance with the common law. They, and the Framers, who understood the value of Magna Carta, would doubtless have deemed any such decree as a sham. Remember that the barons were aware of King John's stratagems and abuses of power. Chapter 39 sought to eliminate them, not simply to transfer them to someone else chosen by the king, who could then be as equally capricious because he would be free from the limitations of that chapter.

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204. Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936); Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 122 (1928); Eubank v. City of Richmond, 226 U.S. 137, 143–44 (1912); *see supra* notes 58, 68, 75 and accompanying text.

205. Nathan Levy, Jr., *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L.J. 52, 80 (1968) ("Upon the dread proclamation of outlawry, such dire consequences resulted as corruption of blood, escheat of lands, forfeiture of chattels, and, as if that were not enough, a one-way trip to the gallows without further trial. The outlaw was so far beyond the protection of the law that he could—at least prior to the thirteenth century—be slain on sight and with impunity by any person."); Bobby G. Deaver, Note, *Outlawry: Another "Gothic Column" in North Carolina*, 41 N.C. L. REV. 634, 635 (1963); *see, e.g.*, Dale Cnty. v. Gunter, 46 Ala. 118, 138–39 (1871); Respublica v. Doan, 1 Dall. 86, 90 (Pa. 1784).

206. *See* Leonard G. Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048, 1049–50 (1968).

The same principle should apply today when the federal government seeks to transfer governmental power to private parties. The Framers sought to limit the powers of the new central government. Articles I, II, and III accomplish that goal in several ways: They create a limited number of federal elected or appointed offices; restrict how private parties may come to hold and exercise the powers of those offices; and provide express and implied remedies for cases in which officeholders abuse their delegated authority.[207] The Due Process Clause protects the public against the federal government's attempt to shed those rules by delegating power to private parties, whether individuals or corporations. Reading the Due Process Clause as a requirement that government officers exercise their lawmaking authority only pursuant to "the law of the land" accomplishes that result by forbidding the government from authorizing private parties, who are unencumbered by any constitutional restrictions on their exercise of government power,[208] to fill in as erstwhile federal officials. Permitting federal officials to delegate power in that manner leaves the recipient able to act without being subject to the safeguards that protect the public against government abuse. It makes

207. Article I establishes a Congress of the United States. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."). The election and term limit provisions imposed by Articles I and II, along with the Twelfth, Seventeenth, and Twenty-second Amendments, create procedures for the periodic election to the offices of Representatives, Senators, and Presidents. *See* U.S. CONST. art. I, § 2, cl. 1 (specifying that House members shall hold office for two years); *id.* art. I, § 3, cl. 1 (specifying that Senators shall hold office for six years); *id.* art. II, § 1, cl. 1 (specifying that the President holds office for four years); *id.* amend. XII (specifying how the President will be elected); *id.* amend. XVII (requiring popular election of Senators every six years); *id.* amend. XXII, § 1 (limiting the number of years that a person may hold office as President). Under the Elections Clause, U.S. CONST. art. I, § 4, cl. 1, Congress may preempt state laws governing the time, place, and manner of holding federal elections, but not the qualifications for voting in them. *See* Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 16–17 (2013); THE FEDERALIST NO. 60, at 371 (Alexander Hamilton) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 51, *supra* note 135, at 326. The Bicameralism and Presentment requirements of Article I, Section 7, regulate how those officeholders may make "Law." *See* U.S. CONST. art. I, § 7, cls. 2, 3; INS v. Chadha, 462 U.S. 919, 948–49 (1983) (explaining that through the bicameral requirement, the Framers reemphasized their belief in the Presentment Clauses that legislation should not be enacted unless it has been fully considered by the Nation's elected officials); *see also* U.S. CONST. art. I, § 7, cl. 1 (stating that "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills"); *cf.* Clinton v. City of New York, 524 U.S. 417, 448–49 (1998) (noting that Article I requires the same process in order to repeal or amend an existing law). The legislative powers granted to Congress in the next section, Article I, Section 8, identify the particular subjects that those laws may govern. *See* U.S. CONST. art. I, § 8 (listing the "[p]ower[s]" that Congress may use law to regulate).

208. Only the Thirteenth Amendment applies to private conduct. The other provisions are limits on government power. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 620–27 (2000); Civil Rights Cases, 109 U.S. 3, 11, 23 (1883).

little sense to read the Constitution as permitting its restrictions to be so easily evaded.

Consider three safeguards in effect for every public delegation. Two are the Article II Appointments[209] and Executive Power[210] Clauses. Together, they enable the President to appoint assistants to execute the laws and to direct how federal officials exercise their assigned powers. The President can overrule their decisions and, if necessary, remove any federal employee who goes off on a frolic and detour of his own creation.[211] That is not the case when Congress delegates authority to a private party. Private delegations keep the President from managing the work of the Executive Branch, which Congress can use to evade constitutional restrictions on executive officials, to reduce the authority of the President, or both. The third safeguard is the Impeachment and

209. The Article II Appointments Clause provides, "The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . ." U.S. CONST. art. II, § 2, cl. 2. The Appointments Clause regulates what personnel may exercise federal authority. *See, e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492–511 (2010); Freytag v. Comm'r, 501 U.S. 868, 880 (1991) ("The Appointments Clause prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint."); Bowsher v. Synar, 478 U.S. 714, 721–22, 730 (1986). The Appointments Clause protects the appointing authority against interference from any other person or branch of the federal government. *See* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2199 (2020). It guarantees that only properly appointed parties who are therefore (presumably) properly vetted can exercise federal power. *See id.* at 2197–98. Finally, it ensures that any official exercising federal power can be removed at a minimum for misconduct or incompetence, even if not for other reasons. *See, e.g.*, *id.*; *Free Enter. Fund*, 561 U.S. at 501–02; Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 483 n.4, 484 (1989) (Kennedy, J., concurring). The term "Officers of the United States" includes any person who occupies a "continuing" position established by law and exercises the "significant authority" of the federal government. Lucia v. SEC, 138 S. Ct. 2044, 2051 (2018) (first quoting United States v. Germaine, 99 U.S. 508, 511 (1879); then quoting Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81). Article II demands that anyone to whom those criteria apply be appointed by the President, with the "Advice and Consent of the Senate," or by another party identified in the clause, such as "Heads of Departments." U.S. Const. art. II, § 2, cl. 2; *see, e.g.*, *Lucia*, 138 S. Ct. at 2053–55 (ruling that SEC administrative law judges are officers); Edmond v. United States, 520 U.S. 651, 658, 666 (1997) (ruling that civilian members of the U.S. Coast Guard Court of Criminal Appeals are officers); Weiss v. United States, 510 U.S. 163, 169–70 (1994) (ruling that military judges are officers); *Freytag*, 501 U.S. at 881 (ruling that "special trial judges" of the U.S. Tax Court are officers); *Buckley*, 424 U.S. at 126 (ruling that Federal Election Commissioners are officers).

