

# Regrounding the Private Delegation Doctrine

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Congress and the Administrative State: Delegation, Nondelegation,  
and

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## I. INTRODUCTION:

## DELEGATION, PRIVATIZATION, AND ACCOUNTABILITY

Who may wield governmental authority? The short answer would be government personnel, but that answer is incomplete and, in some instances, inaccurate. Not everyone who receives a government paycheck can exercise governmental power, and some people who do are not officials of the federal state, or local governments. In fact, there are occasions in which one of those governments vests authority in purely private parties, individuals who could not be deemed government officials in any sense of that term. In those instances, the government could be said to “privatize” the exercise of government authority.

Is that permissible? Can the government grant government power to private parties? Again, the short answer 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.”<sup>1</sup> If the people are the ultimate source of governmental authority, the argument would go, there can be nothing unconstitutional with a law that returns some of that authority from whence it came.

That answer, however, is mistaken. The text that follows the Preamble, particularly Articles I, II, and III, creates a democratic republic. To make that government work the Constitution assigns specified and limited national lawmaking and decisionmaking power to each of three new branches of a new government—legislative, executive, and judicial—that exist independently of but work in conjunction with each other and the states that joined the new union.

Those delegations were important. Under the then-prevailing theory of governance, no branch could further delegate its authority to others.<sup>2</sup> The members of each branch would be accountable directly (by election) or indirectly (through appointment by an elected or other appointed official) to the public. Only a system that assigned national lawmaking and decisionmaking responsibility to clearly identified parties could ensure that the electorate would know whom to hold accountable whenever the new government sought to interfere with the life, liberty, and property of the new nation’s people.

Nonetheless, self-interest and practicality soon triumphed over theory. Long before Tom Sawyer taught us the benefits of delegating responsibility,<sup>3</sup> Congress gave other

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<sup>1</sup> See U.S. CONST. pmb.; *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.”); CHARLES-LOUIS DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 112 (David Wallace Carrithers ed., Univ. of Cal. Press 1977) (1748) (stating in a democracy, political power largely resides in the electorate).

<sup>2</sup> See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 312 (R. Cox ed., 1982) (1689) (“The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than

<sup>3</sup> See MARK TWAIN, *THE ADVENTURES OF TOM SAWYER* (1876) (the fence-painting incident).

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components of the federal government the authority to establish rules for their own internal operation and for the governance of private parties.<sup>4</sup> That practice accelerated during the New Deal as a host of new administrative agencies came on stream to implement President Franklin Roosevelt's efforts to respond to the Depression and, later, to wage World War II.<sup>5</sup> The practice of delegating governmental authority to executive officials therefore has an impressive lineage.

Although the text of the Constitution strongly implies that only a particular branch may exercise legislative, executive, or judicial power,<sup>6</sup> the Supreme Court of the United States has often approved that the delegation of authority from one branch to another. The Court has upheld those delegations of lawmaking power to federal agencies as long as Congress has identified an "intelligible principle to which the person or body author-

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.") (emphasis in original).

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<sup>4</sup> See, e.g., The Non-Intercourse Act (Act of Mar. 1, 1809), ch. 24, 2 Stat. 528, §11 (1809) (authorizing the president to lift an embargo on trade with England or France if either country respects the neutrality of the United States); The Embargo Act (Act of Dec. 22, 1807), ch. 5, 2 Stat. 451, 452 (authorizing the president to issue instructions to enforce the act); The Judiciary Act of 1789 (Act of Sept. 24, 1789), ch. 20, 1 Stat. 73, § 19 (providing that "all the said courts of the United States shall have the power . . . to make and establish all necessary rules for the orderly conducting [sic] in the said courts"); *Field v. Clark*, 143 U.S. 649 (1892) (upholding a provision in the Tariff Act of 1890 on the theory that empowered the president to suspend favorable treatment for foreign nations that he found had imposed "exactions and duties" that he found to be "unequal and unreasonable" on American products and firms); *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813) (upholding the delegation to the president of the authority to lift the embargo on England and France if he found that they ceased violating the neutrality of the United States); JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE STATE: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012).

<sup>5</sup> See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 424 n.9 (1987) ("Although administrative agencies have been a part of government since the founding of the republic, the modern regulatory agency is a recent phenomenon. The Interstate Commerce Commission was created in 1887, and the Federal Trade Commission in 1914, but it 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.").

<sup>6</sup> See U.S. CONST. art. I, § 1 ("All legislative powers herein granted shall be vested in a Congress of the United States . . ."); *id.* art. II, § 1 ("The executive Power shall be vested in a President of the United States."); *id.* art. III, § 1 ("The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

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ized to [act] is directed to conform,”<sup>7</sup> even one as vacuous as “excessive profits.”<sup>8</sup> As long as Congress has identified some remotely usable standard the Court has upheld the delegation of even large-scale rulemaking authority.<sup>9</sup> Some commentators have bemoaned the Court’s refusal to rein in congressional abdication of legislators’ voluntarily assumed responsibility to make the hard choices that today’s government demands.<sup>10</sup> But

<sup>7</sup> *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). The Supreme Court has reaffirmed that standard on numerous occasions since then. See *infra* note 9.

<sup>8</sup>

See *Lichter v. United States*, 334 U.S. 742 (1948).

<sup>9</sup> See, e.g., *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001) (upholding delegation to set ambient air quality standards “allowing an adequate margin of safety”); *Loving v. United States*, 517 U.S. 748 (1996) (upholding delegation to president to prescribe aggravating factors for use at sentencing in capital murder cases); *Touby v. United States*, 500 U.S. 160 (1991) (upholding delegation to the Attorney General to designate new “controlled substances” whose distribution is a federal offense); *Skinner v. Mid-America Pipeline Co.*, 492 U.S. 212 (1989) (upholding delegation to the Secretary of Transportation to promulgate pipeline user fees); *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding delegation of authority to promulgate sentencing guidelines); *Lichter v. United States*, 334 U.S. 742 (1948) (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); *American Power & Light Co. v. SEC*, 329 U.S. 90 (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 (1944) (upholding delegation to Price Administrator to fix “fair and equitable” commodity prices); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) (upholding delegation to Federal Power Commission to determine “just and reasonable” rates); *Bowles v. Willingham*, 321 U.S. 503 (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 finds it “is necessary or proper in order to effectuate the purposes of” the Emergency Price Control Act of 1942); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) (upholding delegation to Federal Communications Commission to regulate broadcast licensing “as public interest, convenience, or necessity” require); *Sunshine Coal Co. v. Adkins*, 310 U.S. 381 (1940) (upholding delegation to set maximum prices for coal when “in the public interest”); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. (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”); *New York Central Securities Corp. v. United States*, 287 U.S. 12 (1932) (permitting consolidation of interstate carries when “in the public interest”); *United States v. Grimaud*, 220 U.S. 506 (1911) (upholding delegation to the Secretary of the Interior to promulgate regulations whose violation would be a federal crime).

<sup>10</sup> There are a few scholars who held or hold out hope for a resurrection of the nondelegation doctrine. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 133-34 (1980); JAMES FREEDMAN, *CRISIS AND LEGITIMACY* (1978); THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 92-126 (2d ed. 2009); MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 136 (1995); DAVID SCHOENROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993); Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1297 (2003); Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J. L. & PUB. POL’Y 147 (2016); Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. LAW, 251 (2010); Marci Hamilton, *Representation and Nondelegation: Back to the Basics*, Symposium, *The Phoenix Arises Again: The Nondelegation Doctrine from Constitutional and Policy Perspectives*, 20 CARDOZO L. REV. 807 (1999); Harold Krent, *Delegation and Its Discontents*, 94 COLUM. L. REV. 710 (1994); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002);

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Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1233-41 (1994); Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471 (1988).

the majority of commentators have concluded that the Delegation Doctrine is effectively an “Unlimited Delegation Doctrine.”<sup>11</sup>

Sometimes, however, legislatures bypass the bureaucracy entirely and vest governmental authority in private parties. Sometimes that practice is described as “privatization”—viz., the decision to rely on non-government parties or companies and the private market to implement federal programs in lieu of government officials. Privatization could involve merely the off-the-shelf purchase of goods and services—food, water, equipment, and the like—from the private sector for use by federal officials or for redistribution to the welfare state, or it could entail the hiring of private contractors to supply

At one time, feeling whimsical (if you said I was being a smart aleck I wouldn’t argue with you), I described those scholars as being reminiscent of the Japanese soldiers who refused to surrender at the end of World War II and remained hidden for 30-40 years. 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, 365-66 n.107 (2015) [hereafter Larkin, *Dynamic Incorporation*]. Those commentators may have the last laugh. Earlier in 2018, the Supreme Court granted certiorari in *Gundy v. United States*, No. 17-6086, to decide whether *Gundy* raises the question whether a provision of the Sex Offender Registration and Notification Act, Pub. L. No. 109-248, Tit. I, 120 Stat. 590 (codified at 34 U.S.C. § 20901 et seq. (2012)), violates the Delegation Doctrine. That law delegates to the U.S. Attorney General the authority to decide whether the act’s registration requirements should apply to someone convicted of a covered offense before the act went into effect. The Senate and House of Representatives disagreed over the answer to that question, and they compromised by authorizing the Attorney General to resolve it. The problem, however, is that Congress did not identify *any* findings that the Attorney General must make or specify *any* factors that he must consider in reaching a decision. Given that Congress crafted *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 has consistently invoked for 80-plus years to uphold congressional delegations.

