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Legislative Delegation

The Erosion of Normative Limits in Modern Constitutionalism

Springer

Chapter 3
The Constitutional History of Delegation: Rules and Changes

> Thus, in the beginning, all the world was America, and more so than that is now. . .
> John Locke, *Second Treatise of Civil Government* (1690)

> Liberty and property. . .c'est le cri anglais. . .c'est le cri de la nature.[1]
> Voltaire (Idées républicaines, 1765)

As it will be argued in this chapter of the book, classical constitutional law incorporated the conceptual assumptions from which the notion of delegation derives. Locke's argument is, in this respect, exemplary of the philosophical presuppositions of classical constitutionalism. It justifies and explains in point of theory premises and distinctions that later reflected themselves in actual legal practices.

This assertion is, of course, not meant to state a causal connection; the Lockean account is simply a conceptual archetype, namely the most accurate philosophical justification of the legal phenomenon. Additional references can be adduced in support of the claim that classical constitutionalism and constitutional law presupposed i. clear-cut conceptual dichotomies, ii. constitutional practices that faithfully instantiated those conceptual distinctions, and iii. almost "geometrically" drawn legal borders by virtue of which the integrity of those divisions was both reflected and protected. A quotation from Benjamin Constant provides sound evidence in this respect: "Government, outside its sphere, must have no power at all; within it, it could not have enough."[2]

Related, the normative constitutionalism of the eighteenth and nineteenth centuries consistently premised man to be a *relatively and relationally* rational being. This presupposition transpired as a counterfactual analytical assumption (as in Locke's argument) or as a pragmatic profession of anthropological faith, derived

[1] Liberty and property. . .it is the English call. . .it is the call of nature.

[2] Cited by Wilhelm Röpke, *The Social Crisis of Our Time* (New Brunswick, New Jersey: Transaction Publishers, 2004), p. 193 "Le gouvernement en dehors de sa sphère ne doit avoir aucun pouvoir; dans sa sphère il ne saurait en avoir trop."

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from observation and in no need of further defense (as the statement can be found in the *Federalist Papers*). The ultimate fundamental-legal consequence of this foundational premise was the systemic justification and acceptance of limits to legal rationality and therefore also to the manipulation of social and economic relations by means of positive law. Furthermore, this foundational belief in relative human rationality and its "natural" borders, translated conceptually into the natural-law justification of the division between state and society, private and public, right and privilege, internal and external affairs. In terms of fundamental law, it served to constitute systemic arrangements that distinguished between areas or fields of public action more intensely subject to judicial control (therefore intensely rationalized) and, respectively, areas where the intensity of public law judicial interference was minimal. In the latter case, consequently, decisions based on political rationality, i.e., considerations of opportunity or the aggregation of votes prevailed.[3] Legal practices associated with these foundational presuppositions would be, after the demise of classical constitutionalism, characterized as examples of "legal formalism" or of the intrinsic "technicality and formalization" (thus Ernst Forsthoff) of the principal constitutional institutions and structures.[4] Such labels are, nonetheless, only half-true, since they bear the reductionistic imprint of hindsight view. What later appeared formalistic and technical, looked at from the viewpoint of a foundationally "disenchanted" legal world, was, in its original conceptual and legal-phenomenal environment, "natural." The distinctions and limitations for which the concept of delegation served from the onset as a self-evident analytical-legal shorthand were part of a coherent and consistent legal metaphysics.

The remark that US constitutional evolutions offer the best illustration of this interrelation between foundational concepts, phenomena, and positive-legal institutions should be reiterated. By the same token, American constitutional developments provide an ideal vantage point from which the transformation and gradual disentanglement of these three strands can be observed. America adopted European natural law (the universe of justifications derived from classical liberal constitutional theory) with quasi-religious belief in the rightness of its postulates and merged this credo with an intensely religious belief in the evidence of its divine ordinance. Thus, in response to the British assertion of parliamentary sovereignty, James Otis ("The Rights of the British Colonies", 1764) declaimed that: "The supreme power in the state is jus dicere only: -jus dare, strictly speaking, belongs alone to God."[5] Locke in particular was so revered around the revolutionary and

[3] *See generally* the volume contributions in Bogdan Iancu, *The Law/Politics Distinction in Contemporary Public Law Adjudication* (Utrecht & Portland, OR: Eleven International Publishing, 2009).

[4] Ernst Forsthoff, "Begriff und Wesen des sozialen Rechtsstaates", in Ernst Forsthoff (Ed.), *Rechtsstaatlichkeit und Sozialstaatlichkeit-Aufsätze und Essays* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1968), p. 165 ff.

[5] In Dieter Grimm, "Europäisches Naturrecht und Amerikanische Revolution—Die Verwandlung politischer Philosophie in politischer Techne," *Ius Commune* III (1970), 120–151, at p. 146.

constitutional adoption times, that the *Second Treatise* served as "a political gospel" and his theses were ubiquitously put forth "as if he could be relied on to support anything the writers happened to be arguing."[6] The impact of this natural law intellectual foundation on positive fundamental law was enhanced by the vastness of space, remoteness from European convulsions, and the apparent inexhaustibility of resources: the state of nature, as it were. European theorists commonly projected their "state of nature" anthropologies on the remote continent. This was of course a purely imagined rendition and their descriptions differed in direct relation to imagination and the argumentative needs at hand. Thus, Hobbes's Americas are evidence of the warlike and devilish character of human nature in the absence of sovereign power. To Locke, in contrast, the primary inconvenience of the "natural" life in the New World is pre-societal lack of property title, division, and legal security thereof: this is why "an Indian king" is "clad worse than a day labourer in England"[7] But the inhabitants of the new continent also regarded themselves in like fashion and, moreover, they did so with the immediacy and genuineness of direct experience. The Mayflower compacts are the classic example yet the spirit persisted until well into the nineteenth century. James Willard Hurst provides the 1836 example of a newly formed claimants' union in Pike Creek, Wisconsin. They adopted a Claimants' Union Constitution for the purpose of prompting the legal security of their newly occupied lands, a security for the benefit of which, as the preamble stated, they had "encountered the hardships of a perilous journey, advancing into a space beyond the bounds of civilization, and having the many difficulties and obstructions of a state of nature to overcome."[8] All these preconditions offered the singular possibility of turning the eighteenth century theoretical justifications of limited government, writing almost on blank slate, into positive, judicially enforceable constitutional law.

Another earlier remark should now be revisited. It was argued in the introduction that liberal constitutionalism presupposes a certain degree of homogeneity of fundamental constitutional structures and therefore also a measure of constitutional synchronicity. This remark appears at first sight paradoxical, since the legally enforceable constitution and judicial review were, through to the twentieth century, American idiosyncrasies. Enforceable constitutions and the review of constitutionality are in Europe and the rest of the world, at least where they were at all introduced, fairly recent legal phenomena. However, the contradiction is only apparent and superficial. The premise and constitutional preservation of a certain model of legislation and legislative reservation, which in the United States was juridically expressed through the nondelegation doctrine, resulted in other paradigmatic Western legal orders from legal institutions that were functionally analogous in a constitutional sense (meaning, foundational to the legal order). Private law autonomy and structural arrangements partly took over the constitutional function of legal-constitutional

[6] *Id*., p. 123.

[7] *Second Treatise*, Par. 41.

[8] Willard Hurst 1967, at p. 4.

rules and constitutionally enforceable fundamental rights.[9] In fact, even in the United States, the legislative reservation understood as intrinsic to the Constitution was only expressed through, not enforced by means of the nondelegation doctrine. The major divisions of constitutionalism (state/society, private/public, internal/external, ministerial/discretionary, and—ultimately—politics/law) and the discrete legal arrangements that gave expression to them were not necessarily implemented by means of constitutional law and were certainly not created by fundamental law alone. They were also constitutive of it.

3.1 Delegation of Congressional Legislative Power in American Constitutional History

3.1.1 The Doctrine of Nondelegation and the US Constitution: A Conceptual Framework

> In the United States, however, the jurisdiction of the legislature is a judicial question. Here the courts may in a proper case determine whether the popular assembly has stepped outside its circle of power as well as whether the sheriff or the town clerk has exceeded his authority. Thus the courts bring unity into the legal system by keeping all private and governmental persons within the range of their allotted powers.
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> James Hart, *The Ordinance Making Powers of the President of the United States* (1925)

> [L]egislatures have no power to pass a law which is not a law in itself when passed. . ..
>
> *Rice v. Foster*, 4 Harr. 479 (Del., 1847)

3.1.1.1 Nondelegation as a Doctrine of American Constitutional Law: An Introductory Taxonomy

> [E]ven the boundaries between the Executive, Legislative, and Judiciary powers, though in general so strongly marked in themselves, consist in many instances of mere shades of difference.
>
> James Madison, letter to Thomas Jefferson of Oct. 24, 1787

> Perhaps there was no argument urged with more success, or more plausibly grounded against the Constitution, under which we are now deliberating, than that founded on the mingling of the Executive and Legislative branches of the Government in one body.
>
> James Madison, House debate in the First Congress, 1789, on the Foreign Affairs Department

Most standard American administrative law casebooks or treatises open with lengthy discussions of the nondelegation doctrine, discussions which regularly

[9] Dieter Grimm, *Recht und Staat der bürgerlichen Gesellschaft* (Frankfurt a. M.: Suhrkamp, 1987), *passim*.

conclude by tersely emphasizing the essentially "ideological" or "philosophical" character of the doctrine and its modern state of legal irrelevance.[10] The delegation doctrine is also one of the most contested topics in modern constitutional law, and rivers of ink are incessantly spilt attacking or defending its constitutional validity and relevance.[11] To wit, the debate on delegation has been proceeding unabated and at the same pace up to now, in spite of the fact that, as critics are usually poised to point out, in only a couple of instances was nondelegation ever used by the Supreme Court as a ground to strike down federal legislation and, furthermore, even those instances pertain to a period of American constitutional history which is nowadays almost unanimously regarded with mixed feelings of hostility and embarrassment.[12] Since 1936, the nondelegation doctrine has been, in an apt characterization, "discussed actively but invoked rarely."[13] It is puzzling at first

[10] For instance, Kenneth Culp Davis opens his *Administrative Law Treatise*, a classic in the field, with long vituperations against the doctrines of the separation of powers, the rule of law, and nondelegation, all labeled dismissively as useless "philosophical thinking": "[p]hilosophical thinking has been a barrier to the developments of administrative law and has contributed little or nothing that is affirmative." (San Diego: K. C. Davis Pub. Co., 1978–1984), Chapter 2-"Philosophical Foundations." *See* for instance at §2: 6, describing the notion of separation of powers as "an empty receptacle for answers that have to be invented" and claiming in essence that... Montesquieu was wrong. *See*, for a more balanced contemporary treatment, Jerry L. Mashaw, Richard A. Merril, Peter M. Shane, *Administrative Law-The American Public Law System: Cases and Materials* (Mashaw et al.) (St. Paul, Minn.: West, c2003), Chapter 2-"The Legislative Connection," *esp*. pp. 59–49.

[11] *See*, for instance, a good and relatively recent breakdown of delegation-related issues and positions in contemporary U.S. constitutional and administrative law, in The Phoenix Rises Again: The Nondelegation Doctrine from Constitutional and Policy Perspectives, Symposium 20 (3) *Cardozo Law Review* (January 1999).

[12] Both *Panama Refining* and *Schechter Poultry* were rendered in 1935. A year later, in 1936, the Bituminous Coal Conservation Act of 1935 (the former Bituminous Coal Code, enacted as federal statute by Congress after the demise of the NIRA) was declared unconstitutional, primarily on Commerce Clause grounds but also because of delegation reasons, in *Carter v. Carter Coal Co.* 298 U.S. 238 (1936). These developments happened before the so-called "shift in time that saved nine" of 1937, that is, before the Supreme Court reversed its 'conservative' pre-New Deal positions (most notably on economic due process and the scope of the Commerce Clause), thus averting FDR's "Court-Packing Plan." Given this inauspicious constitutional context, John Hart Ely notably opined that the post-New Deal demise of the nondelegation doctrine was primarily a matter of "death by association." (John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980), at p. 133). *See* Douglas Ginsburg, "Delegation Running Riot," (reviewing Schoenbrod, *Power Without Responsibility*) 18 (1) *Regulation* 83 (1995): "So for 60 years the nondelegation doctrine has existed only as a part of the Constitution-in-exile, along with the doctrines of enumerated powers, unconstitutional conditions, and substantive due process, and their textual cousins, the Necessary and Proper, Contracts, Takings, and Commerce Clauses. The memory of these ancient exiles, banished for standing in opposition to unlimited government, is kept alive by a few scholars who labor on in the hope of a restauration, a second coming of the Constitution of liberty-even if perhaps not in their own lifetimes."

[13] Paul Verkuil, "The American Constitutional Tradition of Shared and Separated Powers: Separation of Powers, the Rule of Law and the Idea of Independence," 30 *William and Mary Law Review* 301 (Winter, 1989), at p. 319.

glance why a topic of allegedly so little legal import would be at the foreground of so much academic legal debate and why a doctrine of such apparently inconsequential practical value in contemporary constitutional adjudication would prove to be, non-etheless, so resilient over time. Indeed, in terms of resilience in the face of adversity, in Gary Lawson's vernacular, the nondelegation doctrine has turned out to be the "Energizer Bunny" of US constitutional law.[14]

One could safely opine that the main reason why nondelegation is important to American constitutional and administrative law, as a purely *legal* concept, aside from its general heuristic value in structuring the ongoing legitimacy–accountability, separation of powers, and rule of law debates in constitutional theory, is the very nature of American constitutionalism. Carl Friedrich once claimed that "[i]n America. . .constitutionalism struck deeper root than almost anywhere on earth. . .."[15] By this assertion Friedrich meant that, in America, constitutionalism as an umbrella concept of limited government[16] had been, from the very beginning, immediately and very concretely associated with the actual written constitution of the land. The constitution has been in turn, from the onset, primarily perceived as a legal document setting forth clear legal limitations on government, rather than—to juxtapose and contrast with the early European perspective—as a political law and a grant of power.[17] To this extent, the 1787 document and its history constitute the epitomes of 'negative' and 'jurisdictional' constitutionalism.[18] In this vein, it is quite

[14] "No matter how many times it gets broken, beaten, or buried, it just keeps on going and going." Gary Lawson, "Delegation and Original Meaning," 88 *Va. L. Rev.* 327 (April, 2002), at p. 330.

[15] Carl Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America* (Waltham: Blaisdel, c1968) 4th ed., at p. 28.

[16] Encompassing the "set of principles, manners, and institutional arrangements that were used traditionally to limit government," Sajó 1999, at xiv.

[17] Edward Corwin's commentary on the amending provisions of Art. V is very indicative of the American understanding of constitution and constitutionalism: "*The amending, like all other powers organized in the Constitution, is in form a delegated, and hence a limited power*. . . the one power known to the Constitution which is not limited by it is that which ordains it- in other words, the original, inalienable power of the people of the United States to determine their own political institutions." (emphasis supplied), *The Constitution and What It Means Today* (Princeton: Princeton University Press, 1946), at p. 141. For a good exposition of the American 'constitutional exceptionalism' and an insightful comparison of American and early European constitutionalism, *see* Martin A. Rogoff, "A Comparison of Constitutionalism in France and the United States," 49 *Me. L. Rev.* 21 (1997), pp 31–32: "In America the idea of constitutionalism is intimately attached to, and in fact inseparable from, the actual written constitution of the country. Constitutionalism is not a vague concept calling for the separation and limitation of public power, the rights of the governed, and adherence to certain time-honored procedures, customs, and values. It has rather an immediacy and a tangibility, and an association with a particular document, which is usually lacking even in other constitutional democracies."

[18] "[T]he Constitution is a charter of negative rather than positive liberties. The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much for them." Posner, J., *Jackson v. City of Joliet* 715 F.2d 1200, 1203 (1983), certiorari denied 465 U.S. 1049 (1984) (failure by state officers to rescue individuals from a burning car, even if it amounts to reckless negligence, does not amount to a constitutional tort

telling that no less a perceptive observer than Tocqueville himself would early on note in admiring surprise that "[t]here is hardly a political question in the United States which does not sooner or later turn into a judicial one. . ..the spirit of the law, born within schools and courts, spreads little by little beyond them; it infiltrates through society right down to the lowest ranks, till finally the whole people have contracted some of the ways and tastes of a magistrate."[19]

After the early landmark decision in *Marbury v. Madison*[20] "welded judicial review to the political axiom of limited government,"[21] the paramount legal value of the constitution has entailed the consequence that, to the extent that the justiciability requirements are met, the judiciary would effectively harness governmental action and keep it within the four corners of "the supreme law of the land," by enforcing the constitutional limitations on governmental action.

The province of law-making was thus perceived as a matter of legally enforceable jurisdictional limits and the possibility of judicial review has been ever since, correlatively, a principal factor in curbing assertions of unfettered legislative competence.[22] Consequently, in America, a historically situated phenomenon

under the Fourteenth Amendment's Due Process Clause, as a deprivation of life without due process). By 'negative' I understand primarily concerned with limitations, constraining. By 'jurisdictional' I understand that the limitations, primarily those on legislation, are in principle ascertainable in a court of law. In line with the contractualist tradition which informed the Founders, Government as such was arguably perceived as an instrument of limited purposes, limited, that is, by the original compact and the triad of pre-political or 'natural' rights, life, liberty, property (the analogy with Locke's theory is too evident to be restated). The distinction has become eroded as a matter of practices, as we shall *see* in due course, after the New Deal. In terms of political theory, it has come under attack since the Progressive Era, after the Civil War. *See*, for instance, a more recent example of questioning the validity of the distinction between positive and negative constitutionalism and positive and negative rights, Stephen Holmes and Cass Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: Norton, 1999), whose title is fairly revealing of the main thesis. As a question of actual constitutional law, the qualification of 'negative constitutionalism' applied to the U.S. Constitution holds true; in this vein, for an elaboration and an illuminating comparison with contemporary German constitutionalism, *see* David P. Currie, "Positive and Negative Constitutional Rights," 53 *U. Chi. L. Rev.* 864 (Summer, 1986), showing that the Supreme Court has consistently refused to recognize third party effects or affirmative state obligations related to the rights guarantees outside active government aggression, unless a 'positive' governmental obligation is directly and inextricably related to the exercise of a negative (defense) right and triggered by intrusive governmental action.

[19] Alexis de Tocqueville, *Democracy in America*, ed. J. P. Mayer, transl. George Lawrence (New York: Harper Perennial, 1988), p. 270.

[20] 5 U.S. 137 (Cranch) (1803). The understanding that the Constitution would need to be a judicially enforceable charter arguably predates the decision; an argument much akin to Justice Marshall's in Marbury can be found in The Federalist, No. 78 (Alexander Hamilton).

[21] Henry P. Monaghan, "*Marbury* and the Administrative State," 83 *Colum. L. Rev.* 1 (January, 1983), at 32.

[22] *Marbury v. Madison*, 5 U.S. 137 (Cranch) (1803), at pp. 176–177 "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

which has been posing certain challenges to constitutionalism across Western democracies and irrespective of particular constitutional systems, the peculiarly modern problem of legislative delegations to the executive and the administration, translated simultaneously into an issue of constitutionality and constitutional review. The problem has been that of finding the proper constitutional limit on statutory grants of discretion, i.e., a judicially-enforced, constitutionally-derived jurisdictional limit on the institutional legislature.[23]

The nondelegation doctrine made an early judicial appearance in the case commonly known as *The Brig Aurora*,[24] where the appellant, whose cargo had been condemned pursuant to the revival of the Non-Intercourse Act of 1810 against Britain, argued that Congress had in effect delegated legislative power to the president, by making the revival of the act (against either Britain or France or both) contingent upon a presidential proclamation.[25] The Court, while turning a deaf ear on the nondelegation argument in the specific context at hand, that of contingent legislation in the field of foreign affairs,[26] accepted in principle the general soundness, as a matter of constitutional law, of the argument that Congress cannot delegate legislative power to the executive.[27]

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defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it. . .."

[23] I am using the phrase "jurisdiction of the legislature," to a certain extent, by way of stylistic licence, even though the use is not totally improper in the context of our discussion. *See*, for instance, Barber 1978, at p. 29: "Why should [the maxim *delegata potestas non potest delegari*] be applicable to delegations of 'jurisdiction' and not to delegations of legislative power? Is not any delegation of rule-making power a delegation of jurisdiction in some sense and to some degree?"

[24] *The Cargo of the Brig Aurora, Burn Side, Claimant, v. The United States*, 11 U.S. (7 Cranch) 382 (1813).

[25] "But Congress could not transfer the legislative power to the President. To make the revival of a law depend upon he President's proclamation, is to give to that proclamation the force of a law." *Id*., at 386 (argument for the Appellant).

[26] "On the second point, we can *see* no sufficient reason, why the legislature should not exercise its discretion in reviving the act of March 1st, 1809, either expressly or conditionally, as their judgment should direct." *Id.* at 388.

[27] *See*, for instance, the historical overview in David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People through Delegation* (New Haven, CT.: Yale University Press, 1993), pp. 30–31. *But see* Posner and Vermeule 2002, at 1737–1738: "Nothing in *The Brig Aurora* endorses the delegation metaphor; if anything, the Court's terse dismissal of the claim suggests the absence of constitutional limits on statutory grants to the executive." According to the authors, "[t]he nondelegation metaphor, rather, was a legal theory of uncertain provenance that skulked around the edges of nineteenth-century constitutionalism, and wasn't adopted by the Court until 1892." (At 1737.) Nonetheless, considering the actual wording of the decision, where the delegation argument is engaged and not dismissed out

The constitutional value of the rule or doctrine of nondelegation was also expounded and extolled, in succinct and categorical language, in one of the standard early authorities, Cooley's *Constitutional Limitations*[28]; the most relevant passage is worth citing at some length:

> One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust.[29]

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of hand as either strange or impervious, this latter, radically alternative interpretation, is unwarranted.

[28] Joseph Story offers an elaborate account of the Latin maxim *delegata potestas non potest delegari* in his book on agency law: "One, who has a bare power or authority from another to do an act, must execute it himself, and cannot delegate his authority to another; for this being a trust or confidence reposed in him personally, it cannot be assigned to a stranger, whose ability and integrity might not be known to the principal, or, if known, might not be selected by him for such a purpose. . .The reason is plain; for, in each of these cases, there is an exclusive personal trust and confidence reposed in the particular party. And hence is derived the maxim of the common law; *Delegata potestas non potest delegari*." *Commentaries on the Law of Agency as a Branch of Commercial and Maritime Jurisprudence, with Occasional Illustrations from the Civil and Foreign Law* (Boston: Little, Brown, 1839), § 13. The agency law principle, in Story's rendition, establishes a rebuttable presumption against subdelegation. Namely, delegated authority—especially when conferred in view of the agent's special fitness—cannot, in principle, be re-delegated, unless this power is expressly conferred on the agent or can be fairly implied, for instance, from the terms of the agreement or the usages of the particular trade. That is apparently still the law, 1 *Restatement of the Law of Agency Second* (St. Paul, Min.: American Law Institute Publishers, 1958), § 18: "Unless otherwise agreed, a person cannot properly delegate to another the exercise of discretion in the use of a power held for the benefit of the principal." Story does not transpose the agency law maxim into the field of public law in his constitutional *Commentaries,* perhaps since he would have understood it essentially as an inference from an overly doctrinaire or, in modern categories, 'formalistic' understanding of the principle of separation of powers. Story was, like Madison, a strong advocate of a position which comes closer to what nowadays is called separation of powers "functionalism." According to Story, in an argument similar to Madison's in *The Federalist 47*, the principle can be reduced to a requirement that "the whole power of one of these department should not be exercised by the same hands which possess the whole power of either of the other departments." Lest that would happen, institutional autonomy and mutual checks are the best safeguards of the initial allocation; power counteracts power. *See Commentaries on the Constitution of the United States* (Boston: Little, Brown, and Company, 1891(1833)), Vol. 1, Book III, Chapter VII, "Distribution of Powers," pp. 388–406, § 525.

[29] Thomas McIntyre Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (Boston: Little, Brown, and Company, 1868), p. 137.

It is important to point out that, while at the highest level of abstraction a principle of nondelegation as such is relatively easy to justify in a government of limited (divided and enumerated) powers, analysis seems fated to be bogged down at the moment one tries to define, concretize, and give it a certain measure of workable specificity as a doctrine or rule of constitutional law. In the abstract, as a pure exercise of analytical jurisprudence, the discussion can easily revert into tautologies and absurdities. For instance, while the legislature should be in principle prevented from delegating legislative power, legislative power is, by constitutional definition, the only power the American legislature possesses to begin with and—conversely—any power it would delegate to the executive is by definition legislative and non-delegable (since, by the same token, also by constitutional definition, the executive and the judiciary branches only posses and can only exercise executive and judiciary powers, respectively). Does the Constitution then prescribe or assume a purely formal understanding of the 'powers' vested in the respective branches of government, and more particularly of legislative power and legislation or does it require a more substantive or material concept?

To be more specific, the nub of the matter is whether executive and administrative rulemaking, quasi-adjudication, and interpretive discretion or discretionary action in pursuance of a statutory command, no matter how vague the legislative authorization, always constitute only law-execution according to the given statutory terms or whether "the Constitution contains some implicit principle that constrains the scope or precision of otherwise valid statutory enactments."[30]

Accepting *ex hypothesi* that such a principle of limitation on the precision of statutes is supported by the Constitution in turn gives rise to a congeries of subsequent dilemmas. Does nondelegation mean only no legislative abdication or does the prohibition also apply to a delegation of discretion to the enforcement agency? Does a statutory grant of discretion ever equate in substance an unconstitutional abdication of its legislative powers by Congress? Does nondelegation apply only to subordinate executive/administrative rulemaking? Does the application of the doctrine vary in respect of the constitutional context to which it is applied or can a nondelegation standard be identified and applied to all statutory authorizations, irrespective of the nature of the fields to be regulated (an obvious example would be foreign affairs as opposed to purely domestic legislation) or of the given situation (emergency delegations or delegations in normal situations)? Should the

[30] Posner and Vermeule 2002, at pp. 1728–1729, defending the 'naïve view' according to which "a statutory grant of authority is not a delegation"; in the authors' view, the Constitution supports solely a minimalist nondelegation rule, based on which only the delegation of an individual legislator's voting rights would be deemed unconstitutional. *See also* Eric A. Posner and Adrian Vermeule, "Nondelegation: A Post-Mortem," 70 *U. Chi. L. Rev.* 1331 (Fall 2003). Compare and contrast, Larry Alexander and Saikrishna Prakash, "Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated," 70 *U. Chi. L. Rev.* 1297 (Fall 2003).

constitutionally required level of precision or scope of a statutory enactment vary with respect to the delegate (compare delegation to private parties to delegation to an independent regulatory agency to a delegation to a government department to a delegation to the President)?

An across the board answer to all of these questions is impossible to provide. Part of the analytical quagmire arises from the fact that, as Hans Linde, a particularly perceptive commentator on modern delegation debates, once noted, "[t]here is not just one rule on delegation but several, depending on the relevant constraint."[31] Since the doctrine prohibiting the delegation of legislative power is not an explicit rule of the Constitution, different views on nondelegation constitute inevitably so many inferences regarding legislation, inferences either derived directly from text and structure or read into the text from assumptions regarding background norms of constitutional theory (the rule of law, separation of powers, theories of democracy/representation, and legitimacy, notions which, in their turn, do not by any means lend themselves to easy definition). In delegation-related debates, much confusion arises, therefore, from a failure to make explicit the background assumptions and, consequently, to separate the inferential strands. To this extent, the manifold unreflective uses of the phrase "legislative delegation" constitute, to paraphrase Justice Frankfurter, "an excellent illustration of the extent to which uncritical use of words bedevils the law."[32]

What will follow throughout most of this chapter is a discussion of a historical evolution, an account of the need for delegation as it emerged in modern American political legal history; we will be dealing with a phenomenon and its judicial and theoretical reception. Yet, since theoretical or judicial positions on delegation constitute of necessity the by-product of different assumptions, these need to be first properly identified and disentangled, in order for the discussion to approach a level of clarity which would in turn allow for the account and assessment of events to be properly perceived. At this juncture, in order to get a point of ingress into the constitutional dimension, it will thus be necessary to block out a starting conceptual framework and an introductory taxonomy of what can be reasonably understood by the notion of 'legislative delegation,' in terms of the constitutional considerations underlying the nondelegation doctrine.

Since all the theoretical points to be raised over the next few pages have already been visited more generally in the previous chapter of the book and will be commented on, as need arises, throughout the rest of the argument, only groundwork assumptions and taxonomies more directly relevant to the present discussion need to be re-introduced here.

[31] Hans A. Linde, "Structures and Terms of Consent: *Delegation, Discretion, Separation of Powers, Representation, Participation, Accountability,*" 20 *Cardozo L. Rev*. 823 (1998–1999), pp. 849–850.

[32] Frankfurter, J., concurring in *Tiller v. Atlantic Coast Line R. Co*., 318 U.S. 54, 68 (1943).

3.1.1.2 Delegation of the Legislative Power in American Constitutional Law: Relevant Conceptual Associations and Constitutional Constraints

> A phrase begins life as a literary expression; its felicity leads to lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and contradictory ideas.
>
> Frankfurter, J., concurring in *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54 (1943)

> After a single preambulatory sentence, the Constitution of the United States begins with this simple proposition: 'All legislative powers herein granted shall be vested in a Congress of the United States.' What does it mean?
>
> Douglas H. Ginsburg, "Delegation Running Riot," 18 (1) REG. 83 (1985)

The answer to this question is by no means an easy one. The point should be restated that nondelegation is not an explicit rule of the constitution but an implicit doctrine, inferred from constitutional text and structure, as interpreted in light of background assumptions derived from history and political and constitutional theory. The various takes on delegation reflect this multiplicity of assumptions with respect to distinct relevant constraints on the legislature and legislation. This multiplicity of conceptual associations accounts in turn for the irreducibility of the notion of "legislative delegation" to one single definition.

Delegata Potestas Non Potest Delegari

It is sometimes believed that the constitutional rule of nondelegation in American law derives in a way from or at least is largely informed by a Roman law principle which, insofar as it applied to public law, forbade the sub-delegation of specially conferred jurisdictional authority.[33] If *iurisdictio* (literally translated, "the power to declare rights," embracing the general magisterial power to administer justice) was held as of right, attached to an office, it could be delegated, under the reservation that pure or unmixed *imperium* (*merum imperium,* embracing capital jurisdiction in criminal

[33] Dig. I. 21. 1, *De officio eius, cui mandata est iurisdictio* (*Duties of One to Whom Jurisdiction is Delegated*): "Papiniano libro primo quaestionum. Quaecumque specialiter lege vel senatus consulto vel constitutione principum tribuntur, mandata iurisdictione non transferuntur; quae vero iure magistratus competunt, mandari possunt." ("Any powers specially conferred by statute or *senatus consultum* or imperial enactment are not transferable by delegation of a jurisdiction. But the competence attached to a magistracy as of right is capable of delegation.") Dig. I. 21. 5. "Paulus libro octavo decimo ad Plautium. Mandatam sibi iurisdictionem mandari alteri non posse manifestum est. Mandata iurisdictione privato etiam imperium quod non est merum videtur mandari, quia iurisdictio sine modica coercitione nulla est." ("It is obvious that one cannot delegate to another a jurisdiction which one holds by delegation. When a jurisdiction is delegated to a private citizen, it seems that there is also delegated a power of imperation, albeit not a pure one; for there is no such thing as a jurisdiction without some modicum of coercive power.") The example is given (Dig. I. 21.1.) of the praetor not being able to delegate, when allegation is made that a master has been murdered by his slaves, the task of hearing the case, since jurisdiction over such cases is delegated to him by a *senatus consultum*.

matters) could not be carried by the transfer of jurisdiction, since *merum imperium* was considered to have been delegated itself by special legal grant, and thus was not inherent in an exercise of jurisdiction.[34] Conversely, jurisdiction exercised by virtue of formal and special legal grant from higher authority (through a *lex, senatus consultum, constitutio principis*) could not be sub-delegated, unless sub-delegation would be allowed by statute or convention. The underlying Roman law principle, usually expressed in common law sources through the maxim *delegata potestas non potest delegari* (or *delegatus non potest delegare*), was first incorporated into the common law by Bracton, in his *De Legibus et Consuetudinibus Angliae*. Afterwards it was given another authoritative validation by Coke's *Institutes* and—in more recent times—expounded as an important principle of agency law by Lord Mansfield, Kent, and Story. Finally, it was incorporated into constitutional law, so that an early Pennsylvania case, *Parker v. Commonwealth*, could praise the maxim as expressing "a primal axiom of jurisprudence."[35]

In the most comprehensive and authoritative study tracing the archeology of the Latin maxim in common law sources, Patrick W. Duff and Horace E. Whiteside advanced the argument that, apparently, the popularity of the *delegata potestas non potest delegari* principle in American constitutional law would have been the result of a pure mishap, quite literally a typo in one the early manuscripts of Bracton's *De Legibus*. Apparently, the printer inadvertently substituted a "non" for a "nec" and changed a colon for a semi-colon, changes that in turn radically altered the meaning of the text, from the correct one, *i.e.*, "jurisdiction cannot be delegated by the king in such a way that primary jurisdiction does not stay with other king" (or "the King's power is not diminished by delegation to others") to "jurisdiction cannot be delegated."[36] According to the two authors, Coke allegedly seized on the version distorted by the mistake, took a part of it ("jurisdictio delegata non delegari poterit") out of context, turned it into the first version of the modern maxim, and thus erroneously helped to perpetuate a typographical error into an agency and constitutional law principle: "[W]e thus learn that the 'maxim' which was to serve

[34] Dig. II.1.3 (Ulpianus libro secundo de officio quaestoris): "Merum est imperium habere gladii potestatem ad animadvertendum facinorosos homines, quod etiam potestas appellatur." ("To have simple *imperium* is to have the power of the sword to punish the wicked and this is also called *potestas*.") A transfer of jurisdiction would carry a transfer of mixed *imperium*, since a certain measure of coercion (for instance, the power to impose a fine) was considered as entailed by an exercise of jurisdiction). *See*, more generally, one these issues, David Johnston, "The General Influence of Roman Institutions of State and Public Law," in D. L. Carey Miller and R. Zimmermann, eds., *The Civilian Tradition and Scots Law. Aberdeen Quincentenary Essays [Schriften zur Europäischen Rechts- und Verfassungsgeschichte, Bd. 20]* (Berlin: Duncker & Humblot, 1997), pp. 87–101.