210. Article II creates the office of the President of the United States. *See* U.S. CONST. art. II, § 1. The Article II Take Care Clause directs the President to ensure that the "Laws" are faithfully executed. *Id.* art. II, § 3.

211. *See Free Enter. Fund*, 561 U.S. at 493.

Removal Clauses.[212] They allow Congress to remove executive officials who abuse their powers if the President will not do so. They are limited, however, to only the "President, Vice President, and all civil Officers of the United States,"[213] which would prevent Congress from removing a private party from whatever position it fills.

That is why the problem with the privatization of government functions is not merely the risk of biased decision-making. Instead, the problem is the government's effort to shed its accountability for officers exercising a public function. That problem would exist if the government delegated decision-making power to a body of retired federal judges or someone else of unimpeachable integrity because it would deprive anyone injured by the exercise of delegated authority the opportunity to seek judicial relief to hold the government in check. The problem would also exist even if Congress delegates a so-called non-core or ancillary governmental function to a private party. For example, the Constitution does not require that the government provide welfare benefits, housing, or medical services of any type; they are optional.[214] Yet, the principle at stake is still the same. Granting private parties public authority over a matter otherwise deemed fit only for governmental responsibility "eliminates the protections that the rule of law offers everyone as part of the political and social compact that the Framers offered to the nation in 1787."[215]

Delegating governmental authority to private parties flies in the face of a system that delegates governing authority *from* private parties *to* government officials but only insofar as they operate within the constraints that the Constitution and other laws impose. As I have previously explained:

> Granting a private party power that the Constitution vests only in parties who hold the offices created or contemplated by Articles I, II, and III is the exact opposite of what the Framers had in mind. If followed across the board, that practice would allow federal officials to turn the operation of government over to private parties and go home. That result would not be to return federal power to the states. At a macro level, it would be to abandon responsibilities that the Constitution envisioned only a centralized government could execute to ensure that the new nation could survive

212. And those provisions establish a mechanism—impeachment—to remove an officeholder who abuses the powers of his office. *See* U.S. CONST. art. I, § 2, cl. 5, § 3, cls. 6, 7.

213. U.S. CONST. art. II, § 4.

214. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 317–18 (1980) (ruling that the Constitution does not require the government to provide health care services).

215. *See* Paul J. Larkin, Jr., *The Dynamic Incorporation of Foreign Law and the Constitutional Regulation of Federal Lawmaking*, 38 HARV. J.L. & PUB. POL'Y 337, 418 (2015).

> and prosper. At a micro level, it would be to leave to the King's delegate the same arbitrary power that Magna Carta sought to prohibit the King from exercising through the rule of law. The "plan of the Convention" was to create a new central government with the responsibility to manage the affairs of the nation for the benefit of the entire public with regard to particular functions—protecting the nation from invasion, ensuring free commercial intercourse among the states and with foreign governments, and so forth—that only a national government could adequately handle. The states were responsible for everything else, and they had incorporated the common law into their own legal principles. The result was to protect the public against the government directly taking their lives, liberties, and property through the use of government officials or indirectly accomplishing the same end by letting private parties handle that job. The rule of law would safeguard the public against the government's choice of either option. Using private parties to escape the carefully crafted limitations that due process imposes on government officials is just a cynical way to defy the Framers' signal accomplishment of establishing a government under law.[216]

The concept of "a government under law" is critical in this regard. The Constitution is the nation's fundamental law, and the government cannot exempt itself from compliance with it, as *Marbury v. Madison* made clear.[217] Congress cannot allow individuals who do not satisfy the age, citizenship, and birth requirements of Articles I and II to become Senators, Representatives, or President because those provisions define the requirements to hold office.[218] Congress cannot turn the impeachment process over to private judges, lawyers, professors, or ministers because the Framers did not subject removal decisions to plebiscite.[219] Congress cannot designate someone other than the President to sign or veto legislation because, as the nation's chief executive, he must decide what may become a federal law.[220] Congress cannot enact a bill of attainder or ex post facto criminal statutes,[221] nor can it divest a defendant in a criminal case of the right to trial by a jury of his peers,[222] because Congress cannot vote away limitations on its own power. Congress cannot redefine the

216. *Id.* at 419–20.
217. 5 U.S. (1 Cranch) 137, 176–78 (1803).
218. *See* U.S. CONST. art. I, § 2, cl. 2, § 3, cl. 3; *id.* art. II, § 1, cl. 4.
219. *See id.* art. I, § 2, cl. 5, § 3, cl. 6.
220. *See id.* art. I, § 7, cl. 2, 3.
221. *See id.* art. I, § 9, cl. 3.
222. *See id.* art. III, § 2, cl. 3; *id.* amend. VI.

crime of treason to include criticism of a sitting President or one of its members, regardless of the strength of its desire to do so.[223] If Congress cannot take any of those steps, what sense does it make to say that Congress can turn over its legislative responsibilities to private parties who are unencumbered by those—or any other—constitutional regulations? Even if scrutiny is limited to only the criminal justice system, the problem persists. If Congress cannot assign the trial of federal criminal cases to a judge chosen from the community without the tenure and salary protections Article III requires,[224] how can Congress turn over the operation of the federal criminal law to the entire community?[225]

A response might invoke the theory of the dog that did not bark.[226] Why has the Supreme Court not reconsidered private delegations under the rubric suggested here? The likely explanation is two-fold. It is only relatively recently that the Court has shown a rekindled interest in scrutinizing how Congress structures decision-making responsibility. The Court concluded in 1926 in *Myers v. United States*[227] that, as part of his authority to manage the operation of the Executive Branch, the President

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223. *See id.* art. III, § 3, cl. 1.

224. *See id.* art. III, § 1; McElroy v. U.S. *ex rel.* Guagliardo, 361 U.S. 281, 287 (1960) (ruling that the federal government can prosecute civilians only in an Article III court and cannot require them to stand trial in a military court-martial even for offenses they are alleged to have committed while in military service); U.S. *ex rel.* Kinsella v. Singleton, 361 U.S. 234, 246–47 (1960) (same); U.S. *ex rel.* Toth v. Quarles, 350 U.S. 11, 23 (1955) (same); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 337 (1816) ("No part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to state tribunals."); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 952 (1988) (noting that "the historical core of the public rights doctrine" does not include "the actual or threatened exercise by government of coercive powers" under "the criminal law"); *id*. at 952 n.208 ("[C]riminal cases traditionally have been regarded as requiring judicial resolution . . . .") (citation omitted).