<sup>11</sup> See, e.g., JERRY L. MASHAW, GREED, CHAOS & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAWS (1997); Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399 (2000); Cynthia R. Farina, *Deconstructing Nondelegation*, 33 HARV. J.L. & PUB. POL’Y 87, 87 (2010) (“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.”); Dan M. Kahan, *Democracy Schmemocracy*, 20 CARDOZO L. REV. 795 (1999); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

Of course, sometimes, those delegations make sense. There are instances in which the recipients of delegated power are more capable of exercising decisionmaking responsibility than elected officials. Problems requiring the application of medical or scientific judgment are perhaps the classic example because they are subjects that only a few people have the requisite knowledge or training to handle capably. For example, rather than decide for itself what pharmaceuticals are “safe and effective” for public distribution, Congress entrusts those decisions to the medical and scientific experts at the Food and Drug Administration (FDA). See, e.g., Paul J. Larkin, Jr., *States’ Rights and Federal Wrongs: The Misguided Attempt to Label Marijuana Legalization Efforts as a “States’ Rights” Issue*, 16 GEO. J. L. & PUB. POL’Y 495 (2018) (arguing that Congress should leave to the FDA the authority to decide whether cannabis and other controlled substances are “safe and effective” drugs). Expertise, however, is not the only reason why elected officials delegate responsibility. As Public Choice Theory has taught us, elected officials delegate authority to others to have the best of both worlds: the ability to take credit for successes and blame someone else for failures. For a general discussion of public choice theory, see KENNETH J. ARROW, SOCIAL CHOICE AND

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INDIVIDUAL VALUES (3d ed. 2012); ALBERT BRETON, *THE ECONOMIC THEORY OF REPRESENTATIVE GOVERNMENT* (1974); JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962); DENNIS C. MUELLER, *PUBLIC CHOICE III* (2003); ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957); WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1971); WILLIAM H. RIKER, *THE THEORY OF POLITICAL COALITIONS* (1962).

those services within or beyond the federal sector. But privatization can also consist of outsourcing aspects of governance, such as the use of private organizations to audit or carry out a government program, or retaining private physicians to provide health care on government property or Indian reservations or using private security companies for physical security of government facilities.

Several justifications have traditionally been offered for that approach.<sup>7</sup> One is the belief that the government should leave certain roles to the private sector because there is no market defect (such as the free rider problem) that would justify assuming public responsibility for an activity (such as national defense). A second argument is that that individuals and companies in the private sector can deliver goods, services, and ideas to senior executive officials more quickly and efficiently without suffering any loss in quality (such as education vouchers). Another is the fear that government employees would only reluctantly carry out policies they personally find unwise, mistaken, or immoral and might even actively pursue guerilla warfare to defeat any change in policies that they find inappropriate.<sup>8</sup> Together factors such as those drove the belief that the private sector could replace the Fourth Branch of government without the public suffering any adverse consequences.<sup>9</sup> However defended and carried out, privatization enables the president and his lieutenants to end-run the bureaucracy by dealing directly with private firms to obtain goods, services, personnel, and ideas from people who are directly accountable to senior administration officials and who can be hired, supervised, and fired without satisfying the encumbrances imposed on personnel decisions by the civil service laws.

Yet, the delegation to private parties of legal authority ordinarily exercised by government officials is an odd feature of governance. After all, Articles I, II, and III of the Constitution establish a democratic republic for the nation, and Article IV guarantees each state the same form of government.<sup>10</sup> Giving private parties the reins of government is the exact opposite of the Framers' plan. Moreover, if the rationale for the formation of societies is the need to combine with others to protect resources critical for survival instead of resort

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<sup>7</sup> See, e.g., Ronald A. Cass, *Privatization: Politics, Law and Theory*, 71 MARQ. L. REV. 449 (1988).

<sup>8</sup> Events that have occurred during the Trump Administration prove the legitimacy of that concern. See, e.g., Anonymous, *I Am Part of the Resistance*, N.Y. TIMES, Sept. 5, 2018.

<sup>9</sup> See, e.g., The Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified, as amended, at 5 U.S.C. ch. 11 (2012)); ROSEMARY O'LEARY, *THE ETHICS OF DISSENT: MANAGING GUERRILLA GOVERNMENT* (2d ed. 2013).

<sup>10</sup> 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 . . . .")

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to the *bellum omnium contra omnes*,<sup>11</sup> it would seem misguided for government officials to go against the grain by empowering a select few to exercise authority needed for the benefit of all. That choice also poses obvious risks of self-interested, biased decisionmaking.

Numerous scholars have discussed the legal and policy issues surrounding privatization.<sup>12</sup> Most of the discussion has focused on allegations that vesting power and responsibility in private organizations or individuals to perform government functions threatens to whittle away, and ultimately erase, the administrative state that has developed to date. The argument is that privatization will generate a variety of adverse effects through modern-day America. One is that it will throw a monkey wrench into the apparatus that both major political parties and the public have come to accept as necessary to manage a large, complex contemporary welfare state. Another problem is that it will have a debilitating effect on the civil service personnel necessary for the impartial functioning of a bureaucratic government. And privatization will undermine the efforts that American society has made since the New Deal to increase social justice through the unbiased application of popular social welfare measures that, however inadequately, attempt to soften the rigors of large-scale reliance on the free market to allocate necessary goods and services. All that, moreover, without accomplishing either of the justifications that

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<sup>11</sup> THOMAS HOBBS, *LEVIATHAN* 80 (Edwin Curley ed., Hackett Publ'g Co. 1994) (1651); see, e.g., MICHAEL TOMASELLO, *A NATURAL HISTORY OF HUMAN MORALITY* 2-3 (2016).

<sup>12</sup> See, e.g., JOHN D. DONOHUE, *THE WARPING OF GOVERNMENT WORK* (2008); JOHN D. DONOHUE, *THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS* (1989); *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* (Jody Freeman & Martha Minow eds., 2009); JON D. MICHAELS, *CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC* (2017); MARTHA MINOW, *PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD* (2003); E.S. SAVAS, *PRIVATIZATION AND PUBLIC-PRIVATE PARTNERSHIPS* (1999); PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY* (2007); Harold I. Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 *Hastings. Const. L.Q.* 165 (1989); Cass, *supra* note 12; John J. DiIulio, Jr., *Response Government by Proxy: A Faithful Overview*, 116 *HARV. L. REV.* 1271 (2003); James O Freedman, *Delegation of Power and Institutional Competence*, 43 *U. CHI. L. REV.* 307 (1976); Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 *HARV. L. REV.* 1285 (2003); Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Power to Non-Federal Actors*, 50 *RUTGERS L. REV.* 331 (1998); Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 *Nw. U. L. REV.* 62 (1990); David M. Lawrence, *Private Exercise of Government Power*, 61 *IND. L.J.* 647 (1986); George W. Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 *IND. L.J.* 650 (1975); Gillian E. Metzger, *Privatization as Delegation*, 103 *COLUM. L. REV.* 1367 (2003) [hereafter Metzger, *Privatization*]; Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 *HARV. L. REV.* 1229 (2003); Paul Starr, *The Meaning of Privatization*, 6 *YALE L. & POL'Y REV.* 6 (1988); Symposium, *New Forms of Governance: Ceding Public Power to Private Actors*, 49 *UCLA L. REV.* 1687 (2002); Symposium, *Redefining the Public Sector: Accountability and Democracy in the Era of Privatization*, 28 *FORDHAM URB. L.J.* 1307 (2001); Michael J. Trebilock & Edward M. Iacobucci, *Privatization and Accountability*, 116 *HARV. L. REV.* 1422 (2003). Privatizing the criminal justice system raises particularly troublesome issues. I will discuss them in Part below.

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privatization's supporters used to justify that practice: reducing costs and increasing responsiveness.<sup>13</sup>

Far less of the discussion of privatization has focused on the issue of whether there are constitutional restraints on that process.<sup>14</sup> Most scholars have noted that the Supreme Court of the United States dipped its toe in that water during the 1920s and 1930s, but decided not to go any further. The Court's about-face, they believe, is the product of the conclusions that the Court reached during the New Deal Era with regard to the legitimacy and ability of the bench to second-guess a legislature's social and economic welfare

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<sup>13</sup> See, e.g., Metzger, *Privatization*, *supra* note 19, at 1369-70.

<sup>14</sup> See, e.g., *id.* at 1371-72.

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judgments. That is, just as Congress is better able than the federal judiciary to make substantive social welfare decisions, the argument goes, Congress is better qualified to decide how to allocate federal decision-making authority over the subjects on the federal government's agenda.<sup>15</sup>

This Article will analyze the delegation of government decisionmaking authority to private parties. The discussion will proceed as follows: Part II will analyze the Supreme Court decisions dealing with the vesting of government power in the hands of private parties, what I will call the Private Delegation Doctrine. Part III will address the private delegation problem by considering whether the Article II Appointments Clause regulates vesting federal governmental power in private parties. Part IV shifts from the Appointments Clause to the Due Process Clauses in the Fifth and Fourteenth Amendments. It explains why the Court private delegation decisions make sense, not as an application of the current Due Process Doctrine, but in light of the origins of the Due Process Clause in Magna Carta. Part V then addresses the boundaries of the Private Delegation Doctrine—in particular whether (and how) it can be reconciled with a privatization development that we have witnessed increasing in intensity over the last four decades: the use of privately owned and operated jails and prisons.