[35] *Parker v. Commonwealth*, 6 Barr. 507. 515, 10 Law Rep. 375 (Pa. 1847), Pennsylvania decision which held unconstitutional, on nondelegation grounds, a local option law which authorized the citizens of a number of counties to decide by local ballot whether the sale of liquors in those counties was to be continued.

[36] *See* Patrick W. Duff and Horace E. Whiteside, "*Delegata Potestas Non Potest Delegari*: A Maxim of American Constitutional Law," 14 *Cornell L. Q.* 168 (1928–1929).

the turn of Coke, to command the respect of Kent and Story, and to leave its mark on the constitutional history of the United States, owes its origin to medieval commentators on the Digests and Decretals, and its vogue in the common law to the carelessness of a sixteenth century printer."[37]

The wholesale analogy of the delegation problem under a modern constitution with the reference to royal jurisdiction in Bracton is to a certain extent undiscriminating in the narrow etymological sense of the word, a failure to make rational distinctions. Unlike the king, who, notwithstanding medieval developments and debates on the difference between person and office and the king's "two bodies," was a concrete person with a concrete will, in the modern legitimacy paradigm (where the delegation problem arises as a problem of limited and limiting government) the people's 'will' is an abstraction, sovereignty. To be sure, sovereignty as such (as a source of public power or 'primary jurisdiction') is, as an unstated final assumption, unlimited and undiminished by the grant (the constitution), which in turn can in both theory and practice be changed by changing the terms of the grant, adopting another constitution or amending the existing one (according to the procedures by which it bound itself and which structure and form its will). But the delegation problem bears on the extent to which the legislature, as an agent restrained within an initial mandate, is legally within the *vires* of the grant, *i.e.,* the written constitution by which sovereignty is limited. Failure to understand and recognize this *as a matter of principle* is equivalent to the opposite statement, namely (to use Marshall's words) that "written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable."[38] It is thus only as a result of a myopic neglect of first principles that an otherwise well-researched and learned study should come up with the baffling thesis that the nondelegation doctrine in American agency and constitutional law owes its existence to a sixteenth-century typographical error and a number of subsequent happenstances. Contrariwise and obviously enough, the main reason why the Latin maxim was seized upon by judges and commentators is not its ancient pedigree but rather, conversely, the ancient lineage is indicative of the maxim's capacity to condense a simple kernel of truth, which is of the highest relevance to any regime of law-bound exercise of public power. The legislative power under a rigid written constitution, like any power that is not primary but derived, that is delegated, is limited and conditioned in its exercise by the original grant of authority.[39] Hence, the relevant constitutional constraints need to be identified.

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[37] *Id*., at 173.

[38] *Marbury v. Madison*, 5. U.S. 137, 177.

[39] Jaffe also dismissed the Whiteside-Duff thesis with characteristic deftness: "But the judges have, I think, merely seized on a convenient legal formula to express the underlying thought of Locke that 'the legislature neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have.'. . .If it be thought that the judges were reading the 'vesting' provision itself, pursuant to the maxim, it may be replied that a maxim enforced by Coke, Story, and Kent over the course of 400 years is far more relevant to the interpretation of a modern document than an unknown reading of a thirteenth century text." Louis Jaffe, *Judicial Control of*

The Vesting Clause of Art. I and the Supremacy of the Constitution Argument

The most limited version of the principle of nondelegation can be justified solely on the basis of the principle of the supremacy of the Constitution[40] and of the Vesting Clause of Art. I: "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."[41] A nondelegation rule derived from the Vesting and Supremacy Clauses would of necessity not differentiate among recipients of congressional power. Since the focus is on the duty of Congress, the nondelegation prohibition, in this version, applies equally to delegations to the executive, the judiciary, independent administrative agencies, states or local governments, voters or private parties, perhaps even congressional committees. The argument is fairly straightforward: since the legislative powers are granted by an original act of sovereignty, by delegating or abdicating them Congress would render the initial allocation a nullity and defeat the purpose of having government limited by a Constitution in the first place.[42]

Hence, Congress is bound by a constitutional duty to exercise its powers. This duty would entail two obvious nondelegation limitations: (a) Congress cannot delegate powers specific enough so that delegating them would very clearly defeat the purpose of assigning responsibility for their exercise to the Congress in the first place[43] and (b) Congress could not delegate to an agency a completely open-ended authority to choose from and pursue any and all federally permissible ends.[44]

Administrative Action (Boston, Toronto: Little, Brown, and Company, 1965), at p. 54. *See also* comments in Barber 1978, at pp. 26–30.

[40] The Supremacy Clause (Art. VI, Paragraph 2) provides that "[t]this Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

[41] U.S. Constitution, Article I, Section 1.

[42] James Hart, "Limits of Legislative Delegation," 221 *Annals of the American Academy of Political and Social Science* (1941) 91: "Certainly it cannot honestly be denied that this principle (that the creatures of the Constitution may not in their discretion alter its allotment of powers) is necessarily implicit in the constitutional allotment. To deny this would make that allotment meaningless."

[43] Laurence Tribe gives the examples of setting up a special agency outside Congress to ratify treaties (contrary to the requirement of Article II, Section 2, that treaties become effective only upon senatorial ratification by a two thirds majority of present Senators) and setting up a "Federal Court of Impeachment" (contrary to Art. I, Section I "The Senate shall have the sole Power to try all Impeachments"), *American Constitutional Law*, 2nd ed. (Mineola, New York: The Foundation Press, 1988), § 5–17, at p. 363.

[44] *Id.*: "An agency exercising delegated authority is not free, as is Congress itself, to exercise its authority to pursue any and all ends within the affirmative reach of federal authority. Rather, an agency can assert as its objectives only those ends which are connected with the task that Congress created it to perform. The open-ended discretion to choose ends is the essence of legislative power; it is this power which Congress possesses but its agents lack." *See also* James Hart, *The Ordinance Making Powers of the President of the United States* (Baltimore: The Johns Hopkins Press, 1925), for a similar nondelegation argument: there is a constitutionally supported difference between a. legislative power, an almost "full discretion in the premises" and b. "co-legislative power,"

While, as we shall *see* in due course, the latter limitation plays an important role as a nondelegation-related canon of construction in modern judicial review of administrative action, as prohibitions on Congress these two restrictions imagine hypotheticals unlikely enough to have much practical or epistemological value.

Outside these two rather uncontroversial non-delegation restrictions and solely on the basis of the grant of legislative power and the constitutional supremacy clauses, the duty of Congress, in this minimalist version of doctrine, can be reduced to the necessity of making, in the exercise of its enumerated powers, a clear legislative decision among the salient policy alternatives existing at the time of enactment, as registered on the legislative record. This minimalist version of the nondelegation doctrine has been, to my knowledge, only advanced by Sotirios Barber.[45] The thesis is original enough and relatively straightforward: a minimal constitutional rule of nondelegation, the only rule of delegation constitutionally defensible, needs to be a *self-standing* "principle of legalistic inflexibility."[46] The supremacy of the constitution is the last independent *positive legal* argument for nondelegation, remaining after the elimination of germane but conceptually independent constraints (identified as, the separation of powers, theories of representation, the common law agency maxim, and due process). Delegation is permissible, as long as it does not approach abdication, namely, as long as Congress

"discretion as to subordinate premises only." *Delegatus non potest delegare* (*delegata potestas non potest delegari*) would apply only to a. but not to b.

[45] Barber Sotirios, *The Constitution and the Delegation of Congressional Power* (Chicago and London: The University of Chicago Press, 1978).

[46] A similar argument in comparative law was given, in an insightful little exercise in logical positivism, by the Danish philosopher and jurist Alf Ross ("Delegation of Power-Meaning and Validity of the maxim *delegata potestas non potests delegari*" 7 *American Journal of Comparative Law* 1 (1958)). In light of his general jurisprudential project of freeing law and legal thinking from the pernicious influence of metaphysics, the Scandinavian Legal Realist scholar was at the same time puzzled and irked by the persistence in constitutional thought of a notion without (or with scant) support in positive law, which moreover eluded easy definition: "[D]elegation does not appear to be regarded as a functional legal concept, defined by certain observable criteria, but rather as a kind of magical act, the transfer of a magical force, the very 'power to legislate.' The question is not presented as an inquiry as to the legal criteria defining the term 'delegated legislation' (introduced to describe certain juristic acts) but rather as a question whether a juridical magic transfer of power of this kind is in fact possible or not. The maxim *delegata potestas non potest delegari* seen from this angle assumes more the character of an axiomatic truth, a juridical magic law of nature, rather than of an empiric rule of law, conditioned like other rules of law by time and space." (at p. 11) Ross's solution is treating the problem of legislative limits "not in general terms but in relation to the text, presuppositions, and principles of the various constitutions, each in its historical setting." (p. 21) Ross's analysis is ultimately flawed, nonetheless, to the extent that, in an application of his more general theoretical position to the Danish Constitution, he presents as an evident and unproblematic nondelegation limit on the legislature, inferred from Section 63 (courts are competent to review the legality of all administrative acts, including rules pursuant to law): "a prohibition against delegation of such *indefiniteness* that judicial review is eluded." As we shall *see* in due course, however, the delegation-related aspects of normative indeterminacy in modern statutory interpretation are not at all unproblematic exercises of judicial review.

can be fairly said to have made "a clear policy decision among salient alternatives." Judges would enforce this version of the doctrine by poring on the legislative history to determine whether Congress delegates out of indecision, thus unconstitutionally abdicating its duty, or as an incident to making a choice among alternatives.[47] Barber is in a way proposing a 'hard look' (nondelegation) doctrine for congressional enactments.[48] Aside from the separation of powers quandaries it would create by having the judiciary police so intrusively legislative records (to identify only the most problematic among many side-effects one can think of), the problem with this sort of 'hard-look doctrine' version of nondelegation constitutionality review is that the notion of nondelegation as such is incomprehensible

[47] Thus, Congress can make an 'experimental' delegation, incidental to making a future choice, and the delegation would be constitutionally 'saved' by a mandatory review and reenactment provision ('sunset' clause), which binds Congress as an institution and goes through the same legislative process as the initial enactment (bicameralism and presentment): "Through a permissive interpretation of the delegation doctrine, however, delegations from congressional irresolution could be constitutional—at least when measured by the minimal values supporting the rule—if they could be interpreted as instruments of policy decisions yet to be made. A statutory provision for mandatory review and reenactment could be presumptive evidence that Congress had committed itself to decide eventually the issues delegated." (Barber 1978, at pp. 123–124). Barber was aware of the fact that, in the logic of his version of nondelegation, congressional legislative indecision could not be compensated by other methods of review (in his enumeration, the [now defunct] legislative veto, committee oversight, appropriations process), since these methods of control, as substitutes to legislative policy indecision, according to the terms of his nondelegation theory, would pose delegation problems of their own. In view of future formalistic decisions (most notably *INS v. Chadha* and *Bowsher v. Synar*), Barber Sotirios's diagnosis proved to be a good foretelling of doctrinal evolution, even though partially and in a somewhat obverse manner: "[A]s *Chadha* makes clear, once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly-by passing new legislation." *Bowsher v. Synar*, 478 U.S. 714, 733 (1986) (opinion of the Court, per Burger, C.J.). By 'obverse manner' I understand that Supreme Court separation of powers 'formalism' did not directly force Congress to make specific legislative decisions (as Barber's preferred version of the doctrine would have it) but limited Congress's legislative power to the decision made at the time of the enactment, without possibility for further adjustments compensating for the initial delegation-indecision, short of the full-fledged Art. I Section 7 legislative process.

[48] Since this version of nondelegation review is primarily about regulating legislative processes, an analogy could also be drawn with Judge Hans Linde's "due process of lawmaking" approach to the Due Process Clause of the Fifth and Fourteenth Amendments. As commonly known, the Clause protects individuals against federal government (and, respectively, state) deprivation of "life, liberty, and property, without due process of law." In a 1976 article ("Due Process of Lawmaking," 55 *Nebraska Law Review* 197 (1976)), Linde observed that the tests applied by the Supreme Court in substantive due process rationality review are focused on the rationality of the means-ends correlation, whereas—in his view—the real question to be asked was one of legitimacy (i.e., is the choice—the statutory purpose—a legitimate one?), the problem of substance (legitimacy of ends pursued) could be conceptually distinguished from the matter of process, and—last but not least—the Due Process Clause, just as it reads, is primarily concerned with process, not substance. Therefore, asking the due process constitutional question in an instrumentalist key struck him as incorrect and he proposed instead focusing the judicial quest on policing the rationality and consistency of legislative processes.

or vacuous in the absence of the normative constitutional meta-principles that it showcases and stands for.

Representation and Delegation: Accountability, Participation and Deliberative Rationality

Oversimplifying, the basic argument here is that we elect representatives to make, in Lockean terms, "laws and not legislators."[49] Behind the epigram lies, of course, the difficulty of specifying what it means for a legislature to make legislators, in terms of how we understand the constitutional duty of making laws. In Locke's account this difficulty is overcome by reducing the scope of legislation to rules of just conduct and merging two arguments, representation and the rule of law, into one, so that specificity of the mandate renders accountability easy to assess. The specificity of the mandate, in Locke's counterfactual, derives in turn from the way of positing the state of nature, so that the dividing line between private and public, the baseline from which limitations on legislation ("just rules of liberty and property") and thus on delegation would be assessed appears unproblematic, since posited as natural and pre-political. To anticipate further discussion, it is worth pointing out here that understanding of and positions regarding legislation and thus delegation are inextricably linked with assumptions regarding and attitudes towards the proper line dividing between private and public spheres or domains. Laurence Tribe's insightful remark on this matter is particularly apt: "Even the institutions of contract and property can of course be understood as such delegations. A great deal about any legal system's premises may be discerned by observing which exercises of coercive power are regarded in that system as intrinsic to private ordering and which are viewed in the system as delegated by the public."[50] A concrete baseline from which to assess limitations on legislation, hence on delegation, was constituted in America (as in all common law legal orders) by the common law preference for private ordering. This baseline, which was assumed by the pre-New Deal Court as the yardstick for gauging the constitutionally prescribed legislative reservation, nowadays dominates the logic of modern administrative law in all of its constitutive aspects (hearing rights, standing, and reviewability immediately spring to mind).[51]

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[49] Par. 141. *See* discussion *supra*.

[50] Tribe 1988, at p. 368, note 26.

[51] *See*, for instance, Sunstein, "Constitutionalism after the New Deal," 101 *Harvard Law Review* 421, 423 (December, 1987), speaking admiringly about the mutation brought about by "the New Deal reformers, [for whom] the common law was neither natural nor prepolitical." For Sunstein, quite expectedly given his more general thesis regarding the socially and legally constructed nature of preferences and rights, limitations on government derive from a more abstractly normative understanding of legality. Hence the penchant on attacking private law baselines for public law arrangements; *see*—for instance—*supra*, at 426: "One of the greatest ironies of modern administrative law-an area whose origins lay in a substantial repudiation of the common law- is its continuing reliance on common law categories." Also, in "Lochner's Legacy," 87 *Colum. L. Rev.*

From a representation-centered perspective on delegation, the main consideration underlying the nondelegation doctrine is, *prima facie*, one of accountability. Once a legislature enacts statutes that, instead of prescribing clear rules of conduct and assigning benefits and burdens authoritatively, delegate lawmaking either *explicitly* (authorizing an external agency to flesh out the actual content of the law through delegated legislation or—to use the American administrative law terminology—rulemaking, pursuant to vague statutory guidance) or *implicitly* (through statutory ambiguities which allow for excessive interpretive discretion),[52] it blurs the lines of accountability, short-circuiting the self-correcting mechanisms of electoral check: "[F]ormulation of policy is a legislature's primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed to other agencies, often not answerable or responsible in the same degree to the people."[53]

The nub of the matter is not only, however, that, by delegating its power Congress erodes democracy in the sense of simply failing to aggregate and translate properly the common will of a hypothetical people. The people as such, as a subject of public law, were in a way 'relocated' by the Constitution outside government, thus making it impossible for any branch to 'speak' for them and claim a representative monopoly.[54] In fact, throughout the nineteenth and way into the twentieth century, American state constitutional law decisions repeatedly struck down local option laws (or contingent legislation whose entry into force had been made conditional on referenda) on nondelegation grounds. The opinions emphasized, in Madisonian vein, that American constitutions had ordained not simply democracy

873 (June, 1987), at 875: "Numerous decisions depend in whole or in part on common law baselines or understandings of inaction and neutrality that owe their origin to Lochner-like understandings."

[52] "The power of an administrative agency to administer a congressionally created. . .program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, at 231. *See Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, at 843–844: "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *See also Food and Drug Administration v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, at 123: "Chevron deference is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to fill in the statutory gaps." *Also see* Monaghan 1983, at p. 26: "Judicial deference to agency 'interpretation' of law is simply one way of recognizing a delegation of lawmaking authority to an agency."

[53] *United States v. Robel*, 398 U.S. 258, 276 (1967) (Brennan, J., concurring opinion).

[54] "The true distinction between [earlier republics] and the American governments lies in the total exclusion of the people, in their collective capacity, from any share in the latter. . .." The Federalist No. 63 (James Madison) *See* Gordon S. Wood, *The Creation of the American Republic: 1776–1787* (New York: Norton, 1972, c1969), at p. 599: "All parts of the government were equally responsible but limited spokesmen for the people, who remained as the absolute and perpetual sovereign. . .."

but representative democracy, a different and qualitatively superior substitute.[55] Hence, the issue seems to be also that, by delegating its law-making functions, Congress defeats the purpose of the intricate mechanisms of accommodation set forth by the legislative process provisions of Art. I (7) and curbs the main advantages of representation, as the Framers saw them: the "filtering effect" and legitimizing role of public deliberation and—the obverse side of the same coin—avoidance of 'factionalism' or private capture of public power. According to the original design, the purpose of the intricate constitutionally-ordained legislative process, which is arguably defeated by passing the buck through shell enactments and vague statutory language, was to raise the cost of law-making and thus increase the quality of legislation, by reducing the incidence of rash, ill-considered or factional enactments; here the argument from representation is fused at the hip with considerations regarding the constitutionally mandated separation of powers.[56] Raising the decision costs of passing laws means of course a less efficient

[55] An interesting survey of state decisions on delegations to voters is provided in Duff and Whiteside 1928–1929. For instance, in *Rice v. Foster* 4 Harr. 479 (Delaware 1847), one of the earliest cases of this kind, the following reasons are given by the state supreme court for striking down on nondelegation grounds a local option temperance law: "The proposition that an act of the legislature is not unconstitutional unless it contravenes some express provision of the constitution is, in the opinion of this court, untenable. . ..An act of the legislature directly repugnant to the nature and spirit of our form of government, or destructive of any of the great ends of the constitution, is contrary to its true intent and meaning; and can have no more obligatory force, than when it opposes some express prohibition contained in that instrument. . ..Wherever the power of making laws, which is the supreme power in a State, has been exercised directly by the people under an system of polity, and not by representation, civil liberty has been overthrown. Popular rights and universal suffrage, the favorite theme of every demagogue, afford, without constitutional control or a restraining power, no security to the rights of individuals, or to the permanent peace and safety of society. In every government founded on popular will, the people, although intending to do right, are the subject of impulse and passion; and have been betrayed into acts of folly, rashness, and enormity, by the flattery, deception, and influence of demagogues." Compare, nonetheless, with a contemporaneous Illinois decision upholding a law which made a division and redistricting of a county contingent on local option: "The extent to which this maxim should be applied to a legislator depends upon a proper understanding of legislative powers; upon a proper determination of what may legitimately be done in the exercise of those powers. Is it easy to say that it is the business of the legislature to make laws; but then we must inquire, what kind of laws may be made? Must they be full, complete, perfect, absolute, depending upon no contingency and conferring no discretion?" *People v. Reynolds* 10 Ill. 1 (1849).

[56] *See* for instance John F. Manning, "The Nondelegation Doctrine as a Canon of Avoidance," 2000 *Supreme Court Review* 223, 239: "More specifically, Art. I, Section 7 filters congressional lawmaking powers through the carefully structured process of bicameral passage and presentment to the President. By dividing legislative power among three relatively independent entities, that intricate and cumbersome process serves several crucial constitutional interests: it makes it more difficult for factions (or, as we would put it, 'interest groups') to capture the legislative process for private advantage, it promotes caution and restrains momentary passions, it gives special protection to the residents of small states through the states' equal representation in the Senate, and it generally creates a bias in favor of filtering out bad laws by raising the decision costs of passing any law. The nondelegation doctrine protects those interests by forcing specific policies through the process of bicameralism and presentment, rather than permitting agency lawmaking on the cheap."

legislative process, resulting in occasional stalemates, hence a reduced output, less legislation overall, both good and bad—a risk that was considered in the Founding Era, nonetheless, well-worth taking in view of the benefits.[57]

Although here is not the place for a more thorough elaboration, suffice it to point out that, from a representation-derived perspective, the rule of nondelegation seems to mandate a requirement of legislative specificity and clarity at least with respect to certain policy choices[58] and to create a strong presumption against delegations of subordinate lawmaking to politically unaccountable bureaucracies[59] and private parties.[60] In light of the foundational concern with factionalism, the delegation to

[57] The Framers were aware of the trade-off. Madison, discussing the role and value of bicameralism in The Federalist No. 62, argued that, while "the power of preventing bad laws includes that of preventing good ones," "the facility and excess of law-making seem to be the diseases to which our governments are most liable." *See also* No. 73 (Alexander Hamilton), the constitutionally prescribed legislative process guards against the "passing of bad laws through haste, inadvertence, or design."

[58] This position has been most forcefully advanced in recent years by Cass Sunstein, *see*, for instance, *Designing Democracy-What Constitutions Do* (Oxford: Oxford University Press, 2001), Chapter 6-Democracy and Rights: The Nondelegation Canons, arguing that the delegation doctrine properly reverts into canons of narrow construction and judicially mandated requirements of clear legislative specification (clear statement) in constitutionally sensitive areas, a "democracy-forcing judicial minimalism": "What I mean to identify here are the nondelegation canons, not organized or recognized as such, but central to the operation of modern public law in America and many other nations, and designed to ensure clear legislative authorization for certain decisions." (at p. 138) Sunstein's position is not without support in the case-law, *Mistretta v. U.S.*, 488 U.S. 361, 374 n7: "In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." (Blackmun, J.) *See also* Richard Stewart, "Reformation," noting use of the technique of narrow construction of statutes (as opposed to invalidation of congressional enactments: delegation used for 'nullification' purposes) as a nondelegation-related *practice* of the "post-nondelegation doctrine" Court: "Third, courts began to demand a clear statement of legislative purpose as a means of restraining the range of agency choice when fundamental individual liberties were at risk. . .The technique is more discriminating than the nondelegation doctrine; it substitutes tactical excision for wholesale invalidation." pp. 1680–1681.

[59] *See*, for instance, *Printz v. U.S.*, 521 U.S. 898, which struck down as unconstitutional provisions of the Brady Handgun Violence Prevention Act which imposed background check requirements on state officers (chief law enforcement officers (CLEOs) of each local jurisdiction); Congress cannot delegate the enforcement of federal law to state officials, unaccountable to the President, at 922: "The Brady Act effectively transfers [the responsibility to 'take Care that the Laws be faithfully executed'] to thousands of CLEOs in the 50 States, who are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove). The insistence of the Framers upon unity in the Federal Executive-to ensure both vigor and accountability- is well known." (Scalia, J., opinion of the Court). *See also* Harold J. Krent, "Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government," 85 *Nw. U. L. Rev.* 62 (Fall, 1990).

[60] For instance, in *National Association of Regulatory Utility Commissioners v. F.C.C.* 737 F2d 1095, 1143, n. 41: "Recent years have witnessed a renewal of interest in the traditional role of nondelegation doctrine. . ..As attention to this area of our law grows, it refocuses thought on one of the rationales against excessive delegation: the harm done thereby to principles of political accountability. Such harm is doubled in degree in the context of a transfer of authority from Congress to an agency and then from agency to private individuals. The vitality of challenges to the former type of transfer is suspect, but to the latter, unquestionable."

private groups of a publicly-sanctioned power to exercise non-consensual coercion is particularly suspect.

To be sure, what a constitutionally mandated level of specificity is and what the policy choices to which a requirement of legislative clarity is constitutionally attached are questions to which an answer cannot be given in the abstract. The discussion will have to wait concrete exemplifications at a later stage of our analysis. Neither can the constitutional implications regarding delegation of law-making to private actors be clarified at this point. The argument should be re-introduced, nonetheless, that the answer to this latter question is essentially dependent on where the line between public and private is drawn, so that what are essentially public and presumptively non-delegable (as opposed to private) functions can be assessed.[61]

Separation of Powers and Nondelegation: Checks and Balances

> If the effective functioning of a complex modern government requires the delegation of vast authority which, by virtue of its breath, is legislative or 'quasi-legislative' in character, I cannot accept that Article I-which is, after all, the source of the nondelegation doctrine-should forbid Congress from qualifying that grant with a legislative veto.
>
> White, J., dissenting in *I.N.S. v. Chadha*

> Precisely because the scope of delegation is largely uncontrollable by the courts, we must be particularly rigorous in preserving the Constitution's structural restrictions that deter excessive delegations.
>
> Scalia, J., dissenting in *Mistretta v. U.S.*

In the American constitutional context, the doctrine of nondelegation seems to be associated with the principle of separation of powers both conceptually, as an issue of constitutional theory, and functionally, as a matter of legal dogmatics.[62] An argument for a constitutional limitation on the legislative branch can be easily inferred *prima facie* from the doctrine of separation of powers, as derived from the text of the constitution. The introductory ("vesting") clauses of the first three articles read as follows:

> 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.[63]

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[61] *See also* Linde 1999, at p. 847 (note 74): "Much depends, of course, on whether assigning a role to private organizations is characterized as a delegation of public authority or as a legal endorsement of essentially private arrangements. The characterization often reflects unarticulated baselines of public and private functions." The foundational study on this matter is Jaffe's "Law Making by Private Groups," 51 (2) *Harvard Law Review* 201 (December, 1937).

[62] *See*, for instance, *Mistretta v. U.S.*, 488 U.S. 361, at 371 (Blackmun, J., opinion for the Court): "The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of government."

[63] US Constitution, Article I, Section 1.

> The executive Power shall be vested in a President of the United States of America.[64]
> 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.[65]

Nonetheless, a nondelegation rule derived from the text of the vesting clauses alone, while or perhaps because it constitutes a perfect instantiation of what Roscoe Pound once called "the perennial struggle of American administrative law with nineteenth-century constitutional formulations of Aristotle's three-fold classification of governmental power,"[66] is of scant analytical help. As was already noted, it yields results that are circular and absurd. By constitutional definition legislative power could not be delegated, even though legislative power is the only power the legislature has to delegate in the first place. However, it stands to practical reason that without a certain degree of interpretive discretion and delegated rule-making day-to-day government could not carry on.[67] On the other hand, if the "unreality of formal logic," as James Hart once called a purely abstract treatment of the delegation problem, be abandoned for an analysis which emphasizes scope rather than the intrinsic character of the power under analysis, where, along the continuum ranging from no discretion to abandonment or abdication should the line be drawn which distinguishes constitutional legislation from an unconstitutional delegation of the legislative power?

Some authors, most notably Kenneth Culp Davis,[68] and a few decisions, have invoked the Necessary and Proper (or "Sweeping") Clause,[69] to justify legislative delegations as a matter of constitutional principle. As the argument goes, the

[64] US Constitution, Article II, Section 1, Clause 1.

[65] US Constitution, Article III, Section 1.

[66] Roscoe Pound, *An Introduction to the Philosophy of Law,* pp. 15–16.

[67] Hart 1925, at pp. 131–132: "Furthermore, it may be argued that, since Congress has only legislative powers, any power which it delegates to another organ must of necessity be legislative in nature. The logic of such argument is flawless, but it is with the unreality of such formal logic that we disagree. The very nature of government is such that the legislature cannot always decide every detail. It becomes necessary, therefore, for the courts to distinguish between what it must do to fulfill its function and what it may either do or leave to the administrative department in connection with its execution of the law." *See also* Edward S. Corwin, *The President-Office and Powers 1787–1957 –History and Analysis of Practice and Opinion* (New York: New York University Press, 1957), pp. 122–123: "Nor is it sufficient to urge that executive power is a mere capacity to act within limits set by the legislature. For the obvious answer is that, on this assumption too, the maxim against delegation loses all its virtue unless there is some intrinsic limitation to the capacity of the executive thus to act, which again would render the maxim superfluous."

[68] Davis 1978–1984.

[69] Art. I, Section 8, Clause 18: "Congress shall have Power. . .[t]o make all Laws which shall be necessary and proper for carrying into the 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." Of course, the present discussion of the Sweeping Clause is relevant to all the nondelegation-relevant debates under review in this chapter.

Necessary and Proper Clause gives Congress the requisite constitutional authorization to decide how much to decide itself and how much to leave out for others to decide. Nonetheless, while in the abstract it is perfectly true that legislation cannot be perfectly self-contained, since any law entails discretion, a certain amount of "deciding oneself" and a certain amount of "leaving out" for others to decide (delegating),[70] as a matter of constitutional principle this argument is unhelpful and misguided. It poses the question wrongly, since a limitation on the legislative scope of Congress has to exist, otherwise a jurisdiction of enumerated legislative powers would become unfettered legislative discretion. And it states the question in form of an answer, shifting at the same time the justificatory nondelegation burden on the Sweeping Clause, since the problem is precisely determining what and how much is, constitutionally speaking, necessary and proper for Congress to decide (which is in essence the delegation question). These matters are ultimately constitutional line-drawing responsibilities for the Supreme Court (not for Congress) to exercise. That exercise, in turn, cannot be carried out solely based on the text and in the abstract; it needs to be informed by underlying constitutional values and more concrete points of reference.