225. That is not to say that the government acts improperly when officials exercise state power in response to constituent demands. Articles I and II establish a governing process that by design renders the members of those branches politically accountable to the electorate. However much we may wish that government officials will act with only the disinterested interests of the nation, state, or county in mind, we must concede that political and personal self-interest will govern their actions at least some of the time. *See, e.g.*, Editorial, *The Dirt and Delay Playbook*, WALL ST. J. (Sept. 14, 2018, 7:09 PM), https://www.wsj.com/articles/the-dirt-and-delay-playbook-1536966589 [https://perma.cc/S9W7-CQ8V]. In fact, the First Amendment Petition Clause guarantees each person a right to ask the government to redress a perceived "grievance" even if the only alleged wrong or injustice is that someone else has what he wants. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."). It would be odd to say that the Constitution forbids what it elsewhere approves.

226. *See* Chisom v. Roemer, 501 U.S. 380, 396 n.23 (1991) (citing ARTHUR CONAN DOYLE, *Silver Blaze*, *in* THE COMPLETE SHERLOCK HOLMES 335 (1927)).

227. 272 U.S. 52 (1926), *overruled in part by* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

can remove executive officials without the approval of Congress.[228] Later, however, the Court twice upheld restraints on the President's removal power, ruling in *Humphrey's Executor v. United States*[229] and *Wiener v. United States*[230] that Congress may impose "for-cause" restriction on the President's removal authority,[231] and as recently as 1988 the Court signaled in *Morrison v. Olson*[232] that those decisions were still good law.[233] By contrast, even more recent decisions, such as *Bowsher v. Synar*[234] and *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,[235] suggest that the Court might be willing to reconsider *Humphrey's Executor* and *Wiener* in light of Appointments Clause jurisprudence that came on scene decades after *Carter Coal* with the Court's decision in *Buckley v. Valeo.*[236] Finally, since 1976, every private delegation case but one has involved a state delegation, and neither the Appointments Clause nor the federal separation of powers doctrine applies to the states.[237] The only exception is *Amtrak II*,[238] where a majority of the Court concluded that Amtrak was an arm of the federal government for purposes of the Private Delegation Doctrine.[239] Justices Thomas and Alito, however, said that the Court should reconsider its delegation precedents in an appropriate case.[240] Accordingly, *Eubank*, *Roberge*, and *Carter Coal* should not be counted out yet.

There is also reason for optimism that the Private Delegation Doctrine will survive. The principal explanation for the Supreme Court's hesitancy to enforce the Public Delegation Doctrine is its reluctance to draw

228. *Id.* at 135.

229. 295 U.S. 602 (1935).

230. 357 U.S. 349 (1958).

231. *Id.* at 356; *Humphrey's Ex'r*, 295 U.S. at 629.

232. 487 U.S. 654 (1988).

233. *See id.* at 687–88, 693 (upholding a facial challenge to a limitation on the U.S. Attorney General's authority to remove the Independent Counsel).

234. 478 U.S. 714 (1986).

235. 561 U.S. 477 (2010).

236. 424 U.S. 1 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81; *see Bowsher*, 478 U.S. at 726; *Free Enter. Fund*, 561 U.S. at 496–98. Another possibility is that the Court would limit *Humphrey's Executor* and *Wiener* to their facts. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2198–99 (2020) (cabining those decisions to "multimember bodies with 'quasi-judicial' or 'quasi-legislative' functions").

237. *See, e.g.*, Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself. Nothing in the distribution here attempted supplies the basis for an exception.").

238. 575 U.S. 43 (2015).

239. *Id.* at 55.

240. *Id.* at 62, 66 (Alito, J., concurring); *id.* at 77 (Thomas, J., concurring).

arbitrary lines between lawful and unlawful delegations. A similar problem exists in private delegations because the distinction between public and private organizations has grown indistinct.[241] If that were the only way to define the Private Delegation Doctrine, if there were no alternative way to apply the doctrine to contemporary delegation practices, the Court might be no more willing to revitalize *Eubank*, *Roberge*, and *Carter Coal* than to resuscitate *Panama Refining* and *Schechter Poultry*. But there is another way to set boundaries. The theory this Article proposes—one that focuses on the external restraints the rule of law imposes on the recipient of delegated power, rather than on the reach of the delegation itself—holds promise as a means of restraining unreasonable private delegations.

Consider the Court's recent treatment of the issue whether an injured party should be able to bring a *Bivens* action[242] against private prisons and correctional personnel.[243] The Supreme Court has declined to create a constitutional damages remedy where state tort law provides a reasonable alternative.[244] State tort remedies need not be identical to the relief that would be open to a prisoner confined in a federally or state-run facility,[245] but those remedies must be "capable of protecting the

241. *See, e.g.*, MINOW, *supra* note 45, at 22 ("It is not unusual for the boundaries between public and private to blur. The lines themselves are historical inventions."); John J. DiIulio, Jr., Response, *Government by Proxy: A Faithful Overview*, 116 HARV. L. REV. 1271, 1283 (2003) ("Drawing the line between policy execution and policymaking is difficult, and public administration, both as a field of practice and as an academic discipline, has been struggling for over a century with the problem."); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1349 (1982).

242. In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court implied a damages cause of action directly under the Fourth Amendment for the unlawful search of an innocent party's home. *See id.* at 397. There was no other remedy available to someone not charged with a crime, meaning that, as Justice John Harlan so colorfully put it in his separate opinion, "For people in Bivens' shoes, it is damages or nothing." *Id.* at 410 (Harlan, J., concurring).

243. *See* Minneci v. Pollard, 565 U.S. 118, 131 (2012) (ruling that a prisoner cannot bring a constitutional damages action against individual private prison employees); Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 63 (2001) (holding that a prisoner cannot bring a constitutional damages action where a private corporation is the defendant).

244. *Minneci*, 565 U.S. at 125–26; *cf.* Wilkie v. Robbins, 551 U.S. 537, 541, 550–51 (2007) (declining to create a constitutional tort action against federal officials for alleged Due Process Clause violations when tort law provided an adequate alternative remedy). In fact, the Court has said that it will not extend its past *Bivens* cases beyond the four corners of their holdings. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1859–60 (2017) ("If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new. . . . [W]hether a damages action should be allowed is a decision for the Congress to make, not the courts.").

245. *See* Federal Employees Liability Reform and Tort Compensation Act of 1988 § 6, 28 U.S.C. § 2679(d)(1) (requiring that the United States be substituted in as the defendant in a tort action against a federal employee for actions within the scope of his employment); Osborn v.

constitutional interests at stake."[246] For example, the remedy would be sufficient if the allegedly tortious conduct "is of a kind that typically falls within the scope of traditional state tort law" (such as physical injury), if state tort law imposes a duty of "reasonable care (including medical care)" on a private prison facility or its personnel, and if state law recognizes a cause of action (for assault or negligence).[247] That is sufficient even if a plaintiff cannot recover compensation for every claimed injury.[248] As the Supreme Court explained in *Minneci v. Pollard*,[249] "the question is whether, in general, state tort law remedies provide roughly similar incentives for potential defendants to comply with the Eighth Amendment while also providing roughly similar compensation to victims of violations."[250]

One of the criticisms of private delegation is that the courts cannot adequately police private conduct because the Supreme Court has refused to apply constitutional restraints to such conduct under the State Action Doctrine.[251] Courts "assiduously adhere to a formal but increasingly unrealistic public-private distinction," the criticism goes, "that protects contractors from significant legal and constitutional accountability."[252] The theory this Article proposes avoids that criticism by requiring that courts be open to provide reasonable common law tort and contract remedies for abusive conduct by recipients of government power. The Supreme Court's decision in *Minneci* allowed *ex post* common law remedies to substitute for *ex ante* constitutional restraints. That is a reasonable judgment given that after-the-fact damage remedies can have the same type of regulatory effect as antecedent agency rules.[253] Relying

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Haley, 549 U.S. 225, 238–41 (2007) (concluding that the Westfall Act immunizes federal employees from a tort suit through their removal and the substitution of the United States as defendant).