## II. THE PRIVATE DELEGATION DOCTRINE

The Delegation Doctrine generally addresses scenarios involving a congressional assignment of federal governmental authority—legislative, executive, or judicial—to officials in one of the other two branches. In either case, Congress empowers one or more federal officers to exercise authority that arguably can only be performed by members of a different branch. Such delegations, however, do not exhaust the possibilities. A subissue of the delegation controversy is the extent to which Congress may delegate governmental authority to non-federal officials, including private parties.<sup>16</sup>

The Supreme Court has addressed that issue on fewer occasions than it has addressed the vesting of similar authority in government officers. The Court has held unconstitutional some private delegations, but those decisions are more than 80 years old.<sup>17</sup> Since then, the Court has upheld every statutory scheme involving private parties in the government's decision-making process in one capacity or another.<sup>18</sup> The consequence is that the courts cannot avoid answering the question whether the Court's early decisions are

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<sup>15</sup> See, e.g., *id.* at 1437-45.

<sup>16</sup> In some instances, those non-federal officials can be state officials or foreign government parties, whether government officials or private citizens. Those types of delegations raise special issues that go beyond the scope of this Article. For a discussion of those issues, see Larkin, *Dynamic Incorporation*, *supra* note 10.

<sup>17</sup> See *Eubank v. City of Richmond*, 226 U.S. 137 (1912); *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

<sup>18</sup> See, e.g., *Currin v. Wallace*, 306 U.S. 1 (1939); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940); *New Motor Vehicle Bd. v. Fox Co.*, 439 U.S. 96 (1978); *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668 (1976); *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984); *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984); *Dep't of Trans. v. Ass'n of Amer. R.R.*, 135 S. Ct. 1225 (2015).

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no longer “good law.” The academy has debated that issue without reaching a unanimous conclusion regarding the continued validity of the Private Delegation Doctrine.<sup>24</sup>

The leading cases are the Court’s 1912 decision in *Eubank v. City of Richmond*,<sup>25</sup> its 1928 decision in *Washington ex rel. Seattle Title Trust Co. v. Roberge*,<sup>26</sup> and its 1936 decision in *Carter v. Carter Coal Co.*<sup>27</sup> *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 existing structures to be modified to conform to that line.<sup>28</sup> The Supreme Court ruled that the ordinance violated the Due Process Clause because it created no standard for the property owners to use, permitting them to act for their self-interest or arbitrarily. In the Court’s words:

<sup>24</sup> See, e.g., Harold I. Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 HASTINGS CONST. L.Q. 165, 169 (1989); A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17 (2000); Louis Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937); Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW.

U. L. REV. 62 (1990); David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647 (1986); George W. Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650 (1975); Merrill, *supra* note 5, at 2168; Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 NOTRE DAME L. REV. 975 (2005); Ira P. Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 UCLA L. REV. 911 (1988); Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411 (2000); Joanna Shepherd, *The Fox Guarding the Henhouse: The Regulation of Pharmacy Benefit Managers by a Market Adversary*, 9 NW. J.L. & SOC. POL’Y 1 (2013); Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 422 (2006); Alexander “Sasha” Volokh, *The Shadow Debate over Private Nondelegation in DOT v. Association of American Railroads*, 2014-2015 CATO SUP. CT. REV. 359; Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J. L. & PUB. POL’Y 931 (2014); Note, *The Validity of Ordinances Limiting Condominium Conversion*, 78 MICH. L. REV. 124 (1979); Note, *The Vagaries of Vagueness: Rethinking the CFAA as a Problem of Private Nondelegation*, 127 HARV. L. REV. 751 (2013); Note, *The State Courts and Delegation of Public Authority to Private Groups*, 67 HARV. L. REV. 1398 (1954).

<sup>25</sup> 226 U.S. 137 (1912).

<sup>26</sup> 278 U.S. 116 (1928).

<sup>27</sup> 298 U.S. 238 (1936). There were a few earlier decisions that touched on this issue involving claims that the government had unlawfully delegated authority to private parties. The first two cases involved a federal statute authorizing private parties to adopt regulations governing proof of mining claims on federal property. See *Butte City Water Co. v. Baker*, 196 U.S. 119 (1905); *Erhardt v. Boaro*, 113 U.S. 527 (1887). Neither case involved a congressional delegation to private parties of the authority to regulate someone else’s land. In *Butte City* the Court rejected the argument that Congress could not delegate such rulemaking authority to a private party on the ground that the federal government, as owner of the property could dispose of it as Congress saw fit. 196 U.S. at 125-26. In *Erhardt* there were no relevant regulations. 113 U.S. at 536. The last case, *St. Louis, Iron Mountain & So. Ry. Co. v. Taylor*, 210 U.S. 281 (1908), involved a challenge to a federal statute allowing a private railway association to set drawbar safety heights. The American Railway Association adopted the standard, but the Interstate Commerce Commission approved it. *Id.* at 287.

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<sup>28</sup> *Id.* at 141 (quoting Richmond ordinance).

[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 determines not only the extent of use, but also 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 5 and 30 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.<sup>19</sup>

In the *Roberge* case a trustee of a home for the elderly poor sought a permit to enlarge the facility for additional residents. A Seattle zoning ordinance limited buildings in the vicinity to single-family homes, public and certain private schools, churches, parks,

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<sup>19</sup> *Id.* at 143-44. One other municipal land use case followed shortly after *Eubank*. *Thomas Cusak Co. v. Chicago*, 242 U.S. 526 (1917), 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. *Id.* at 190 (quoting Chicago ordinance). Relying on *Eubank*, an outdoor advertising company claimed that the Chicago ordinance was unconstitutional. The Court rejected as “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 benefitted, by this provision for without it the prohibition of the erection of such billboards in such residence sections is absolute.” *Id.* at 191; *see also id.* at 531 (“The plaintiff in error relies chiefly upon *Eubank v. Richmond*, 226 U.S. 157. 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 not a delegation of legislative power, but is, as we have seen, a familiar provision affecting the enforcement of laws and ordinances.”).

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and the like, but empowered the city to grant a zoning variance if at least one-half of the nearby property owners consented.<sup>30</sup> The city building superintendent denied the permit because the adjacent property owners had not consented, and the trustee sued. 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.<sup>31</sup> Like Richmond, Seattle could not hand over government zoning power to private parties.

The last case is *Carter v. Carter Coal Co.*<sup>32</sup> *Carter Coal* involved a delegation challenge to a federal law, the Bituminous Coal Conservation Act of 1935.<sup>33</sup> Among

<sup>30</sup> 278 U.S. at 117 & n.1 (quoting Seattle ordinance).

<sup>31</sup> *Id.* at 122-23. The *Thomas Cusak 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 Cusak Co.*, expressly relies on *Eubank*. The Supreme Court expressly relied on *Eubank* in *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936), which held unconstitutional Congress's delegation of federal authority to private parties. Lastly, post-*Carter* Supreme Court decisions distinguished *Eubank* rather than jettison it. See *infra* notes 40-43.

<sup>32</sup> 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), Act of June 16, 1933, ch. 90, 48 Stat. 195 (1933). At issue was a provision that delegated to trade or industrial groups the authority to define “unfair methods of competition” that would become law only when approved by the President. Title I, § 3(a) of the NIRA provided as follows: “Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title: Provided, That such code or codes shall not permit monopolies or monopolistic practices: Provided further, That where such code or codes affect the services and welfare of persons engaged in other steps of the economic process, nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes. The President may, as a condition of his approval of any such code, impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide 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.” “This was no small operation,” as Professor Richard Epstein has noted. RICHARD A. EPSTEIN, *THE CLASSIC LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* 270 (2017). “In the eighteen months between August 1933 and February 1935, the frenzied activities of the Roosevelt Administration generated some 564 codes, 185 supplemental codes, 685 amendments, and over 11,000 administrative orders.” *Id.* (footnote omitted). The scale of the difference between the delegations in *Eubank* and *Roberge*, on the one hand, and *Schechter Poultry*, on the other, was enormous. Untroubled by the breadth of a judgment holding the NIRA unconstitutional, the Supreme Court held that Congress's delegation went too far. *Schechter Poultry*, 295 U.S. at 529-43.

The Court noted that the question was “whether Congress in authorizing ‘codes of fair competition’ has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others.” *Schechter Poultry*, 295 U.S. at 530. The Court found that the term “methods of unfair competition” had only the narrow meaning

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at common law of “palming off of one’s goods as those of a rival trader,” *id.* at 531, and that the term had not acquired a clear and stable understanding in contemporary usage, *id.* at 532-33. The state-

other things, the act authorized the district board in local coal districts to adopt a code<sup>20</sup> that included agreed-upon minimum and maximum prices for coal that would become law.<sup>21</sup> 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.<sup>22</sup> 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. Relying on *Eubank* and *Roberge* (as well as *Schechter Poultry*), the Supreme Court ruled that the Bituminous Coal Conservation Act unconstitutionally delegated federal governmental power. 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.<sup>23</sup>

ment 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 537-42; *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 1? 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. *Id.* at 537-42. (Of course, as I have noted elsewhere, 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. 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 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 514-42 (“To summarize and conclude upon this point: Section 3 of the Recovery Act (15 USCA § 703) is without precedent. It supplies no standards for any trade, industry, or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative

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<sup>20</sup> Ch. 824, 49 Stat. 991 (1935).