It will be remembered at this juncture that, in Locke's argument, whose distinctions might once again shed some light on the matter, a nondelegation limitation on the legislative branch appeared as a corollary of the limitation of the legislature to the enactment of permanent "rules of liberty and property" addressed to the individual; Lockean legislation is always and only normative (in Lockean language, "general, antecedent, promulgated, standing rules of liberty and property"), not constitutive. Conversely, it should be pointed out that the reverse side of Locke's limitation of legislation to normative enactments was the recognition that there are certain fields of government action and situations that, by their very nature, cannot be regulated in the same manner as the regular domestic regime of liberty and property, by means of rules. Because they are irreducible to legislative prescription, these matters need to be regulated politically and according to discretion. One cannot predetermine by rules, for instance, the actions of foreigners, which are dynamic and unpredictable, whereas their treatment in domestic law is largely subordinated to prudential considerations deriving from foreign affairs imponderables and the pursuit of national interest; the matter is better left to "the prudence of those, who have this power committed to them, to be managed by the best of their skill, for the advantage of the commonwealth."[71] Hence, Locke's

[70] *See* Scalia, J. dissenting opinion in *Mistretta v. U.S.*, 488 U.S. 361, at 417: "The whole theory of *lawful* congressional 'delegation' is not that Congress is sometimes too busy or too divided and can therefore assign its responsibility of making law to someone else; but rather that a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or how large that degree shall be." (emphases in original) The delegation question bears precisely on the parenthetical observation "up to a point."

[71] *See esp.* Second Treatise of Civil Government, § 147, cited in full and commented, *supra*.

federative and prerogative 'powers' were treated as analytically distinct from the executive (where by 'executive' he essentially understood non-discretionary or ministerial execution of the law), even though, as a matter of governmental practice, Locke correctly pointed out that the same person or group of people would need in most cases to exercise all three of these 'powers': the executive (in the sense of non-discretionary enforcement of the law), the federative, and the prerogative.

Unlike Locke's legislature, the American Congress shares with the executive branch attributions in fields which Locke considered as essentially non-legislative, such as foreign affairs and war measures, whereas emergency situations are almost completely passed over in the text of the Constitution.[72] By the same token, in spite of theoretical arguments and occasional judicial rebuffs to the contrary,[73] a president, by virtue of his independent constitutional attributions (Chief Executive, Commander in Chief) and of the constitutional power to "take care that the laws are faithfully executed" has a certain original, independent law-making (decree-making) power.

What nondelegation means in the context of separation of powers is dependent on first identifying and defining the relevant among two different theoretical strands, so that the considerations underlying a nondelegation doctrine could be isolated and independently assessed. The conceptual intersections will mainly vary, as we have already noted in the course of the previous chapter, with respect to whether one refers to a constitutive or procedural, checks-and-balances variance of the separation of powers or a rule-of-law or normative, more functionally-oriented, version of the doctrine.

Within the balance version, power has a more dynamic and colloquial meaning (sway, strength, influence)[74] and the major concern is "undue" accumulation or

[72] "Article II vests 'the executive power in the president, but only after Article I has given most of the traditional royal prerogatives, or at least a share in them, to one or both houses of Congress." Forrest McDonald, Foreword, *The Constitution and the American Presidency*, (Martin L. Fausold & Alan Shank eds., 1991), at ix.

[73] "In the framework of our Constitution, the President's power to *see* that the laws are faithfully executed refutes the idea that he is to be a lawmaker. . ..And the Constitution is neither silent nor equivocal about who shall make the laws that the President is to execute. The first section of the first article says that 'All legislative Powers herein granted shall be vested in a Congress of the United States. . .'" *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 937, 579, 587 (Black, J., opinion for the Court).

[74] A good exemplification of the balance theory can be found in Blackstone, 1 (Ch. 2) *Commentaries* 151, speaking of the benefits of the balance of powers (the two Houses of Parliament and the "crown, which is a part of the legislative, and the sole executive magistrate"): "Like three distinct powers in mechanics, they jointly impel the machine of government in a direction different from what either, acting by themselves, would have done; but at the same time in a direction partaking of each and formed out of all; a direction constitutes the true line of the liberty and happiness of the community." *See*, for a similar argument regarding the two main strands of separation of powers arguments and constraints, Elizabeth Magill, "The Real Separation in Separation of Powers Law," 86 (2) *Virginia Law Review* 1127 (September 2000).

aggrandizement of political power at any one point in the system, threatening monopoly. The balance version or strand of the principle of separation of powers is related mainly to the prevention of tyranny by structural (institutional autonomy and procedural interdependence, checks and balances) arrangements. From this perspective, the main concern underlying the nondelegation doctrine is aggrandizement of the executive by means of open-ended statutory authorizations. As we will see in due course, the modern phenomenon of massive lawmaking delegations tilted the balance in favor of the Presidency and a revival or vigorous enforcement of the rule of nondelegation, it is sometimes believed, would, in the new setting, produce salutary results consistent with the original scheme of distributing power among autonomous institutional actors. In this respect, as Laurence Tribe pointed out, nondelegation would serve the dual purpose of the separation of powers principles underpinning the constitutional allocation of powers, namely that of "simultaneously limit[ing] and protect[ing] congressional power."[75] Conversely and by the same token, the phenomenon of massive delegations of law-making discretion to the executive and the administration produced both a number of new institutional accommodations and a resulting conceptual divergence in separation of powers jurisprudence, arising from modern judicial attempts to grapple with the phenomenon of delegation ('formalist' and 'functionalist' schools).

Separation of Powers and Nondelegation: The Rule of Law Version of Separation of Powers

> [N]ormally the progress of law should be away from discretion toward definite rule.
> Ernst Freund, "The Substitution of Rule for Discretion in Public Law" (1915)

We now come to another version of the nondelegation doctrine, conceptually related to the normative, rule of law strand of the principle of separation of powers. Looked at from this perspective, by delegation is understood a formal statute which grants a vast amount of discretion, whether of rulemaking or (quasi-)adjudication, to the implementing/enforcement agency. Here, the principles or rather values underlying the doctrine are grounded in considerations of justice and dignitary concerns which regard the discrete individual faced with adverse state action. In this understanding and from this perspective, the nondelegation doctrine is related to the fair notice and due process (or 'natural justice') considerations of impartiality and independence underlying the procedural requirements of the due process clause of the Fifth and Fourteenth Amendments[76] and—more directly—to the substantive

[75] Tribe 1988, at p. 362. *See also* Verkuil 1989, at 318: "The courts can review the quality of the delegation, to ensure that legislative power is not unintentionally divested. In this role, the Court acts paternalistically, to protect Congress from itself."

[76] *See* Cushman 1941, who, not at all surprisingly given the topic of his study, reduces the rule of nondelegation to a matter of due process (discretion confined by standards): "To permit (. . .) an officer or an agency to exercise legislative power unrestrained by legislative standards is to subject

fair warning requirements of the related void-for-vagueness doctrine or the rule of lenity in criminal law.[77] In the latter, substantive dimension, the doctrine is also germane to the requirements of the First Amendment overbreadth doctrine on the specificity of enactments, even though the area of fundamental rights is more focused and seems analytically and constitutionally distinct from the problem of nondelegation as such. The reason why a high degree of specificity or statutory precision is required in this area is that, otherwise, selective licensing policies (where prior licensing is required), and selective, discriminating or arbitrary enforcement (where sanctions are applied) would achieve indirectly what is not permissible directly, i.e., prior restraints on speech (censorship) or content-based

the citizen to the danger of an arbitrary power against which he may have no effective protection. It is but a short step from this to the position that one whose rights have been impaired by the exercise of unrestrained legislative discretion in the hands of an administrative officer or agency is being deprived of liberty or property without the due process of law. In short, the rule against the delegation of legislative power as it is now construed exists not for the purpose of keeping alive an abstract principle of government, but for the purpose of surrounding private rights with a protection just as readily available under the due process clause. In fact, the doctrine of the non-delegability of legislative power could safely be scrapped as long as due process of law remains the effective constitutional guarantee it now is." Robert E. Cushman, *The Independent Regulatory Commissions* (New York: Pentagon Books, 1972 (c1941)), pp. 433–434. Now, of course, as such, a constitutional requirement of legislative standards to guide the delegate can serve both structural (balance version) separation of powers purposes and normative (discretion-related) separation of powers considerations. In this respect, compare *Skinner v. Mid-America Pipeline, Co.*, 109 S. Ct. 1726, 1731: "[S]o long as Congress provides an administrative agency with standards guiding its actions such that a court could 'ascertain whether the will of Congress has been obeyed,' no delegation of legislative authority trenching on the principle of separation of powers has occurred."; and *American Power & Light Co. v. SEC* 329 U.S. 90, 105 "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in light of these legislative declarations."

[77] The void-for-vagueness doctrine supports the same clarity and generality purposes of the rule-of-law version of nondelegation, by requiring, to use Oliver Wendell Holmes's characteristically terse and eloquent definition that "[a]lthough it is unlikely a criminal will consider the text of law before he murders or steals, it is reasonable that a fair warning be given the world, in language the common world will understand, of what the law intends to do if a certain line is passed." In *McBoyle v. U.S.* 283 U.S. 25. To better perceive the correlation, in *United States v. L. Cohen Grocery Co.* 255 U.S. 81 (1921), a grocer was indicted under a provision of the war time Food Control Act, which made it a federal crime, punishable with imprisonment for up to two years "for any person willfully. . .to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." The defendant challenged the constitutionality of the act on nondelegation grounds: Congress had delegated to courts and juries its "legislative power to determine what acts should be held to be criminal and punishable." The court struck down the provision on void-for-vagueness grounds: Congress had not fixed an ascertainable standard of guilt, adequate to present the accused under the statute with the nature and cause of the accusation against them: "to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of court and jury." (White, J., opinion of the Court, 255 U.S. 81, 89).

restrictions. The following excerpt from a concurring opinion of Justice Brennan is particularly useful for illustrating the constitutional problematics: "Congress ordinarily may delegate power under broad standards. . ..The area of permissible indefiniteness narrows, however, when the regulation invokes criminal sanctions and potentially affects fundamental rights. . .This is because the numerous deficiencies connected with vague legislative directives whether to a legislative committee. . .to an executive officer. . .to a judge and jury. . .or to private persons. . .are far more serious when liberty and the exercise of fundamental rights are at stake."[78] (case citations omitted)

Arguments which approach the problem of delegation from a rule of law perspective are also concerned with the systemic values which would be served by imposing across the board qualitative rule of law constraints on legislation (and on the institutional legislature): a legal system modeled as a framework of rules of just conduct enhances net individual liberty (Hayek),[79] promotes dignitary values (Fuller),[80] enhances both democracy and the authority of law as such (Lowi).[81]

[78] *U.S. v. Robel*, 389 U.S. 258 (1967), 274–275, Frankfurter, J., concurring. *See* Tribe 1988 § 12–38, "The Problem of Overbroad Delegation," pp. 1055–1057.

[79] *See* Friedrich Augustus von Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1978 (c1960)), pp. 212–213: "The trouble with the widespread use of delegation in modern times is not that the power of making general rules is delegated but that administrative authorities are, in effect, given the power to wield coercion without rule, as no general rules can be formulated which guide the exercise of such power. What is often called 'delegation of law-making power' is often not delegation of the power to make rules—which may be undemocratic or politically unwise—but delegation of the authority to give any decision the force of law, so that, like an act of the legislature, it must be unquestioningly accepted by the courts. . ..It is only when the administration interferes with the private sphere of the citizen that the problem of discretion becomes relevant to us; and the principle of the rule of law, in effect, means that the administrative authorities should have no discretionary powers in this respect." *Also see The Road to Serfdom* (London: Routledge, 1991, c1944) and *Law, Legislation, and Liberty-A New Statement of the Liberal Principles of Justice and Political Economy* (London: Routledge, 1993 (c1982)). In the former work, Hayek famously argued that, given the massive exercise of administrative discretion by the administration, pursuant to the open-ended enabling type of legislation characteristic of the twentieth century, the difference between Western democracies and the contemporaneous Nazi Germany or Stalinist Russia was just one of degree. By 'rules of just conduct' Hayek understood the traditional tort, contract, property, and criminal law, which coagulated into a framework of clear guidelines for individual action. As I understand his main thesis, the more legislation departs from this model and allows for administrative discretion which interferes with the private sphere of the citizen, the more individual liberty is displaced by legislatively-mandated discretion. Hayek's preferred model of law is not legislation but common-law, which, by its emphasis on tradition and incremental development by means of analogy and contextual distinctions over time, was, epistemologically, the embodiment of a superior type of rationality than legislation, in Hayek's opinion, a rationalistic, warped, rigid, one-time exercise in a larger post-Enlightenment project of self-subverting rationality.

[80] *See* his *The Morality of Law* (New Haven: Yale University Press, 1969).

[81] *See* Lowi, *The End of Liberalism-The Second Republic of the United States*, 2nd edition (New York and London: Norton, c1979), *esp*. Chapter 5: "Liberal Jurisprudence: Policy without Law," pp. 92–126. The thesis, as I understand it, is that the displacement of the rule of law as a law

Yet these latter considerations are contingent or epiphenomenal, and should not be allowed to detract attention away from correctly comprehending that the principal consideration underlying the nondelegation doctrine from a normative, rule of law-derived separation of powers perspective, is discretion in the sense of arbitrariness, which needs in this account to be at the same time checked and authorized by clear and specific legislative directions.[82] Specific, normative enactments guide administrative action and minimize the incursion of the state in the protected sphere of individual autonomy, since clear legislative guidance (where no discretion equates no delegation) makes it possible in turn for the court to exercise its role of containment. This theoretical account of nondelegation finds in the evolution of American administrative law a paradigmatic instantiation in the historical period identified by Richard Stewart as the "traditional" or the "transmission belt" model of administration, which, according to him, ran until and up to the New Deal and was characterized[83] by "protecting private autonomy by curbing agency power":

of "authoritative" rules by statutory grants of discretion accompanied by vague standards obfuscated the distinction between politics and law, by rendering the entire political process "tentative" and thus amenable at all its points to bargaining and horse-trading, therefore subject to capture by the most vociferous or powerful interest-groups: "Liberal jurisprudence is a contradiction in terms. Liberalism is hostile to law. . ..Interest-group liberalism has little place for law because laws interfere with the political process. . ..In brief, law, in the liberal view, is too authoritative a use of authority. Authority has to be tentative and accessible to be acceptable. If authority is to be accommodated to the liberal myth that it is no power at all, it must emerge out of individual bargains. . ..Delegation of power provides the legal basis for rendering a statute tentative enough to keep the political process in good working order all the way down from Congress to the hearing examiner, the meat inspector, the community action superviser, and the individual clients with which they deal. Everyone can feel that he is part of one big policy-making family." pp. 92–93. *Also see*, by the same author, "Two Roads to Serfdom: Liberalism, Conservatism, and Administrative Power, 36 *Am. U. L. Rev*. 295 (Winter, 1987).

[82] Laurence Tribe's caveat is, nonetheless, particularly useful here: "But vagueness is not calculable with precision; in any particular area, the legislature confronts a dilemma: to draft with narrow particularity is risk nullification by easy evasion of the legislative purpose; to draft with great generality is to risk ensnarement of the innocent in a net designed for others." *Supra*, at p. 1033. *See also* Colin Diver, "The Optimal Precision of Administrative Rule" 93 *Yale L. J*. 65 (Nov. 1983), identifying three 'dimensions' of rules, "transparency" (the virtue chiefly celebrated by the delegation doctrine), "accessibility" (the degree to which a rule is accessible to its intended audience and "easily applicable to concrete situations without excessive difficulty or effort"), "congruence" (basically, means-ends correlation) and observing that pursuing change on one dimension will usually require a trade-off on another. The necessity of "transparency" – "congruence" tradeoffs is evident *prima facie*.

[83] Stewart's well-known study identified three periods, roughly, pre-New Deal, New Deal, post-New Deal-especially the 60s and 70s, characterized by three paradigms of administrative law, the traditional (when judicial review was focused on policing and containing discretion), expertise (when judicial deference was justified by the belief in the expertise of the administrator of the statute), and the interest-balancing models of administrative law (judicial review serves the function of reinforcement and balancing of participation or—if you will—representation in administrative rulemaking processes, so that bureaucratic decision making approaches a surrogate micro-legislative process). The periods are slightly overlapping while the 'models' of administrative law have to be understood in the Weberian sense of ideal-types, i.e., explanations that give

"With the possible exceptions of military and foreign affairs functions and times of national emergency, the Constitution recognizes no inherent administrative powers over persons and property. Coercive controls on private conduct must be authorized by the legislature, and under the doctrine against delegation of legislative power, the legislature must promulgate rules, standards, goals or some 'intelligible principle' to guide the exercise of administrative power."[84] The mutually reinforcing considerations of individual autonomy, fairness, and coherence (predictability and consistency) that underlie a rule of law-oriented rule of nondelegation are of course analytically distinct from the nondelegation constraint on legislation as such. What joins discretion and the nondelegation constraint on the legislature is a requirement and an assumption that intrusions into the protected individual sphere are legitimate only if assented to and agreed upon by the people's representatives, through the legislative process, because of the limited mandate that legislation has and—secondarily—since thus the people are taken to impose burdens on themselves. Here, indeed, defining the protected individual sphere (for instance, this protected sphere could be defined along a life, liberty, and property criterion; or just fundamental rights) will be the crucial question for conceptually assessing the level of legislative vagueness that constitutes an impermissible delegation. To put it even more clearly, from the standpoint of conceptualizing a general constraint on legislation and the legislature, the delegation inquiry will ultimately have to be conceptually traced back to the point of identification of a baseline: a stable line of assessment delimiting private autonomy from permissible scope of public (legislative) action. Theoretically, in Locke, for instance, the limit is one of natural and therefore neutral, pre-political rights: the life, liberty, and property triad; legislation is institutionalized natural law. Historically, the common law also presumed both liberty and property rights as a legal baseline for gauging state action in terms of departure from status quo (neutrality) and legislative legitimacy.

At the end of this section and related to what has been remarked above regarding the analytical distinctiveness of rule of law-related concerns with discretion, it should be pointed out that the doctrine can also revert from constraints on legislation and legislative discretion into nondelegation-derived limitations on the administration. Thus, for instance, a derivative nondelegation constraint can be imposed on the administration by judicial requirements to check and confine its legislatively-granted discretion through standards and rules.[85] The logic is apparent: a legislative delegation places on the administration a rule-of-law duty to confine its discretion by delegated legislation which corresponds to the formal justice requirements which we associate with legislation in the first place. In modern American legal theory, this secondary rule of nondelegation is associated with the work of Kenneth

coherence to clusters of judicial review and legislative developments, extracting out of them the dominant paradigm. Richard B. Stewart, "The Reformation of American Administrative Law," 88 *Harv. L. Rev.* 1667 (1974–1975).

[84] *Id.,* at 1672.

[85] *See*, for instance, *Holmes v. New York City Housing Authority*, 398 F.2d 262 (1968).

Culp Davis on administrative discretion. While Davis deemed the nondelegation doctrine as a conceptual excrescence of—in his words—the Diceyan-Hayekian "extravagant notion of the rule of law,"[86] he advanced the argument that courts could impose, in the absence of legislative standards, a sort of 'nondelegation doctrine' on the administration.[87] In terms of actual judicial practices, even as the problem will be revisited, to anticipate further discussion and clarify the pragmatic stakes of the matter, consider the following excerpt from a modern Oregon Court of Appeals decision which required the Oregon Liquor Control Commission to structure and limit its licensing discretion, exercised under the open-ended guidance "demanded by public interest or convenience," through written and published standards and rules; I shall take the liberty of giving a longer citation which, to put it in vernacular, covers all the bases: "A legislative delegation of power in broad statutory language such as the phrase 'demanded by public interest or convenience' places upon the administrative agency a responsibility to establish standards by which that law is to be applied. . ..We recognize the wide discretion vested in the commission by its enabling legislation, but that discretion is not unbridled. It is discretion to make policies for even application, not discretion to treat each case on an ad hoc basis. . ..Finally, and most directly applicable to this case, the parties to a contested case are entitled to judicial review. Judicial review is among the safeguards which serve to legitimatize broad legislative delegations of power to administrative agencies. In the absence of standards, however, the courts are unable to perform that task of judicial review."[88]

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[86] Kenneth Culp Davis, *Discretionary Justice- A Preliminary Inquiry* (Westport, CT: Greenwood Press, 1980 (c1969, by Louisiana University Press)), II-The Rule of Law and the Non-delegation Doctrine, pp. 27–51. *See* Stewart 1974-1975 arguing that Davis's derivative version of the doctrine is, unsurprisingly, fraught with the same difficulties, judicial enforcement-wise, as the doctrine itself. *See* Skelly Wright, *Beyond Discretionary Justice* (Book Review; reviewing Davis) 81 *Yale L. J.* 575, 582 (1972): "We need, in short, some standards for when we should require standards."

[87] *Id*., at pp. 58–59. "I propose that the courts should continue their requirement of meaningful standards, except that when the legislative body fails to prescribe the required standards the administrators should be allowed to satisfy the requirement by prescribing them within a reasonable time. . ..The requirement should gradually grow into a requirement that administrators must strive to do as much as they reasonably can to develop and to make known the needed confinements of discretionary power through standards, principles, and rules. The nondelegation doctrine might also be gradually shifted from a constitutional base to a common law base." (emphases omitted)

[88] *Sun-Ray Drive-In Dairy, Inc. v. Oregon Liquor Control Commission*, 16 Or. App. 63, 517 P.2d 289 (Or. App. 1973). *See* comments in Mashaw et al., p. 82. As a matter of federal law, the D.C. Circuit Court of Appeals held, in a 1999 decision, that the Environmental Protection Agency's failure to limit its statutory discretion under the Clean Air Act by an "intelligible standard" violated the nondelegation doctrine, effecting an unconstitutional delegation of legislative power, and remanded to the agency for adoption of a limiting, permissible construction of the statute (*American Trucking Associations, Inc. v United States Environmental Protection Agency*, 175 F.3d 1027(C.A.D.C., 1999)) Now, as one can *see*, even though the issues are related, in terms of constitutional nondelegation constraints, this interpretation has the matter completely the other way around. The Supreme Court reversed, observing, in a characteristically trenchant opinion by

3.1.2 Legislation and Delegated Lawmaking in American Constitutional History

> From Wiscasset in the district of Maine, to Savannah in Georgia, by the following route, to wit: Portland, Portsmouth, Newburyport, Ipswich, Salem, Boston, Worcester, Springfield, Hartford, Middletown, New Haven, Stratford, Fairfield, Norwalk, Stamford, New York, Newark, Elizabethtown, Woodbridge, Brunswick, Princeton, Trenton, Bristol, Philadelphia, Chester, Wilmington, Elkton, Charlestown, Havre-de-Grace, Hartford, Baltimore, Blandensburg, Georgetown, Alexandria, Colchester, Dumfries, Fredericksburg, Bowling Green, Hanover court-house, Richmond, Petersburg, Halifax, Tarborough, Smithfield, Fayetteville, Newbridge over Downing creek, Cheraw court-house, Camden, Statesburg, Columbia, Cambridge and Augusta; and from thence to Savannah.
>
> Act of February 20, 1792, ch. 7, § 1, 1 Stat. 232, establishing the first post road
>
> Article I, Section 8, Clause 7, granting Congress the power "[t]o Establish Post Offices and Post Roads."

Contemporanea expositio est optima et fortissima in lege. The excerpt from the 1792 Act of Congress that serves as motto for this introduction is not necessarily meant to unravel, by pointing out the minute enumeration that the statute makes of each single point of transit on the post road, the public-spiritedness of early American legislatures and the public-regardedness of specificity in statutory language. Indeed, from a public choice perspective on delegation, specificity is sometimes indicative, conversely, of interest-group ('factional,' in Madisonian language) legislation.[89] In 1792, being on a post route was one of the most valuable

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Scalia, J.: "In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. . ..We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute. . ..The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise –that is to say, the prescription of the standard that Congress had omitted- would *itself* be an exercise of forbidden legislative authority. Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer." *Whitman v. American Trucking Association*, 531 U.S. 457, 472–473 (2001).

[89] In "A Theory of Legislative Delegation," 68 *Cornell L. Rev*. 1 (1982–1983), a standard public choice treatment of the nondelegation doctrine, Peter H. Aranson, Ernest Gellhorn, and Glen O. Robinson (AGR), argue that the practice of congressional delegations creates 'public policy lotteries' (by virtue of the irresolution reflected in vague statutory language, politics is moved down the line into the administration of the statute) and 'fiscal illusions' (by not assigning clearly benefits and burdens, the real policy stakes and the actual costs of a given regulatory scheme are obfuscated and delayed, just like in the case of deficit spending) and distributes private goods at public expense. Thus, according to AGR, vigorous enforcement of the nondelegation doctrine would produce more public goods legislation and thus increase aggregate social welfare. But *see* Jerry L. Mashaw, *Greed, Chaos, and Governance-Using Public Choice to Improve Public Law* (New Haven, CT.: Yale University Press, 1997), at pp. 143, arguing that, often enough, it is precisely specific legislation which codifies pork barrel transactions, so that "AGR should advocate a constitutional rule which somehow requires that the legislature be limited to specific

federal goods one's Congressman could deliver and, consequently, the 1792 act might be regarded as no more than an early example of 'pork-barrel politics.' There is an even better reason for referring to this statutory provision. The choice between specificity and generality of the statutory language in this particular case occasioned the first delegation controversy in American constitutional history.

The debates on a postal bill began in the first session of Congress after the ratification of the Constitution. The original version reported to the Committee of the Whole was in effect an enabling act, authorizing the President to decide, at his discretion, the postal routes and the locations of the post offices. This language was stricken when an unnamed representative argued that "this is a power vested in Congress by an express clause of the Constitution, and therefore cannot be delegated to any person whatever."[90] The final version of the bill continued with the Post Office and established the office of the Postmaster General, under the authority of the President "in performing the duties of his office and in forming contracts for the transportation of the mail."[91] The Post Office was afterwards continued by two statutes providing for 1-year extensions until, in December 1791, during the House of Representatives Committee of the Whole debate of the First Session of the Second Congress on a more detailed bill, which, among other new specifications,[92] designated in its first section a particular coastal post road from Maine to Georgia. Representative Sedgwick proposed to strike out the clause which designated the route and insert instead the following language: "by such route as the President of the United States shall, from time to time, cause to be established."[93] Sedgwick noted that the second clause of the bill, as reported by the committee, read: "it shall be lawful for the Postmaster General to establish such other roads as post roads, as to him may seem necessary."[94] Should his motion be deemed unconstitutional on delegation reasons, Sedgwick argued, the second section as reported would also be invalid, "for if the power was altogether indelegable, no part of it could be delegated; and if a part of it could, he saw no reason why the whole could not."[95]

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legislation whenever it wants to be vague, and to vague legislation whenever it finds it easier to be specific."

[90] I was able to find the excerpt from the postal act and the reference to this particular legislative debate in Gary Lawson, "Discretion as Delegation: The 'Proper' Understanding of the Nondelegation Doctrine" 73 George Wash. L. Rev. 235 (2005) and Nicholas J. Szabo, "Origins of the Nondelegation Doctrine" (unpublished paper available for download at http://szabo.best.vwh.net/delegation.pdf, last visited August 19, 2005), respectively. The Congressional debates cited here can be found on-line, on the website of the Library of Congress, http://www.memory.loc.gov/ammem/amlaw/lwac.html, Annals of Congress, 2nd Congress, 1st Session, House of Representatives debates, *see* Post Office Bill, pp. 229–235, 237–242 December 1791.

[91] 1 Cong. Sess. I Ch. 16, Act of September 22, 1789, 1 Stat. 70.

[92] The act also formally admitted newspapers to the mails and prohibited postal officials from opening letters.

[93] Annals of Congress (Library of Congress on-line version, *see* URL *supra*) at p. 229.

[94] *Id*., p. 230.

[95] *Id*.

Moreover, he reasoned, if the duty of Congress to the commands of the Constitution is understood in an absolute sense, to require no delegation in the sense of no implementing discretion whatsoever, why would not members of Congress turn coiners and start minting money, in fulfillment of their Art. I, Section 8, clause 5 duty "[t]o coin Money"? The constitutional difference between legislation and execution cannot be understood as more than a difference between establishing a *principle* and carrying it through by means of administration: "Congress, he observed, are authorized not only to establish post offices and post roads, but also to borrow money; but is it understood that Congress are to go in a body to borrow every sum that may be requisite? Is it not rather their office to determine the principle on which the business is to be conducted, and then delegate the power of carrying their resolves into execution? They are also empowered to coin money, and if no part of their power be delegable, he did not know but they might be obliged to turn coiners and work in the Mint themselves."[96] In a rebuff, Representative Page carried the *reductio ad absurdum* argument to the opposite pole of the continuum: if this much legislative discretion could be constitutionally devolved upon another branch, why could not everything legislative be left to the lights of the Executive and meanwhile Congress might as well adjourn indefinitely: "If the motion before the committee succeeds, I shall make one which will save a deal of time and money, by making a short session of it; for if this House can, with propriety, leave the business of the post office to the President, it may leave to him any other business of legislation; and I may move to adjourn and leave all the objects of legislation to his sole consideration and direction."[97]

One of the supporters of the Sedgwick motion opined in turn that, since the duty of Congress, lying as of necessity it must somewhere between these two extremes, was a matter of degree, unascertainable in a principled manner, how much regulation was constitutionally mandated must in the end be left to the decision of the legislature: "Much has been observed respecting the Legislative and Executive powers, and the committee are cautioned against delegating the powers of the Legislature to the Supreme Executive. Without attempting a definition of their powers, or determining their respective limits, which he conceived it was extremely difficult to do, he would only observe that much must necessarily be left to the discretion of the Legislature."[98] Prudential considerations were also adduced in support of the Sedgwick motion, most notably the necessity of future adjustments in the administration of the law (which would be hampered by making advance statutory provision for a given route) and the superior expertise of the administration.

Most Congressmen spoke vehemently against a delegation to either the President or the Postmaster General, delegation that they regarded not only as unconstitutional as such, in relation to the Art. I legislative duties of Congress, but also as a practice

[96] *Id*., pp. 230–231.
[97] *Id*., 233.
[98] *Id*., 236.

prone to breed in the long run administrative corruption and executive tyranny. The motion was voted down in the session of Wednesday, December 7. One of the most eloquent closing arguments against it, before it was put to the vote of the Committee of the Whole, came from James Madison. He observed that, since the power had been granted in the Constitution, it was the duty of the legislature to exercise it itself, whereas the specificity of the authorization would of necessity vary with the field of regulation and the necessity of further adjustment could be fulfilled by Congress through further legislative action. The fact that a line could not be logically drawn along a continuum of discretion to describe the difference between legislative and executive action was of no consequence, since the matter was not one of abstract logic but of practical government and needed to be perceived in a given context: "Mr. Madison said, that the arguments which are offered by the gentleman [*sic*] who are in favor of the amendment, appear to be drawn rather from theory than from any line of practice which had hitherto governed the House. However difficult it may be to determine with precision the exact boundaries of the Legislative and Executive powers, he was of the opinion that those arguments were not well founded, for they admit of such construction as will lead to blending those powers so as to leave no line of separation whatsoever."[99]

3.1.2.1 The Executive, the Administration, and the Bounds of Legislative Specificity

> Thus we arrive at the fundamental principles of our administrative system: no executive power without express statutory authority-the principle of enumeration; minute regulation of nearly all executive functions, so that they become mere ministerial acts-the principle of specialization; and specific delegation of these functions to separate officers-the principle of diffusion of executive power. In contrast to these we find in Europe executive powers independent of statute, discretionary powers of action and control vested in superior officers, and the concentration of the administrative powers of the government through the hierarchical organization of the executive departments.
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> Ernst Freund, "The Law of the Administration in America," 9 (3) *Political Science Quarterly* (September 1894)

> [I]n a government by law discretion ought to have a very limited place in administration. Its legitimate function is indicated by the organization of a chief executive power which stands for that residuum of government otherwise subject to law which cannot be reduced to rule.
>
> Ernst Freund, "The Substitution of Rule for Discretion in Public Law" 9 (4) *American Political Science Review* (November, 1915)

> The distinction between administrative power and executive power, a distinction which once had the stature of a first principle, is today on the verge of obliteration, and ready and waiting to replace it is the concept of the unity of the executive power.
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> Nathan D. Grundstein, "Presidential Power, Administration, and Administrative Law," 18 (3) *Geo. Wash. L. Rev.* 285 (April, 1950)

[99] *Id.* 238.