246. *Minneci*, 565 U.S. at 125, 129 ("State-law remedies and a potential *Bivens* remedy need not be perfectly congruent."); *see Wilkie*, 551 U.S. at 550.

247. *Minneci*, 565 U.S. at 127–29, 131.

248. *Id.* at 129 (rejecting the argument that a cap on the amount of damages, the denial of damages for emotional suffering unconnected with physical harm, and the use of an expert panel in a medical malpractice case render a state remedy inadequate).

249. 565 U.S. 118 (2012).

250. *Id.* at 130.

251. *See, e.g.*, Metzger, *supra* note 46, at 1444–45.

252. Freeman & Minow, *supra* note 13, at 16.

253. As Supreme Court Justice and Professor Stephen Breyer has explained: "The common law is in fact a regulatory system . . . . It depends on the creation and enforcement, by law, of a set of rights, notably those creating private property and enforceable contracts." STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 4 (7th ed. 2011); *see also, e.g.*, HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE 7 (2005) ("[A]ntitrust is a form of regulation—a type of market intervention in an economy whose nucleus is private markets."); HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY 12–35 (1955) (discussing the development

on common law remedies for superintendence of private parties exercising government authority also makes sense from a management perspective because it answers the questions necessary for accountability to survive: What mechanism exists to provide relief for injuries? What relief is available? Who can obtain relief? On what grounds? What standards apply? Who can be held responsible? What are the effects of the operation of that system?[254]

Evaluating the nature of the remedies available under state law to an injured party is far more amenable to reasoned judicial inquiry than is deciding whether a particular delegation has gone too far. *Minneci* not only pursued that precise inquiry, but also expressly rested its holding on the reasonableness of making that determination. *Minneci* also made clear the Court's readiness to undertake that inquiry to ensure that private correctional facilities and their personnel cannot simply take the law into their own hands. Examining whether state law remedies are protected is also similar to the type of inquiry that the Court has performed in determining whether Congress has violated Article III by removing particular issues from the jurisdiction of the federal courts.[255] The result is that federal courts should be able to avoid getting lost in the line drawing Serbonian Bog that the Public Delegation Doctrine has become.

IV. APPLICATION OF THE PRIVATE DELEGATION DOCTRINE

At this point, the reader is entitled to ask for an example or two to illustrate how the theory set forth above would apply in practice. The following sections discuss two such applications. One deals with the problems that arise when a legislature empowers non-government officials to make law on a continuous or irregular basis by passing a statute that automatically incorporates by reference as governing law whatever rules or standards a private organization might adopt. The other application can be seen when the legislative and executive branches collaborate to delegate to a private party the responsibility to perform a function that traditionally had been viewed as a "core" function that only the government may legitimately perform. More specifically, an example

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of antitrust law in the United States, showing that the common law provided remedies to address unfair competition claims before passage of the Antitrust Laws, such as the Sherman Act).

254. *See* Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, *in* PUBLIC ACCOUNTABILITY 115, 118 (Michael W. Dowdle ed., 2006).

255. *See, e.g.*, Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1372–74 (2018); Stern v. Marshall, 564 U.S. 462, 482–95 (2011); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 67–76 (1982) (plurality opinion), *superseded by statute*, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, *as recognized in* Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665 (2015); *id.* at 91 (Rehnquist, J., concurring); Crowell v. Benson, 285 U.S. 22, 50–51 (1932) (discussing the so-called "public-rights" doctrine).

of the former is the passage of a law that dynamically incorporates private rules or standards; an example of the latter is the use of privately owned and operated prisons to confine and supervise parties convicted of a crime.

A. *The Dynamic Incorporation of Private Rules or Standards*

The Constitution defines how a "Bill" can become a "Law,"[256] but it is silent on how an idea can become a "Bill," which gives Congress complete freedom to draw on whatever sources it chooses. Taking advantage of that flexibility, some acts incorporate by reference existing laws, a technique known as static incorporation.[257] Static incorporation poses no delegation problem. It both meets the Article I Bicameralism and Presentment requirements and ensures legislative accountability because it simply adopts previously existing laws to create the new law.

By contrast, there are occasions where an act of Congress incorporates future rules someone else may create, a technique known as dynamic incorporation.[258] That term, however, is misleading. What dynamic incorporation in fact does is delegate lawmaking power to someone else on an ongoing basis.[259] The recipient of lawmaking authority can formulate, re-evaluate, and revise the law over time. Where that party is a government agency, dynamic incorporation is an example of empowering a regulatory body to make law. In fact, the *Chevron* doctrine directs courts to accept an agency's reasonable interpretation of an ambiguous statute,[260] even if the agency has changed its position.[261]

Dynamic incorporation becomes problematic, however, when Congress uses that legislative technique to delegate lawmaking power to a private party. Dynamic incorporation thereby vests governmental power in private parties that may not be politically responsible, directly or indirectly, to the federal electorate.[262] It is the legislative equivalent of

256. *See* U.S. CONST. art. I, § 7, cls. 2, 3 (including further details in the Bicameralism and Presentment Clauses). Each chamber can supplement the Bicameralism and Presentment Clauses through its own internal operating rules. *See id.* § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . . .").

257. Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103, 104–05 (2008); Larkin, *supra* note 215, at 359.

258. Dorf, *supra* note 257, at 104–05.

259. *Id.* at 105.

260. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

261. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005).

262. *See* U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."); *id.* art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature

enabling private parties to add new "pocket parts" to the law whenever and however they see fit. It is as if Congress handed over to someone outside of Articles I or II a piece of paper with all the trappings of a bill but none of its content and without any of the restraints that protect the public against the arbitrary exercise of government power.

What is worse is that occasionally Congress delegates lawmaking power to a *foreign government* or *international body*. For example, the Lacey Act[263] makes it a federal crime to import flora or fauna into this nation in violation of the laws of the country from whence that item came.[264] The government convicted David McNab of importing a significant number of undersized lobsters packed in plastic rather than paper, some of which contained eggs, *all in violation of Honduran law*; the district court sentenced him to *eight years' imprisonment*.[265] That is a mighty stiff punishment for a federal court to impose for conduct that no act of Congress outlawed.