<sup>21</sup> 298 U.S. at 280-83.

<sup>22</sup> *Id.* at 283-84.

<sup>23</sup> *Id.* at 311 (“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

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undertaking, section 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction, and expansion described in section 1. In view of the scope of that broad declaration and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.”).

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.

The Supreme Court has revisited the Private Delegation Doctrine on 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 issue in each of those cases, however, left final decisionmaking authority in the hands of a government official. For example, in *Currin v. Wallace*<sup>37</sup> 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. The Court’s decision in *Sunshine Anthracite Coal Co. v. Adkins*<sup>38</sup> upheld a coal regulatory act that permitted local coal producers to recommend rules governing coal sales, but left it to a government board the power to approve, disapprove, or modify the private recommendations. *New Motor Vehicle Board v. Orrin W. Fox, Co.*<sup>39</sup> 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. *Hawaii Housing Authority v. Midkiff*<sup>40</sup> rejected the argument that due process prohibits a state from allowing private parties to initiate the eminent domain condemnation process.<sup>41</sup> In each case, the Court reasoned, there was no true delegation of government authority. A private party could initiate the process leading to a government officials deciding whether and how to exercise governmental authority, but only a government official had the final say.

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 the Court was insistent that only government officials may exercise gov-

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 intrusted 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. *Schechter Poultry Corp. v. United States*, 295 U.S. 495, [537]; *Eubank v. City of Richmond*, 226 U.S. 137, 143; *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121, 122.”).

<sup>37</sup> 306 U.S. 1 (1939).

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<sup>38</sup> 310 U.S. 381 (1940).

<sup>39</sup> 439 U.S. 96 (1978). <sup>40</sup> 467 U.S. 229 (1984).

<sup>41</sup> See also *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668 (1976) (upholding a referendum process challenged under *Eubank* on the ground that it was a “reservation” of power, rather than a “delegation”).

ernmental power. Since then, however, the Court has upheld every public-private government decisionmaking 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 giving the Private Delegation Doctrine its last rites.<sup>24</sup>

Why has the Private Delegation Doctrine (apparently) flat-lined? We cannot be sure. Two possibilities, however, come to mind.

One reason could be that legislatures have learned their lessons from *Eubank*, *Roberge*, and *Carter Coal* about how to delegate government power and have made sure that some government official must endorse whatever decision private parties reach. Strictly speaking cases like *Currin*, *Adkins*, *Fox*, and *Midkiff* posed no question whether the government has violated the rule adopted in *Eubank* and applied in *Roberge* and *Carter Coal*. The Court’s recent decisions all involved a regulatory scheme in which a government official was ultimately responsible for exercising state authority. By contrast, in cases like *Eubank* the government had no discretion to reject or modify the decision made by private parties.<sup>25</sup> That might be important. Even where a public official engages in the “perfunctory” ratification of a private decision,<sup>26</sup> the presence of governmental action has two benefits for anyone injured and the public: It identifies the responsible party, and it triggers federal constitutional protections that no legislature can evade.<sup>27</sup> Maybe

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<sup>24</sup> See Metzger, *Privatization*, *supra* note 18, 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 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).

<sup>25</sup> See *Eubank*, 226 U.S. at 143 (“It [the Richmond ordinance] leaves no discretion in the committee on streets as to whether the line shall or shall not be established in a given case.”).

<sup>26</sup> Metzger, *Privatization*, *supra* note 18, at 1440.

<sup>27</sup> 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 some time. See, e.g., 1 JULIUS GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 204-50 (P. Freund gen. ed. 1971); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 *STAN. L. REV.* 895 (1984); Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress*

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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,<sup>28</sup> a principle so thoroughly accepted that no one would consider violating it today.

The explanation could also be that the Court has decided to treat *Eubank*, *Roberge*, and *Carter Coal* like other pre-New Deal Era decisions—*Lochner v. New York*<sup>29</sup> is the best example—that the Court has decided to ignore rather than overrule. Said differently, just as the Supreme Court has decided to leave the merits of economic and social decision to the political process,<sup>30</sup> so, too, has the Court chosen not to second-guess political decisions regarding the architecture of government decisionmaking. The Court may have been reluctant to undertake any serious scrutiny of such legislative decisions because it fears that doing so will force it to engage in an undirected, subjective, statute-by-statute or case-by-case line-drawing exercise to decide exactly what scrutiny is adequate.

Neither explanation, however, is completely satisfactory. With regard to the first one: Legislatures occasionally forget (or conveniently ignore) the teaching of *Eubank*, *Roberge*, and *Carter Coal* by enacting regulatory schemes that vest final state authority in private parties.<sup>31</sup> Several of those delegations have made their way into the courts, and some judges, state court judges in particular, have found them constitutionally objectionable.<sup>32</sup> The second explanation also leaves something to be desired. Recently, the Supreme Court has been quite willing to strictly enforce other, non-Article I constitutional restraints on the structure of decisionmaking responsibility. The Court has struck down as unconstitutional Congress's decisions that did not comply with the Article II Recognition and Appointments Clauses,<sup>33</sup> along with the Article III Judicial Power

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*Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923). That issue is beyond the scope of this Article.

<sup>28</sup> See 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.”).

<sup>29</sup> 198 U.S. 45 (1905).

<sup>30</sup> See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963) (“Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation.”); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955) (“The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment 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.”).

<sup>31</sup> See, e.g., *The Passenger Rail Investment and Improvement Act of 2008*, Pub. L. No. 1110-432, Div. B, 122 Stat. 4848, 4907 (2008); *Dep’t of Transp. v. Ass’n of Am. RRs*, 135 S. Ct. 1225 (2015) (*Amtrak II*) (discussed *infra* notes 57-61).

<sup>32</sup> See, e.g., *Dep’t of Transp. v. Dep’t of Transp.*, 821 F.3d 19, 27-31 (D.C. Cir. 2016) (*Amtrak III*), supplemented as to remedy, *Dep’t of Transp. v. Dep’t of Transp.*, 896 F.3d 539 (D.C. Cir. 2018) (*Amtrak IV*); Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL’Y 931 (2014).

<sup>33</sup> See, e.g., *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) (holding that the Article II Reception Clause prohibits Congress from deciding whether to grant formal recognition to a foreign sovereign); *Lucia v. SEC*, 138 S.

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Clause,<sup>34</sup> on the ground that even a modern-day Congress must comply with the Framers' allocation of authority. <sup>35</sup>If the Due Process Clause also poses a restraint on Congress's power to delegate, there is no reason to assume that the Court will steadfastly refuse to consider applying it. Accordingly, the Court is very likely to confront the question whether the Private Delegation Doctrine remains a vital part of its jurisprudence.

It almost did three years ago. The Supreme Court was in a position to consider the constitutionality of a private delegation in *Department of Transportation v. Association of American Railroads (Amtrak)*.<sup>53</sup> An association representing railroads challenged the constitutionality of a provision of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA).<sup>36</sup> 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 improved "metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations."<sup>37</sup> Those metrics and standards were not simply advisory. Rather, they were to become part of the access and service agreements adopted by Amtrak and its host rail carriers, and could play a role in investigations and enforcements actions undertaken by the Surface Transportation Board.<sup>38</sup> The railroad association alleged that the PRIIA was unconstitutional because it delegated federal regulatory authority to Amtrak, a private entity. The D.C. Circuit Court of Appeals agreed with the association, but the Supreme Court reversed.

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.<sup>39</sup> The majority therefore did not address the private delegation argument endorsed by the D.C. Circuit because the Court decided that Amtrak was a public entity for that purpose. Justice Samuel 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.<sup>40</sup> Justice Clarence Thomas would have gone even

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Ct. 2044 (2018) (holding that the Article II Appointments Clause governs the appointment of SEC administrative law judges); *supra* note 22.

<sup>34</sup> See, e.g., *Stern v. Marshall*, 564 U.S. 462 (2011) (holding that the Article III Judicial Power Clause prohibits Congress from empowering federal bankruptcy courts to decide certain state law counterclaims).

<sup>35</sup> S. Ct. 1225 (2015).

<sup>36</sup> The PRIIA, 122 Stat. 4907, was a component of Title VII of the Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848 (2008).

<sup>37</sup> Section 207(a) of the PRIIA, 122 Stat. 4916.

<sup>38</sup> *Amtrak II*, 135 S. Ct. at 1228-30.

<sup>39</sup> *Id.* at 1231-33.

<sup>40</sup> *Id.* at 1237-38 (Alito, J., concurring).

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further. He concluded that the Court’s entire delegation jurisprudence was mistaken and that, in a proper case, the Court should reconsider it.<sup>41</sup>

Although the *Amtrak* case did not resolve the question whether the Private Delegation Doctrine remains vital, the issue is likely to resurface.<sup>42</sup> Government officials delegate decisionmaking 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 law-making, law-applying, or law-adjudicating power to a private party raises a variety of issues that do not come up when a federal official is given that authority. In my opinion, a private delegation is unconstitutional not because it violates Article I, II, or III, 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).<sup>61</sup> Instead, a private delegation is unconstitutional because it is an attempt to evade the structural constitutional processes for government action, as well as the substantive and procedural guarantees that constitutional law imposes on each of the three categories of officials who serve under federal law.