> THE COURT: So, when the sovereign people adopted the Constitution, it enumerated the powers set up in the Constitution, but limited the powers of Congress and limited the powers of the judiciary, but it did not limit the powers of the Executive. Is that what you say?
> Mr. BALDRIDGE: That is the way we read Article II of the Constitution.
> Argument for the Government in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 937 (1952) (*The Steel Seizure Case*) (in Alan F. Westin, *The Anatomy of a Constitutional Law Case* (1958)

As Justice Holmes pointed out with characteristic acumen and typical hyperbole, sometimes and on certain points of law "a page of history is worth a volume of logic."[100] *Consuetudo est optimum interpres legum*. While the Sedgwick delegation motion with respect to the Post Office Establishment occasioned fiery opposition and was easily defeated in favor of specific language delineating the administrative attributions of the Postmaster General and even the exact route of the post road, the controlling provisions of two contemporaneous statutes, which created the Foreign Affairs and War Departments, were worded in the following language: "Be it enacted, &c., That there shall be an Executive department, to be denominated the Department of Foreign Affairs, and that there shall be a principal officer therein, to be called the Secretary for the Department of Foreign Affairs, who shall perform and execute *such duties as shall from time to time be enjoined on or entrusted to him by the President of the United States,* agreeable to the Constitution. . .and furthermore, that the said principal officer shall conduct the business of the said department *in such manner as the President of the United States shall, from time to time, order and instruct*." (emphasis supplied)[101]

The explanation (which presents much interest for our topic) that comports best with historical fact and common historical sense resides in the peculiarly American separation between executive and administrative functions. From the onset, a number of Presidential powers were deemed as essentially executive in nature, where by 'executive' it was understood, *caeteris paribus*,[102] something more in the Lockean sense of 'prerogative' or 'federative' powers or Blackstone's conception of prerogative (*i.e*., primarily military and foreign affairs attributions).[103]

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[100] *New York Trust Co. v. Eisner*, 256 U.S. 345, 349.

[101] An Act Establishing an Executive Department, to be denominated the Department of Foreign Affairs, Act of July 27, 1789, ch. 4, 1 Stat. 28, § 1. The War Department Act, § 1 (Act of August 7, 1789, 1 Stat. 49) contains, *mutatis mutandis*, almost identical language.

[102] Namely, 'as qualified by the constitutional institutional (structural) arrangements' (for instance, the Senate foreign affairs role or Congress's power "to declare war" or "grant letters of marque and reprisal").

[103] *See* Arthur Bestor, "Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined," 5 *Seton Hall L. Rev*. 527 (1974), at p. 532: "Executive power signified to Blackstone, as it did to the American framers, those powers of decision and action that can be exercised by a chief executive in his name, simply by virtue of the authority granted directly to him by the constitution or the laws. Though the executive may ultimately be held responsible-by impeachment or repudiation at the polls-for executive decisions made or executive actions carried out, executive powers themselves are almost by definition discretionary, and therefore capable of being exercised without the necessity of submitting a proposed course of action to prior legislative deliberation or approval."

The latter's view of the matter, particularly given the influence of the *Commentaries* (as one of the main and most accessible authorities on the common law) on the Framers, presents particular interest in this respect. Its brief summation shall be useful here, for heuristic purposes. Blackstone makes a clear distinction between the prerogatives of the crown "respect[ing]. . .[England's] intercourse with foreign nations" and those that concern "its own domestic government and civil polity." Regarding the former, the king is "the delegate or representative of his people" and embodies the sovereignty of the nation in relation to other equal sovereigns.[104] Thus, the prerogatives of the King in respect of war and foreign affairs are vast and unchecked by "stated rule, or express legal provision," even though a political check exists in the possibility of impeaching ministers of the Crown. The list of 'external' prerogatives comprises power to conclude treaties, to wage war, send and receive ambassadors, grant letters of safe conduct, power to control the entry and residence of foreigners, who "are under the king's protection, though liable to be sent home when the king sees occasion."[105] Likewise and on the same principle, in the exercise of domestic prerogatives directly related to foreign affairs prerogatives, such as controlling the exportation of arms, Parliament would normally grant the executive broad powers.[106] In purely domestic matters, on the other hand, the

[104] As a matter of political and legal theory, this distinction is usually explained in natural law and the contractarian tradition (the argument comes forth most clearly, though with different emphasis, in both Locke and Hobbes) by the fact that, while the creation of civil government presupposes the giving up of each member's natural right to wage war within the political community (consequently, all-out conflict is contained within), without, states as such remain in the state of nature (which is potentially a state of war). Blackstone seized on this principle, and adduced it to strengthen the argument, in addition to historical (the Crown's residuum of power) and prudential (need for unity and strength) considerations: "For it is held by all the writers on the law of nature, that the right of making war, which by nature subsisted in every individual, is given up by all private persons that enter into society, and is vested in the sovereign power." 1 *Blackstone's Commentaries* (Ch.7-"Of the King's Prerogative") 249.

[105] *Id.*, at p. 252.

[106] *See* for instance 1 *Blackstone's Commentaries* 255, commenting on "the power vested in his majesty, by statutes 12 Car.II.c.4. and 29 Geo.II.c.16 of prohibiting the exportation of arms or ammunition out of this kingdom, under severe penalties." In this vein, consider the argument in *United States v. Curtiss Wright Export Corporation*., 299 U.S. 304 (1936), where the Court considered a delegation challenge to a congressional joint resolution authorizing the President to prohibit or allow, by proclamation, the sale of arms and ammunitions to countries engaged in armed conflict in the Chaco region, if such prohibition—or allowance—"may contribute to the reestablishment of peace." In a famous opinion, Justice Sutherland (largely in dicta) described attributes of external sovereignty having flowed from the Crown directly to the United States "in their collective and corporate capacity as the United States of America." The President is declared the foremost actor within the domain of foreign relations: "The President is the constitutional representative of the United States with regard to foreign nations." (at 319) Indication of the policy to be followed was deemed to be pertinent to the denial of the delegation challenge, yet the breadth of the delegation is to be assessed under different standards than those applicable to an enabling law dealing with purely domestic matters: "Whether, if the Joint Resolution had related solely to internal affairs it would be open to the challenge that it constituted an unlawful delegation of legislative power to the Executive, we find it unnecessary to determine." (at 315).

prerogative is narrowly limited by statute and right and cannot infringe on the liberty and property of the subject, by creating new obligations and crimes. The king cannot for instance create by proclamation new offices save purely honorary ones, for creating new offices with fees attached or attaching new fees to existing offices "would be a tax upon the subject, which cannot be imposed but by an act of parliament."[107] Neither would Parliament be understood to constitutionally grant extensive discretion with respect to purely domestic matters and the delegation in the so-called *Statute of Proclamations*, 31 Henry VIII. c.8., is described as "calculated to introduce the most despotic tyranny."[108]

Other things being equal, this seems to have been the original understanding in American public law. Thus, while in the exercise of purely 'executive' power, the Executive would be granted broad delegations of authority, since supported by original and autonomous constitutional authority, domestic administration, on the other hand, would to a large extent be perceived as an extension of legislation.[109] Correlatively, the Vesting Clause of Art. II, which would occasion much debate later on,[110] was given a limitative interpretation during the Founding Age and

[107] 1 *Blackstone's Commentaries* 262.

[108] 1 *Blackstone's Commentaries* 261.

[109] As late as 1881, a Senate Report drew the distinction between executive power and the administrative authority of departmental officers in the following terms: "The President, and the President alone, is the Constitutional executive; he and he alone is the co-ordinate executive branch of the government. . ..The departments and their principal officers are in no sense sharers of this power. They are the creatures of the laws of Congress, exercising only such powers and performing only such duties as those laws prescribe." S. Rept. 837, 46th Cong., 3rd Sess., 1881.

[110] The Vesting Clause of Art. II is, like the Vesting Clause of Art. III and unlike their Art. I counterpart, not qualified by the phrase "herein granted." This difference would occasion a twentieth-century debate on the proper constitutional scope of presidential power between incumbent President Theodore Roosevelt and former President (then Chief Justice) Taft. While the former, unsurprisingly in view of his sanguine and vigorous political career, interpreted the clause (the so-called "stewardship theory") extensively, as granting a President, as a 'steward' of the People, all powers not expressly denied, the latter ("constitutional theory") read the clause as granting only powers expressly granted (as enumerated in the rest of the article). As a matter of constitutional drafting history, it appears that the "herein granted" qualification was a last minute addition made by the Committee of Style, a committee without authority to make substantive modifications, cf. Charles C. Thatch, Jr., *The Creation of the Presidency 1775–1789: A Study on Constitutional History* (1922), cited by Lawrence Lessig and Cass R. Sunstein, "The President and the Administration," 94 *Colum. L. Rev.* 1 (January, 1994) pp. 48–49, FN 203: "When the report of the committee of style was submitted it was found that the legislative grant now read: 'All legislative powers herein granted shall be vested in a Congress.'. . .Whether intentional or not, it admitted an interpretation of executive power which would give the President a field of action much wider than that outlined by the enumerated powers." Historically, the clause had been consistently interpreted narrowly, as limited to the attributions specifically enumerated in the article. A notable (since disregarded) exception in the Founding Era was made by Alexander Hamilton ("Pacificus," No. 1, June 29, 1793). Yet it should be emphasized that Hamilton's more expansive views of administration (*see The Federalist No. 72*) and strong, energetic executive power (*see* for instance, The *Federalist No. 70*, giving the example of Roman dictatorship and speaking about the occasional necessity for republics "to take refuge in the absolute power of a single man, under the formidable title of a dictator") were largely idiosyncratic in the Founding

throughout the nineteenth century, thought to encompass only the former kind of power and be limited by the attributions specifically enumerated in the other sections of Article II.[111] Hence, in exercising his duty under the constitutional requirement to "take care that the laws are faithfully executed," the President would be essentially an agent of Congress, entrusted only with "powers as to administrative details"[112] and powers indispensable to carrying out his duties under the Take Care Clause.[113] If one accepts the premise of a constitutionally-ordained distinction between administrative and executive powers and of a corresponding institutional distinction between the president and the administration, then, as Nathan Grundstein was keen to point out, "[c]ongressional delegations of power to the President would be tested by different constitutional criteria than Congressional delegations to administrative agencies of its own creation. That is to say, a true question of constitutional separation of powers could arise only with respect to the delegation of legislative power to the President, whose office was not created by Congress, whose enumerated powers were beyond Congressional control, and who was not responsible to Congress."[114] This is all the more true bearing in mind that any delegation of discretion to the President (or to the administration if the

Era décor. *See*, more specifically, on these issues, Nathan D. Grundstein, "Presidential Power, Administration, and Administrative Law," 18 (3) *Geo. Wash. L. Rev.* 285 (April, 1950). For a modern theoretical defense of a unitary executive grounded in the more open-ended wording of Art. II's Vesting Clause (like the Vesting Clause of Art. III and as opposed to the Vesting Clause of Art. I), *see*, for instance Steven G. Calabresi and Saikrishna Prakash, "The President's Power to Execute the Laws," 104 *Yale L. J. 541* (December, 1994); Steven G. Calabresi and Kevin H. Rhodes, "The Structural Constitution: Unitary Executive, Plural Judiciary," 105 *Harv. L. Rev.* 1153 (1992).

[111] Frank Johnson Goodnow, *Comparative Administrative Law: An analysis of the Administrative Systems National and Local, of the United States, England, France and Germany* (New York, London: Putnam, 1893), at p. 62: "What the meaning of these words was in 1787 has just been shown. It was that the President was to have a military and political power rather than an administrative power." Also, W. W. Willoughby: "[I]t was undoubtedly intended that the President should be little more than a *political chief*; *that is to say, one whose function should, in the main, consist in the performance of those political duties which are not subject to judicial review*." (as found quoted in Lessig and Sunstein, *supra*, at p. 44) (emphasis added)

[112] Frank Johnson Goodnow, *The Principles of the Administrative Law of the United States* (New York, London: Putnam, 1905), at p. 75.

[113] *See Cunningham v. Neagle (In re Neagle)* 135 U.S. 1, 10 S. Ct. 658 (1890). U.S. Marshall Neagle had been appointed by the Attorney General to protect U.S. Supreme Court Justice Field while on circuit duty and, fearing for the latter's life during an altercation, had shot and killed a man. Held that the Take Care Clause was sufficient legal basis and defense to justify issuance of a federal writ of habeas corpus to free Neagle from a California jail where he was held pending trial for murder: "The Constitution, section 3, Article 2, declares that the President 'shall take care that the laws be faithfully executed'. . ..Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*, or does it include the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?" (per Miller, J.) These powers would have effect in a court of law if limited to acts of individual application.

[114] Grundstein 1950 at p. 304.

President can effectively control it) entails, because of the veto power, a *de facto* 'retrieval' difficulty. Once a statute effects a departure from the political status quo (inter-branch balance) and delegates power without a 'sunset' clause or a mandatory review and reenactment provision, if the president chooses to veto subsequent changes in the initial statutory authorization (abrogation or amendment), a very likely reaction if the change would result in a diminution of executive power, the law can be passed only under the very stringent requirement of a two-thirds override.[115]

In the exercise of his political powers, a President would not be controlled by the courts, which could not review collaterally, for instance, decisions of the President as to the boundaries of foreign states or the payment of claims based on international awards.[116] Yet, as the first president, George Washington, was to notice in 1793, there was an important legal limitation[117] to the president's original executive powers: they did not have the force of law and thus could not unilaterally impinge upon individual rights at domestic law.[118] The Washington Administration's attempts to prosecute U.S. citizens in violation of the Neutrality Proclamation

[115] Confusion between the two issues is common. *See* Posner and Vermeule 2002 at p. 1741, note 81, citing *United States v. Winstar Corporation*, 518 US 839, 873 (1996) ("[A statute] is not binding upon any subsequent legislature.") and concluding that: "Those who disagree with our argument about legislative entrenchment, however, should take into account that the revocability of delegatory legislation leaches out much of the starch from the sort of horrible hypotheticals commonly advanced to support a nondelegation rule." In fact, it does not; this sort of argument confounds and conflates the categories. What is theoretically possible and what is practically feasible or possible, given the 'retrieval difficulty' associated to the veto power, are not one and the same thing. Put otherwise, save from the perspective of the most radical (obtuse?) form of positivism, there is a point at which practical considerations of such magnitude gain dogmatic constitutional value. This is all the more true as the authors defend a pragmatic viewpoint on the matter.

[116] *Foster v. Neilson* 27 U.S. 253 (1829), *U.S. v. Blaine* 139 U.S. 306 (1891).

[117] Other than the political one of having to share foreign affairs attributions with the Senate, which, according to Goodnow, for instance, had been modeled on the colonial precedent of executive councils (in the exercise of these functions, the Senate would be effectively an 'executive council' and not a legislative body; Goodnow observed that the House is actually said to be in 'executive session'), just like the president himself had been granted most of the attributions pertaining to the former colonial governors. *See also* Gerhard Casper, "The American Tradition of Shared and Separated Powers: An Essay in Separation of Powers: Some Early Versions and Practices," 30 *Wm. and Mary L. Rev*. 211 (Winter, 1989), at 261: "Although the special responsibility of the President for the maintenance of foreign relations was understood, neither the President nor Congress assumed that the Executive had what John Locke, in his version of separation of powers, called the 'federative' power, which pertained to foreign relations and was, by him, classified as an executive power." (reviewing separation of powers practices from the Washington Administration).

[118] "The Executive. . ., in addition to 'tak[ing] Care that the Laws be faithfully executed,' Art II, § 3, has no power to bind private conduct in areas not specifically committed to his control by Constitution or statute; such a perception of '[t]he Executive power' may be familiar to other legal systems but is alien to our own." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), Scalia, J., concurring. *See* more generally for this distinction discussion and authorities in Henry P. Monaghan, "The Protective Power of the Presidency," *93 Colum. L. Rev*. 1 (January, 1993).

(obliquely, under the common law crime of breach of the peace, as violations of the laws of nations or U.S. treaties) failed until, in 1794, Congress passed the Neutrality Act and expressly made violation of neutrality a federal crime.[119] Nonetheless, legislative authorizations in fields over which the executive was understood to have independent or original constitutional authority would be fairly broad. One such example, from the last year of the Washington administration, 1796, is a statutory grant authorizing the placement of individuals on the invalid list of the army "at such rate of pay, and under such regulations as shall be directed by the President of the United States for the time being."[120] During the Adams Administration, by an act of July 9, 1798, the Executive was delegated the power to license privateers against armed French vessels, giving the captains "commissions. . .revocable at the pleasure of the President of the United States." The "Act concerning Aliens" of June 25, 1798, and the "Act respecting Alien Enemies" granted the President the power to regulate by proclamation the terms of residence or the deportation of virtually any and all classes of non-citizen residents (or to grant dispensations at his own discretion). Offenders would be brought before the courts to be tried and deported, bonded or "otherwise restrained, conformably to the proclamation or regulations which shall and may be established as aforesaid."[121]

[119] *See* Saikrishna Prakash and Michael D. Ramsey, "The Executive Power over Foreign Affairs," 111 *Yale L. J.* 231 (November, 2001).

[120] 1 Stat. L. 450 (1796).

[121] 1 Stat. L. 577. It could be objected that the constitutionality of the Alien and Sedition Acts was contested at the time, that the opposition stirred by the enactments was believed to have led to the election of Thomas Jefferson, and that the acts would be quickly repealed at the beginning of Jefferson's Administration (*see also The Kentucky Resolution* and *The Virginia Resolution*, passed by the legislatures of the two states, condemning the acts; available for download on the site of the Avalon Project at Yale Law School, http://www.yale.edu/lawweb/avalon/kenres.htm). Nonetheless, for our purposes here, the acts are just an extreme manifestation of a constitutional reality, that of very broad delegations and of a very lenient (patent unreasonableness) standard of review in domains understood as traditionally executive. *See*, for instance, *Mahler v. Eby* 264 U.S. 32 (1924) formula to deport aliens based on administrative determination of "undesirability" found constitutional (at p. 40): "Nor is the act invalid as delegating legislative power to the Secretary of Labor. The sovereign power to expel aliens is political, and is vested in the political branches of government. Even if the executive may not exercise it without congressional authority, Congress cannot exercise it effectively save through the executive. . ..With the background of a declared policy of Congress to exclude aliens classified in great detail by their undesirable qualities in the Immigration Act of 1917, and in previous legislation of a similar character, we think the expression 'undesirable residents of the United States' is sufficiently definite to make the delegation quite within the powers of Congress." (opinion of the Court, per Taft, C.J.) *Gegiow v. Uhl* 239 U.S. 3 (1915), narrow scope of review applied to an immigration officer's construction of statutory language ("likely to become a public charge") in a denial of admission (based on the officer's appreciation of the state of the labor market) (at p. 10): "Detriment to labor conditions is allowed to be considered in § 1, but it is confined to those in the continental territory of the United States, and the matter is to be determined by the President. We cannot suppose that so much greater a power was intrusted by implication in the same act to every commissioner of immigration, even though subject to appeal, or that the result was intended to be effected in the guise of a decision that the aliens were likely to become a public charge." (per Holmes, J.).

Obversely, in the administration of domestic legislation, the Executive would have little statutory discretion and—consequently—political control. Even though a measure of political control over the administration was recognized by the so-called "decision of 1789," by virtue of which the President was granted removal power by Congress (in the statutes creating the first three federal departments, Foreign Affairs, War, and Treasury),[122] control over the administration would be limited by the minute specification of administrative attributions in the statutes. It stands to reason that, if the administrative tasks are generally ministerial (or considered so by the reviewing court, which amounts in practice to the same result), the actual political (executive) control is minimal.[123] Correlatively, the courts would police the discharge of statutory duties and the interference of the administration with the rights of the subject under a stringent standard of review. The distinction between executive action (political; exercise of constitutional and statutory discretion) and administration (ministerial, non-discretionary; according to the rule of law) and the consequences thereof on judicial review was first expounded, as it is well known, in *Marbury v. Madison*. Yet neither the actual extent of the presidential political control of the administration by means of the removal power nor the scope of review of administrative acts as a legal check on administrative action were settled matters for a while.[124] For instance, Congress considered the Secretary of the Treasury as its agent so much so that, although the statute had granted removal power to the president, Jackson's dismissal of Secretary Duane from this office, as a result of the latter's failure to execute an order would be later described by Wyman to have been "worth a hundred cases from the law reports."[125] Conversely, in terms of legal

[122] The Constitution gives the President a qualified Appointment Power, Art. II, Section 2 (2): "[H]e shall nominate, and by and with the 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 otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." It says nothing about removal.

[123] The other side of the token is that in the case of broad delegations, the half-truth of David Currie's remark becomes apparent: "[J]udicial review is not an end in itself but a means of enforcing (constitutional and statutory) limitations on executive authority; if there are no limitations, there is nothing to review." *The Constitution of the Federal Republic of Germany* (Chicago, Chicago University Press, 1994), p. 131.

[124] Indeed, Postmaster General Kendall did not even appear in the Circuit Court and his return to the writ (to show cause why a mandamus should not be issued, compelling him to pay the balance owed) made the—retrospectively surprising—argument that "the doctrine laid down by the chief justice in *Marbury v. Madison*, never was recognized as law by the executive authority." *U.S. ex rel. Stokes v. Kendall*, 5 Cranch C.C. 163 (C.C.D.C. 1837). *See* discussion of the case, *infra*.

[125] Wyman, *The Principles of the Administrative Law Governing the Relations of Public Officers* (1903), cited by Grundstein 1950 at p. 289. The story can be found in Lessig and Sunstein 1994 at pp. 78–85. In short, much like Nixon was to do later on, in the Watergate affair, Jackson promoted a first Secretary, fired summarily the second (Duane), until a third appointee (the future Supreme Court Justice Roger Taney) finally complied with Jackson's orders to withdraw government money from the Bank of the United States. The first two refused to comply with an order which

authority to direct the conduct of the administration, a completely different answer would obtain during the tenure of the same president, in the case of *Kendall v. United States*,[126] which held that the Postmaster General could be compelled by mandamus to pay the balance owed a number of mail transportation contractors, according to the terms of a special appropriation bill, presidential directives to the contrary notwithstanding: "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible."[127]

Unlike the contemporaneous European practice, American constitutional law, from the very onset, did not make a distinction between material ordinances and administrative ordinances[128]; both were understood to need legislative authorization, in order to be enforceable by the courts.[129] Thus, the ordinances adopted by the President as a result of his independent constitutional power to direct the

they perceived as being in derogation of their constitutional and statutory duties. The larger constitutional question was and is whether and to what extent the President can exercise circuitously, by virtue of his removal power, the discretionary power vested (delegated) by statute in an administrative officer.

[126] *Kendall v. U. S. ex rel. Stokes*, 37 U.S. 524 (1838). Willoughby considered the case had finally clarified the meaning of the Constitution on Congress's being "the primary source of administrative power."

[127] 37 U.S. 524, 613.

[128] The former create rights and duties, regulating the relations of private citizens towards one another and towards the state; the latter, the duties of the administration in relation to the law. *See* Hart 1925, at p. 19: "In general, our laws have been based upon a conception of the relation between legislation and administration entirely different from that in vogue in Europe. There, general legislation passed with the knowledge that the Executive has the independent power to supplement statutory generalizations, is the normal method. With us it is conceived to be the function of the legislative department to define with completeness and in concrete terms the right and duties which are to be created, and not simply to set forth a general policy to guide the Executive. The enactments of Congress have accordingly been characterized by concreteness, specificness, detail, the limitation of generalities by provisos, and the anticipation (as far as possible, of all future contingencies." *See also id.*, pp. 53–54, explaining the difference by analogy with the German administrative law distinction between *Rechtsverodnungen* and *Verwaltungsverordnungen*.

[129] Goodnow 1905, at pp. 84–85: "The ordinances which the President may adopt are of two kinds: First, those which are issued simply as a result of the exercise of his power of direction over the officers of the administration and which are sanctioned merely by his power of removal; and second, those ordinances which are intended to have the force of law, which, therefore, will be enforced by the courts and which may bind not merely an officer of the government, but as well an individual who in the proper case may be punished criminally for refusing to obey them." Hart's 1925 study establishes a more comprehensive taxonomy, by analogy with contemporaneous European constitutional-administrative practices, along four criteria: (a) source of authority (constitutional and statutory); (b) scope (autonomous and self-contained, independent of statute, as compared/opposed to sub- or co-legislation); (c) subject-matter (ordinances which constitute material law as opposed to material ordinances); (d) purpose (emergency versus normal situations).

administration would be unenforceable other than by his power of removal.[130] The power to issue normative ordinances, which bind the citizen, needed to be expressly delegated by Congress: "[I]t may be laid down as a general rule, deducible from the cases, that whenever, by the express language of an Act of Congress, power is entrusted to either of the principal departments of the government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice."[131] With the exception of army and navy regulations, where (for reasons which have been already stated) the statutory authorization would be broad and the standard of review more lenient,[132] to the extent that domestic normative regulations would be enforced in the courts in the case of an attempt to punish their violation criminally, the rule of strict construction would be followed.[133]

This distinction between law (administration) and politics (executive) or—even better—between inward office bound by law (ministerial) and outward commission

[130] Goodnow 1905, at pp. 84–85 gives the example of a civil service rule promulgated 1896, which forbade the removal for political reasons of officers in the classified civil service of the United States. Courts regarded such an ordinance a matter of pure administration and refused to enforce it "and have declared that the only redress open to one who claims that he has been removed contrary to its provisions, is an appeal to the President to remove the offending officer." *White v. Berry* 171 U.S. 366 (1898).

[131] *Caha v. U.S.*,152 U.S. 211(1894), 222.

[132] *Ex parte Reed* 100 U.S. 13 (1879); *Swaim v. U.S.* 165 U.S. 553 (1897). An officer (and even a civilian in the employment of the navy) may be punished by imprisonment by virtue of a court martial constituted under such regulations, whose sentence would be reviewable by Art. III courts only for clear jurisdictional error. *Swaim* goes as far as recognizing an inherent constitutional authority, resting on the Commander in Chief Clause, to convene general courts-martial "in the absence of legislation expressly prohibitive." (at 558) Wyman considered that the President would have an original decree-making power to issue general regulations which bind the citizen, not delegated by Congress but deriving directly from the commander-in-chief clause (Administrative Law, p. 287 et sequitur).

[133] *See United States v. Eaton*, 144 U.S. 677 (1892). Defendant, a wholesaler, had been prosecuted for failure to keep a book and make a return respecting sales of oleomargarine, to the commissioner of internal revenue, as prescribed by a regulation (under the authority of congressional statutory authorization to make "needful regulations" for carrying the act into effect, the failure to do anything "required by law" made by the act a criminal offense; the statute expressly imposed duties only on manufacturers), in addition to the statutory requirements. The regulation was voided by the Supreme Court as unsupported by the statute: "Regulations prescribed by the president and by the heads of departments, under authority granted by congress, may be regulations prescribed by law, so as lawfully to support acts done under them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

bound by practical and political necessity (discretion)[134] was first eroded and blurred by emergencies. The Civil War marked a first sharp increase in executive powers, through both broad anticipatory delegations (enabling legislation) and ex post indemnity bills voted by Congress after the executive had already acted independently, by decree.[135] In terms of anticipatory delegations, to give an example, the Act of Congress of Aug. 6, 1861 made it the duty of the President "to seize, confiscate and condemn all property used in aiding, abetting or promoting the present or any future insurrection against the United States."[136] The Civil War also inaugurated a "short-lived major bureaucratic effort," establishing the precedent of a first attempt at extensive administrative reform, even though a professional, well-structured bureaucracy did not exist and the civil service was still based on the Jacksonian 'spoils system.'[137] This major concentration of power in the executive branch offset the balance existent in the antebellum period, by creating a precedent of executive action the intensity and breadth of which had never been experienced.[138]

The First World War period witnessed a massive grant of crisis lawmaking discretion to the Wilson administration, by means of authorizations given by

[134] *See*, in this vein, Carl Schmitt, *La Dictature*, especially the chapter 1 discussion on the relevance of the distinction between an officer and a commissioner in Bodin's *Six livres de la République*.

[135] Making the orders of the President or his immediate subordinates "a defense in all courts," for instance the Acts of March 3, 1863, May 11, 1866, and March 2, 1867, ratifying the unilateral presidential suspensions of Habeas Corpus and (the latter) protecting officers against suits based on *Ex parte Milligan*. According to the Supreme Court, Congress could validly ratify whatever action it could have approved in the first place: "...it is plain that if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congressm that on the well known principle of law, 'omnis ratihabitio retrotrahitur et mandato equiparantur,' this ratification has operated to perfectly cure the defect." *The Amy Warwick (The Prize Cases),* 67 U.S. 635, 671 (1862).

[136] Public Acts of the XXXVII. Congress, 1st sess., ch. Lx. More generally, *see* William A. Dunning's brief but excellent study on the impact of the Civil War on the Constitution, "The Constitution of the United States in Civil War," 1 (2) *Political Science Quarterly* 163 (Jun., 1886).

[137] The South was governed after 1865 much like a conquered colony, by large numbers of federal civilian bureaucracy employed in the Freedman's Bureaus. The Civil Service (Pendleton) Act inaugurated, in 1883, the partial demise of the spoils system administration and the beginnings of professionalized (merit-based) federal civil service; it was passed partly as a result of the Progressive efforts at reforming the aministration and partly in direct response to the public outcry stirred by the 1881 assassination of President Garfield by a disappointed office-seeker. Jerry L. Mashaw, "Reform" and the Public Service in the United States (New Haven: Yale University Press, 2001), unpublished draft on file with the author.

[138] Herbert Tingstén, *Les pleins pouvoirs-L'Expansion des pouvoirs gouvernamentaux pendant et après la grande guerre*, traduit du Suédois par E. Söderlindh (Paris: Librairie Stock, Delamain et Boutelleau, Publications du Fonds Descartes, 1934), p. 153. *Also see*, Clinton Rossiter, *Constitutional Dictatorship-Crisis Government in the Modern Democracies* (Princeton: Princeton University Press, 1948) and James Hart's study, "The Emergency Ordinance: A Note on Executive Power," 23 *Colum. L. Rev*. 528 (1923).

Congress to issue regulations and orders controlling drafting (Selective Service Act), food and fuel regulation (The Food and Fuel Act of 1917), and reorganize the administration in a way that would render executive action more efficient, including any change in agencies already regulated by congressional acts (Overman Act of 1918). These latter two acts were only passed after long delays and extensive debates in Congress (The Food and Fuel Act was stalled for four months in the Senate and was finally passed after a protracted conference committee), while disgruntled Congressmen brandished epithets like "despotism," "dictatorship," or "absolutism."[139] Fiery parliamentary opposition notwithstanding, it was fairly well understood that these laws, given the clear indication of policy, limited domain of authorization (specific fields: drafting, food control, executive reorganization, etc.), and the practice of built-in sunset provisions, did not constitute "blanket delegations."[140] Exercise of broader powers was comprehended as just temporarily required, in essence a form of what Clinton Rossiter would later call, with a phrase of staying power, "constitutional dictatorship."

The return to normalcy and perhaps also the fact that the war-time strong administrations of Lincoln and Wilson were followed by the lame-duck presidencies of Johnson and Harding, obfuscated for a period of time the changes and disruptions in the original scheme, so much so that most contemporaneous commentators (Goodnow, Hart, Willoughby) treated the emergency enabling act as no more than an exception to the initial constitutional arrangement. What was important, Willoughby concluded, was that the President, outside exercise of strictly 'executive' powers, acted as an administrator, according to the terms of statutory authorizations. The statutes granted "administrative powers of the most comprehensive character," true, but they were administrative powers based on statutory grant, nonetheless. Yet, *definitio fit per genus proximum et differentiam specificam*. Used perhaps, as us humans often are, to employ a given conceptual order long after the factual predicates that first justified it have outgrown initial belief in their validity, these great public lawyers failed to perceive the transformation in the nature of statutory authorizations as such, and what that transformation entailed for the integrity of the whole system. They also failed to grasp the fact that powers exercised during a real emergency may be acquired by prescription and reclaimed in the future under a pretense of emergency and, further, that an emergency may to a certain extent be legally manufactured by the sovereign. This is perhaps the nub of truth in Carl Schmitt's characteristically ambiguous and ambivalent

[139] *See* detailed description in Tingstén 1934, pp. 151–174. A taxonomy and analysis of war cases is provided by Clinton Rossiter, *The Supreme Court and the Commander in Chief* (Ithaca, N.Y.: Cornell University Press, c1951).