Yet, the Lacey Act is not the only such example of delegating decision-making authority to a foreign body. Supreme Court Justice Stephen Breyer has noted that "with increasing frequency" our government has joined a large number of agreements that empower foreign governments to adopt rules governing the conduct of Americans.[266] Handing a foreign

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thereof may direct, a Number of [presidential] Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."); *id.* amend. XVII ("The electors [for Senators] in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."). Under the Elections Clause, *id.* art. I, § 4, cl. 1, Congress may preempt state laws governing the time, place, and manner of holding federal elections, but not the qualifications for voting in them. *See* Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 16–17 (2013); THE FEDERALIST NO. 60, *supra* note 207, at 371; THE FEDERALIST NO. 51, *supra* note 135, at 323.

263. Ch. 553, 31 Stat. 187 (1900) (codified as amended at 16 U.S.C. § 701).

264. 16 U.S.C. § 3372(a); Larkin, *supra* note 215, at 348–54.

265. *See* United States v. McNab, 331 F.3d 1228, 1233, 1235 (11th Cir. 2003). For a full explanation of the case, see Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 777–82 (2012).

266. STEPHEN BREYER, THE COURT AND THE WORLD 227 (2015); *id.* at 197 ("[T]here were 123 international governmental organizations (IGOs) in 1951, about double that figure (242) in 1971, and about fifteen times as many in 2012, which saw 1,993 IGOs."); *see also, e.g.*, Nat. Res. Def. Council v. EPA, 464 F.3d 1, 9–10 (D.C. Cir. 2006) (holding that the Clean Air Act and Montreal Protocol created an ongoing international political commitment rather than a delegation of lawmaking authority to annual meetings of the parties); Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1585, 1591, 1595 (2003) (discussing the increasing amount of international adjudicatory bodies and the implications their rulings have on U.S. conduct and litigation); David Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 STAN. L. REV. 1697, 1734–35 (2003) (discussing the relationship between domestic law and delegations to international bodies); John Harrison, *International Adjudicators and Judicial Independence*, 30

government "fill-in-the-blank authority for one of our domestic laws" not only creates a categorical exception to the Article I Bicameralism and Presentment rules, but also nullifies the right to self-government that the Founding Generation had just successfully won by the Revolution.[267] Moreover, unlike federal and state officials who are "bound by Oath or Affirmation" to support the Constitution,[268] foreign officials and private parties owe this nation no duty of allegiance, and might even be obliged to remain loyal to a nation whose interests conflict with America's own. Accordingly, there could be no greater Legislative Vesting Clause violation than giving a foreign government or international organization the authority to make laws that govern Americans. Granting foreign governments or parties lawmaking power is less a delegation of authority than it is a surrender of sovereignty.[269]

HARV. J.L. & PUB. POL'Y 127, 127 (2006) (discussing the power of treaty-empowered international bodies to bind the United States as a matter of international law); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 71–72 (2000) (examining constitutional objections to the United States' participation in international organizations); Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1586 (2004) (discussing legislative implications of the United States' participation in international institutions); Rice, *supra* note 172, at 542 (discussing the delegation of regulatory power to international organizations). I have previously argued that Congress cannot delegate lawmaking power to a foreign party. Larkin, *supra* note 215, at 340.

267. Larkin, *supra* note 215, at 377–78, 380 ("Foreign nations do not elect Senators and Congressmen to Congress, nor do they choose electors for President. Instead, they send 'Ambassadors and other public Ministers' to America. Foreign nations do not pass laws for governance of this nation. Instead, with the cooperation of the President, they make treaties. Foreign nations, unlike states, do not require their officials to swear allegiance to our Constitution—and, even if they did, the oath would have no importance for purposes of federal law. Accordingly, as far as our Constitution is concerned, foreign officials stand in the same position as private parties. In fact, because they (presumably) swear allegiance to their own constitutions, foreign officials actually occupy a *worse* position." (footnotes omitted) (quoting U.S. CONST. art II, § 3)).

268. U.S. CONST. art. VI, cl. 3.

269. Dorf, *supra* note 257, at 115 ("Dynamic incorporation of foreign law poses a prima facie threat to the democracy of the incorporating polity because it takes decisions out of the hands of the people's representatives in that polity and delegates them to persons and bodies that are accountable only to a different polity, if at all. Under various circumstances, such a delegation of power may be sensible as a matter of policy. It may even increase the democratic accountability of the political system as a whole. Nonetheless, where the polity that dynamically incorporates foreign law is a reasonably well-constituted democracy, the act authorizing dynamic incorporation undermines self-government within that polity so conceived."). Dorf cites the United States as one such democracy. *Id.*

B. *Private Jails and Prisons*

Privatization has also reached into one of the most ancient of public institutions—the criminal justice system.[270] Although some commentators have argued that imprisonment is (or ought to be) a nondelegable core government function,[271] there is a long history of using private detention facilities to confine adult offenders in England and the United States.[272] That practice gradually fell into disuse a century ago,

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270. *See, e.g.*, Mick Ryan & Tony Ward, *Privatization and Penal Politics*, *in* PRIVATIZING CRIMINAL JUSTICE 52, 53 (Roger Matthews ed., 1989); DAVID SHICHOR & MICHAEL J. GILBERT, PRIVATIZATION IN CRIMINAL JUSTICE 3 (2001); Avihay Dorfman & Alon Harel, *The Case Against Privatization*, 41 PHIL. & PUB. AFFS. 67, 92 (2013); Alon Harel, *Why Only the State May Inflict Criminal Sanctions: The Case Against Privately Inflicted Sanctions*, 14 LEGAL THEORY 113, 114 (2008); Dan M. Kahan, *Privatizing Criminal Law: Strategies for Private Norm Enforcement in the Inner City*, 46 UCLA L. REV. 1859, 1860 (1999); Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 911 (2007).

271. *See* John J. DiIulio, Jr., *The Duty to Govern: A Critical Perspective on the Private Management of Prisons and Jails*, *in* PRIVATE PRISONS AND THE PUBLIC INTEREST 155, 172–73 (Douglas C. McDonald ed., 1990); Ira P. Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 UCLA L. REV. 911, 952 (1988). That argument draws strength from Thomas Hobbes and John Locke, who argued that the *raison d'être* for public government is its enhanced ability to protect against private marauders. *See* THOMAS HOBBES, LEVIATHAN 169 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651); JOHN LOCKE, *supra* note 18, at 324.