### III. THE ARTICLE II APPOINTMENTS CLAUSE

Article II speaks to this issue. The issue is whether the Appointments Clause prohibits the delegation of governmental power to private parties.<sup>62</sup> The president, with the “Advice and Consent of the Senate,” can appoint “Superior Officers.” The President also can appoint “Inferior Officers” in the same manner, but Congress can delegate their appointment to the President alone, the courts, or heads of departments.<sup>63</sup> The appointment process is not a bureaucratic technicality; like other aspects in our tripartite system of designated and separated powers, the Appointments Clause protects liberty by regulating the personnel who may exercise the federal government’s authority.<sup>64</sup> The Appointments

summer of 2018 excising certain provisions in the PRIIA (dealing with binding arbitration) to remedy the constitutional flaw in the act. *Amtrak IV*, 821 F.3d at 551. One or more parties may ask the Supreme Court to revisit the matter.

<sup>61</sup> It is possible to read the Supreme Court’s decisions in *Eubank* and *Carter Coal* as resting on the proposition that private delegations violate due process because of the inherent and overwhelming risk of bias that results whenever the government allows an interested party to adjudicate a case. The D.C. Circuit so read *Carter Coal* in *Amtrak III*. 821 F.3d at 27-31. The principle of “*Nemo iudex in causa sua*—viz., a Latin phrase that means “No one should be a judge in his own cause”—has deep roots in our law. See, e.g., *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876-77 (2009); *THE FEDERALIST* No. 10, at 59 (J. Cooke ed. 1961) (James Madison); Jerome Frank, *Disqualification of Judges*, 56 *YALE L.J.* 605, 611-12 (1947); Dr.

<sup>41</sup> *Id.* at 1240-55 (Thomas, J., concurring in the judgment).

<sup>42</sup> It may resurface in the *Amtrak* case. 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 selfinterested private parties the authority to adversely affect the interests of others. *Amtrak III*, 821 F.3d at 2731. Following additional proceedings in the district court, the D.C. Circuit issued a final judgment in the

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Bonham's Case, 8 Co. 107a, 77 Eng. Rep. 638 (K.B. 1608) (Coke, C.J.). I believe that the history of the origin of the Due Process Clause, however, reveal a broader and more fundamental concern, as I explain in Part II below.

<sup>62</sup> See U.S. CONST. art. II, § 2, cl. 2 ("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[.]").

<sup>63</sup> On the meaning of the terms "Superior Officers" and "Inferior Officers," as well as the differences between them, see, for example, *Edmond v. United States*, 520 U.S. 651, 662 (1997) ("Generally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President: Whether one is an 'inferior' officer depends on whether he has a superior.").

<sup>64</sup> See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *Freytag v. Commissioner*, 501 U.S. 868, 880 (1991) ("The Appointments Clause prevents Congress from dispensing

Clause protects the appointing authority against interference from any other person or branch of the federal government. It guarantees that only parties who have been properly appointed and therefore (presumably) properly vetted can exercise federal power. 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.<sup>65</sup>

The term "Officers of the United States" includes any person who occupies a "continuing" position established by law and exercises the "significant power" of the federal government.<sup>66</sup> 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 the "Head of a Department."<sup>67</sup>

Modern Appointments Clause case law began with the Supreme Court's 1976 decision in *Buckley v. Valeo* case in 1976. Any current delegation of "significant [federal] authority" to a private party would need to be justified under the clause. Given the Supreme Court's willingness to enforce the clause's requirements strictly, as demonstrated in cases such as *Lucia*, *Free Enterprise Fund*, *Edmond*, and *Freytag*, it would be difficult to defend any such delegation under current case law. That issue, however, is beyond the scope of this Article. Moreover, neither the Appointments Clause nor federal separation of powers doctrine applies to the states.<sup>68</sup> By contrast, the Fourteenth Amendment Due Process Clause in terms applies to the state, and, as explained below, the Private Delegation Doctrine is a child of the Due Process Clause. Accordingly, the viability of the Private Delegation Doctrine would remain relevant even if the Appointments Clause regulates Congress's delegation of federal power to private parties.

#### **IV. THE FIFTH AND FOURTEENTH AMENDMENT DUE PROCESS CLAUSES**

In *Eubank*, *Roberge* and *Carter Coal* the Supreme Court relied on the Due Process Clauses to hold unconstitutional, respectively, the Richmond and Seattle ordinances and an act of Congress. Almost all of the contemporary discussion of due process fits the Court's decisions into one of two categories: *procedural due process cases*, which involve the question whether the government has adequately reduced the risk of making a mistaken decision whether to infringe on someone's life, liberty, or property, and *substantive due process cases*, which ask the question whether the government may take some such step regardless of how

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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).

<sup>65</sup> See, e.g., *Free Enterprise Fund*, 130 S. Ct. at 3146–47; *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 483–84 & n.4 (1989) (Kennedy, J., concurring) (quoting *THE FEDERALIST* No. 76, at 455–56 (A. Hamilton) (Clinton Rossiter ed., 1961)).

<sup>66</sup> See, e.g., *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018).

<sup>67</sup> See, e.g., *id.* at 2053–55 (ruling that SEC administrative law judges are officers); *Freytag v. Commissioner*, 501 U.S. 868 (1991) (same, “special trial judges” of the U.S. Tax Court); *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (same, Federal Election Commissioners); *Edmond v. United States*, 520 U.S. 651, 65966 (1997) (same, civilian members of the U.S. Coast Guard Court of Criminal Appeals); *Weiss v. United States*, 510 U.S. 163, 169–70 (1994) (same, military officers).

<sup>68</sup> See *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937).

accurate the decisionmaking process might be.<sup>69</sup> When deciding cases in either category, the Court discusses the history of the particular subject under dispute and whether it reveals a longstanding Anglo-American interest in preventing the government from interfering in a private party’s decision whether to undertake some activity.<sup>70</sup> What is rare is for the Court to examine the history of the Due Process Clause itself for whatever light it may shed on the issue. The Private Delegation Doctrine, however, is one of those instances in which it makes sense to do just that. It turns out that the history of the birth and development of the clause fairly well illuminates the role that the First Congress intended that it would play in American constitutional law.

### **A. THE ORIGIN OF THE DUE PROCESS CLAUSE IN MAGNA CARTA**

The Due Process Clause is a lineal descendant of Magna Carta, and the best-known feature of the Great Charter is Article 39.<sup>43</sup> Article 39 provided that “[n]o free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor

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<sup>43</sup> See *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855) (“The words, ‘due process of law,’ were undoubtedly intended to convey the same meaning as the words, ‘by the law of the land,’ in *Magna Charta*. Lord Coke, in his commentary on those words, (2 Inst. 50,) says they mean due process of law. The constitutions which had been adopted by the several States before the formation of the federal constitution, following the language of the great charter more closely, generally contained the words, ‘but by the judgment of his peers, or the law of the land.’ The ordinance of congress of July 13, 1787, for the government of the territory of the United States northwest of the River Ohio, used the same words.”). For a discussion of the history and purposes of Magna Carta, see, for example, DAVID CARPENTER, *MAGNA CARTA* (2015); ARTHUR L. GOODHART, “LAW OF THE LAND” (1966); J.C. HOLT, *MAGNA CARTA* (2d ed. 1992); A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* (1968); THEODORE F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 22–26 (5th ed. 1956); *MAGNA CARTA COMMEMORATION ESSAYS* (Henry Elliott Malden ed., 1917); WILLIAM SHARP MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN WITH AN HISTORICAL INTRODUCTION* (2d ed. 1914); R.H. Helmholz, *Magna Carta and the Ius Commune*, 66 U. CHI. L. REV. 297 (1999); C.H. McIlwain, *Due Process of Law in Magna Carta*, 14 COLUM. L. REV. 27 (1914).

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will we go or send against him, except by the lawful judgment of his peers or by the law of the land.”<sup>44</sup>

Article 39 “was a plain, popular statement of the most elementary rights.”<sup>45</sup>

Those rights traced their lineage to pre- and post-Norman Conquest traditions, also known as the “customary practice,” the “common conviction of the community,” or the “general custom of England.”<sup>46</sup> William the Conqueror did not bring with him a new body

<sup>69</sup> See Paul J. Larkin, Jr., *The Lost Due Process Doctrines*, 66 CATH. U. L. REV. 293, 297-303 (2016) [hereafter Larkin, *Lost Doctrines*].