[140] However, in spite of sunset clauses and a general understanding that official ending of the war would terminate these authorizations, emergency powers were exercised after the cessation of hostilities, for instance, during the 1919 mining strike.

epigraph: "Sovereign is he who decides on the exception."[141] Much better situated in terms of hindsight, Nathan Grundstein later captured, in a brief passage commenting on William Dunning's essay on the constitutional legacy of the Civil War, the crux of the changes that had intervened. The observations are worth citing at length in the conclusion of this section: "Professor Dunning's brief essay cuts to the very bone of executive power as we know it today, and we are on familiar ground when we scan his findings-the concentration of governmental power in the executive, the open recognition of 'popular demand' as a legitimate basis for executive action, the resort to 'general ideas of necessity' as a convenient source of executive authority, the appearance of the principle of 'temporary dictatorship' as an accepted part of our constitutional system, absolute executive discretion as to means in the prosecution of war, the merger of civilian and military power of the President, the breakdown of the distinctions between the executive and legislative functions, and the impotence of the judiciary as against the executive."[142]

3.1.2.2 Administrative Discretion, Legislative Scope, and the Growth of Federal Regulation: "A Law that Takes Property from A. and Gives it to B"

> The state of nature has a law of nature to govern it, which obliges every one; and reason, which is that law, teaches. . .that, being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions.
>
> John Locke, *The Second Treatise of Civil Government* (1690)

> The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it: *The nature, and ends of legislative power will limit the exercise of it*. . ..An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. . .a law that takes property from A. and gives it to B.: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it. (emphasis supplied)
>
> Chase, J., opinion of the Court in *Calder v. Bull* (1798)

In *Marbury,* Chief Justice Marshall famously remarked, distinguishing political (unreviewable) executive action from judicially reviewable performance of ministerial administrative duties, that "[t]he province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion."[143] The juxtaposition of individual rights and scope of judicial review reveals another meaning and aspect of discretion

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[141] *Political Theology-Four Chapters on the Concept of Sovereignty* (*Politische Theologie: Vier Kapitel zur Lehre der Souveränität*), George Schwab transl. (Cambridge, Mass. and London, England: The MIT Press, c1985), p. 5.

[142] Grundstein 1950, at pp. 307–308.

[143] 5 U.S. 137, 170 (1803)

and another dimension of the delegation phenomenon. Here, as noted above, the delegation-relevant disjunction is not the separation of powers between political (executive) and ministerial (administrative) exercises of public power according to distinct constitutional and legislative terms but a rule of law differentiation between rule-bound, legally confined administrative interference with private individual rights on the one hand and discretionary administrative action with respect to state claims and publicly-granted privileges (public rights) on the other. The issues are analytically distinct and, even though there is an obvious conceptual and historic overlap between the two problems,[144] the emphasis or focus at this point is on the rights of the individual faced with intrusive state action and not on the balance struck between the branches of power.

According to the classic constitutional and administrative algorithm, whereas private rights were subject to exceptional, narrow, and limited legislative regulation, public rights and to a certain extent state claims on the individual were the proper matter of administrative discretion.[145] Accordingly, the brief account that follows will approach the phenomenon of legislative delegations from the perspective of increasing governmental interference with liberty and property rights (and with the economic configuration that a given legal definition of property and liberty rights constitutes) and the resulting realignment and adjustment of public power and private right which characterizes the evolution of modern administrative law and sets the terms of debates on the constitutionality of legislative delegations.

I shall try to clarify and concretize these starting points, through the intermediary of a case roughly contemporaneous with and whose factual background is somewhat similar to that of *Kendall v. U.S.*, the Jackson administration adjudication discussed in the context of the historical presentation of presidential control over the administration of the law. In *Decatur v. Paulding*,[146] Susan Decatur, the widow

[144] Richard B. Stewart and Cass Sunstein, "Public Programs and Private Rights" 95 *Harv. L. Rev.* 1193 (April, 1982), at 1232–1233: "*The reservation of a major share of economic life to a system structured through private litigation was a key element in the separation of powers scheme*. . ..The grant of extensive lawmaking authority to administrative bodies deprived the courts of much of their established dominion, granted vast responsibilities to bureaucratic entities not anticipated in the Constitution, and undermined the separation of powers." [emphasis supplied]

[145] The theoretical father of modern constitutionalism, Locke, provides us here with another interesting insight into the matter. The rule of law distinction explored in this section parallels the difference between legislative (stated, antecedent, promulgated rules of liberty and property) and prerogative (§ 160 "[a] power to act according to discretion for the public good, without the prescription of the law and sometimes even against it") powers, just as the separation of powers problems analyzed in the preceding section mirror Locke's disjunction between legislative, executive, and federative powers. Even though it has a political dimension as well, derived from English historical contingencies (the convening and dissolution of parliament was historically an important part of royal prerogative) Locke's prerogative encompasses a larger sphere than that of Aristotelean equity, with which it is sometimes analogized (justice considerations which justify departures from rules according to the needs of individual situations) and is essentially very close to the modern equivalent of "policy-making discretion."

[146] 39 U.S. 497 (1840).

of a Navy officer, sought a writ of mandamus to compel the Secretary of the Navy to pay her, out of the Navy pension fund, both a lifetime pension under the general statute providing for the widows of officers deceased in the naval service and, cumulatively, a second one, granted her personally for five years, under a special resolution passed by Congress on the same day as the general naval pension act. She (reasonably enough under the circumstances) felt entitled to both, while the administration, in the absence of express statutory language mandating disbursement, interpreted the legislative silence on the precise matter of whether the resolution had granted a cumulative indemnification to mean that she had to make a choice between the two. Her request denied by the Secretary of the Navy, Susan Decatur applied for a redetermination of her claim to the President, Andrew Jackson, who concurred with the Secretary and denied the request. The Court, in stark departure from the *Kendall* case, deferred to the administrative interpretation, noting that a head of an executive department, "in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. . .in expounding the laws and resolutions of Congress, under which he is from time to time required to act."[147] In his dissent, Justice Catron went further still and doubted whether there was *any* case in which it were proper for the courts to compel disbursement of public money through the prerogative writ of mandamus, since (to sum up his argument in familiarly modern terms) this sort of claim dealt not with an individual right but with issues of policy, outside the judicial purview. Such matters are unfit by their nature for judicial resolution: "It is an invitation to all needy expectants, with pretensions of claim on the government, to seek this superior and controlling power, (the Circuit Court of this District,) and invoke its aid to force their hands into the treasury, contrary to the better judgment of the guardians of the public money."[148]

To be sure, even though it is essential for the integrity of a legal system that a demarcating line should be drawn between them, in a systemic and broader sense 'legal' and 'discretionary'[149] are by no means categories with self-evident meanings attached. As noted earlier, in terms of nondelegation, this distinction needs a line of reference for assessing the legitimacy of legislation as such. The baseline theoretically assumed by classical constitutionalism and historically

[147] *Id.*, at p. 515.

[148] *Id.*, at p. 521.

[149] Which does not mean that sources of discretion as such cannot be identified and tabulated taxonomically, *see*, for instance Stewart 1974-1975, at p. 1676, note 25, identifying three sources of discretion:

i. "the legislature may endow an agency with plenary responsibilities in a given area and plainly indicate that within that area its range of choices is entirely free";
ii. "the legislature may issue directives that are intended to control the agency's choice among alternatives but that, because of their generality, ambiguity, or vagueness, do not clearly determine choices in particular cases"; and
iii. clauses precluding judicial review.

provided as a matter of actual practice by the common law was one of private rights, which were to a certain degree presumed and perceived in both legal theory and actual law as natural and prepolitical.[150]

As Henry Monaghan argued in his article on "*Marbury* and the Administrative Law,"[151] much of early American judicial review of administrative action clustered around the different import of Marshall's admonition in *Marbury v. Madison* that "it is emphatically the duty and province of the judicial department to say what the law is" with respect to state interference with common law, private liberty and property rights and individual claims against the state or "public rights", respectively. The distinction is important since 'what the law is' in both constitutional and administrative matters depends to a certain extent on who gets to define statutory meaning with finality, while at the same time the level of deference accorded administrative statutory interpretations both constitutes and validates, as Monaghan points out, a delegation of lawmaking authority.[152] In the case of governmental interference with private rights of liberty and property, including instances when the judicial process (Art. III courts) would be used for enforcement of the government's claims against private parties, the judiciary would carefully scrutinize the administrative interpretation of the law, just as it would do in controlling the constitutionality of legislation,[153] on a correctness standard or (in Monaghan's phrasing) "independent judgment rule," i.e., substituting its own interpretation for that of the administration if need be.[154]

[150] The classic debate on the issue of whether the Constitution reposes on natural law or is just positive legislation is the dispute between Justices Chase and Iredell in *Calder v. Bull* 3 U.S. (3 Dall.) 386 (1798), with Justice Chase's seriatim opinion expounding the natural rights/natural law version. *See* comments in Tribe, *supra*, at 561: "Chase's natural rights were defined in large part reflexively: they were the residue marked out by the limits on government implied by its very reasons for being." Perhaps, to a certain extent, adherence to a final assumption of natural rights or—in Tribe's words—a "residue marked out by the limits on government implied by its very reasons for being" is inescapable for a public lawyer adhering to the idea of limited government, constitutionalism. As a theoretical matter (yet with quite a few practical implications) the question is only what that implied limitation should be at any given time and whether the rule of law wedge one seeks to draw between the state and the individual would be a more *concrete normative* one, such as the generality-life-liberty-property criterion of old constitutionalism or whether one should seek its replacement by an *abstract normative* position of sorts.

[151] Monaghan 1983.

[152] *Ibid*., at p. 6.

[153] The Court has a monopoly of interpretation of questions of constitutionality, *see*, for instance *City of Boerne v. Flores* 521 U.S. 507 (1997).

[154] Monaghan is only interested in the narrower question of the extent to which the Constitution, i.e., *Marbury*'s definition of judicial review, controls in turn judicial review of administrative legal interpretation of federal statutes and in the resulting allocation of interpretive authority between the federal judiciary and the administration. *See also*, related, Robert Rabin's more expansive history of judicial control of federal regulatory action, "Federal Regulation in Historical Perspective," 38 *Stan. L. Rev*. 1189 (May, 1986). Judicial review of administrative action can also be imagined as defined by a continuum whose poles are *de novo* consideration of law, facts, policy (which was the position of the Court, for instance, in some post-Civil War reviews of rate

Conversely, when non-coercive governmental conduct would be scrutinized, in the case of "public rights," claims by private individuals upon the government (especially governmentally granted benefits, purely statutory creations, such as the pension claim at stake in *Decatur*), the judiciary would review administrative action under a mere rationality or patent unreasonableness standard (in Monaghan's phrasing, "clear mistake"). That is, unless the statutory duty would be so clearly ministerial as to compel another (judicial) interpretation (the situation in *Kendall*), the meaning attributed by the administration to the statute (jurisdictional questions aside) would be awarded a large degree of deference and allowed as a matter of course to control the decisional outcome. Claims by individuals against the government and certain claims of government against individuals (customs duties, taxes) could, theoretically, be resolved by Congress itself, executive officers or specially created "legislative courts."[155] To wit, in the leading 'public rights' case, *Murray's Lessee v. Hoboken Land & Improvement Co*., the Court held that summary execution on a warrant of distress to levy on the property of a collector of public revenue found by the Treasury auditor to be in default did not constitute (by virtue of failure to go through the judicial process) a denial of due process under the Fifth Amendment. The warrant issued in accordance with the Treasury audit *was* the due process of law required by the Constitution: "For, though 'due process of law' generally implies and includes *actor, reus, judex,* regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings, yet, this is not universally true."[156]

While government made little demands (customs and taxes) from and provided little benefits (veterans' pensions, with a big outflow after the Civil War) to individuals, the distinction was unproblematic in thought as in practice. Until the Civil War, most federal activity revolved around subsidizing private enterprise. Even as the West was settled, culminating in the passage of the Homestead Act

reasonableness) and—at the other extreme—a highly deferential model of review, in matters of both interpretation of law and factual predicates for administrative action (*NLRB v. Hearst*). According to Rabin, most frequently, the Court oscillated between two intermediate positions within this range, which he defines as "Right Answer" (the so-called "hard look" review, best exemplified by *Citizens to Preserve Overton Park v. Volpe*) and "Best Efforts", respectively (for instance *Chevron, U.S.A. v. Natural Resources Defense Council*).

[155] A brief historical note may help clarify the matter. Since the central government as such has sovereign immunity against direct suits, unless it chooses to waive it expressly, the initial way of proceeding was for an individual having a claim on the government to petition the legislature for a special appropriation bill, which the *Kendall* case held, as we have noted above, to be mandatory upon the administration (the disbursing officer). In 1855, the Court of Claims was created (now, recreated in 1982, as the U.S. Court of Federal Claims) under Art. I, as a "legislative court." At the beginning, its 'judgments' had no legal effect whatsoever and were drawn up in the form of a bill to be laid before Congress, then it became a real legislative court, its judgments binding on the Secretary of the Treasury, with a possibility of appeal to the Supreme Court. Initially it was given no equity jurisdiction. It still has no jurisdiction over torts committed by the government.

[156] 59 U.S. 272 (1855), 280. *See also Ex parte Bakelite Corporation* 279 U.S. 438 (1929), for an extensive review of developments and enumeration of Art. I courts.

(1862), with huge tracts of land given away to settlers and railroads, neither the states nor the federal government delivered services directly. Responding to a number of catastrophic explosions, federal statutes mandating standards, labeling, licensing and inspection requirements for steamboat boilers (infractions subject to criminal penalties) were passed in 1838 and 1852 under the Commerce Clause. Yet these statutes were legislative oddities in a landscape where, "from a national perspective, commercial affairs took place in a world without regulation."[157] In fact, aside from public works (canal and road building, which were contracted out), the government's paramount function, both state and federal, was largely limited to the facilitation of private development through ensuring property rights.[158]

By the same token, as a constitutional issue, the government's function was limited thus since legislation, both federal and state, was in its turn limited in scope by a restrictive reading of the Commerce Clause and respectively and correlatively by the guarantees of liberty (including freedom of contract)[159] and property. Property and liberty and, consequently, the legitimacy of legislation, were constitutionally defined and limited, in turn, by the background common law legal institutions, in terms of common law rights.[160] As a direct result, constitutionally, the police power of the states was perceived to extend only to *sic utere* (concrete damage to another's property or to health, safety, and morals) equal regulations of property.[161] The limitation on the police power of the states became an explicit rule of positive federal constitutional law with the passage of the Fourteenth Amendment in 1868. Yet, it had been commonly presumed from the very onset that residual legislative power did not mean plenary. To wit, in the classic text of American constitutional law, Justice Story's 1833 *Commentaries,* the common classical assumptions had been resumed and restated with an accuracy and forcefulness which warrant a longer citation: "Whether, indeed, independently of the constitution of the United States, the nature of republican and free governments does not necessarily impose some restraints upon the legislative power, has been much discussed. It seems to be the general opinion, fortified by a strong current of

[157] Rabin 1986, at p. 1196.

[158] Willard Hurst 1967, passim.

[159] *Allgeyer v. Louisiana* 165 U.S. 578 (1897), constitutional definition of liberty extends to freedom of contract.

[160] Cass Sunstein labels this interpretation of the constitution and judicial review of administrative action, i.e., from the premise or standpoint of property and liberty rights, and the many property-related constitutional provisions, "Lochner-like premises" (probably because of the pejorative overtones which the label has acquired) and assimilates them to a reactionary-conservative, misplaced or at least obsolete (and now debunked) common law baseline of natural rights and proposes departure from this baseline and its replacement with a new theory of interpretation. In passing, it is unclear in what if any *legal* sense a constitutional provision is "Lochner-like." *See* for instance his *Reconceiving the Regulatory State: After the Rights Revolution* (Cambridge, Mass.: Harvard University Press, 1990).

[161] *Sic utere tuo ut alienum non laedas* (use your property so as not to harm another's).

judicial opinion, that since the American revolution no state government can be presumed to possess the transcendental sovereignty to take away vested rights of property, to take the property of A and give it to B by a mere legislative act. A government can scarcely be deemed to be free, where the rights of property are left solely dependent upon a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty, and private property, should be held sacred. At least, no court of justice, in this country, would be warranted in assuming, than any state legislature possessed the power to violate and disregard them; or that such a power, so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority, or ought to be implied from any general expression of the will of the people, in the usual forms of the constitutional delegation of power. The people ought not to be presumed to part with rights, so vital to their security and well being, without very strong and positive declarations to that effect."[162]

Against this background, legislative measures such as minimum wage laws or the maximum hours legislation of the type later made famous by the dispute in *Lochner v. N.Y.,* since unsupported by this limited array of reasons (as purely redistributive), would exceed the constitutionally permissible purview. Consequently, such a law would be deemed unconstitutional, being considered as in and of itself—substantively—a deprivation of property and contractual liberty without due process, under the Fourteenth Amendment.[163] This sort of legislation would essentially be, in the words of Chase and Story, the "law that takes property from A. and gives it to B.", against the purposes of the social compact, and hence against justice, nature, reason, and, more importantly, against the Constitution.

Aside from the equal regulation of noxious uses of property (nuisances), understood as the proper constitutional scope of state legislation under the police power, the common law traditionally imposed a price reasonableness and nondiscrimination obligation on certain professions and businesses, either on the ground that their services were held out to the public ("common callings")[164] or because they were "affected with a public interest," within the list of businesses historically recognized as crown prerogatives and as such the beneficiaries of a legal (exclusive

[162] Story, Commentaries (Rotunda and Nowak edition, 1987), pp. 510–511.

[163] *Lochner v. New York*, 198 U.S. 45 (1905) A law restricting to sixty the number of hours bakers could work during a week (a maximum of ten during a day) was declared unconstitutional, since rationally unsupported by any classical police justification (health or safety). Compare with *Muller v. Oregon*, 208 U.S. 412 (1908) where a similar law, limiting the number of hours women could work in laundries and factories was upheld, largely as a result of the Court's being persuaded by the social data in the famous "Brandeis Brief" that physical and social differences between men and women established a public health (police) justification for the law.

[164] Or, in a more modern analogy, because they provided "prime necessities" from the economic vantage point of actual monopoly (public utilities). *See* discussion in Michael Taggart, "The Province of Administrative law Determined?," in *The Province of Administrative Law*, Michael Taggart (ed.) (Oxford, England: Hart Publishing, 1997), pp. 1-20. The common callings still recognized today are the innkeeper, the ferryman, and the common carrier.

grant from the king) monopoly: turnpikes, canals, roads, strategically located seaports and wharfs, bridges and ferries.[165] And, conversely, a property historically considered as affected with a public interest would be entitled to monopoly protection and subjected to regulation by charter, as a prerogative of the crown.[166] The rationale for the reasonableness restrictions on prices applied to legal monopolies and public franchises, as first stated by Lord Chief Justice Hale in the seventeenth-century tract *De Portibus Maris*, is that one who benefits from a public privilege accepts the privilege under terms, with the stated and implied restrictions on his property attached to it, including state regulation of its use and compensation. When one accepts a public benefit, property is no longer merely private (a "common right") but becomes "affected with a public interest."

In the landmark 1787 decision of *Munn v. Illinois,*[167] the Supreme Court upheld a Granger law that imposed a maximum rate on use of grain warehouses and elevators in the state. The actual market position of the business was analogized to that of a "legal monopoly." A "virtual monopoly," the Court held, would also be a proper subject of regulation, as a "business affected with a public interest": "Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest,' it ceases to be *juris privatis* only.'. . .*Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large*. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."[168] (emphasis supplied) In *Munn*, the Supreme Court also accepted as constitutional *ex post legislative* ratemaking on an unchartered business, a grand departure from the original understanding that any price regulation would be imposed by the charter incorporating the business, *ex ante*, as a *contract* between the sovereign and the private enterprise "affected with a public interest." By the same token, in the logic prevailing before *Munn*, what would be affected with public interest and thus subject to regulation by charter was not a matter for arbitrary legislative earmarking but stood defined by the common law.[169]

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[165] The classic English decision is *Alnutt v. Inglis* 12 East, 527, 104 Eng. Rep. 206 (K.B.1810), in which Lord Ellenborough held that the London Dock Company, a licensed customs house for goods bound for export, being the beneficiary of a legal monopoly, was under a duty to the public of imposing only such charges as were reasonable (at pp. 210–211): "There is no doubt that the general principle is favored both in law and justice, that every man may fix what price he pleases upon his property or the use of it: but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must as an equivalent perform the duty attached to it on reasonable terms."

[166] Hovenkamp 1991, at p. 114.

[167] 94 U.S. 113.

[168] Hovenkamp 1991, at p. 126.

[169] *Id.*, "Modern regulation by statute applies more or less equally to all similar firms in a sovereign jurisdiction –for example to all common carriers within the state. But regulation by charter was

In that logic, public interest was considered as an exceptional function of private interest, limitedly confined in terms of enumerated historical categories.

Moreover, the *Munn* Court stated, no one had a constitutional interest in the common law definition of property; legislation could in theory replace determination of prices by private contracts in the case of "businesses affected with a public interest" at any time, since "[i]n fact, the common law rule, which requires the charge to be reasonable, is itself a regulation as to price. . ..a mere common law regulation of trade or business may be changed by the statute. A person has no property, no vested interest, in any rule of the common law."[170] As it is apparent (in part perhaps from the vantage point of hindsight), there are a fair number of tensions in this way of framing the problem. As the author of the dissenting opinion, Justice Field, noted in a strongly worded opinion, once what is "affected with the public interest," as a matter of public regulation, would no longer be determined strictly according to the terms of the common law, the lines of demarcation between private and public would blur and the constitutional protection of property from legislation could potentially become illusory. If a legislature could attach the label "affected with the public interest" to any kind of property and then regulate its use, what is then the constitutional limit on legislation? Would regulation of use not be a substitute for a taking, imposing burdens on few for the benefit of all without any need for all to compensate? As Justice Holmes would later be keen to point out, in the first 'regulatory takings' case, *Pennsylvania Coal Co. v. Mahon*, "When this seemingly absolute protection [of property and liberty of contract under the Fourteenth (and Fifth) Amendment] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears."[171] In practice, protection came from reasonableness review of ratemaking. While the *Munn* Court identified rate regulation as a legislative function, it then proceeded to supervise statutory ratemaking under a strict *de novo* standard of review. While ratemaking would be "essentially legislative," final determination of the reasonableness of a rate, in order to ensure against its becoming arbitrary or confiscatory, would be, by the same token, essentially judicial.[172]

specific to the firm. . ..This approach was generally consistent with classical theory, which regarded regulation as rare and not to be presumed. As late as the 1860's and 1870's railroads were chartered with no price regulation whatsoever. . ..As late as 1877, when *Munn v. Illinois* affirmed the constitutionality of rate regulation of an unincorporated enterprise, many believed price regulation was beyond state power unless the firm operated under a charter authorizing the regulation."

[170] *Id.*, at p. 134.

[171] 260 U.S. 393, at 415 (1922).

[172] Rabin 1986, at p. 1210.

3.1.2.3 What Exactly Is a Trust?

> Suppose the great Lawgiver had constructed the Ten Commandments with the same uncertainty. Suppose he had said: "Thou shalt not steal; thou shalt not bear false witness; thou shall not covet-contemporaneously or under substantially similar circumstances and conditions" (laughter); or suppose at the conclusion of the decalogue the following provision had been added: "Provided, however, that upon application. . .persons so designated may be authorized to cheat, steal, bear false witness, or covet, and said commission may from time to time prescribe the extent to which said persons may be relieved from any or all said commandments."
>
> Congressman Weaver, debates on the Interstate Commerce Commission Act (*Congressional Record*, 49th Cong., 2d Sess. 820 [1887]

> Iv all th' great evils now threatenin' th' body politic and th' pollytical bodies, these crool organizations an' combinations iv capital is perhaps th' best example iv what upright an' arnest businessmen can do whin they are let alone. They cannot be stamped out be laws or th' decisions iv coorts, or hos-tile ligislachion which is too frindly. Their desthruction cannot be accomplished be dimagogues.
> Th' thrust are heejous monsthers built up be th' inlightened intherprise iv th' men that have done so much to advance pro-gress in our beloved counthry. On wan hand I wud stamp thim undher fut; on th' other hand not so fast.
>
> Mr. Dooley's summary of Theodore Roosevelt's first message to Congress[173]

Constitutional limitations on legislation from the baseline of the common law constituted the legal counterpart of the classical economic system. Similarly, departures from the classical legal arrangement which conceptualized common law rights as pre-political or natural went in lockstep with departures from classical economic thought, which had conceptualized the market as self-correcting outside the limited governmental intervention of enforcing a framework of equal rules of conduct (including equal and limited police power legislation).[174] The railroads were, after the Civil War, one of the most important economic fields, vital to the economic health of the country. After some efforts at state subsidization of competition, by chartering competing railroads, it became more and more clear that the

[173] In Willard Hurst 1967, at p. 84.

[174] Tribe 1988, Chapter 8, Model II-The Model of Implied Limitations on Government: The Rise and Fall of Contractual Liberty. For an exploration of the correlation between classical economics and classical legal thought, Herbert Hovenkamp, *Enterprise and American Law 1836–1937* (Cambridge, Mass.: Harvard University Press, 1991). The study seeks to demonstrate that Adam Smith-like economic classicism and legal classical thought were interrelated and marginally overlapping, not in some simplistic deterministic way but rather because: "American political economists and American judges operated in the same uniquely American 'market' for ideas." (at p. 96) Of more direct interest to us here is the observation, at p. 296, that: "[t]he great values of nineteenth-century American lawyers-individualism, liberty of contract, abhorrence of forced wealth transfers- were also the values of classical political economy." More generally on the history and evolution of regulation, Thomas K. McCraw's monograph, *Prophets of Regulation* (Cambridge, Mass, and London, England: Belknap-Harvard University Press, c1984).

laws of competition, assumed to be self-correcting by classical economics, just did not apply to this industry. Because of its characteristics (very large fixed costs with comparatively very little operating costs), if either forced into competition or left unregulated by the state—the orthodox classical economic options—the railroad companies seemed ever "destined to be either filthy rich or perpetually broke."[175] Legally, the railroads were the ideal embodiment of a "business affected with a public interest," as common carriers, historically subsidized by the state (sometimes granted extensive eminent domain privileges). According to the common law, they were under a duty of nondiscrimination and charge reasonableness. In the wake of the Civil War, complaints of rate discrimination and preferential treatment of shippers, merchants, farmers, and localities by the railroads were ubiquitous.[176] After the Supreme Court disabled the states from regulating rates on interstate rail traffic (including its intrastate segment), in the 1886 decision of *Wabash, St. Louis & Pac. Ry. v. Illinois,*[177] Congress would be compelled to regulate instead and, in 1887, the modern federal administrative state was inaugurated by the creation of the Interstate Commerce Commission, fashioned after the state railroad commissions and given the power to issue retroactive, nonpunitive cease and desist orders from conduct deemed in violation of the statute, i.e., unreasonable and discriminatory rates. The Court took a very limited view of the scope of federal regulatory power and read the statute accordingly, regarding the commission as no more than a preliminary referee, whose findings of fact were treated in a judicial proceeding as only prima facie valid. The ICC's interpretation of its governing statute was accorded almost no deference whatever.[178] In his monographic article on the

[175] Hovenkamp 1991, at p. 148: "If the railroads were permitted to have unregulated monopolies, rate gouging and large monopoly profits at the expense of the shippers were sure to result. If the railroads were forced to compete with each other and pooling or other forms of cartelization were strictly forbidden, railroad rates would almost certainly be driven to a level too low to cover fixed costs, forcing the railroads into bankruptcy."

[176] An economic and legislative history of the problems leading to the creating of the state and federal railroad commissions can be found in the first chapter of McCraw's monograph. *See also*, Rabin 1986, at pp. 1206–1207: "[W]hat seems most apparent is that virtually no one was happy with the discriminatory practices engaged in by the railroads to secure additional business. Merchants, farmers, regional loyalists, and railroad entrepreneurs all shared the view that federal regulation was essential. Where they disagreed was on the crucial particulars."

[177] 118 U.S. 557 (1886).

[178] E.g., *ICC v Cincinnati, New Orleans & Texas Pacific Railway*, 168 U.S. 11 (1897) In the face of ten years of different ICC practice (and Congressional acquiescence), power expressly conferred in the act to declare rates *unreasonable* was declared by the Court not to imply a power to establish *reasonable* rates; if Congress had wished to confer ratemaking power, it should have done so in express terms. *See also Chicago, Milwaukee, St. Paul Railway v. Minnesota*, 134 U.S. 418 (1889) state legislation giving an agency "final and conclusive" authority over the reasonableness of rates would not control the courts, since rate reasonableness is "eminently a judicial question." In the 1910 case of *Interstate Commerce Commission v. Illinois Central Railroad*, 215 U.S. 452 (1910) the Court would present a different, much more restrained view of the scope of review: "Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider: (a) all relevant questions of constitutional power or right; (b) all pertinent

history of federal regulation, Robert Rabin makes the interesting remark that: "[t]he tendency in administrative law to regard the delegation doctrine as the principal judicial tool for determining the legitimate scope of agency authority seems to me to be mistaken. By far, the more common strategy resorted to by the Supreme Court in [the] ICC cases was a persistently narrow construction of the substantive authority conferred upon the agency."[179] In fact, while Rabin's observation is correct in a sociological-statistical sense (i.e., with respect to cumulative practical results and judicial strategy), the two matters of *legitimacy-oriented* constitutional limitations on the scope and precision of statutes and the *discretion-relating* degree of deference accorded administrative statutory interpretation in judicial review of administrative action are conceptually related and reinforcing, since both are related to the concrete baseline of private liberty and property rights, as defined by the common law.[180]

questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (c) a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power." (at 470). According to Rabin, the history of federal regulation explains this change from correctness to a relaxed reasonableness review as a period of acclimatization and accommodation of the Court with administrative innovations.

[179] Rabin 1986, at p. 1215, note 65.

[180] Besides, aside from the fact that the judiciary effectively rendered the Commission's powers almost nugatory through *de novo* review, even as Congress gave the ICC positive power to set maximum rates upon a shipper's complaint that a rate was unreasonable, through the Hepburn Act, in 1906, there was yet not that much administrative discretion granted, within the logic of the classical legal paradigm. The Commission was also given a locomotive inspection function. According to Martin Shapiro, both locomotive inspection and rate setting were perceived as one and the same issue essentially, i.e., "objective, scientific assessements based on exact, nondiscretionary standards." As the locomotive safety standards were set scientifically (since the cost-risk trade-offs incorporated in the standard and based on professional conventions were then unapparent), so too was maximum rate-setting an objective application of science (economics and accounting) to facts (market value): "Economics would determine what a fair rate of return was on investment. That rate was a phenomenon as 'natural', that is, beyond human manipulation, as the transit of Venus. The economist would observe the free market as the astronomer did the heavens, and measure fair rate of return, that is the return that any investment in the market would yield, as the astronomer charted Venus's sidereal movement. The accountant would then determine the amount of the railroad's costs to be properly attributed to the hauling of a particular commodity over a particular track, add the appropriate fair return figure provided him by the economist and arrive at the correct rate. In this realm of accounting, all was quantified and accurately measurable. Nothing was uncertain. Rate regulation was a matter of science rather than discretion." The Frontiers of Science Doctrine: American Experiences with the Judicial Control of Science-Based Decision-Making, EUI Working Papers, European University Institute RSC No. 96/11 (1996). According to Theodore Lowi as well, the nature of ICC became truly discretionary only with the 1920 Transportation Act's granting it power to set "just and reasonable" "minimum rates." This is a very interesting observation in light of the distinct nature of an

Regulation of natural monopolies such as public utilities and the railroads could, after the theoretical issues became clearer, be conceptualized without much effort in common law terms and was, for historic reasons, a lesser challenge for classical economic thought as well. The problem of regulating the *de facto* monopoly as a market failure and 'monopolistic' practices, such as contracts in restraint of trade and dishonest competition practices that undercut the proper functioning of economic laws, would pose, nonetheless, a bigger challenge to both paradigms. At common law, a monopoly was a *legal* monopoly, a grant from the king excluding others from commerce. In classical economic thought, hostility with monopolies was associated with hostility towards mercantilism and its whimsical and wasteful interferences with the laws of the market, while classical legal thinking regarded with just suspicion a privilege.[181] The classical economic and legal idea was that the state should not interfere with the market and not play favorites, a totally different matter than the problem posed by the *de facto* monopoly, namely that the market needed correcting by state interference lest the consumers and small businesses should be coerced by monopolistic prices. Forbidden practices in obstruction of trade, yet another matter, had been in England strictly enumerated and defined with great specificity by the 1552 *Statute against Forestallers, Regrators, and Ingrossers*.[182] As a rule, nonetheless, cartel practices like price-fixing, if non-coercive, were not unlawful, in the sense that, although unenforceable, they could not be challenged by non-(third-)parties to the agreement. A contract in restraint of trade, a third issue still, was a contract by which one limited by covenant one's rights to practice a trade, such as when a grocer would sell a business with an agreement not to engage in the same business in the same locality or within a certain distance. The limitation, lawful if reasonable 'from the point of view of the parties and of the public,' was predicated on public policy grounds having to do with the reasonableness of the self-imposed coercion to the party imposing this limitation on himself and the correlative risk that one who would impose an unreasonable restriction on himself would likely lose all means of livelihood and thus become a public charge.[183] The only trade restrained was, as

affirmative power granted in vague terms and exercised in a judicial manner, in an essentially "polycentric" domain: "In effect this meant case-by-case bargaining (called 'on the merits'), the results putting the commission on every side of every issue. . ..this totally altered the meaning of the ICC." (*supra* at 102) .