272. *See, e.g.*, JAMES AUSTIN & GARRY COVENTRY, U.S. DEP'T OF JUSTICE, EMERGING ISSUES ON PRIVATIZED PRISONS 9–13 (2001); DiIulio, *supra* note 271, at 158 ("For much of the nineteenth century and as late as the 1960s, prisons and jails in many parts of the United States were privately owned and operated."); Malcolm M. Feeley, Lecture, *The Unconvincing Case Against Private Prisons*, 89 IND. L.J. 1401, 1412–14 (2014). Consider the federal system: Initially, there were no federal prisons or jails. Federal courts would sentence convicted defendants to confinement in any state facility in the state of conviction that was willing to accept them. Act of Mar. 3, 1825, ch. 65, § 15, 4 Stat. 115, 118; Act of Mar. 3, 1835, ch. 40, § 5, 4 Stat. 775, 777; Act of Mar. 28, 1856, ch. 9, 11 Stat. 2; Act of Mar. 3, 1865, ch. 86, § 3, 13 Stat. 500, 500. Some states complied with this request. *See* McNutt v. Bland, 43 U.S. (2 How.) 9, 16 (1844) (discussing a Mississippi statute); Randolph v. Donaldson, 13 U.S. (9 Cranch) 76, 84 (1815) (discussing a Virginia statute); Edgardo Rotman, *The Failure of Reform: United States, 1865-1965*, *in* THE OXFORD HISTORY OF THE PRISON 151, 166–67 (Norval Morris & David J. Rothman eds., 1998). In other states, the First Congress and later Congresses permitted the federal marshal, under the direction of the federal district judge, to "hire a convenient place to serve as a temporary jail" until permanent arrangements could be made. Act of Mar. 3, 1791, ch. 5, 1 Stat. 225; Act of Mar. 2, 1833, ch. 57, § 6, 4 Stat. 632, 634; *see Randolph*, 13 U.S. at 85. During the Civil War, Congress also empowered the Secretary of the Interior to assign federal prisoners to state prisons. Act of May 12, 1864, ch. 85, § 1, 13 Stat. 74, 74–75 (adult prisoners); Act of Mar. 3, 1865, ch. 121, § 1, 13 Stat. 538, 538 (juvenile offenders). A few years later, Congress gave the Attorney General broad authority to assign federal prisoners to any suitable jail or prison. Act of July 12, 1876, ch. 183, 19 Stat. 88; Act of Mar. 5, 1872, ch. 30, 17 Stat. 35. The first federal prison opened in Leavenworth, Kansas, in 1903. *See* Howe v. Smith, 452 U.S. 473, 483–84 (1981); Cosgrove v. Smith, 697 F.2d 1125, 1135–36 (D.C. Cir. 1983) (Bork, J., concurring in part and dissenting in part). Today, the federal government often contracts with private parties that provide halfway houses (also known as group homes or community treatment centers) for adult offenders re-entering society, for juveniles

but in the last four decades the federal and state governments have frequently resorted to privately owned and operated jails, prisons, and detention facilities to relieve overcrowding and take advantage of alleged private market efficiencies.[273] Here, as with other issues of privatization, the argument in favor of such facilities is principally economic: private companies can build prisons more quickly and operate them more efficiently than the government can.[274] Critics say that private firms are more efficient only because they skimp on the amount or quality of the food, medical care, rehabilitative services, or legal protection that prisoners must receive in a public facility, and that they lack the expertise that public correctional officers have acquired over time.[275] As the practice grew more common, the government's reliance on private prisons became a controversial one, both as a policy and a constitutional matter.[276] Nonetheless, private prisons weathered that criticism, and the

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subject to restraint, and for aliens subject to detention pending admission or deportation decisions, and for the incarceration of convicted offenders. *See, e.g.*, 18 U.S.C. § 3621(a)–(b) ("A person who has been sentenced to a term of imprisonment pursuant to the provisions of subchapter D of chapter 227 shall be committed to the custody of the [Federal] Bureau of Prisons . . . . The Bureau of Prisons shall designate the place of the prisoner's imprisonment . . . ."); *id.* § 4001(b)(1) (vesting in the U.S. Attorney General "control and management" of federal correctional institutions); *id.* § 4001(b)(2) ("The Attorney General may establish and conduct industries, farms, and other activities and classify the inmates; and provide for their proper government, discipline, treatment, care, rehabilitation, and reformation."); *id.* § 4013(a) (recognizing that the Attorney General may enter into contracts with private parties to house federal prisoners); PRESIDENT'S COMM'N ON PRIVATIZATION, PRIVATIZATION: TOWARD MORE EFFECTIVE GOVERNMENT 146–55 (1988); AUSTIN & COVENTRY, *supra*, at iii.

273. *See, e.g.*, AUSTIN & COVENTRY, *supra* note 272, at 13–17. It is important to distinguish between contracting with private parties for particular services to be provided at a federal or state correctional institution (e.g., food, medical care) and for confinement of inmates in a privately owned and operated institution (e.g., a private prison). *See* LAUREN-BROOKE EISEN, INSIDE PRIVATE PRISONS 55 (2018). The former raises no eyebrows because the government is still responsible for all aspects of caring for the daily life of inmates. *See, e.g.*, West v. Atkins, 487 U.S. 42, 54 (1988) (ruling that a physician who is under contract with the state to provide medical care to prisoners at a state-prison hospital acts "under color of" state law). The latter was the new development in the 1980s.

274. *See, e.g.*, AUSTIN & COVENTRY, *supra* note 272, at 15–17.

275. *See, e.g.*, Douglas C. McDonald, *Public Imprisonment by Private Means: The Re-Emergence of Private Prisons and Jails in the United States, the United Kingdom, and Australia*, 34 BRIT. J. CRIMINOLOGY 29, 40–42 (1994); Minow, *supra* note 12, at 1233 & n.19 (collecting studies); Trebilcock & Iacobucci, *supra* note 124, at 1432–33. For an example of a summary rebuttal to such criticisms, see Charles H. Logan, *Well Kept: Comparing Quality of Confinement in Private and Public Prisons*, 83 J. CRIM. L. & CRIMINOLOGY 577, 592 (1992); David Yarden, Book Note, *Prisons, Profits, and the Private Sector Solution*, 21 AM. J. CRIM. L. 325, 327–32 (1994) (book review).

276. *See, e.g.*, Harold J. Sullivan, *Privatization of Corrections: A Threat to Prisoners' Rights*, *in* PRIVATIZING CORRECTIONAL INSTITUTIONS 139, 139–41, 152–53 (Gary Bowman et al. eds., 1993); RICHARD W. HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY 51–52, 110–

federal and state governments continue to use them today, albeit on a relatively small scale.[277]

The debate over the legitimacy and wisdom of private prisons, however, has recently reappeared. Even though private facilities hold a very small number of prisoners, they have become "ground zero for the anti-mass incarceration movement that sees closure of these prisons as a concrete step toward reducing the number of people behind bars."[278] In fact, during the 2020 presidential campaign several candidates promised to end this practice.[279] Accordingly, the issue of whether prison privatization is an unconstitutional practice (or just an easy target for criticism by critics of imprisonment) is worth briefly addressing here.