<sup>70</sup> See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (same-sex marriage).

of law for England. To avoid seeming oppressive, William’s judges applied indigenous customs, which evolved into a body of rules that became the primary source of unwritten law,<sup>75</sup> known as the “common law.”<sup>76</sup> The common law was “a law common to the whole land, a “set of rights and obligations immanent in the country, growing incrementally” that was “passed down as part of the patrimony of each new generation.”<sup>77</sup>

A novel and integral feature of the common law was its sovereign status. Even the Crown was subject to the law.<sup>78</sup> According to thirteenth century legal scholar Henry de Bracton, English law was not whatever ukase the Crown would issue. On the contrary, it empowered the Crown to rule but also limited the authority of the king.<sup>79</sup> The law served

see also *id.* at 48 (noting that the terms “the general custom of England” and “the common law” “are synonymous in our books . . . [and] must be taken to be”). As I have explained elsewhere:

The constitutional history of Magna Carta, like that of England itself, has Teutonic roots. Early English law” reflected the Anglo-Saxon-Jute-Dane customs of the local community and was rudimentary at best, both “rough and crude.” The laws of the folk, the “folk-right,” could vary among ancestors and from community to community.

Unlike today’s laws, Anglo-Saxon customs were rarely written. The “men of the folk,” especially “the old and wise,” knew the law. The “essence” of early English law was its “popular” nature, which reflected the fact that the law was made in meetings of the entire community. Early English law also “represented custom, of which any man with a good memory might be the repository, and local opinion, a valuable feature given that most people were illiterate. Like today’s laws, Anglo-Saxon customs sought to prevent wrongs and to redress grievances. Unlike today’s laws, however, Anglo-Saxon traditions operated in the only way possible in a land of multiple, decentralized communities given to tribal

<sup>44</sup> HOLT, *supra* note 64, at 461.

<sup>45</sup> 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).

<sup>46</sup> See 1 WILLIAM BLACKSTONE, COMMENTARIES \*67 (“Whence it is that in our law the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority; and of this nature are the maxims and customs which compose the common law, or *lex non scripta*, of this Kingdom.”); FREDERICK WILLIAM MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 17 (1919); FREDERICK POLLOCK, THE EXPANSION OF THE COMMON LAW 49 (1904) (“The law of the thirteenth century was judge-made law in a fuller and more literal sense than the law of any succeeding century has been.”);

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loyalty and intertribal disputes and lacking a central government: paying off the kinfolk of the victim to avoid a blood feud. It was years before even a rough criminal code emerged.

English King Ethelbert drafted the first written code in approximately 600 A.D. Consisting of only ninety brief sentences, Ethelbert's code—composed of *dooms* (“decrees”) not *leges* (“laws”), because the concept of law was as yet unknown in England—was essentially a tariff, a schedule of fines, payable in money known as the *wergild*, that a wrongdoer was obliged to give to the victim of a crime or his kin, principally for murder, mayhem, other acts of violence, or cattle-thievery. The hoped-for goal was to forestall violent retaliation and intertribal warfare.

Larkin, *Lost Doctrines*, *supra* note 62, at 327-29 (footnotes and internal punctuation omitted).

<sup>75</sup> See POLLOCK, *supra* note 67, at 50 (“The law of the thirteenth century was judge-made law in a fuller and more literal sense than the law of any succeeding century has been.”); Larkin, *Lost Doctrines*, *supra* note 62, at 327-50.

<sup>76</sup> See MAITLAND, *supra* note 68, at 17; POLLOCK, *supra* note 67, at 49 (“The law of the thirteenth century was judge-made law in a fuller and more literal sense than the law of any succeeding century has been.”); see also *id.* at 48 (noting that the terms “the general custom of England” and “the common law” “are synonymous in our books . . . [and] must be taken to be”).

<sup>77</sup> MAITLAND, *supra* note 67, at 13.

<sup>78</sup> See 2 HENRY DE BRACON, *ON THE LAWS AND CUSTOMS OF ENGLAND* 33 (S. Thorne transl. 1968); JOHN PHILLIP REID, *THE RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES* 4-11 (2004) (hereafter REID, *RULE OF LAW*); CONRAD RUSSELL, *THE CAUSES OF THE ENGLISH CIVIL WAR* 138 (1990).

<sup>79</sup> Bracton was one of the earliest authorities for the doctrine of the “rule of law.” REID, *RULE OF LAW*, *supra* note 71, at 11.

as a protection against anarchy and despotism, a formal authorization to protect the realm but also an essential safeguard against tyrannical government, a principle today known as the “rule of law.”<sup>80</sup> The result was that “the supreme authority in political society was not that of the ruler, but that of the law.”<sup>81</sup> That “broad, indeterminate yet vital doctrine of constitutionalism” came to be as important a feature of legitimate English rule as the principle of government by the consent of the governed.<sup>47</sup>

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<sup>47</sup> DANIEL HANNAN, *INVENTING FREEDOM: HOW THE ENGLISH-SPEAKING PEOPLES MADE THE MODERN WORLD* 65, 65, 78 (2013) (stating that the “common law” was more than “the sovereign’s decree; nor was it yet an interpretation of Holy Scripture. The law, rather, was a set of inherited rights that belonged to every freeman in the kingdom. The rules did not emanate from government, but stood above it, binding the King as tightly as they bound the poorest ceorl. If the monarch didn’t uphold the ancient laws and customs of his realm, he could be removed.”); JOHN PHILLIP REID, *THE ANCIENT CONSTITUTION AND THE ORIGINS OF ANGLO-AMERICAN LIBERTY* 4 (2005) (hereafter REID, *ANCIENT CONSTITUTION*) (“Sometimes called the gothic constitution, the ancient constitution was the putative aboriginal political structure of Anglo-American governance, the origins of which are discernable in the mythology of the forests of prehistoric Germany. It was the supposed norm of government for the Angles, the Saxons, and the Jutes when they were said by ancient constitutionalists to have been free people living under elected kings, vested with limited authority, and confined by the rule of customary law. For lawyers, constitutionalists, and parliamentarians of the sixteenth and seventeenth centuries, the ancient constitution provided a standard with which to argue against the actions, programs, laws, and decrees of contemporary government. The further that a government command deviated from the supposed model of the ancient constitution of liberty, the more it could be opposed as unconstitutional, or, at least, challenged as an act of ‘power’ rather than an act of ‘right.’”).

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King John put those principles at risk early in the thirteenth century. His arbitrary manner of ruling, along with his unsuccessful and expensive foreign military campaigns, drove the barons to renounce their feudal obligations to the Crown and rebel.<sup>48</sup> To quell the rebellion, King John agreed to the barons' demands in 1215 "in the meadow which is called Runnymede, between Windsor and Staines, on the fifteenth day of June, in the seventeenth year of [his] reign."<sup>49</sup> Over time, Magna Carta became known as the "Torah" of English law or the "Bible" of the English Constitution.<sup>50</sup>

Article 39 restored the customary rights of the Barons and prevented the Crown from arbitrarily detaining and punishing someone not first adjudged guilty of a crime—a common occurrence under King John.<sup>51</sup> As one scholar noted a century ago, "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*."<sup>52</sup> The guarantee that the Crown could administer punishment only in accordance

<sup>80</sup> ARTHUR L. GOODHART, "LAW OF THE LAND" 27 (1966).

<sup>81</sup> A.J. CARLYLE, POLITICAL LIBERTY: A HISTORY OF THE CONCEPTION IN THE MIDDLE AGES AND MODERN TIMES 53 (1941).

with "the law of the land" meant, as Coke put it, that "no man [could] be taken or imprisoned, but *per legem terrae*, that is, by the common law, statute law, or custome of England."<sup>88</sup> Expressed in today's language, Article 39 protected "life (including limb and health), personal liberty (using the phrase in its more literal and limited sense to signify freedom of the person or body, *not* all individual rights), and property."<sup>89</sup>

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<sup>48</sup> MCKECHNIE, *supra* note 64, at 377 & n.1.

<sup>49</sup> CARPENTER, *supra* note 64, at 69 (quoting signature provision of Magna Carta).

<sup>50</sup> See DANNY DANZIGER & JOHN GILLINGHAM, 1215: THE YEAR OF MAGNA CARTA 277-78 (2003); HANNAN, *supra* note 75, at 110.

<sup>51</sup> MCKECHNIE, *supra* note 64, at 377 & n.1.

<sup>52</sup> McIlwain, *supra* note 64, at 41.

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Article 39 of Magna Carta became a foundational part of American constitutional law in the eighteenth century.<sup>53</sup> Familiar with the legal theories of Sir Edward Coke,<sup>54</sup> the Founders saw Article 39 as exemplifying the tenet of English constitutionalism that the Crown and Parliament were obligated to respect the “natural and customary rights recognized at common law.”<sup>55</sup> 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

<sup>88</sup> 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 45 (William S. Hein & Co. 1986) (1642).

<sup>89</sup> Shattuck, *supra* note 66, at 373 (footnote omitted). In the fourteenth century, Parliament revised Magna Carta by changing the phrase “*per legem terrae*” or “the law of the land” to “due Process of the Law.” 28 Edw. 3, c. 3, *reprinted in* 1 STATUTES OF THE REALM 345 (William S. Hein & Co. 1993) (1810); *see also* McIlwain, *supra* note 65, at 49. That revision, however, did not alter its meaning, effect, or significance. *See* Davidson v. New Orleans, 96 U.S. 97, 101 (1878) (“The equivalent of the phrase ‘due process of law,’ according to Lord Coke, is found in the words ‘law of the land,’ in the Great Charter, in connection with the writ of *habeas corpus*, the trial by jury, and other guarantees of the rights of the subject against the oppression of the crown.”); Walker v. Sauvinet, 92 U.S. 90, 93 (1875) (“Due process of law is process due according to the law of the land.”); *see also* Daniels v. Williams, 474 U.S. 327, 331 (1986); Hovey v. Elliott, 167 U.S. 409, 415–17 (1897); RALPH V. TURNER, MAGNA CARTA 3 (2003); Max Radin, *The Myth of Magna Carta*, 60 HARV. L. REV. 1060, 1063–68, 1075, 1090–91 (1947).