[181] The constitutional question was whether within the regulatory limits of police powers legislation, the Constitution either implied or forbade (as a Contract Clause impairment and, respectively as a Fourteenth Amendment due process limitation) the conferral of monopoly privileges in public contracts (i.e., corporate charters). The Supreme Court would answer both questions in the negative, Charles River Bridge Case, *Charles River Bridge v. Warren Bridge* 13 U.S. 420 (1837) and *The Slaughter House Cases* 83 U.S. 36 (1872).

[182] 5th and 6th Edw. VI, Ch. 14.

[183] Interpreting the Sherman Act in light of these common law assumptions was the reason for Holmes's argument in his famous *Northern Securities* dissent, where, to the dismay of Theodore Roosevelt, he made the apparently surprising statement that: "[t]he court below argued as if

Holmes would later take pains to emphasize in his *Northern Securities* dissent, the contractor's own. All these rules corresponded essentially to a different economic reality and conceptual template than those reflected in the Sherman Law.

In the politically charged climate of passing the Sherman Law, in 1890, within the context of a very incomplete and muddled understanding of the 'trust' problem,[184] all these problems were 'jumbled' together, in a confused legal formula which replaced the definition of prohibited practices with a vague prohibition stated in the colloquial and moralistic terms inspired by the contemporaneous dislike for the 'trusts.' The act criminalized "every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several states." Because of the vagueness of the terms and the blanket, no-exception prohibition of the statutory provision, this was rendered in effect a much more serious delegation of authority than the 'unjust and unreasonable rate' one in the Commerce Act, since the terms as such inevitably gave unprecedented policy making discretion to either the Executive or the courts. By the face of the statute, it was not at all clear *what* exactly was prohibited, since every contract is in a sense a restraint of trade, and thus could potentially fall under the statutory sweep. Holmes would later characterize the act, in a 1910 letter to Pollock, as a "humbug based on economic ignorance and incompetence."[185] The "rule of reason"[186]

maintaining competition were the expressed object of the act. *The act says nothing about competition*." At 403 (emphasis supplied)

[184] Brandeis, one of the most vociferous critics of the 'trusts,' personally instrumental in the creation of the Federal Trade Commission, because of his visceral antipathy to 'big business' as such, seems to have been curiously unable to grasp the economic differences in kind between business fields where, because of economies of scale, cartel arrangements would tend towards tight central vertical integration (the 'trusts'), and business fields where, due to easy entry, cartel arrangements would never amount to more than loose peripheral horizontal associations, easy to default on and prone to early demise. He disliked first and foremost the Moloch, big business as such, irrespective of economic benefits derived from operational size, and concentrated his energies on the elimination of unfair trade practices since he correlated 'bigness' (the 'trusts') with unfairness and deceit. Considerations of efficiency and thus consumer welfare came a distant second for Brandeis. During 1911 Congressional hearings, Brandeis states his position bluntly: an efficient firm might nonetheless become "too large to be tolerated among people who desire to be free." Cited by Mark Winerman, "The Origins of the FTC: Concentration, Cooperation, Control, and Competition," 71 *Antitrust L. J.* 1 (2003), at 35. *See* McCraw 1984, "Brandeis and the Origins of the FTC," pp. 80–142. *See also* Ellis Hawley, *The New Deal and the Problem of Monopoly-A Study in Economic Ambivalence* (Princeton, N.J., Princeton University Press, c1966).

[185] Mark DeWolfe Howe, ed., *Holmes-Pollock Letters*, vol. I (Cambridge: Harvard University Press, 1941), at p. 163.

[186] *Standard Oil Co. of New Jersey v. U.S.* 221 U.S. 1 (1911), *see* at 60, for instance, the judicial statement of the problem: "[A]s the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibition had or had not in any case been violated."

formula by which, analogizing with the common law, the Court sought to narrow down the open-ended terms of the statute, failed to satisfy anybody. The reasonableness test had been developed by the common law to apply to small-scale transactions between individuals in a pre-industrial market and did not fare well applied to huge trust operations in an industrial economy, in the absence of clear legislative guidance.[187] Failure to clarify the statute in terms of received categories through a test of predictable application limiting judicial decision-making presented the danger of a potential arrogation of vast and completely unstructured policy-making discretion by the Court. This was the unprecedented case of legislation which, since impossible to narrow down according to common law categories within the logic of the classic judicial paradigm, could end up either granting unfettered enforcement discretion to the administration (in effect to the Executive, through the Department of Justice), with respect to private rights or else would transform the judiciary into a large-scale policy-maker.[188]

This legal and political quagmire would be momentarily resolved by the conversion of the 'trust-busting' criminal enforcement position of the Sherman Act into a 'fairness of trade practices' corrective administration issue, through the creation, during the Wilson Administration, of the Federal Trade Commission. This solution, of an independent regulatory agency, is generally recognized to characterize the pragmatic and to a certain extent unsystematic American approach to regulation, in both institutional terms and economic strategy.[189] At the time, the commission

[187] The issue was described quite clearly and at an early stage by Gerald Henderson: "It may be conceded that the test is not of itself susceptible of precise and definite application. A court may have good reasons for concluding that it is not proper for a physician to covenant not to practice his profession within 100 miles of the city of York, but they are not very helpful in determining whether or not a consolidation of 40 per cent of the steel industry in the United States is reasonable. At most they suggest the frame of mind into which the judges should put themselves." Gerald Henderson, *The History of the Federal Trade Commission-A Study in Administrative Law and Procedure* (New York: Agathon Press, 1968 (c1924)), at p. 6.

[188] *But cf.* Lowi 1979, at p. 99, the act not a delegation since the object of control was a "numerous but namable collection of companies and identifiable conducts (Therefore, *The* Trusts.)" That may be true in an instrumental, more result-oriented political science sense. From a legal perspective, what is important from a delegation-related perspective is whether or not the new legislation could be narrowed down and interpreted in a consistent manner, through a judicial test which would render the legislative command predictable. Here, Holmes's dissent in *Northern Securities Co. v. U.S.* 193 U.S. 197 (1904), at 402, is pertinent: "[T]he statute is of a very sweeping and general character. It hits 'every' contract or combination of the prohibited sort, great or small, and 'every' person who shall attempt to monopolize, in the sense of the act, 'any part' of the trade or commerce against the several states. There is a natural inclination to assume it was directed against certain great combinations, and to read it in that light. It does not say so. On the contrary it says 'every,' and 'any part.'"

[189] *See*, Giandomenico Majone, *Regulating Europe* (New York and London: Routledge, c1996), for an elaboration on the remark that, categorized with respect to the way in which the proper role of the state and the corresponding place of the market is primarily approached, America is an ideal-typical "regulatory state," since its regulatory function predominates, and to this extent it differs from the welfare state (redistribution function), Keynesian state (stabilization function) or a

formula, already used at the federal level by the Commerce Act, had become a familiar regulatory tool and thus met with almost general approval as a solution to the many dilemmas raised by the unfortunate attempts at enforcing the Sherman Act. It seemed the self-evident answer to the concrete problem posed by the 'trusts.' The extent to which the trust problem and the debates around it constituted a novelty would not be apparent for a while since, in terms of immediate legal developments, the Supreme Court would, in the course of a quick series of decisions, 'interpret away' most of the discretionary powers of the Federal Trade Commission.[190] In 1920, in *Federal Trade Commission v. Gratz*, the Court decided that, while, just as the statute said, "findings of the commission as to the facts, if supported by testimony, would be conclusive" upon the courts, the operating sentence of the FTC Act, "unfair methods of competition," since the meaning of the phrase was in dispute, was *a matter of law* for the court to decide according to the common law.[191] Yet, the conceptual intricacies surrounding the monopoly problem and the various legislative and judicial positions with respect to the matter were the harbingers of a new constitutional paradigm. The essential elements of this new paradigm, many of which constitute the contemporary legal and theoretical template, need to be specified at the closing of this section.

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combination of the latter two, the Keynesian welfare state: "[T]he regulatory function. . .attempts to increase the allocative efficiency of the market by correcting the various types of market failure: monopoly power, negative externalities, failures of information or an insufficient provision of public goods." That is to say, the state regulates the market policing or substituting for the real life departures from an economic model that supposes a perfect competition, with a perfectly well informed customer and internalization of all the costs.

[190] Usually decisions on appeal from the circuit court of appeals decisions on applications for enforcement or petitions for review of FTC cease-and-desist orders. In a long line of cases, the most representative are *Federal Trade Commission v. American Tobacco Co*. 264 U.S. 298 (1924), rendering nugatory the investigative powers of the FTC; the agency had sought in District Court a writ of mandamus directing the tobacco companies to produce records, contracts, memoranda, correspondence, for making copies and inspection: "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. . ..The right to access given by the statute is to documentary evidence-not to all documents, but to such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for documents in order to *see* if they do not contain it." Opinion of the Court, per Holmes, J.

[191] *Federal Trade Commission v. Gratz*, 253 U.S. 421 (1920), at 427: "The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly." Opinion of the Court, per McReynolds, J. The contrast with Brandeis, J.'s dissent is revealing of the clash of paradigms and the issue of delegation as standard of review in statutory interpretation: "Instead of undertaking to define what practices should be deemed unfair, as had been done in earlier legislation, the act left the determination to the commission." (at 436)

In terms of legislative accountability to the electorate (as a representation problem) or regarding Congress's fulfillment of its constitutional lawmaking duty, the general approval with which the new trade commission legislation met reflected precisely the extent to which the legislation constituted a delegation in one of the modern senses of the word, that of irresolution and evasion from responsibility in face of a difficult choice. The vague and broad legislative mandate under which the Commission was meant to operate, prohibition of "unfair methods of competition. . .and unfair or deceptive acts or practices" "in the public interest,"[192] reflected the indecision and lack of agreement on both means and ends surrounding the drafting of the Federal Trade Commission Act. The end product seemed, on the face of it, a statutory cornucopia, able to give all possible things to all possible people which could possibly be affected by the operation of the statute. Small business, big business, consumers, could get protection, advice, good quality of products and lower prices. Bad business would be brought to justice, good business would prosper and thus, under the watchful eye of the commission, everyone would be provided for.

Nobody can disagree, as a matter of principle, with a general proposition, stated in abstract and morally charged terms. Usually, the higher the level of abstraction, the lesser the disagreement; who could ever be, to cite K. C. Davis's characterization of modern legislative mandates, against "the true, the good, and the beautiful."[193] Disagreement comes usually in terms of concrete policy and, by failure to define clearly the critical terms of the statute, "unfair methods of competition," the American Congress broke the path of modern delegations.[194] This legislative direction differed essentially from the Commerce Act, which, initially, had given the Interstate Commerce Commission only power to determine what an unreasonable rate would be, in a quasi-judicial manner, across one industry, proscriptively. Now, even though the method prescribed for the Trade Commission would be quasi-judicial, the task was essentially legislative, to the extent that the commission would need to define what "unfair methods of competition" would mean, across most of the economy, prescriptively, without legislative guidance. It should be pointed out that even the formula "in the public interest," as it found its place in the Clayton and FTC Acts, was no longer freighted with meaning by history and common law. A business 'affected with public interest,' as the reader will remember, had been considered in economic terms one that could be exceptionally

[192] In the Clayton Act, which would also be enforced by the Commission, Congress made an attempt to specify three categories of conduct expressly prohibited: price discrimination, interlocking directorates, exclusionary agreements.

[193] Davis 1969, at p. 20.

[194] Jerry L. Mashaw observed that modern American statutes, even though otherwise replete with technical detail, "often exhibit surprising vagueness precisely at the point of critical policy choice," since "adverbial equivocations" ("feasible," "practicable," "reasonable") render the legislative direction essentially and irresolutely vague, precisely at the point of critical policy choice and this in spite of technical or procedural detail. Mashaw 1997 at p. 135.

excluded from competition and regulated. Conversely, in legal terms, this was an exception from the substantive due process constitutional justificatory burden the government would have to meet when seeking to reach by legislation purely private common law rights. In the FTC Act, "public interest" was standing for a different legislative template, which Jaffe would later call "the illusion of ideal administration," presumed by the "broad delegation model," where, by virtue of collapsing under an open-ended proposition both 'what agencies are and what they ought to be' (namely, regulators in the public interest), the normative burden of assessment is up for grabs and entirely projected on the critic-observer.[195] To put it otherwise, a formula such as 'the public interest,' unless concretized and defined by legislative assignment of burdens and benefits, is in itself lofty and noble-sounding but essentially meaningless abstraction.

Regarding bureaucratic political accountability and closely related to the above observations, at the time, the commission solution as such embodied the expertise-oriented attitude of the Progressives towards administration.[196] At the end of the nineteenth century and the beginning of the twentieth, a belief had surged in legal and political thought that administration could be separated from politics and that regulatory issues could be met with objective, scientific answers. To be sure, in due course, the rightness of Herring's premonitory observation would be proved that "[a]dministrators cannot be given the responsibilities of statesmen without incurring the tribulations of politicians."[197] Since it influenced American administrative law to an important degree and in the longer run, the belief as such in a neat separation of economic administration from politics, is of broader interest to this study. There are

[195] Louis Jaffe, "The Illusion of Ideal Administration," 86 *Harv. L. Rev.* 1183 (May, 1973). The main thesis is revealed by the following passage: "The broader the power defined as appropriate for exercise by an administrator, the greater the frustration of the critic who finds that the state of the regulated world is not to his tastes. The assumption that a vague delegation to regulate in the public interest yields a standard which is readily discoverable by an administrator provokes objection when results do not comport with one or another individual's concept of what the 'public interest' requires."

[196] A number of related social-intellectual ideas concerned with social, legal, and institutional reform are brought together under the umbrella of 'progressivism,' a political and intellectual movement influential from the late nineteenth until the first decade of the twentieth century. Daniel T. Rodgers analytically broke the general label of 'progressivism' (and the 'ideology of discontent' characterizing the different positions characterized loosely as progressivism) into three "languages of discontent," epitomizing "three distinct clusters of ideas. . .the first was the rhetoric of antimonopolism, the second was an emphasis on social bonds and the social nature of human beings, and the third was the language of social efficiency." "In Search of Progressivism," 10 (4) *Reviews in American History* 113 (Dec., 1982), at p. 123.

[197] "[T]he control of business remains too controversial and too vital a political issue to be entirely relegated to any commission independent of close control by the policy-formulating agencies of the government." E. Pendleton Herring, *Public Administration and the Public Interest* (New York: McGraw Hill, 1936), at p. 138. *See*, by the same author, a review and analysis of the early political and legal imbroglios of the Federal Trade Commission, "Politics, Personalities, and the Federal Trade Commission," I and II, 28 (6) and 29 (1) *American Political Science Review* 1016 (Dec., 1934) and 21 (Feb., 1935).

two different issues captured under the expertise idea, which concern equally the phenomenon of delegation and its subsequent conceptualization and treatment in legal theory and actual law. If policy making is posited as a matter of expertise, then it seems to be the case that it does not need to be directly controlled politically. More so, *direct* political control would be detrimental, the Progressives believed, since it would bring venality, factionalism and special interest within a realm of objective reason. Regulation by commission was to be in all senses, in the words of a later critic, "regulation without tears."[198] The Progressives were after all, as the word readily shows, progressive, concerned with rapid social change,[199] and thus quite impatient with separation of power theories and their emphasis on forestalling governmental action.[200] As a good litmus test for the temper and stultifying confusion of the times, in this vein, suffice it to point out that a personage of Harvard Law School Dean Roscoe Pound's stature and wit could write in 1920 that: "No one will assert at present that the separation of powers is part of the legal order of nature or that it is essential to liberty."[201] Since as a matter of institutional-procedural design the commissions had been given functions that resembled those of the traditional political branches[202] this became a self-fulfilling prediction about administrative

[198] Marver H. Bernstein, *Regulating Business by Independent Commission* (Princeton, N.J.: Princeton University Press, 1955), at p. 37: "The Progressives had an abiding faith in regulation, expertness, and the capacity of American government to make rational decisions provided experts in the administrative agencies could remain free from partisan political considerations."

[199] *See* Herbert Hovenkamp, "Evolutionary Models in Jurisprudence," 64 *Tex. L. Rev.* 645 (December, 1985). *Also see* by the same author "The Mind and Heart of Progressive Legal Thought" (Presidential Lecture given at the University of Iowa), available for download at http://sdrc.lib.uiowa.edu/preslectures/hovenkamp95/, last visited October 31, 2010). Hovenkamp relates legal Progressivism to the transposition of Darwin's evolutionary theories to social sciences. According to him, *The Descent of Man,* published in 1871, which linked humans to Darwin's general theory of evolution, produced both a right- (Herbert Spencer is here the epitomic example) and a left-wing or Reform Social Darwinism. The Progressives, as Reform Darwinists, believed that the specific difference of the human species is that it can understand and thus control or 'manage' scientifically its evolutionary process.

[200] *See* a review in Vile 1967, X-"Progressivism and Political Science in America," pp. 263–293. Thus the interest and fascination with "efficiency, rationalization, and social engineering" (Rodgers at p. 126)

[201] Roscoe Pound, "Spurious Interpretation," 7 *Colum. L. Rev.* 379 (1907), at p. 384. In short time Pound will experience a spectacular about face, complaining of New Deal "administrative absolutism," just as Landis would later experience his own disillusionment, with the ideas of administrative expertise and objectively attainable public interest. *See*, on these issues, Horwitz, op. cit. Chapter Eight, "Legal Realism, the Bureaucratic State, and The Rule of Law," pp. 213–246.

[202] Even though the initial commissions were not given rulemaking functions, the Federal Trade Commission issued a complaint, enforcing the law ('like' the executive), decided on the merits of the complaint and issued a cease and desist order ('like' a court). Being the institutional heir of the 1903 Bureau of Corporations within the Department of Commerce and of the state 'sunshine' (investigatory) commissions, it also investigated trade practices and compiled data, held trade practice conferences, and made proposals *de lege ferenda* to Congress, functions that resembled (were 'like') those of a legislature.

regulatory independence. This attitude would later be epitomized by James Landis's *The Administrative Process*. Landis, a prominent New Dealer, law professor, and member in the boards of both the Federal Trade Commission and Securities and Exchange Commission, described regulatory administration and the administrative process as such essentially in terms of expertise and as necessary and welcome innovations upon the separation of powers.[203]

In terms of rule of law and judicial review of administrative discretion, should the administrator be deemed an expert in his field of administration, it follows that, as a matter of course, the proper judicial posture should be deference. More so, it would be an unproblematic deference, not the sort involved in the case of judicial submission to the *subjective* legislative and administrative or executive choices of the political branches, in which case the very word, as John Vining put it "calls up lowering the eyes, baring the covered head, laughing at jokes that are not funny."[204] Deference to the *objective* decision of an expert policymaker would pose no such problems, since thus the judge would yield to science and not arbitrariness or whim; properly speaking, there would be in fact no discretion at all, since the administrator would himself be bound by the objective and self-evident result to be achieved.[205] In the general ethos of the time, Ernst Freund's admonition remained largely unheeded, that administration, precisely the other way around, could remain neutral, separate, and expert *if* political decision would specify both means and ends in advance and that "with regard to major matters, the appropriate sphere of delegated authority is where there are no controversial issues of policy or opinion."[206]

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[203] James M. Landis, *The Administrative Process* (New Haven and London: Yale University Press, 1966 edition with a Foreword by Louis L. Jaffe (c1938)), at p. 15: the administrative process "presents an assemblage of rights exercisable by government as a whole." Yet, the innovation is unproblematic, since (at p. 47): "The desirability of four, five, or six "branches" of government would seem to be a problem determinable not in light of numerology but rather against a background of what we now expect government to do."

[204] Quoted by Michael Taggart in "The Tub of Public Law," in David Dyzenhaus, ed. *The Unity of Public Law* (Oxford & Portland, Oregon: Hart Publishing, 2004), at p. 474.

[205] *See* Stewart 1974-1975, at p. 1678 (commenting on the judicial review consequences of the 'expertise' model of administrative law): "For in that case the discretion that the administrator enjoys is more apparent than real. The policy to be set is simply a function of the goal to be achieved and the state of the world. There may be a trial and error process in finding the best means of achieving the posited goal, but persons subject to the administrators control are no more liable to his arbitrary will than are patients remitted to the care of a skilled physician." In a brief interdisciplinary interlude, consider the 'expertise' model as expounded, in a more chilling formulation, by one of the fathers of modern architecture, Le Corbusier: "The despot is not a man. It is the . . . correct, realistic, exact plan. . . that will provide your solution once the problem has been posed clearly. . .It is the Plan. . .drawn up well away from the frenzy in the mayor's office or the town hall, from the cries of the electorate or the laments of society's victims. It has been drawn up by serene and lucid minds. It has taken account of nothing but human truths." (The Radiant City)

[206] Ernst Freund, *Administrative Powers over Persons and Property* (Chicago: Chicago University Press, 1928), at p. 218. The Progressives had borrowed their view of administration as distinct from politics—at least in part—emulating the work of administrative scholars like Freund and

Most importantly, the political and legal contentions over the monopoly problem revealed a deeper cleavage in law and legal thought. As discussed earlier, the classic paradigm of discretion (associated with public law and public rights) and rule of law (associated with judicial determination of private rights) was the result of a sharp distinction between public law and private law, policed by (political) constitutional limitations on legislation on a baseline of natural (pre-political) concrete property and liberty common law rights. In the words of Herbert Hovenkamp: "Classical legal thought was characterized by a rhetoric that viewed the law as coming from a transcendent source, as if it existed apart from the courts and legislatures that formulate the rules. . ..Legal classicism borrowed from William Blackstone, the important eighteenth century writer on the common law, a sharp distinction between private law and public law. In private law the state administered independently established rules, but in public law it *made* the rules."[207] The rules made, we might add, had in turn to be justified in terms of those immanent in the common law and correspond at the point of legislation with the rule of law qualitative requirements on legislation (formal equality, generality, promulgation, prospectiveness, clarity) in order to further minimize state coercion.

Everybody is familiar with Anatole France's mockery of the formal equality of laws which prohibit both the rich and the poor to sleep under bridges and steal bread.[208] In a number of variations on the same theme, the Progressives would turn the tables on the classical paradigm, so that state *non*-interference with the liberty to contract and with property rights would be described as state-sponsored coercion of those subject to actual relations of power underpinned by the structure

Goodnow. The latter had famously drawn a distinction between politics and administration, depicted as a distinction between an expression and the execution of state will. But the difference between these early writers and the 'expertise' model of administrative law is one of kind. What Goodnow and Freund were advocating was not the idea that administration as such could be set apart from politics. Rather, emulating in turn European models of administration, they predicated the instrumental value of professionalized bureaucracy of the 'Weberian' strand, *sine ira ac studio*—in Weber's words—"discharge of business according to *calculable rules*." In this paradigm, the ideal of bureaucracy is a machine, not an expert: "The progress toward the bureaucratic state, adjudicating and administering according to rationally established law and regulation, is nowadays very closely related to the modern capitalist development. The modern capitalist enterprise rests primarily on *calculation* and presupposes a legal and administrative system, whose functioning can be rationally predicted, at least in principle, by virtue of its fixed general norms, just like the expected performance of a machine." [emphasis in original] Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Berkeley and Los Angeles: University of California Press, 1978), Guenther Roth and Claus Wittich, Eds., at p. 1394. The shift or rather leap of paradigm to the Progressive version of administration is epitomized by Woodrow Wilson's take on the matter, as perhaps best exemplified by his short article on "The Study of Administration," (Vol. II (2) *Pol. Sci. Q.* 197 (June, 1887)) which, not coincidentally, was published in 1887. This is the year that marked the beginning of the modern administrative state, with the establishment of the Interstate Commerce Commission.

[207] Hovenkamp 1995.

[208] Anatole France, *Le lys rouge* (1894).

of property rights.[209] For instance, in a reversion of the contractualist logic upon which the Constitution had been premised, whereby the government is a delegation of society for protection of natural rights of life, liberty, and property, Morris Cohen's influential article on "Property and Sovereignty" described property as a delegation of state power to private individuals.[210]

These arguments had been made much easier by the fact that—at the same time—property as such had been presented as (and perhaps to a certain extent had also become) both "de-physicalized" and "de-personalized." The logic of classical constitutionalism and classical legal thought assumes property to be a relation between a person and a thing. Property, in Locke's *Second Treatise* for instance, is something that I take out of the state of nature and that becomes, by virtue of my 'mixing' labor with it, mine. In a way it is therefore, by virtue of will and intention, an extension of my self. Inherent in the concept of property is the possibility of excluding others, since interfering with my property is equivalent to interfering with me and hence limiting my freedom without my consent. The state cannot legitimately interfere with my property by definition, since the state is my creation for limited and specified purposes, based on consent. We all (pre-politically speaking) only gave it limited powers, for reasons of convenience and uniformity, as our common agent, to interpret the laws of nature, solve undisputedly disputes as to their meaning, and punish transgressions. The same logic can be found in the arch-authority on the common law, Blackstone's *Commentaries,* where the right of property is presented as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[211] This concrete (physical) and personal notion of property had come under various attacks, such as Gerald Henderson's observation that the Supreme Court's announcement, in review of rates cases, of the rule that rate reasonableness would be a factor of the railroad property's fair market value was in fact circular, since market value was, conversely, a function of the

[209] A very good example in this vein is Robert L. Hale's "Coercion and Distribution in a Supposedly Non-Coercive State," 38 (3) *Political Science Quarterly* 470 (September, 1923). *Also see*, for a summation and commentary of relevant debates, Morton J. Horwitz, *The Transformation of American Law 1870–1960 -The Crisis of Legal Orthodoxy* (New York, London: Oxford University Press, c1992), *esp*. Ch. Five-The Progressive Transformation in the Conception of Property, pp. 145–167.

[210] 13 *Cornell L. Q*. 8 (1927).

[211] *Blackstone's Commentaries, supra* 2 (Ch. 1-Of Property, in General). Of course, in both Locke and Blackstone, the final assumption is natural law, i.e., Divine ordinance. In Blackstone the relation between actual practices (positive law) and their foundation in natural law is made very explicit. While "[i]t is well if the mass of mankind will obey the laws when made, without scrutinizing the reasons of making them," if we go to the roots of things, we *see* that the final authority is Divine command, so that the foundation of property is, positively speaking, Genesis 1:28: "In the beginning of he world, we are informed by holy writ, the all-bountiful creator gave to man 'dominion over all the earth.' This is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been started by fanciful writers upon this subject."

rates established.[212] Property had conceptually become, in this logic, a legal abstraction, an expectation of gain on the market, protected by state coercion, rather than a tangible thing protected from the state by the constitutional limitations.

By 1933, when an economist and a lawyer, Adolf A. Berle and Gardiner Means, published a book which was called by *Time* magazine "the economic Bible of the Roosevelt administration," it had become harder to argue that the state should not interfere with the individual's natural rights to property and freedom of contract.[213] *The Modern Corporation and Private Property*[214] argued that the main characteristic of modern business corporations was the separation of ownership and management. According to their thesis, the owner-stockholders had relinquished actual control, whereas those in actual control, the managers, had proportionally negligible property-interests in the business and, moreover, were paid salaries often set without a direct correlation with profits made. As a consequence and as the reverse side of shareholder passivity, they exercised real control over other people's property, having at the same time interests partly divergent from those of the actual owners. There seemed to be no reason, in this logic, why the state should not regard all corporations as "affected with a public interest," and legislate to subject them accordingly to "the paramount interests of the community. . .fair wages, security to employees, reasonable service to their public, and stabilization of business. . .."

The Constitution as such had been 'debunked' in 1913 by the Progressive historian Charles Beard, as no more than a 1787 Philadelphia cabal by a handful of self-interested propertied individuals, which sought to selfishly protect their possessions against redistribution, by erecting a legal bulwark against the will of the people.[215] Soon this would be common attitude, to the point when, during the Depression, a state governor would ask in cavalier disregard, when advised that the Agricultural Adjustment Act, a major New Deal piece of legislation, could be declared unconstitutional: "Hell, what's the Constitution between friends?"[216]

In the future, in terms of the proper scope of the legislative reservation, in line with this logic, property would be looking less natural and private and more legally constructed and thus more 'public,' hence more amenable to legislative and administrative discretionary interference. Conversely, what had been in the past deemed as purely legal or public rights would begin to be seen as more like property.

[212] "If we reduce your rates, your value goes down. If we increase them, it goes up. Obviously, we cannot measure rates by value if value is itself a function of rates." Cited by Horwitz 1992, at p. 163.

[213] *Cf.* Hovenkamp at p. 360. *See*, relevant for the discussions here, "The Business Corporation in the Post-Classical Era," pp. 357-362.

[214] Adolf A. Berle and Gardiner Means, *The Modern Corporation and Private Property* (New York: Macmillan, 1933).

[215] Charles A. Beard, *The Economic Interpretation of the Constitution of the United States* (New York: Free Press, c1935 (first published 1913)).

[216] *Cf.* Arthur M. Schlesinger, Jr., *The Coming of the New Deal* (Boston: Houghton Mifflin, 1959), at p. 66.

The lines of demarcation between discretionary and legal would shift and blur, with this partial collapse and blending of categories. Most importantly for our purposes, with legislation more discretionary (constitutionally speaking), administration would in time become more lawful and 'constitutionalized.'

3.1.2.4 Assumptions About Legislation, the Nondelegation Doctrine in Court, and the New Deal Constitutional Compromise

> But in the event Congress shall fail to take one of these two courses, and in the event that the national emergency is still critical, I shall not evade the clear course of duty that will then confront me. I shall ask the Congress for the one remaining instrument to meet the crisis-broad Executive power to wage a war against the emergency, as great as the power that would be given to me if it were in fact invaded by a foreign foe.
>
> Franklin Delano Roosevelt, Presidential Inaugural Address, March 4, 1933

> The Constitution of the United States was a layman's document, not a lawyer's contract. *That* cannot be stressed too often.
>
> Franklin Delano Roosevelt, Address on Constitution Day, September 17, 1937

> The mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.
>
> Jackson, J., dissenting in *Federal Trade Commission v. Ruberoid Co.* 343 U.S. 470 (1952)

> Procedure is to law what 'scientific method' is to science.
>
> Foster, "Social Work, the Law, and Social Action," cited in *In Re Gault*, 387 U.S. 1 (1967), opinion of the Court, per Fortas, J.

The Legal Doctrine of Nondelegation: A Brief Conceptual Aside

Identifying correctly the poles delimiting the spectrum of a given debate constitutes often a sound heuristic tool. In this case, it may be particularly useful to our proper perception of the historical intersection of the judicial doctrine of nondelegation with the phenomenon of delegation to start the analysis of the crucial constitutional juncture we have reached (the New Deal) with a brief conceptual introduction-reminder.

The logomachy (at times cacophony) of the manifold delegation-related positions in modern and contemporary American public law literature can be reduced to a limited number of sharply polarized standpoints on the precise matter of the proper judicial attitude with respect to the consistent enforcement of a delegation-related constraint, for statutory nullification purposes, in constitutional review of legislation. Since this is the conclusion to a historical analysis and not a literature review and since, moreover, the issue will be revisited once more in the third part, I shall proceed to only exemplify each theoretical benchmark with what I consider to be, for present purposes, its most representative advocates.

At one extreme, there are nowadays those who believe that delegation was and is a viable judicial doctrine (as a matter of positive law), capable of consistent enforcement in constitutional adjudication and in need of resurrection from the legal oblivion into which it has sunk since the New Deal. To exemplify, this position

has been expounded more recently in American constitutional theory by John Hart Ely[217] and, in more adamantine fashion, by David Schoenbrod. The proponents of a vigorously enforced nondelegation doctrine believe this judicial attitude would bring a bevy of various benefits. In line with the observations made earlier, it should be pointed out that the envisioned benefits from enforcing a rule of nondelegation differ with respect to one's normative view towards legislation (a constitutionally-mandated legislative choice, a democratic choice, the product of representative deliberation, a constraint on discretion, a limitation on executive power, a rule of liberty, a *public* enactment, etc.). As noted earlier, one's normative assumptions regarding legislation will inevitably determine one's prescriptions on the issue of the constitutionally-mandated legislative reservation and thus also regarding the scope and proper application of a constitutional nondelegation doctrine.