For purposes of the Private Delegation Doctrine, the question is whether the Due Process Clause prohibits the delegation to private parties of the ability to exercise one of the most powerful features of government authority that any polity can possess: the power to incarcerate someone,

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15 (1997); CHARLES H. LOGAN, PRIVATE PRISONS: CONS AND PROS 10–12 (1990); DAVID SHICHOR, PUNISHMENT FOR PROFIT: PRIVATE PRISONS/PUBLIC CONCERNS 78–81, 166–69 (1995); MARTIN P. SELLERS, THE HISTORY AND POLITICS OF PRIVATE PRISONS 51–60 (1993); James R. Sevick, *Introduction*, *in* CONSTRUCTING CORRECTIONAL FACILITIES 1, 3, 5, 7–8 (James R. Sevick & Warren I. Cikins eds., 1987); Sharon Dolovich, *State Punishment and Private Prison*s, 55 DUKE L.J. 437, 440–44, 460–62 (2005); Martin E. Gold, *The Privatization of Prisons*, 28 URB. LAW. 359, 373–79 (1996); Charles H. Logan & Sharla P. Rausch, *Punish and Profit: The Emergence of Private Enterprise Prisons*, 2 JUST. Q. 303, 316 (1985); Daniel L. Low, *Nonprofit Private Prisons: The Next Generation of Prison Management*, 29 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 1–4, 46–47 (2003); Ira P. Robbins, *Privatization of Corrections: Defining the Issues*, 40 VAND. L. REV. 813, 815–16 (1987); Lawrence F. Travis III et al., *Private Enterprise and Institutional Corrections: A Call for Caution*, FED. PROB., Dec. 1985, at 11, 11–15; Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111, 112–14, 134–35 (2001); Joseph E. Field, Note, *Making Prisons Private: An Improper Delegation of Governmental Power*, 15 HOFSTRA L. REV. 649, 653–55, 662–74 (1987). There has also been considerable growth in the number not just of private correctional personnel, but also private security guards, who can exercise power that is either the same as or comparable to what state or municipal police officers possess. *See, e.g.*, Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH L. REV. 573, 575–78, 594–95; Stephen Rushin, *The Regulation of Private Police*, 115 W. VA. L. REV. 159, 167–70 (2012). This Article does not discuss that issue.

277. *See* JENNIFER BRONSON & E. ANN CARSON, U.S. DEP'T OF JUSTICE, PRISONERS IN 2017, at 16, 27 tbl.17 (2019) (noting that, as of December 31, 2017, private prison facilities, including non-secure community corrections centers and home confinement, held 15% of the federal prison population and 8% of the combined federal and state populations); EISEN, *supra* note 273, at 9, 25–26, 29–32.

278. EISEN, *supra* note 273, at 10.

279. *See, e.g.*, *Private Prisons*, POLITICO (Dec. 19, 2019), https://www.politico.com/2020-election/candidates-views-on-the-issues/criminal-justice-reform/private-prisons/ [https://perma.cc/TUY9-ZX5T] (collecting the views of the candidates then running).

potentially for the remainder of his natural life, or even to carry out an execution. This Article argues that the answer is, "It depends."[280]

Aside from the small number of cases where the death penalty is an available sanction for a crime, the due process safeguards born in Magna Carta have their most vital application when the government physically imprisons someone. But the decision to place someone in custody is perhaps subject to more constitutional restraints than any other action that the executive branch can take. The Fourth Amendment requires the government to have probable cause to arrest someone and hold him in custody to charge him with a crime.[281] If the police arrest someone without first obtaining an arrest warrant or an indictment, the Fourth Amendment requires them to bring the suspect before a neutral and dispassionate magistrate within forty-eight hours so that the magistrate can decide whether there is probable cause to hold the suspect for trial.[282] If the federal government seeks to charge the suspect with a crime, the Fifth Amendment Indictment Clause requires a grand jury to charge him with a felony.[283] In both federal and state cases, the companion Due Process Clause protects against a variety of practices that would corrupt

280. There are two related questions. One is whether the Constitution regulates whether and, if so, how a private prison may transfer an inmate from the general population to more restrictive conditions of confinement as a disciplinary measure. The Constitution generally allows the state to confine a convicted offender in any of its facilities, *see* Meachum v. Fano, 427 U.S. 215, 225 (1976); *cf.* Olim v. Wakinekona, 461 U.S. 238, 247 (1983) (upholding an interstate prisoner transfer); *Ex parte* Karstendick, 93 U.S. 396, 398–99 (1876) (same), and does not further restrain a prison's confinement authority unless it "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," Sandin v. Conner, 515 U.S. 472, 484 (1995). Temporary disciplinary segregation does not automatically meet that standard, *id.* at 485–87, but transferring a prisoner to a so-called "Supermax" facility—which generally involves solitary confinement for twenty-three hours per day for the duration of the inmate's confinement (which is often for life)—does, Wilkinson v. Austin, 545 U.S. 209, 214–15 (2005). Another question is whether the Constitution requires that federal or state prisoners have an available tort remedy for misconduct by prison guards or other personnel, such as physicians. As this Article explains above, the Supreme Court has declined to create a constitutional tort remedy for offenders held in private prisons. *See supra* notes 242–250.

281. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."); *see, e.g.*, Illinois v. Gates, 462 U.S. 213, 216–17 (1983); Beck v. Ohio, 379 U.S. 89, 91 (1964); Brinegar v. United States, 338 U.S. 160, 175–76 (1949).

282. *See, e.g.*, Kaley v. United States, 571 U.S. 320, 328–29 (2014); Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991); Gerstein v. Pugh, 420 U.S. 103, 112, 114 (1975).

283. U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . ."). A "felony" is punishable by imprisonment and therefore is an "infamous" crime for which an indictment is required. *Ex parte* Wilson, 114 U.S. 417, 429 (1885).

the trial process, such as trial before a biased judge or in a mob-dominated courtroom.[284] The Due Process Clause also demands that the prosecution establish the defendant's guilt by adequate proof beyond a reasonable doubt.[285] The Sixth Amendment grants the accused a variety of trial rights, such as representation by counsel and trial by jury.[286] In short, the government cannot criminally punish someone unless and until it satisfies the foregoing constitutional requirements, as well as any subconstitutional rules that regulate the trial process, such as the Federal Rules of Criminal Procedure. Once the government has carried its burden, however, it may confine the now-convicted offender for the length of his term of imprisonment in any of its prisons.[287] At that point, the government has satisfied whatever "the law of the land" requires.