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<sup>53</sup> *See, e.g.,* Horne v. Dep’t of Agric., 135 S. Ct. 2419, 2426 (2015) (“The colonists brought the principles of Magna Carta with them to the New World . . . .”); Kerry v. Din, 135 S. Ct. 2128, 2133 (2015) (plurality opinion) (“Edward Coke[’s] . . . Institutes ‘were read in the American Colonies by virtually every student of 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.” (footnote omitted)).

<sup>54</sup> *See, e.g.,* Kerry v. Din, 135 S. Ct. 2128, 2133 (2015) (plurality opinion) (“Edward Coke[’s] . . . Institutes ‘were read in the American Colonies by virtually every student of 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.” (footnote omitted)).

<sup>55</sup> Gedicks, *supra* note 83, at 619.

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the Fifth Amendment.<sup>56</sup> They did not see any material difference in meaning between the two phrases.<sup>57</sup>

Like its ancestor term in Magna Carta “the law of the land,” the concept of “due process of law” binds the government to act according to law.<sup>58</sup> Most contemporary discussion of the Due Process Clause focuses on the debate over the issue of whether the clause should be limited to a procedural guarantee of fundamentally fair proceedings or should also embrace a substantive component, one that forbids arbitrary legislation.<sup>59</sup> What is often forgotten is that the clause guarantees “due process of law.” That last phrase is an important one. Article 39 of Magna Carta, the lineal ancestor of the clause, obligated the Crown to act pursuant to “the law of the land,” rather than the king’s fancy. King John had acted arbitrarily, the barons had grown tired of being subject to his whims, and they demanded that he be subject to the law as a condition of ending their rebellion. Article 39 made it clear that King John must comply with the common law before he could deprive them of their lives, liberty, or property. The Founding Generation carried that principle forward into the Due Process Clause of the Fifth Amendment.

### **B. THE SIGNIFICANCE OF MAGNA CARTA AND THE “LAW OF THE LAND”**

The upshot of that history is this: 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*,<sup>60</sup> no legislature can exempt itself from the Constitution.<sup>61</sup> A legislature can always exempt itself from a generally applicable statute, but it

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<sup>56</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2633 & n.3 (2015) (Thomas, J., dissenting); *Kerry v. Din*, 135 S. Ct. 2128, 2132 (2015) (plurality opinion); *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855); HOWARD, *supra* note 64, at xi, 15–16, 19, 211–15 (listing colonial charters); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1789, at 547 (4th ed. 1873); Gedicks, *supra* note 83, at 622–23; H.D. Hazeltine, *The Influence of Magna Carta on American Constitutional Development*, 17 COLUM. L. REV. 1, 22 (1917).

<sup>57</sup> 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).

<sup>58</sup> See JOHN PHILLIP REID, THE RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES 93 (2004) (“Rule-of-law belonged to the seventeenth and eighteenth centuries. It was . . . the cornerstone of the jurisprudence of liberty in the years when liberty was struggling to survive.”).

<sup>59</sup> See Larkin, *Lost Doctrines*, *supra* note 62, at 294–303.

<sup>60</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>61</sup> See *id.* at 176–77 (1803) (“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

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cannot render itself immune from whatever restraints the Constitution imposes. And if that is true, then it follows that the government also cannot empower a private party to operate outside of the Constitution.

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. 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.<sup>99</sup> The delegation in *Eubank*, *Roberge*, and *Carter Coal* had the opposite effect. They 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. 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 Article 39 requirement of governance according to law. The barons certainly would have objected to the king's attempt to nullify Article 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. Article 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.

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, and Articles I, II, and III accomplish that goal in several

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.").

<sup>99</sup> 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

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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

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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.*, *Respublica v. Dean* 1 U.S. (1 Dall.) 86, 90 (Pa. Sup. Ct. 1784); *Dale Cnty. v. Gunter*, 46 Ala. 118, 138-40 (Sup. Ct. 1871).

ways: They create a limited number of federal elected or appointed offices; they restrict how private parties may come to hold and exercise the powers of those offices; and they provided express and implied remedies for cases in which officeholders abuse their delegated authority.<sup>100</sup> 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 constitutional and statutory restrictions on their exercise of government power, to fill in as erstwhile federal officials. Permitting federal officials to delegate power in that manner leaves the recipient able to act without being sub-

<sup>100</sup> Article I establishes a Congress of the United States. *See* 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 and Seventeenth Amendments, create procedures for the periodic election to the offices of Representatives, Senators, and Presidents. *See* U.S. CONST. art. I, § 2, cl. 1 (House members hold office for two years); *id.* art. I, § 3, cl. 1 (Senators hold office for six years); *id.* art. II, § 1, cl. 1 (the President holds office for four 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 Arizona, Inc.*, 570 U.S. 1 (2013); *THE FEDERALIST* NO. 60, at 371 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *id.* No. 52, at 323, 326 (James Madison). 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 (1983); *cf.* *Clinton v. City of New York*, 524 U.S. 417 (1998) (noting that Article I requires the same process in order to repeal or amend an existing law); *see also* U.S. CONST. art. I, § 7, cl. 1 (“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.”). 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 “power[s]” that Congress may use law to regulate). Article I also expressly contemplates that Congress may select certain officers. *See* U.S. CONST. art. I, § 2, cl. 5 (“The House of Representatives shall chuse their Speaker and other Officers”); *id.* § 3, cl. 4 (“The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.”); *id.* § 3, cl. 5 (“The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of the President of the United States.”). The Necessary and Proper Clause implicitly empowers Congress to hire staff. *See id.* § 8, cl. 18 (“The 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.”). And those provisions establish a mechanism—impeachment—to remove an officeholder who abuses the powers of his office. *See id.* art. I, § 2, cl. 5; *id.* § 3, cls. 6 & 7.

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 “Law” is faithfully executed. *See* U.S.

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CONST. art. II, § 3. The companion Article II Appointments Clause contemplates that Congress and the President can create additional offices to fill executive positions in the government. The Clause ensures that only parties properly appointed to their posts may enforce the law. *See* U.S. CONST. art. II, § 2.

Article III creates the Supreme Court of the United States and grants Congress the power to establish additional, lower courts. *See* U.S. CONST. art. III, § 1. The Article III Judicial Power Clause grants the Supreme Court and lower federal courts the power “to say what the law is.” *See* U.S. CONST. art. III, cl. 1; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

ject to the safeguards that protect the public against government abuse. It makes little sense to read the Constitution as permitting its restrictions to be so easily evaded.

That is why the problem with privatization of government functions is not merely the risk of biased decisionmaking. The problem is the government’s effort to shed accountability of its officers for exercising a public function. That problem would exist if the government delegated decisionmaking 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 the government delegates a so-called noncritical 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.<sup>62</sup> The principle at stake is still the same. Granting private parties governmental 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.”<sup>63</sup>

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 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

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<sup>62</sup> *See, e.g., Harris McRae*, 448 U.S. 297, 314-18 (1980).

<sup>63</sup> Larkin, *Dynamic Incorporation*, *supra* note 10, at 418.

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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.<sup>64</sup>

That last phrase—“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 the Constitution. Congress cannot allow parties to become Senators, Representatives, or president who cannot satisfy the age, citizenship, and birth requirements of Articles I and II.<sup>65</sup> Congress cannot turn the impeachment process over to private judges, lawyers, professors, or ministers.<sup>66</sup> Congress cannot designate someone other than the president to sign or veto legislation.<sup>67</sup> Congress cannot enact a bill of attainder or *ex post facto* criminal statutes.<sup>68</sup> Congress cannot divest a defendant in a criminal case of the right to trial by a jury of his peers.<sup>69</sup> Congress cannot redefine the crime of treason to include criticism of a sitting president.<sup>70</sup> 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?<sup>71</sup> Even if we limit our scrutiny to the criminal justice system, we still come up against that problem. If Congress cannot assign the trial of federal criminal cases to a judge chosen from the community without the tenure and salary protections required by Article III,<sup>72</sup> how can Congress turn over to the entire community the operation of the federal criminal law?

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

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<sup>64</sup> *Id.* at 419-20.

<sup>65</sup> See U.S. CONST. art. I, § 2, cl. 2; *id.* § 3, cl. 3; *id.* art. II, § 1, cl. 4.

<sup>66</sup> See U.S. CONST. art. I, § 2, cl. 5; *id.* § 3, cl. 6.

<sup>67</sup> See U.S. CONST. art. I, § 7, cls. 2 & 3.

<sup>68</sup> See U.S. CONST. art. I, § 9, cl. 3.

<sup>69</sup> See U.S. CONST. art. III, § 3, cl. 3; *id.* amend. VI.

<sup>70</sup> See U.S. CONST. art. III, § 3, cl. 1.