At the other extreme, there are those who believe that the nondelegation doctrine is now defunct. This theoretical stand can be again subdivided. One main position, best typified in my view by an article by Edward Rubin on "Law and Legislation in the Administrative State," urges that, since the practice of modern legislation has drifted apart from our normative view of it (the author makes a universal claim, exemplified with contemporary American practices), and thus modern legislation does not possess "the normative force or metaphysical kick of law,"[218] one would now be allegedly free to legal scholarship and legal technique on the "question of effectiveness," such as (in the American context) the relation between Congress and its executive and independent 'agencies.'[219] The demise of the nondelegation doctrine is, according to Rubin, a very good example of how, in modern American law, normative constraints on legislation have become 'otiose,' since modern legislation is, according to him, best understood and approached as a 'directive addressed to an implementation mechanism.' Rubin asserts that the modern ideal-type of legislation is an "intransitive external statute" (as opposed to its pre-modern 'transitive external' counterpart). This means (in plain English) that modern statutes have become more discretionary and less normative: they delegate discretion (vernacularly, instead of addressing the individual and telling him what to do, they address the administration, telling it what to achieve and how to act) and hence are, in Rubin's preferred jargon, "intransitive."[220] Since, in his view, the category

[217] Who believed an enforceable nondelegation doctrine to be a corollary of his procedural theory of constitutional interpretation, perhaps as an interesting gloss on the inevitable interaction between process and substance-based constitutional theories.

[218] Edward L. Rubin, "Law and Legislation in the Administrative State," 89 *Columbia Law Review* 369 (April, 1989), 379–380.

[219] *Id.*, at 426.

[220] *Ibid.*, at 383: "From the perspective of the implementation mechanism, the statute's degree of transitivity is the mechanism's degree of discretion." Through this pseudo-technical jargon, Rubin means to make the rather simple and apparent observation that modern statutes do not address the individual directly, stating rules for action, they are not *normative*. Modern statues are *constitutive* of administrative discretion. In a condescending comment on and paraphrase of Lon Fuller, Rubin concludes that the 'morality of law' should be properly called, modern legislation-wise, "the morality of transitive external statutes."

'law' is in modern times perforce separated by virtue of practices from the category 'legislation,' Rubin counsels—with surprising yet perhaps somewhat commendable candor—a separate treatment of the matters. To sum up his long and elaborate argument in pedestrian language, legal practice should in general be concerned with practical matters, things in the world, technical issues for the most part, 'category legislation'; legal theory, respectively, with theoretical matters, namely whatever abstract ideas that people may choose to have, 'category law.' The two domains should be separated. The concept and doctrine of delegation would, in this author's view, epitomize best the said cleavage between practices (what legislation is like) and normative assessment (what legal theory tells us law ought to be like) and the consequent need for further separation between the 'categories' 'law' and 'legislation.'

Another version of the 'anti-delegation' stand is yet more radical, since it does not state that the nondelegation doctrine is an obsolescent constitutional constraint but rather affirms that there is no such thing as a delegation-related constitutional constraint on congressional enactments to begin with, and there never was, hence the whole debate is meaningless. This claim is best exemplified by the Posner-Vermeule article already mentioned in the introduction. The title is fairly revealing of the thesis: "Interring the Nondelegation Doctrine."[221] The two authors undertake to demonstrate that, since the doctrine of nondelegation seems instrumentally unfit, maladapted to advance the purposes underlying it, and since the concept as such is a 'metaphor,' 'standing for' and supported by many values and purposes which are both self-standing and hard to disentangle, and thus 'delegation' is irreducible to any single one of them, both the concept and the doctrine are useless. Posner-Vermeule also adduce in support of their thesis the correct observation that the legal doctrine has only been used to strike down statutes twice, during the New Deal, in exceptional circumstances, and thus it should be regarded as an exception to be discarded altogether and relegated to the closet of constitutional oddities, since it confounds clear understanding of actual positive law. There is—in short—no such thing as 'legislative delegation,' conceptually or legally speaking. For centuries, libraries have been stacked with useless writing on a sham topic; redemption comes at last, in slightly more than 41 law review pages.

To be sure, these latter two delegation-related theoretical positions are interesting as such, as events more than as arguments, to the extent that they show how modern legal transformations have impoverished juridical scholarship, divorcing accounts from practices to the extent that legal thought becomes very often, correspondingly, either exclusively quiescent-instrumental or—at the other extreme—divorced from reality, utopian. In our context, it would be easy to dismiss them as caricatures. Rubin's claim could be answered by noting that the fact as such that practices ('category legislation') have departed from normative accounts ('category law') is precisely a good reason for concern and reassessment of

[221] "Interring the Nondelegation Doctrine," 69 *University of Chicago Law Review* 1721 (2002).

practices in terms of the traditional normative constraints. This is especially so since our normative tools, which are sometimes captured under the umbrella concept of constitutionalism, are seemingly the best ones we have at hand. It is unclear otherwise how one could assess legal practices (other than in normative terms) and how one can conceptualize the phenomenon of delegation (except according to the normative framework showcased by the concept).[222] Related, a reasonable rejoinder to the Posner-Vermeule thesis[223] would be that, if nondelegation is a legal concept and a legal doctrine supported by many assumptions and irreducible to any one of them in particular, then so are many other concepts and doctrines of legal theory and of public law: the separation of powers, the rule of law, due process (natural justice), respectively. The Posner-Vermeule thesis is essentially (to paraphrase Lord Reid's *Ridge v. Baldwin* answer to claims "that natural justice is so vague as to be practically meaningless") "tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist."[224]

Yet caricaturized renditions of an issue, even though false, contain a germ of truth distorted by exaggeration. Pointing out the falsity of this latter pole of delegation doctrine-related positions does not, by implication, mean that the former set of theoretical standpoints would be correct. A claim demonstrably false does not become true by standing it on its head. Legislative delegation as a concept is inescapable, since inextricably linked to the idea of constitutionalism, of legislation limited by the conditions of the grant by which government, as an instrument ordained for limited purposes, is itself bound. Since these conditions are captured by the conceptual 'metaphor' legislative delegation, debates generated by the doctrine keep the legal and political stakes under continuous scrutiny, giving unity, consistency and coherence to public law. By the same token, the legal doctrine of nondelegation is inescapable under a written constitution which embodies the idea of government limited by law and whose grants of power are

[222] In this vein, *see*, for a very balanced and thoughtful critique, Peter L. Strauss, "Legislative Theory and the Rule of Law: Some Comments on Rubin," 89 *Colum. L. Rev.* 427 (April, 1989), *esp*. the comment at 427–428, which is worth reproducing at length: "[I]t is in part perhaps because of a failure to *see* that once the conversion has been made from 'transitive' to 'intransitive' statute-making, the question about control-and that question is not only one about Congress's relation to the agencies (the question on which he would have us focus), but also about the people's relationship to both Congress and the agencies; and also about our relationship to the President, and the President's relationship to the agencies. This is, if you like, the separation-of-powers question; one needs to account for the President and the courts as well as for Congress, and for the impact of change in Congress on how we would wish Congress (and our government generally) to be."

[223] Other than the unorthodox argument of authority: too many authors of notice have written too much about it, for the topic to be so easily and cavalierly discarded.

[224] [1964] A.C. 40, at 66, per Lord Reid. Likewise, it would be said in *Maxwell v. Dept. of Trade*, [1974] 2 W. L. R. 338, 349, regarding fairness, that "From time to time, during that period lawyers and judges have tried to define what constitutes fairness. Like defining an elephant, it is not easy to do, although fairness in practice has the elephantine quality of being easy to recognize."

expressed in limited and enumerated manner, in categorical terms.[225] Government as such is an aggregate of delegated power and, as Louis Jaffe puts it, the principle is simple and clear: "[A] delegation of power implies some limit. Action beyond that limit is not legitimate."[226] Nevertheless, the fact that a doctrine of nondelegation is an unavoidable constitutional corollary, does not of necessity mean that it can be judicially enforced through a test of consistent application or that it would be even desirable for it to be enforced, unless perhaps in the most extraordinary of circumstances. Neither does it mean that the deleterious consequences of a modern phenomenon, that of legislative delegations (in the sense of broad interpretive discretion, discretionary action, quasi-adjudication, and rule-making conferred by vague statutory enactments upon the executive and the administration) can be countered or disciplined by a judicially enforced nondelegation constraint on the legislature.

In the following, I will first try to point out briefly that nondelegation tests show fairly well how the doctrine of delegation mirrored judicial assumptions regarding legislation and that, as the character of legislation changed, with the advent of the modern administrative state, corresponding overall less and less to these background assumptions, the nondelegation tests changed in lockstep.

Second, I will show that, to the extent that the notion and legal doctrine of delegation 'capture' or 'showcase' the limitations on legislation and thus on government that are thought constitutionally proper at a given time,[227] the New Deal is indeed exceptional and crucial. It is exceptional not in the sense that it reveals, through the actual example of federal legislation being struck down on nondelegation doctrine grounds, the practical possibility of the doctrine's enforcement. The New Deal is both exceptional and essential because the legislative and judicial practices that marked this watershed constitutional period essentially changed the constitutional baseline along which the legitimacy of legislative enactments would be assessed and thus shifted the boundaries and the essential distinctions along which both constitutional and administrative law had been, as noted earlier, consolidated. By the same token, the famous nondelegation cases of this period, in their grapple with the phenomenon of delegation, mark and announce the essential tensions of the uneasy constitutional compromise along which new practices and debates would be structured.

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[225] *Field v. Clark*, 143 U.S. 649 (1892), 692: "That Congress cannot delegate legislative power. . .is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

[226] Jaffe 1965, at p. 320.

[227] *See* for instance Cynthia Farina, "Statutory Interpretation and the Balance of Power in the Administrative State" 89 *Colum. L. Rev*. 452, at 479 (April, 1989): "Nondelegation doctrine served as on the principal battlegrounds upon which the constitutionality of the growth of the federal regulatory authority was tested." Meaning, as I understand her argument, that is served as a battleground since and in the way it structured the major debates on administrative discretion, the proper scope of government, separation of powers, and accountability.

The Nondelegation Doctrine in Court: 216 Bad Years (and Counting)

> Major premise: Legislative power cannot be constitutionally delegated by Congress.
> Minor premise: It is essential that certain powers be delegated to administrative officers and regulatory commissions.
> Conclusion: Therefore the powers thus delegated are not legislative powers.
> Robert E. Cushman, *The Independent Regulatory Commissions* (1941)

> While the Constitution of the United States divides all power conferred upon the Federal Government into 'legislative Powers,' Art. I, § 1, '[t]he executive Power,' Art II, § 1, and '[t]he judicial Power,' Art. III, § 1, it does not attempt to define those terms. . ..Obviously, then, the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts.
> *Lujan v. Defenders of Wildlife* 504 U.S. 555 (1992), opinion of the Court, per Scalia, J.

The title of this section is a paraphrase of Cass Sunstein's 2001 observation that the nondelegation doctrine, as applied to statutes, had by then 211 bad years[228] and one good year (arguably, two). The first motto is taken from a section of Robert Cushman's book on the independent regulatory commissions, where Cushman observed that the Supreme Court had, with the two well-known and notable exceptions, always declared legislative powers as non-delegable, yet constantly evaded the practical consequences of its statement of legal doctrine (i.e., striking down as unconstitutional statutes that delegate legislative power). The usual method of evasion, as Cushman observed, would be the artifice of 'labeling' whatever powers the necessities of government would make Congress devolve upon agencies as non-legislative ('administrative' or 'quasi-legislative' or 'quasi-judicial') and thus delegable.[229]

Yet the Court also sought to confront the matter directly, by enunciating a test separating permissible and constitutional from unconstitutional delegation. As mentioned earlier, the first nondelegation objection to a statute arose in the so-called *Cargo of the Brig Aurora* controversy, where the challenge as such was

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[228] Sunstein 2001, *supra* note at p. 143. His observation was made in 2001 but the events intervening in the meanwhile, most notably the Supreme Court decision in *Whitman v. American Trucking Assn.*, confirm it.

[229] *Cf.* also Theodore W. Cousens, "The Delegation of Federal Legislative Power to Executive Officials," 33 *Michigan Law Review* 512 (1935), at p. 538: "Summing up the previous cases, without any undue attempt at clarifying that which the Supreme Court itself has left more or less nebulous, two general conclusions may fairly be arrived at:

(1) Wherever a question has arisen as to the validity of the delegation of alleged legislative power it has been uniformly upheld, and
(2) Powers which have been held non-legislative for the purpose of upholding their delegation have for other purposes in other cases (and sometimes in the same case) been held to be legislative or quasi-legislative."

brushed with a quick judicial aside, while the constitutional principle of nondelegation was affirmed.

Field v. Clark,[230] the first actual 'delegation decision,' was triggered by the 1890 Tariff Act's authorization to the President to "suspend, by proclamation. . .the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea, and hides" from foreign countries imposing "duties or other exaction upon the agricultural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea, and hides. . .he may deem to be reciprocally unequal and unreasonable."[231]

The constitutionality of the act was affirmed, under the delegation test enunciated by an earlier Supreme Court of Pennsylvania decision, coincidentally bearing the theoretically auspicious name *Locke's Appeal*: "Then, the true distinction, I conceive, is this: The legislature cannot delegate its power to make a law; but *it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend*."[232] [emphasis supplied] The test enunciated is one of contingent legislation. To a certain extent unsurprising, given the fact that the state case from which the test was 'borrowed' dealt with a contingent local option temperance law. In the case of a statute of contingent application, the delegation-relevant distinction is correctly described as one between making a rule and finding a fact upon which the rule applies; the issues are clearly delineated. Both the fact to be found and the method of finding it are easily determinable. For instance, in *Locke's Appeal*, voting during municipal election would determine whether or not the citizens of the Twenty-second ward of the city of Philadelphia wanted (fact) a further granting of licenses to sell intoxication liquors (rule). The rule applies when the fact obtains. The same demarcation, between a legislative rule and executive ministerial fact-finding according to it had been for good reason pointed out in *The Cargo of the Brig Aurora*, where the President Madison would need to ascertain as a matter of fact whether or not either Britain or France or both of them had revoked their embargo decrees or ceased their hostilities on the high seas against the United States. Nonetheless, upon closer inquiry, one can see that, unlike the statute challenged in *Brig Aurora*, the Tariff Act provision under scrutiny in *Field v. Clark* did not just direct the determination of a state of facts upon the existence of which the application of the law was conditional. It encompassed a value judgment and an element of

[230] 143 U.S. 649 (1892). Delegation by a state statute had already been attacked in the *Railroad Commission Cases*, 116 U.S. 307 (1886). The Supreme Court affirmed the decision of the highest court of Mississippi and maintained that establishing a regulatory commission with supervisory role over the railroads was not contrary to the Mississippi Constitution.

[231] C. 1244, sec. 3, 26 Stat. 567.

[232] "To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend, which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation." *Commonwealth ex rel. McClain v. Locke et al.*, 72 Pa. 491 (1873)

discretion as to the application of the statutory policy, since comparing tariff structures and assessing whether they are "reciprocally unequal" is not just a matter of finding facts (as the court implied).

The Supreme Court followed the contingent legislation, determination-of-fact rationale as a test in delegation cases until the first nondelegation attack on an administrative agency regulation, in *United States v. Grimaud*.[233] In *Grimaud*, a federal statute granting the Secretary of Agriculture power to make "rules and regulations... to regulate the occupancy and use and to preserve the forests from destruction," violation of the rules made in pursuance of the statute subject to criminal sanctions, was challenged by Pierre Grimaud, a California sheepman charged with grazing his sheep on public lands without having secured the permit required by the regulations. The delegation challenge was that Congress could not constitutionally delegate to the Executive what in fact amounted to the determination, by means of regulations, of the essential elements of a crime. The statute was upheld, on the grounds that: "....when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions '*power to fill up the details*' by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress or measured by the injury done....But the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offence."[234][emphasis added]

The "fill up the details" test had been 'borrowed' from Chief Justice Marshall's opinion for the Court in *Wayman v. Southard,*[235] an earlier case dealing with a nondelegation challenge to the 1792 Process Act' authorization to the judiciary to establish rules for the service of process and execution of judgments in federal courts. In dicta, Marshall stated that: "It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself....The *line has not been exactly drawn* which separates those *important subjects, which must be entirely regulated by the legislature itself*, from those of less interest, in which a general provision may be made, and *power given to those who are under such general provision to fill up the details*." In Marshall's interpretation, as it is apparent from this excerpt, the problem of nondelegation was at the same time unavoidable (according to the letter and spirit of the Constitution, it cannot be contended that Congress could delegate its power), resisting of judicial resolution (hard to draw lines in problems of degree, incapable of principled resolution), and thus best left to practical political adjustment (Congress can delegate to others what Congress can do itself).

[233] 220 U.S. 506 (1911).

[234] 220 U.S. 506 at 517, 521.

[235] 23 U.S. 1, at 43 (1825).

The modern nondelegation test was announced in *J. W. Hampton, Jr. & Co. v. United States*.[236] Hampton imported barium dioxide and the custom duty was assessed at a dutiable rate of 6 cents per pound, 2 cents higher than the one set by statute, by a New York custom collector's action, in line with the so-called 'flexible tariff provision' of the Tariff Act of September 21, 1922, which empowered the President to increase or decrease custom duties within a margin of 50% under or above the statutory rates.[237] In exercising his delegated statutory power, the President had to ascertain whether the cost of production in competing countries was equalized by the existing rates with the cost of production in the United States, taking into account, "insofar as he [found] practicable," among other factors, differences in conditions of production, advantages granted the foreign producers by foreign persons or governments, and "any other advantages or disadvantages in competition." The Court stated that the Tariff Act did not constitute an unconstitutional delegation of lawmaking by Congress, under yet another (and the current) nondelegation test: "If Congress shall lay down by legislative act an *intelligible principle* to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[238] [emphasis supplied]

David Schoenbrod, perhaps the most outspoken proponent of a revived nondelegation doctrine, considers this a borderline case since, allegedly, with it: "[T]he Court took a giant step toward explicitly allowing Congress to delegate... The Court upheld this statute, citing *Field v. Clark*, but the rationale that the president had only to find facts under a law made even less sense in *Hampton & Co*. The president cannot weigh the equality in costs of production in foreign and domestic industries without first having decided such broad policy question as the appropriate levels of wages and profits in the domestic industry."[239] Schoenbrod argues that, while the test in *Field v. Clark* had been too demanding, since a foreign affairs rationale alone could have saved the statute anyways, the same argument would not apply to *Hampton,* where the president's decision "turned on whether domestic industries earned enough money, rather than on whether foreign affairs charged excessive tariffs."[240] There are some objections to Schoenbrod's claim. In the opinion for the Court, Chief Justice Taft shows that, while the 1890 Tariff Act reviewed in *Clark* had left the judgment upon 'reciprocally unequal and unreasonable' foreign tariffs to the President alone (in practice, of course, to his delegates), the 1922 Act constrained the discretion by procedural safeguards: before action would be taken based on the 'flexible tariff provision,' there would be an initial investigation by the Tariff Commission, with "notice and opportunity to be heard

[236] 276 U. S. 394 (1928).

[237] Sec. 315 of Title III of the Tariff Act of September 21, 1922, 19 U.S.C.S., Sec. 154, 156, 42 Stat. 858 at 941.

[238] 276 U. S. 394, 409.

[239] Schoenbrod 1993, at p. 35.

[240] *Id.*

for all interested parties." Moreover, Taft, C.J., noted, where exactly the line would be drawn when deciding, in a nondelegation challenge, whether Congress had fulfilled its constitutional duty "must be fixed according to the common sense and the inherent necessities of the governmental co-ordination."[241]

Besides, as noted earlier, due to both political and epistemological reasons, there are very substantial differences with respect to the practically attainable and pragmatically feasible degree of statutory precision (and therefore level of discretion) in foreign-affairs related fields. Here, the subject-matter of the statute deals, to put it in Lockean language, with "Leagues and Alliances, and all the Transactions, with all Persons and Communities without the commonwealth."[242] With respect to tariff schemes, "whether domestic industries make enough money" could depend, conversely, on the treatment of foreign industries and the decision on whether they charged excessive tariffs; in a foreign relations paradigm, this policy making problem is a stick that can be grabbed at either end. Here, the "law enforcement model of the Presidency," which constitutes Schoenbrod's assumption, is least tenable and the "protective power of the Presidency" has the upper hand.[243] Moreover and related, it should be noted that the statutory discretionary power at issue was bearing on tariffs, traditionally considered public rights, and did not invade the private rights of the citizen. In 1933, in another Tariff Act case, this time a primarily administrative law statutory interpretation decision regarding the extent to which the Tariff Commission was bound procedurally to function in a court-like fashion, with full disclosure of evidence and opportunity of cross-examination, Justice Cardozo, speaking for a quasi-unanimous Court, stressed the importance of context in determining the constitutionally appropriate level of both legislative and administrative discretion. He also pointed out that the Tariff Act as such was "a delegation, though a permissible one, of the legislative process."[244] Cardozo was

[241] 276 U.S. 406.

[242] "This therefore contains the Power of War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the commonwealth, and may be called Federative, if any one pleases. So the thing be understood, I am indifferent as to the name." Locke, Par. 146.

[243] Monaghan "The Protective Power of the Presidency," 93 *Colum. L. Rev.* 1 (Jan. 1993)

[244] *Norwegian Nitrogen Products Co. v. United States* 288 U.S. 294 (1933), 305. (in the course of the Tariff Commission process for changing the tariff assessment, initiated at the request of an American competitor that the existing rate, given much higher costs of production in the United States, disadvantaged it) It is interesting to note that Louis Jaffe 1965, at p. 60, note 91, misquotes ("legislative [sic] power" instead of "legislative process") and therefore misinterprets the argument, as an early recognition by Cardozo that legislative power could be delegated but within limits. In fact, within the logic of the decision and Cardozo's argument, he most likely meant what he said and said what he meant. This was a delegation of legislative process, since process is what he was referring to. The argument was that the object of the decision was not legislative in the classical sense of determining rights and duties but rather the determination, according to circumstance, of a mere privilege, by a legislative court. Thus further: "What was once a mere practice [i.e., providing interested parties with a hearing before changing tariff rates] has been converted into a legal privilege. But the limits of the privilege were not meant to be greatly different from those of the ancient practice that had shaped the course of legislation."

literally irate and baffled by the fact that the American subsidiary of a Norwegian nitrite producer would dare request the Commission for production of "every particle of evidence gathered by the Commission or its representatives." The extent of the procedural protections and thus the meaning of the word 'hearing' as used in the Tariff Act depended on the nature of the interest affected: "We are not unmindful of cases in which the word 'hearing' as applied to administrative proceedings has been thought to have a broader meaning. *All depends upon the context*. . ..Whatever the appropriate label, the kind of order that emerges from a hearing before a body with power to ordain is one that impinges upon legal rights in a very different way from the report of a commission which merely investigates and advises. . .. No one has a legal right to the maintenance of an existing rate or duty."[245] [emphasis supplied] While the holding is of course restricted to the facts at hand (since the Tariff Commission was just an investigative body, the final decision on the tariff would rest technically with the President), much can be extrapolated from the facts of the case to the delegation problems discussed throughout the chapter. As one can see, the appropriate levels of administrative statutory and constitutional legislative discretion are seen as cognate and are dependent, as the appropriate level of procedure and appropriate level of judicial intervention (with respect to all these matters), on the nature of the governmental action: essentially political, since relating to foreign affairs; essentially discretionary, since affecting a privilege not a right. Posing the legal problem in terms of the delegation doctrine enforcement induces a generalized and abstract expectation of an across-the-board Congressional nondelegation duty according to the Constitution.

This brief discussion on the tariff cases shows fairly well that, how, and why, even though the concept and doctrine of delegation cannot be 'interred,' since expressive of our fundamental principles and intuitions regarding the nature and scope of government, the doctrine of nondelegation cannot be enforced. Framing the issue in delegation terms, without first separating and unpacking the many assumptive strands which the notion of nondelegation showcases, inevitably obfuscates the problem. That is so because proceeding, as Schoenbrod does, from an assumption of nondelegation, inevitably imposes a heavy normative burden on the critic (or the judge): what is the constitutionally prescribed test of nondelegation depends on first answering, in a general across-the-board manner, the question regarding the constitutionally required 'definition' of legislation.[246]

Posing that question is inevitable, to a certain extent, given the nature of the delegation inquiry, and this reveals also the main problem with the legal doctrine of nondelegation, in terms of enforcement. That is to say, the nondelegation doctrine

[245] *Id*., at 318.

[246] Here I believe Carl Schmitt's early identification of the tensions to be essentially correct, as was his appreciation that the practice of delegations and the judicial invalidation or admission of their constitutionality had cast a new light on the evolution of legislation and of fundamental constitutional principles. Schmitt 1936, at pp. 253–254.

seems unyielding to consistent application, among other reasons, because the delegation inquiry, in and of itself, makes an impossible demand, seeking inevitably an abstract and generalized answer to a question which can only be posed in concrete and pragmatic terms and along specific issues.[247] The doctrine can only, therefore, ultimately be reduced to a legal test which is either too formalistic and normative (as the early tests which sought to distinguish legislation as a constitutional function, essentially distinct from other functions, which cannot be delegated) or too commonsensical ('intelligible principle') to yield a criterion of consistent discrimination application. Nondelegation either conflates in a reductive manner the 'categories' law and legislation, to paraphrase Rubin and echo Kenneth Culp Davis's criticism of the nondelegation doctrine as expressive of "the extravagant version of the rule of law," or reverts the matter of constitutionality into a question of overall legislative decisional precision, of across-the-board constitutionally permissible degree (how much is too much legislative discretion). Either way of posing the problem is—as a rule of judicial decision—essentially useless, since it overtaxes both reality and judicial capabilities.

Moreover, once the delegation doctrine is described as a matter of degree or policy and not of principle, as a rule of judicial decision its enforcement raises, as it has been justly observed, nondelegation problems of its own. As Louis Jaffe noted, "'policy' is like a Chinese puzzle containing the potentialities of an infinite recession of lesser and lesser policies. There is no given line between policy and administration."[248] If there is no way of posing the question in a principled manner, the judiciary cannot enforce the constitutional limitation of nondelegation, since then the "optimal precision" of legislative rules becomes a matter of policy tradeoffs and thus neither amenable nor legitimate for purposes of judicial determination. Statutory precision can only be judicially gauged by reference to more specific constraints and constitutional values, where the question posed is more focused (e.g., what is the constitutionally appropriate/permissible legislative precision and administrative discretion in terms of free speech regulation; or criminal statutes; or taxation), not by virtue of a generalized judicial inquiry into the specificity of statutes.

Observing how, in the nondelegation cases we have reviewed earlier, the tests progressively changed is, nonetheless, of the highest importance, since the inquiry sheds light both on the judicial assumptions regarding the constitutionally appropriate definition of legislation and on the transformations that occurred in the nature

[247] This is why nondelegation tests seem, as one author observed, fated to "[restate] the issue to be decided. But while their strength lies in the ability to suggest that, if they are properly applied, everything will be all right, their weakness lies in their inability to generate any consistent application. Legal argument about nondelegation consists of applying these tests to specific delegations of power, applications that generate contradictory conclusions: any delegation both does and does not satisfy the relevant results." Gerald Frug, "The Ideology of Bureaucracy in American Law," 97 *Harv. L. Rev.* 1276 (1984).

[248] Louis Jaffe, "An Essay on the Delegation of the Legislative Power I," 47 *Colum. L. Rev.,* 359, at p. 369 (1947).

of legislation as such. With the advent of the modern administrative state, as judicial presuppositions and understandings regarding legislation no longer easily obtained in reality, constitutional practice found it more and more difficult to come to grips conceptually with these transformations. To wit, the early 'determination of fact' test presupposes an easily identifiable set of normative constraints on legislation. Legislation, in this framework, appears as the epitome of law, a self-contained rule, expressed in general normative terms, addressed to the individual, announcing clear guidance for action, enforceable in a court of law. The administration 'executes' the law (and the judiciary decides its meaning) in a classical paradigm, syllogistically one could say, as a subsumption of rule to facts. The test reflects this paradigm even when in practice the judge formally applies it to a situation falling outside its paradigmatic substantive purview (public rights, foreign affairs-related legislation, where a degree of statutorily authorized administrative discretion had long been recognized as a matter of statutory interpretation).[249] What this implies is that the legislature is, as a default conceptual rule and *theoretically speaking,* constitutionally limited by a certain notion of law, which applies to legislation.

The next judicial step, the 'fill up the details' test, is already a major departure, since now the question is posed differently, more instrumentally, in terms of subject matter and legislative policy. The test is not focused anymore on the 'nature' of legislation as such, as essentially different, distinct in kind from other substantively limited specific state functions and thus non-delegable. As long as the legislature decides the 'important issues' in a statutory scheme, the executive can 'legislate' interstitially.

In the next, 'intelligible principle' test, everything reverts to a question of degree: the constitutionally permissible level of legislative guidance on a continuum of statutory precision. But once the question is posed in this maner, the satsifactory answer is virtually begged in all situations. An 'intelligible principle' can be found in almost every imaginable case, as a result of the very fact that there is a statute passed, empowering a specific agency to act in some way.[250] All statutes can be said to satisfy the constitutional requirements of such a principle. Moreover, the

[249] *U. S. v. Vowell. See also supra.*

[250] *See Whitman v. American Trucking Association* 531 U.S. 457 (2001), Justice Thomas, concurring.

"Although this Court since 1928 has treated the 'intelligible principle' requirement as the only constitutional limit on congressional grants of power to administrative agencies, *see J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409, 72 L. Ed. 624, 48 S. Ct. 348 (1928), the Constitution does not speak of 'intelligible principles.' Rather, it speaks in much simpler terms: '*All* legislative Powers herein granted shall be vested in a Congress.' U.S. Const., Art. 1, § 1 (emphasis added). *I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'* As it is, none of the parties to this case has examined the text of the Constitution or asked us to reconsider our precedents on cessions of legislative power. On a future day, however, I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers."

paradigm has already been turned on its head when legislative discretion is implicitly recognized as the rule rather than the exception. In this sense, the evolution of nondelegation tests can be even said to have conceptually anticipated, as a matter of recognizing legislative discretion, the demise of substantive due process during the New Deal. Nevertheless, the New Deal Court, during the only 'good year' of the nondelegation doctrine, will announce the new constitutional compromise between legislative discretion and the constitutional values underlying the nondelegation doctrine, in the course of a rather dramatic inquiry into how much would be considered, constitutionally speaking, too much delegation.

The Blurring of Bright Lines and 'Delegation Running Riot'

> The state would be used as a positive instrument of economic intervention; whether to restore and maintain a competitive system, to aid industrial groups in suppressing competition, or to plan a new industrial order was not clear.
>
> Ellis Hawley, *The New Deal and the Problem of Monopoly* (1966)

> We must lay hold of the fact that the laws of economics are not made by nature. They are made by human beings.
>
> Franklin Delano Roosevelt, "Speech Accepting the Nomination for the Presidency," July 2, 1932

> A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist.
>
> National Industrial Recovery Act ch. 90, 48 Stat. 195

> This is delegation running riot.
>
> Cardozo, J., concurring in *Schechter Poultry Corporation v. United States* 295 U.S. 495 (1935)

Occasional references to the post-New Deal period as a 'post-delegation' period of American public law often confuse the concept and doctrine with the phenomenon of delegation. As a common story goes, shortly after the New Deal, the Court gave up reviewing the conformity of statutes with the demands of the nondelegation doctrine. Yet, as I hope to have already showed by now, the nondelegation doctrine had nothing to do, instrumentally speaking, with actual constitutional control (judicial review) of legislative discretion. It had never been enforced before 1935 and it defeats, by its very nature, the possibility of consistent and principled judicial enforcement; thus, it is misleading to imply that it would have somewhat fallen from the grace of judicial enforcement in the aftermath of the New Deal.[251] Rather, the limitation on legislation had always been the restrictive interpretation of

[251] For instance, Cass R. Sunstein, "Changing Conceptions of Administration," 1987 *BYU L. Rev.* 927, at p. 945 (1987), defending a certain measure of administrative independence from the President: "Such authorization might also be a necessary quid pro quo for the downfall of the nondelegation doctrine, which has allowed a large rise in presidential power."

constitutional provisions in terms of the common law baseline, with the clear distinctions and associated judicial practices allowed by this baseline (between political and ministerial, public and private). Qualitative restrictions on legislation had been constitutionally possible not because of the enforcement of the nondelegation rule but due to the limitations directly derived from the Contracts, Commerce, and Due Process Clauses. With the traditional boundaries partly collapsed by judicial acquiescence in the New Deal, through the famous line of cases altering the prior constitutional constraints, the nature of the legislation changed and practices were altered, in the sense of increased administrative discretion, an alteration of the traditional balance of powers, and representation-accountability problems.