Accordingly, confinement in a private prison pursuant to a court-entered judgment of conviction satisfies the Due Process Clause.[288] By the time a prisoner arrives at a privately run prison he has received all of the guarantees that the Constitution demands before the government can take away his liberty. The judgment of a trial court, federal or state, has long been the standard measure of the legality of a person's confinement. That judgment was proof that the person was not languishing in jail simply because the Crown or sheriff took a dislike to him and decided to throw him into the hoosegow. It was proof that a party had received

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284. *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333, 335 (1966) (holding that a defendant was denied a fair trial due to massive and prejudicial pre-trial publicity); Tumey v. Ohio, 273 U.S. 510, 514–15, 523 (1927) (holding unconstitutional a state law allocating a trial judge's compensation based on the number of convictions in his court); Moore v. Dempsey, 261 U.S. 86, 90–92 (1923) (ordering a hearing for a habeas corpus petitioner who had a credible allegation that he had been convicted at a mob-dominated trial).

285. *See, e.g.*, Jackson v. Virginia, 443 U.S. 307, 316 (1979).

286. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."); *see, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (holding that the Sixth Amendment's Counsel Clause guarantees an indigent defendant charged with a felony the right to the appointment of trial counsel at state expense).

287. *See, e.g.*, Chapman v. United States, 500 U.S. 453, 465 (1991) ("Every person has a fundamental right to liberty in the sense that the Government may not punish him unless and until it proves his guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant constitutional guarantees. But a person who *has* been so convicted is eligible for, and the court may impose, whatever punishment is authorized by statute for his offense, so long as that penalty is not cruel and unusual, and so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment." (citations omitted)).

288. To be sure, a prisoner can challenge that judgment on direct appeal or collateral attack. The point is that a judgment of conviction and sentence of incarceration establish the legitimacy of imprisonment until a federal or state court sets aside the judgment.

whatever process he was due before the government convicted him of a crime and ordered him imprisoned for committing it.[289] Once an offender has been lawfully convicted, it should not be relevant which organization or person has the legal title to the facility. Only the answers to two questions should matter: First, is the person in custody pursuant to the judgment of a court? Second, has the government effectively removed the operators of the facility from compliance with all law? If the answers are "Yes" and "No," respectively, there should be no reason why the government cannot pay a private facility to house its prisoners. The first question has a ready answer, but the second inquiry might not. It could require some examination of the legal remedies available to a prisoner to challenge the legality and conditions of his confinement.

Habeas corpus is the historic remedy to obtain release from an illegal confinement, and both federal and state prisoners have access to the writ.[290] Congress and the states cannot deprive a prisoner of all access to the writ if they confine him in a federal or state facility and therefore should not be able to do so simply by transferring custody to a privately owned and operated prison.[291] In addition, Congress and the states cannot jail someone before trial under conditions that are tantamount to a criminal punishment,[292] and convicted offenders cannot be forced to endure conditions of confinement that are "cruel and unusual."[293] For the reasons this Article gives above, Congress and the states cannot escape those limitations by placing a prisoner in a private institution.

To be sure, a prisoner can seek injunctive relief against the federal or state governments, as well as damages from the responsible governmental official, for those violations,[294] but a prisoner cannot bring a

289. *See Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202–03 (1830).

290. *See, e.g.*, 28 U.S.C. §§ 2241, 2254–55.

291. *See* U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); Boumediene v. Bush, 553 U.S. 723, 771 (2008) (ruling that Congress cannot deny parties imprisoned as enemy combatants all access to habeas corpus to challenge the legality of their detention).

292. *See* Bell v. Wolfish, 441 U.S. 520, 536–37 (1979).

293. *See* U.S. CONST. amend. VIII (prohibiting the imposition of cruel and unusual punishments); Brown v. Plata, 563 U.S. 493, 502 (2011) (concluding that overcrowding in California's prisons violated the Eighth Amendment); Farmer v. Brennan, 511 U.S. 825, 837 (1994); Estelle v. Gamble, 429 U.S. 97, 104–06 (1976) (interpreting the Eighth Amendment to prohibit "deliberate indifference" to serious medical needs of prisoners).

294. *See, e.g.*, The Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671–80; Carlson v. Green, 446 U.S. 14, 18 (1980) (implying a cause of action under the Cruel and Unusual Punishments Clause for damages against the responsible prison officials); Hutto v. Finney, 437 U.S. 678, 681, 685 (1978) (upholding injunctive relief and an award of attorney's fees for state prison violations of the Cruel and Unusual Punishments Clause) ("Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards.").

constitutional damages claim against a private party or corporation operating a prison under contract with the federal or a state government.[295] Is that a flaw? Perhaps, but only in an unusual case. As this Article explains above, the federal or state governments may require a prisoner held in a private facility to seek state tort law remedies for unlawful conditions of confinement.[296] If the available remedies are reasonable in their scope, even if less than perfect, requiring a prisoner to seek relief under state law after the fact satisfies due process requirements.

The bottom line is this: Neither Congress nor the states may foreclose *all* judicial relief for such a prisoner's claim that his confinement is unlawful or that its conditions damaged him. Cutting off all relief would allow the government to exempt itself and its delegate from the operation of constitutional law, which Magna Carta and the Due Process Clauses prevent. Otherwise, the federal and state governments have room to decide what relief a prisoner can pursue without violating the Constitution and therefore can use the services of private prisons and correctional officers.[297]

CONCLUSION

The Supreme Court created the Private Delegation Doctrine more than a century ago, but the Court has not grounded the doctrine's legitimacy in the text or history of the Constitution. Perhaps the reason for that omission is that the Court's contemporary "procedure vs. substance" dichotomy has obscured the original meaning of the Due Process Clause: namely, a guarantee that the government comply with "the law of the land" before trespassing on someone's life, liberty, or property. That guarantee, which reaches back to Chapter 39 of Magna Carta, means that the government cannot legislate around the Constitution. Congress

295. *See, e.g.*, Minneci v. Pollard, 565 U.S. 118, 126 (2012); Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 63 (2001).

296. *Supra* notes 242–250.

297. Two professors have argued that a private prison is an unconstitutional delegation of government authority to a private party. Robert Craig & andré douglas pond cummings, *Abolishing Private Prisons: A Constitutional and Moral Imperative*, 49 U. BALT. L. REV. 261, 282–90 (2020). Their argument is unpersuasive for several reasons. They rely on a fundamental rights analysis that the Supreme Court expressly rejected in *Chapman v. United States*, 500 U.S. 453, 464–65 (1991), and they fail to explain why an *ex post* tort remedy is not a satisfactory remedy for a constitutional claim, as the Supreme Court held in *Minneci v. Pollard*, 565 U.S. at 129–31. They also favor consideration of an eight-part test to measure a permissible delegation, but say that other factors could be relevant too. Craig & cummings, *supra*, at 287–88. A non-exclusive eight-part test—particularly one without any necessary and sufficient conditions or an ordinal ranking of the factors' importance—is a totality-of-the-circumstances standard masquerading in objective-looking clothes. It is useless as a mechanism for objective decision-making.

cannot escape constitutional restraints by delegating government authority to private parties to accomplish indirectly what Congress cannot do directly. So viewed, the Private Delegation Doctrine continues to have vitality today.