<sup>71</sup> With the exception of the Thirteenth Amendment, the Constitution does not govern private conduct. See, e.g., *United States v. Morrison*, 529 U.S. 598, 624 (2000); *Civil Rights Cases*, 109 U.S. 3 (1883).

<sup>72</sup> See U.S. CONST. art. III, § 1.

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that by design renders the members of those branches politically accountable to the electorate.<sup>73</sup> 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.<sup>74</sup> The result is that there will be a number of cases, much higher than 1 percent but hopefully less than 100, where the only rational, credible explanation for what the government does is politics. 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.<sup>114</sup> It would be odd to say that the Constitution forbids what it elsewhere approves.

## **V. THE NEW GROUNDS APPLIED: THE LEGITIMACY OF PRIVATE PRISONS**

A couple of decades ago, one of the most controversial developments in the privatization of historically government functions was the growth of privately-owned and – operated jails and prisons as alternative places of confinement for parties charged with or convicted of a crime.<sup>75</sup> Here, as with other issues of privatization, the argument in favor of such facilities was largely economic: private prisons are less expensive to operate than facilities staffed by government employees. There was considerable academic discussion of the policy and legal issues private confinement facilities pose.<sup>76</sup> Private prisons survived, however, and the federal and state governments continue to use them to this day.

If the Private Delegation Doctrine retains vitality, one question that arises is whether the Due Process Clauses bears on the legality of private prisons. In particular, the issue is whether those clauses prohibit the delegation to private corporations of the authority to exercise one of the most powerful government powers that any government can possess:

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<sup>73</sup> See U.S. CONST. art. I, § 2, cl. 1 (House members hold office for two years); *id.* art. I, § 3, cl. 1 (Senators hold office for six years); *id.* art. II, § 1, cl. 1 (the President holds office for four years); *id.* amend. XXII, § 1 (limiting the number of years that a person may hold office as President).

<sup>74</sup> See, e.g., Editorial Bd., *The Dirt and Delay Playbook*, WALL ST. J., Sept. 14, 2018.

<sup>75</sup> That practice is materially different from two others: using a private company to provide food, medical, or other services at a state prison, and having inmates participate in a business, such as furniture-making, while confined.

<sup>76</sup> See, e.g., CHARLES H. LOGAN, *PRIVATE PRISONS: CONS AND PROS* (1990); DAVID SHICHOR, *PUNISHMENT FOR PROFIT* (1995); *CONSTRUCTING CORRECTIONAL FACILITIES: IS THERE A ROLE FOR THE PRIVATE SECTOR* (J.R. Sevick & W.I. Cifkins eds., 1987); DAVID SHICHOR & MICHAEL J. GILBERT, *PRIVATIZATION IN CRIMINAL JUSTICE: PAST, PRESENT, AND FUTURE* (2001); Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437 (2005); Joseph E. Field, Note, *Making Prisons Private: An Improper Delegation of Governmental Power*, 15 HOFSTRA L. REV. 649 (1987); Martin E. Gold, *The Privatization of Prisons*, 28 URB. LAW. 359 (1996); Daniel L. Low, *Nonprofit Private Prisons: The Next Generation of Prison Management*, 29 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1 (2003); Ira P. Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 UCLA L. REV. 911 (1988); Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111 (2001).

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the ability to confine someone, potentially for the remainder of his natural life, away from the public. In my opinion, the answer is “No.”<sup>77</sup>

<sup>114</sup> 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.”).

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<sup>77</sup> 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 (1976); *cf. Ex parte Karstendick*, 93 U.S. 396, 398-99 (1876) (interstate transfer), 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,” *see* *Sandin v. Connor*, 515 U.S. 472, 484 (1995). Disciplinary segregation does not automatically meet that standard. *Id.* at 485-87. 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. The Constitution does not create any tort remedies for government misconduct. The Supreme Court created a federal tort damages remedy for police violations of the Fourth Amendment in *Bivens v. Six Unknown Fed’l Narcotics Agents*, 403 U.S. 388 (1971), and extended the reasoning of *Bivens* to the prison context in government in *Carlson v. Green*, 446 U.S. 14 (1980), for claims that a prison official violated the

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The explanation is actually relatively straightforward. Aside from the small number of cases where the death penalty is an available sanction for a crime, the due process principles born in England in Magna Carta and carried forward to the present in this nation have their most vital application when the government physically confines 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 make an arrest of someone and hold him in custody to charge him with a crime.<sup>78</sup> If the police arrest someone without first obtaining an arrest warrant or an indictment, they must bring the suspect before a neutral and dispassionate magistrate within 48 hours to hold him for trial.<sup>79</sup> If the government charges him with a crime, two other amendments come into play. The Sixth Amendment grants the accused a variety of trial rights, such as representation by counsel and trial by jury.<sup>80</sup> The Fifth and Fourteenth Amendment Due Process Clauses are also relevant. They protect against a variety of practices and occurrence that would corrupt the trial process—such as trial before a biased judge or in a mob-dominated courtroom<sup>81</sup>—as well as require that the prosecution establish the defendant’s guilt beyond a reasonable doubt.<sup>82</sup> In short, the government cannot criminally punish someone unless and until it satisfies the foregoing constitutional requirements. Once the government has done so, however, it may confine the now-convicted defendant for the length of his term

Eighth Amendment Cruel and Unusual Punishments Clause. The Supreme Court, however, has rejected the argument that there should be a *Bivens* remedy for offenders confined in private prisons. See *Minneci v. Pollard*, 565 U.S. 118 (2012) (refusing to create an Eighth Amendment *Bivens* action against private

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<sup>78</sup> 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., *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949).

<sup>79</sup> See, e.g., *Kaley v. United States*, 571 U.S. 320, 328 (2014); *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991); *Gerstein v. Pugh*, 420 U.S. 103 (1975).

<sup>80</sup> 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).

<sup>81</sup> 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 pretrial 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); see generally Larkin, *Lost Doctrines*, *supra* note 62, at 316-22.

<sup>82</sup> See, e.g., *Jackson v. Virginia*, 443 U.S. 307 (1979).

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individuals working at private prison); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001) (same, the corporation operating a private prison).

of imprisonment in any of its prisons.<sup>123</sup> At that point, the government has satisfied whatever “the law of the land” required.<sup>124</sup>

Confinement in a private prison under a judgment of conviction entered by a court satisfies the Due Process Clause.<sup>83</sup> By the time a prisoner arrives at a privately run prison he has received all of the guarantees that the Constitution grants him 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 had decided to throw him into confinement. It was proof that a party had received whatever process he was due before being convicted of a crime and being ordered imprisoned for his crime.<sup>84</sup> It should not matter which organization or person has the legal title to the facility. Only the answers to two questions should matter: (1) Is the person in custody pursuant to the judgment of a court? (2) Has the government effectively removed the operators of the facility from compliance with all law? If the answers are “Yes” and “No,”

<sup>123</sup> 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).

<sup>124</sup> History also supports that conclusion. Initially, there were no federal prisons. Federal courts would sentence convicted defendants to confinement in any state prison in the state of conviction that was willing to accept them. See 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 (13 Stat.) 500. Some states complied with this request. See *McNutt v. Bland*, 43 U.S. (2 How.) 9, 16 *modified*, 43 U.S. (2 How.) 28 (1844) (discussing Mississippi statute); *Randolph v. Donaldson*, 13 U.S. (9 Cranch) 77, 84 (1815) (discussing Virginia statute); Edgardo Rotman, *The Failure of Reform: United States, 1865-1965*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 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. 2, 1833, ch. 57, § 6, (4 Stat.) 632, 634; Act of Mar. 3, 1821, (3 Stat.) 646; Act of Mar. 3, 1791, (1 Stat.) 225; see *Randolph*, 13 U.S. (9 Cranch) at 84. During the Civil War, Congress also empowered the Secretary of the Interior to assign federal prisoners to state prisons. See Act of May 12, 1864, ch. 85, §§ 1-2, (13 Stat.) 74, 74-75 (adult prisoners); Act of Mar. 3, 1865, ch. 121, §§ 1-2, (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. See Act of July 12, 1876, ch. 183, (19 Stat.) 88; Act of Mar. 5, 1872, ch. 30, § 1, (17 Stat.) 35, 35. See *generally* *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). Congress did not adopt any special rules governing incarceration

<sup>83</sup> That does not mean that such a judgment cannot be challenged on direct appeal or collateral attack; it can. It means only that a judgment of conviction and sentence of incarceration permits the federal or state government to confine an offender in a public or private prison.

<sup>84</sup> See, e.g., *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830) (Marshall, C.J.).

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of federal prisoners in state institutions. Congress directed receiving states to confine federal prisoners for the exact length of their sentences, no more and no less. See Act of June 30, 1834, ch. 163, (4 Stat.) 739 (federal prisoners must be treated the same as state prisoners); *Mackin v. United States*, 117 U.S. 348, 352 (1886) (discussing 1834 Act); *Ex parte Karstendick*, 93 U.S. 396, 398-99 (1876); *McNutt*, 43 U.S. (2 How.) at 9; *Randolph*, 13 U.S. (9 Cranch) at 84.

respectively, there should be no reason why the government cannot pay a private facility to house its prisoners.

**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 it may take away someone's life, liberty, or property. That guarantee, which reaches back to Article 39 of Magna Carta, means that the government cannot legislate around the Constitution. Congress cannot try to 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.