The line of cases marking the relaxation of these constitutional limitations is well-known and an exhaustive enumeration and description would detract attention from the present argument. Yet, a brief detour is here warranted, for purposes of clarification. It should be mentioned that, before the nondelegation cases were decided, *Home Building & Loan Association v. Blaisdell*[252] had already, by upholding a Minesotta mortgage moratorium law, read an exception into the absolute textual prohibition of the Contracts Impairment Clause, whereas *Nebbia v. People of New York*[253] had averred Justice Field's earlier fears in *Munn,* by upholding a price control statute against a due process and equal protection challenge, upon the rationale that what was considered a 'business affected with a public interest' would be essentially for the legislature to decide, independent of common law categories of acceptable police regulation. The judiciary would only scrutinize the reasonableness or rationality of social and economic legislation on a relaxed means-ends standard of review.[254] This interpretation would effectively trigger the phenomenon of delegation, i.e., more legislative discretion. With the subsequent relaxation of the Commerce Clause limitation on the federal government, the judicial retraction from constitutional review of rationality would validate delegation, in the sense of vast amounts of statutory discretion and a new constitutionally mandated legislative reservation. Thus, effective control of constitutionality would be 'shrunken' to issues of rights and process.

It should be therefore restated that, while the notion of delegation captures well these problems and their associated concerns and helps comprehend and gauge their significance, the legal doctrine had nothing to do with the phenomenon as such and is no cure for the problems raised by it. The nondelegation cases of the period, nonetheless, are constitutionally crucial, since the decisions themselves and the events that led to them reveal both the tenets of the New Deal constitutional

[252] 290 U.S. 398 (1934). A Milk Control Board, according to a state statute empowering it to set minimum and maximum prices, had fixed the minimum retail price of milk at 9 cents per quart. Leo Nebbia was convicted for selling two quarts for 18, while throwing in a five cent loaf of bread.

[253] 291 U.S. 502 (1934).

[254] *Id.*, at p. 516: "The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reasons, is subject to control for the public good."

compromise and the nature of the tensions and problems that would characterize post-New Deal—contemporary—public law.

Since not one single federal statute had been declared unconstitutional based on a nondelegation challenge before the New Deal, the entire issue had by then come to be considered completely academic. When the 'Hot Oil' Case came before the Court, in a challenge to the National Industrial Recovery Act, the centerpiece of Franklin Delano Roosevelt's legislative program, the delegation question, as Justice Jackson would later report, was "so little anticipated that the governments brief of 227 pages and 200 more of appendix devoted only 13 pages to the topic."[255] Yet, in *Panama Refining Co. v. Ryan*,[256] section 9 (c) of the NIRA, based on which the president was authorized to prohibit the transportation in interstate commerce of oil produced in excess of the limits set by the state quotas ('hot oil'), was struck down as unconstitutional on nondelegation grounds. Louis Jaffe would later observe that, in light of previous nondelegation decisions, the case "involved a narrow power with a somewhat vague but recognizable standard. It should have been upheld and probably would have been if the Court had not been eager to chastise the New Deal's failings."[257] It may very well have been so since, by the time the 'Hot Oil' Case reached the court, NIRA had already been unanimously perceived as a dismal policy failure and a bureaucratic nightmare. Roosevelt himself confessed, around the time of the *Schechter* decision, that 'the whole NIRA business' had become an 'awful headache.'[258] These impressions were only further confirmed by the fact that, as it turned out in court, the main count on which the petitioners in *Panama Refining* were being prosecuted, had already been abrogated because a bureaucratic mistake and, since the Executive Order had not been published, neither the prosecuting attorney nor the courts were aware of this. The event would subsequently lead to the creation of the *Federal Register*.[259] Nonetheless, the power granted as such was arguably, in line of precedents, not excessive, taking into account the fact that the President was effectively limited by the state-determined quotas, incorporated by reference into the federal act.

[255] Cited by Barber 1978, at p. 82.

[256] 293 U. S. 388 (1935).

[257] Jaffe 1965, at p. 63.

[258] In Hawley 1966, at p. 130.

[259] Before that, Executive Orders were published yearly with the Statutes at Large. Yet, according to Jaffe, the practice was not unusual of not publishing Executive Orders that a president liked to keep away from public view. In the Federal Register all federal rules, regulations and orders are now officially published, daily, Monday through Friday. According to the Federal Register Act, 49 Stat. 500 (1935), 44 U.S.C. para. 307, no federal regulation, rule, order required to be published, until filed for publication "shall be valid as against any person who has no had actual knowledge" of it. The Code of Federal Regulations, updated yearly (and published on a quarterly basis), codifies the general and permanent rules published by the executive departments and agencies of the Federal Government in the Federal Register. It is organized under 50 titles organized according to subject matter.

The main problem, in the Court's view, was the open-ended declaration of policy in the first section of the act, a "pick and choose" laundry list of often conflicting statutory goals, covering almost any imaginable justification. This was, theoretically, a consistent position, since open-ended policy guidance can mean that there is no 'intelligible principle.' The section reads as follows: "It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate government sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of productions (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources." Cardozo, the lone dissenter in the case, noted that as long as discretion had essentially been limited by a standard or procedure, unclear policy direction was not considered fatal in prior delegation cases. According to him, since overproduction was clearly understood as the premise behind state quotas, applying the broad ("hydra-headed" as Louis Jaffe later called it) declaration of policy in Section 1 to the mandate of Section 8 meant a fairly clear policy guideline: protecting persons from competition with illegal producers and avoiding 'demoralizing' prices, that is, prices below costs. Thus, a standard could be read into the section by "reasonable implication." Here, there was therefore no "roving commission to inquire into evils and then, upon discovering them, do anything he pleases."

The true test of delegation would be the unanimous decision in the "Sick Chicken" Case.[260] When the National Industrial Recovery Act granted FDR, as he asked for, 'war powers to fight the Depression,' it soon became clear that nobody quite knew what to do with them, the main reason being that the economic issues (monopoly, unfair trade practices, the relation between them, the size-efficiency correlation) which had been plaguing the Federal Trade Commission and Sherman Act enforcement were still both misunderstood and not agreed upon, policy-wise. Various conflicting 'visions' were thus, in some way or another, incorporated into the act (for instance, codes were exempted from the reach of antitrust laws, yet were 'not to permit monopoly'). In Ellis Hawley's words: "Congress, in effect, had refused to formulate a definite economic policy or to decide in favor of specific economic groups. It had simply written an enabling act, an economic charter, and had then passed the buck to the Administration."[261]

[260] *A. L. A. Schechter Poultry Corporation et al. v. United States* 295 U.S. 495 (1935).

[261] Hawley 1966, at p. 33.

Three policy solutions to the 'economic problem' had presented themselves simultaneously: a market-oriented approach, centered on eliminating market dysfunctions, government planning of the economy, and a form of corporatism with government-sponsored cartelization, i.e., (again in Ellis Hawley's words) a rationalized "business commonwealth." The cartelization solution would have the upper hand in the implementation of NIRA. Under Title I, the most important part of the act, trade or industrial associations or groups could apply to the President for approval of initiating a "code of fair competition" for the trade or industry. The President had the statutory duty to ascertain that the groups applying for a code "impose[d] no inequitable restriction on membership" and were "truly representative." The code as such would then be approved, in his discretion, by the President (who could alternatively prescribe his own code), on the sole proviso that it did not "permit monopolies or monopolistic practices" and was not "designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them." The codes set maximum hours and minimum wage provisions, minimum prices, and fair trade practices and were drafted under government mediation through the National Recovery Administration.[262] Once these provisions were agreed upon and approved by the President, through an Executive Order, they would effectively become law, each breach separately subject to criminal prosecution on misdemeanor charges (the penalty being a up to 500 $ fine on each offence).

The facts of the case are simple. The owners of the biggest kosher poultry business in New York, the Schechter brothers, had been convicted under the "Live Poultry Code" of 'fair competition' on a number of counts, among which of interest to us are the code-related ones: violation of the 'straight killing' requirement in the code (which forbade allowing a customer to choose particular chickens from a coop and imposed an obligation to sell only batches of one coop or half-coop) and violating the minimum wage and maximum hours provisions of the code.[263] The court overturned the judgment of conviction, declaring NIRA unconstitutional on delegation and commerce clause grounds. The commerce clause part of the reasoning is of no direct interest here; the court reasoning on delegation can be divided into three different analytical strains, which are all of the highest importance, since they set the groundwork of and thus announce the modern constitutional settlement. While the Executive made the plea of necessity an argument for upholding the constitutionality of the act, the Court declared that emergency justifications, albeit "conditions to which power is addressed are to be always considered when the exercise of power is tested," do not effectively "create or enlarge constitutional power."

In terms of accountability, the court observed, this was not a delegation of 'privileges and immunities' to voluntary trade or industrial associations but in

[262] In fact, since the deputy administrators were drawn from business circles as well, the result would be in effect "little more than a bargain between business leaders on the one hand and businessmen in the guise of government officials on the other." Hawley 1966, at p. 57.

[263] The others were in relation to violations of N.Y. municipal ordinances and regulations and charges of conspiracy.

effect a delegation of 'coercive exercise of lawmaking power' to private groups.[264] Soon afterwards, in *Carter v. Carter Coal Co.,*[265] one of the codes (the Bituminous Coal Code), which had been re-passed by Congress as an act (Bituminous Coal Conservation Act of 1935), would be invalidated, upon a rationale that stresses also (besides the obvious accountability problems) the rule of law implications. There as in *Schechter*, weekly wages and hours could be set for all by a majority of miners and producers in a district or group of districts. The *Carter Coal* court emphasized that a statute that delegated to a majority of private parties the power to impose their will, sanctioned by state coercion, on others, was not only deeply suspect as a matter of accountability-representation but also as a denial of due process (an "intolerable and unconstitutional interference with constitutional liberty and property"): "The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. . ..The 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 to refer to the decisions of this Court which foreclose the topic. *Schechter Poultry Corp. v. United States,* [etc.]"[266]

As the *Schechter* court noted next, there was no legislative guidance to the Executive, other than the laundry list of rationalizations provided by the first section of the act. Moreover, and this was stressed, unlike the FTC Act, which gave *an administrative body* power to regulate "unfair competition," NIRA conferred on *the President* power to determine "fair competition."[267] In effect, the court made two nondelegation arguments, one related to separation of powers proper and the other to its cognate rule of law strain; the executive and the administration.

To start with the administrative discretion argument, as its was noted earlier, public rights could (in the logic of the classical constitutional paradigm) be subject

[264] *See* Stewart 1974-1975, at p. 1796, notes 579–581 and associated text, pointing out the fact that, after the demise of the N.I.R.A., direct and formal interest representation "has fallen into disrepute in the United States and Great Britain, in part because of a tendency to associate it with fascist corporate state programs" and giving an account of the actual operation of NIRA code-making practice similar to that provided by Hawley. In effect, the codes represented a government-sponsored bargain between big industry and organized labor interests at the expense of consumers and smaller employers.

[265] 298 U.S. 238 (1936)

[266] At. 311.

[267] *See* Hawley 1966, at pp. 127–130 for an interesting description of the circumstances of the case. Anecdotically, Brandeis would reportedly tell one of Roosevelt's advisors, after the reading of the decision: "This is the end of this business of cartelization, and I want you to go back and tell the President that we are not going to let this government centralize everything. It's come to an end." A. Schlesinger, *The Politics of Upheaval,* cited by Peter H. Aranson, Ernest Gellhorn, Glen O. Robinson, " A Theory of Legislative Delegation," 68 Cornell L. Rev. 1 (November 1982), FN 35.

to administrative determination as to both fact and law, by means of legislative courts, exception being made for *de novo* review of all questions regarding the so-called 'constitutional' or 'jurisdictional facts,' which determine the agency's power to act.[268] Private rights would contrariwise go for exclusive determination to the regular courts of law, with all the guarantees of judicial process; the administration would be accorded no deference. The departure from this paradigm and the terms of the compromise had been already acquiesced in *Crowell v. Benson,*[269] when the court upheld against a due process challenge the Longshoremen's and Harbor Workers' Compensation Act, under which the administrative method was used to determine compensation awards, i.e., the liability of an individual to another (employer-employee). The court, noting the extensive procedural protections in the act, observed that nothing would preclude Congress in the future from using the administrative method in some such cases, with final administrative determination as to the facts, provided that questions of law and 'fundamental' or 'jurisdictional' facts would be re-determined by the courts, in reviewing the 'quasi-judicial' determinations of these bodies. *Schechter* complements these statements by a broad *constitutional* '*quid pro quo*' statement. The Court emphasized that the words "unfair competition" had a meaning in common law and were a "limited concept." By authorizing the Federal Trade Commission a certain measure of discretion as to the determination of the broader term "unfair methods of competition," Congress had structured that discretion, since the Commission was "an expert body" authorized to act quasi-judicially (in light of a specific and substantial public interest, according to a special procedure (formal complaint, notice and hearing, findings of fact supported by adequate evidence, judicial review of the *vires*)).[270] What was essentially alluded to was that, while the court accepted the departure from the common law constraints in what concerned the legitimacy of legislation (as a matter of constitutionally acceptable legislative reservation requirements), broad and discretionary statutory provisions would need to be constrained at the level of administrative implementation by administrative procedure and judicial review. The example of the newly created Federal Radio (future Communication)

[268] *Ohio Valley Water Co. v. Ben Avon Borough et al*. 253 U.S. 287 (1920), the rate determination made by a utility can be reviewed by a court (independent judgment) when charge would be made that the rate is confiscatory, statutory provisions ousting judicial review notwithstanding: "In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment." (at 289) *Ng. Fung Ho v. White, Commissioner of Immigration*, etc. 259 U.S. 276 (1922) (judicial redetermination of the question of citizenship if raised in an immigration deportation proceeding). *Johnson v. Robison* 415 U.S. 361 (1974), a Veterans' Administration determination of eligibility for educational benefits, if challenged under the equal protection clause of the Fifth Amendment, would be reviewed de novo, clause precluding judicial review notwithstanding.

[269] 285 U.S. 22 (1931).

[270] *Schechter*, at 844.

Commission was also given; while the act gave flimsy guidance (grant licenses "as public convenience, interest or necessity requires"), administrative discretion had been contained by expertise (nature of communication industry; allocation of frequencies on the spectrum) and procedure (hearing and evidence). The President was constrained by neither of these limitations.[271]

To be sure, experts and judges or those institutional actors that are 'like' them are best kept independent from politics, for obvious rationality and impartiality considerations. The meaning of these delegation-related distinctions would be clarified in the same day, as the *Humphrey's Executor v. United States*[272] decision was rendered. In *Humphrey*, the Supreme Court took away much of what had been said nine years before in *Myers v. United States,*[273] prohibiting Franklin Delano Roosevelt's removal of a Federal Trade Commissioner, without cause, before the end of his seven-year statutory term, for his uncongeniality with the President's politics. The appointment had been made by the statute subject to limitations (malfeasance, neglect of duty, inefficiency) and the question was whether Congress could constitutionally insulate such an officer from Presidential supervision. Given the nature of the function performed by a Commissioner, the case at hand was essentially distinct from *Myers,* where a statute providing for Senatorial concurrence to the removal of a Postmaster had been declared unconstitutional, as imposing undue limitations on the President's executive duties. The statutory attributions of the Commissioner were, the Court observed, mixed, "quasi-judicial" and "quasi-legislative," and the Commission exercised a mere "executive function," incidental or contingent to these essential functions, rather than being a part of the executive branch. The expertise and impartiality rationales are fused in the reasoning: "The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative. . .a body of experts 'appointed by law and informed by experience."[274] Therefore, the argument of unitary executive derived from *Myers* was found unapplicable, since the nature of the office at hand required a higher degree of insulation from political control. The decision in *Humphrey's Executor* gave thus both a legal validation and an essential qualification to the modern administrative state. The President would not be allowed to control by unfettered executive interpretation (and thus implicit law-making) these vast delegations of legislative power to the administration.

[271] *Id.*, at 848: "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."

[272] 295 U.S. 602, at 624 (1935).

[273] 272 U.S. 52 (1926).

[274] 295 U.S. 624.

3.2 The Constitutional Problem of Delegation in Pre-WWII Parliamentary Jurisdictions

3.2.1 The General Problematics of Delegation in Parliamentary Systems

All the jurisdictions which will come under scrutiny below (the Westminster model, France and Germany until the WWII) have a number of common characteristics with respect to the delegation problem that distinguish them from the American counterpart. Before proceeding to specifics, group similarities should be identified.

In mature parliamentary systems, the institutional delegate is a government politically responsible to and thus dependent on the confidence of the legislature. By the same token, the theoretical delegate controls in practice the delegator-legislature, also in the exercise of the latter's law-making functions. Nineteenth century parliamentarism still evidenced a measure of individual MP autonomy from the party machine and also a degree of parliamentary faction independence from the government in power. As the electoral and party systems came of age, departing gradually from the initial 'Burkean' assumptions regarding representation,[275] the delegation problem began to embrace a common form which in the US is not present to the same extent. American distinctiveness is due to both the institutional self-sufficiency of the political branches of power (a constitutional criterion) and the perpetuation of a 'primitive' electoral and party system (a political peculiarity).[276]

In a parliamentary system, by contrast, law-making is most commonly initiated and effectively controlled by the government, whereas the bill is usually drafted by experts in a ministry. To be sure, this state of facts is not an argument against a constitutionally prescribed legislative reservation opposable to the parliament. To a certain extent, the case against delegation may even be stronger. The legislative process ensures publicity, openness, and transparency of decisionmaking. Thus, a constitutionally entrenched reservation, at least in important matters, even aside from the general legitimacy and rule of law benefits, also becomes an institutional guarantee. It protects the rights of the parliamentary minority, which would

[275] "The theory of parliamentary representative government is built on the assumption of the early-nineteenth-century restrictive electoral system." Sajó 1999, at p. 112, generally, "The Transformations of Parliament," pp. 103–121.

[276] The qualification "primitive" is not used here in a pejorative sense but only to point out the fact that the individual Congressman is still dependent much more on his constituency than upon the party. Since the American electoral and party system did not fully evolve into common modern forms (streamlined decisionmaking, rigid party discipline), members of Congress enjoy a much larger degree of autonomy.

otherwise be routinely sidestepped by the majority through expedited procedures, including shell enactments delegating subordinate legislation to the executive.[277] This role of the legislative reservation in ensuring the rights of the minority and promoting democratic and rule of law values associated with parliamentary publicity and transparency is still highly relevant nowadays.

Limitations on the specificity and subject-matter of statutes (and consequently on delegations) were often introduced in European post-war constitutions as a direct response to the collapse of parliamentarism before WWII. Article 80 of the German *Grundgesetz*, for example, according to which the "content, purpose, and scope" (*Inhalt, Zweck und Ausmaß*) of an authorization to adopt subordinate legislation (*Rechtsverordnungen*) have to be determined by the parliament in the enabling act, is a clear reaction to the vagaries of the Weimar parliaments. Most particularly, it is a constitutional response to the *Ermächtigungsgesetz* of March 1933, by virtue of which the Reich government (*i.e.*, Hitler) was given a blank cheque, for an indefinite future, to adopt executive legislation. Likewise, Art. 13 in the French Constitution of 1946, stating that "[t]he National Assembly adopts legislation alone. It cannot delegate this right"[278] was a response to the authorization given Marshall Pétain by the last parliament of the Third Republic to adopt measures of legislative effect and even change the constitution itself by means of executive decree. Whether these post-war provisions have in fact accomplished the functions they were expected to fulfill and whether they fill in a different role in the general structure of contemporary European constitutionalism than that of the nondelegation doctrine in US constitutional law is a general question for the fourth chapter of this book.[279] But whether the constitutionally-required models of legislative reservation, up until the great law and state transformations of the late nineteenth to early twentieth centuries, did serve a different constitutional function in the European context (and therefore whether the contemporary constitutional response properly addressed the posed phenomenal question) is a historical matter that must be grappled with at this analytical point.

[277] *See* Jérôme Trémeau, *La réserve de loi-compétence législative et Constitution* (Aix-en-Provence: Presses Universitaires d'Aix-Marseilles, 1997), at p. 38. *Also see* for a similar and earlier argument Tingstén 1934, at p. 208.

[278] "L'Assemblée nationale vote seule la loi. Elle ne peut déléguer ce droit."

[279] French post-war developments under the Fourth Republic (1946) Constitution will however be discussed in this sub-chapter, since they are in effect a continuation of the constitutional paradigm and constitutional-political problems of the Third Republic. The actual moment of contemporary break with the past, in French constitutional context, is the Fifth Republic Constitution (of 1958), which will be therefore addressed in the next section of the book.

3.2.2 *"The Paradox of Supremacy": Phenomena and Rules, Causes and Effects*

The common mutations of late nineteenth to early twentieth century parliamentary systems (speed and streamlining of political decision-making, control of parliaments by the government in power, control of the parliamentary process by the strongest faction, sham publicity of parliamentary debates doubled by backroom haggling and party machine dictatorship, etc.) were exacerbated by pre-WWII constitutional orders. They ultimately degenerated into a particularly volatile and malignant form, by virtue of "the paradox of parliamentary supremacy."[280] Peter Lindseth coined this inspired turn of phrase. The paradox referred to is that an omnipotent parliament turned out in the end to be powerless, sliding on the slippery slope toward its own demise and executive dictatorship. But the context and way in which Lindseth used the expression are exemplary of a common conceptual conflation of the phenomenon of delegation, on the one hand, and the constitutional rules with respect to delegating enactments, on the other. Therefore, since the issue is of the highest analytical importance at this juncture, and even at the risk of anticipating somewhat future discussions, his argument must be briefly engaged. He showed, in an extensive comparative study on the matter, how in Third and Fourth Republic France and under the German Weimar Constitution, parliamentary supremacy effectively relegated normative non-delegation arguments to the field of theoretical-academic speculation, political debates, or background norms of parliamentary practice. Lack of review of constitutionality and various institutional deficiencies combined in the result that a legislative reservation could not be effectively opposed to the parliament as a matter of constitutionality.

In his study, Lindseth makes the related causal argument that those systemic problems had as a direct consequence made it easier to delegate vast amounts of discretion to the executive in times of crisis, thus subverting the constitutional system. But the author also seems to advance the more doubtful correlative thesis that the lack of a constitutional nondelegation limitation on the legislature, *as such*, had a direct effect on practices and contributed to the demise of liberal democracies. Contrariwise, nondelegation provisions, after the war (the "postwar constitutional settlement," as Lindseth calls it), would have contributed to the stabilization of these democracies.

Although oversimplifying Lindseth's more elaborate general argument, I will provide a longer citation, to help exemplify at the same time the reasons for my doubt as to his causal claim and the relevance of this discussion for the present study: "It was this *notion of unlimited parliamentary power*, in particular as it

[280] Peter L. Lindseth, "The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France 1920s-1950s" 113 *Yale L. J.* 1341 (May, 2004). Lindseth Peter L., The Contradictions of Supranationalism: European Integration and the Constitutional Settlement of Administrative Governance, 1920s-1980s (Ph.D. dissertation, Columbia University, Department of History, 2002 [on file with the author]).

related to the permissible *scope of legislative delegation* to the executive, that distinguished the French and German interwar constitutional experiences from the American one. . ..By 1933 and 1940 respectively, the *practice* of unchecked delegation in Germany and France led ultimately to the collapse of the parliamentary system into one in which all effective governmental power would, as a matter of constitutional doctrine, be fused in the person of the national leader. . .. In postwar West Germany and France, rather, the development of *enforceable, yet flexible, delegation constraints* marked an important constitutional innovation, one essential to the reconciliation of historical conceptions of parliamentary democracy with the reality of executive power in an age of modern administrative governance. The emergence of flexible delegation constraints after 1945 reflected a constitutional commitment to preserve—despite delegation—a mediating role for elected legislatures along with the conception of representative government that they embodied."[281] [emphases supplied]

The author, in support of his thesis, extensively cites Carl Schmitt's claim, advanced in the latter's 1936 "Legislative Delegations" article, that the contemporaneous practice of delegation showed without doubt an irreconcilable tension between practices and "the concepts of legislation and constitution peculiar to separation-of-powers regimes" and "an insurmountable opposition between the concept of legislation in a parliamentary regime and the evolution of public life over the course of the last decades." This tension was then for Schmitt (for obvious reasons, given the time when made and the political propensities of the author) a clear sign that liberal constitutionalism needed to be discarded altogether. Schmitt's argument is contrasted by Lindseth with the recognition by a much more restrained Schmitt, made in the latter's 1943 piece on "The Plight of European Jurisprudence," that: "in the changing situations we preserve the basis of a rational human existence that cannot do without legal principles such as: a recognition of the individual based on mutual respect even in a conflict situation; a sense for the logic and consistency of concepts and institutions; a sense for reciprocity and the minimum of an orderly procedure, due process, without which there can be no law."[282]

The general reasoning leaves the reader with the misleading impression that there would be a direct correlation and close link between delegation-related constraints (or the lack thereof) at the level of the constitution, the phenomenon of crisis legislation, and the fact that dictatorship came about in Europe by means of enabling laws. Aside from revealing the lawyerly habit of overrating somewhat the problem-solving capacity of positive legal measures, this only goes to show the extent to which, while the notion of delegation captures under the assumption of a concept of legislation the most fundamental intuitions about limited government (since it showcases the various constitutional concerns underlying nondelegation constraints), indiscriminate use of the notion as such can easily lead to a failure of

[281] *Id.*, at p. 1353.

[282] Carl Schmitt, "The Plight of European Jurisprudence" ["Die Lage der europäischen Rechtswisseschaft" 1943/44], G. L. Ulmen transl., 83 *Telos* 35 (Spring 1990), p. 67.

separating both the various strains of debate. It can also lead to an undiscerning conflation of the constitutional-political phenomenon from legal concepts and positive rules. What Schmitt actually had said (description-wise) was that the assumptions regarding legislation failed to translate in legal practices. This only indicated the extent to which the system did not correspond to its presuppositions.

The practices of liberal democracies were as a matter of fact realigned along a retrenchment of their presuppositions after the war, in ways responding to the concerns voiced by Schmitt (and many other critics of unfettered parliamentarism) in 1943. To wit, distortions in the political process and institutional power imbalances had been caused by the fact that antebellum constitutionalism had failed to master its facts, since parliamentarism still functioned, before WWII, on the Burkean assumption of an independent representative, i.e., in a general format designed for a much more restrictive electoral system. This was an anachronism at stark variance with the transformations brought by the emergent mass democracy, with its disciplined party systems, where the individual member of parliament resembles a cog in a monolithic party-machine much more than the lofty portrayal of an independent representative in the "Letter to the Electors in Bristol." Given the splintered nature of the contemporaneous political spectrum and the constitutional institution of political responsibility, this contradiction had created in practice staggering systemic instability, with frequent overthrows of governments. In response to this problem, after the war, parliamentarism would be stabilized ('rationalized') by means of institutional changes, for instance by introducing the mechanism of the 'constructive vote of no-confidence' in the German Basic Law and giving up the pre-war unalloyed proportional representation. Thus, the fragmentation and fluidity of the political spectrum were considerably reduced. Likewise, whereas, before the war, rights guarantees were not opposable to the legislator as such (proposals to introduce American-style control of constitutionality had been constantly rejected), legislation would be afterwards disciplined by the adoption of various judicial forms of enforcing constitutional limitations (the French Constitutional Council, the German Federal Constitutional Court, etc.). To counter at the sub-constitutional level the major rule of law displacements produced by the relatively more open-ended character of modern legislation, constitutionality review was paralleled by more intensive ('activist') inroads into the traditional fields of administrative discretion, by means of "activist" judicial review of administrative action.[283] In British Commonwealth jurisdictions, bolder forms of judicial control of the administration (also by way of Privy Council decisions on appeal)

[283] *See* the account of this evolution (comparison between American and English administrative law) in Bernard Schwartz, *Lions Over the Throne-The Judicial Review of English Administrative Law* (New York and London: New York University Press, c1987) and Bernard Schwartz and Henry William Wade, *Legal Control of Government: Administrative Law in Britain and the United States* (Oxford: Clarendon Press, 1972).

partly substituted for the absence of enforceable constitutions an emergent form of common law constitutionalism.

But it is fair to infer that, instrumentally speaking, express nondelegation limitations or the lack thereof *as such* have and had little if anything to do with either the demise or the rebirth of constitutional democracies. Furthermore, leaving aside the common difficulties of establishing grand historical lines of causation, it may reasonably be surmised that a delegation limitation in the constitution is not in any way preventive of dictatorships. Besides, the phenomenon of delegation is related to the problem of emergencies only incidentally and partially. The transformations in the nature of legislation and government that culminated in the present administrative states had been underway long before the major crises of the twentieth century. The impact of these transformations on public law is still evident nowadays, albeit in less dramatic and malignant forms, long after the totalitarian peril was fended off in the respective democracies. Thus, crisis legislation is systemically related to the phenomenon of delegation and both to dictatorship only, perhaps, in the sense captured by Hugo Black in the *Steel Seizure Case*: "[E]mergency powers. . .tend to kindle emergencies." What is presumptively acceptable in an emergency can create the precedent of pleas of necessity in circumstances where the plea is less justified. How this real problem is to be remedied by means of positive fundamental law is a great contemporary quagmire, a systemic riddle still awaiting its solution.[284] But to expect a nondelegation constitutional provision to solve in any way the sort of problems and disruptions associated with the arrival of dictatorship in Germany is expecting too much of constitutions and judges. It is also confusing an effect with the cause itself: the practice of delegations simply revealed in a dramatic way the shortcomings of the entire constitutional-political systems as such. As Justice Jackson wrote in his unpublished *Steel Seizure* draft: "No thing is more certain than that in the political regime power is attracted by competence and gravitates away from indecision and mediocrity. The autopsy on the Hitler regime in which we participated at Nürnberg leaves a firm conviction that dictatorship in Germany did not seize power because of the strength or competence of the man or clique that headed it, but was suffered to take over by the mediocrity, inertia and disintegration of the Reichstag, a legislative body whose partisan divisions, sectionalism, and inertia let power slip through its fingers."[285]

Before the war, debates on delegation had reflected a clash of paradigms, deriving from the fact that legislation as a practice was gradually failing to correspond with its normative premises, the fundamental classical constitutionalist normative assumptions regarding legislation. Those assumptions had rested on social and economic presuppositions that, across legal orders and on both sides of

[284] *See* András Sajó, "From Militant Democracy to the Preventive State?," 27 *Cardozo L. Rev.* 2255 (2006), on the interaction between welfare-state- and counter-terrorism-related patterns of risk-prevention.

[285] In Schwartz 1987, p. 206.

the ocean, had started to creak and then fail more and more visibly towards the second half of the nineteenth century, under the weight of an industrial, technically advanced and standardized, mass society. The upheaval had changed political (parliamentary and electoral) systems to the point where institutions built upon obsolete ideal-typical justifications and practical presuppositions were functioning in full disagreement with their changed environments and eventually collapsed. In strictly juridical terms, a discrepancy was gaping between the constitutional guarantees of fundamental legal institutions and the reality of their instantiations. We have already tracked the uneasiness of the constitutional protections of common law with the emergence of the trusts and the modern "monopoly" in the United States. Albeit the judicial-constitutional dramatics of the American events was not paralleled elsewhere, similar developments and debates occurred in all major democracies.

All justifications of foundational juridical institutions are of course idealized legal fictions. But they must also be ideal-typically fictional; at a certain point of departure from the reality of things the justification has to yield and the practice must be changed or at least qualified. It is, to give just one example, hard to maintain and constitutionally hold as sacrosanct the idea of a contract as "law between the parties," "meeting of the minds," "free fusing of volitions," when the ubiquitous practical example is the sale or provision of standardized goods and services under a standardized form, over the content of which one of the parties has routinely no say.[286] As legislation consequently changed to cope with these transformations, in more or less abrupt patterns of intervention, this departure from accepted understandings and practices regarding the constitutionally premised legislative reservation was labeled "delegation." Many reactions under this label had at the time an ideological, "reactionary" component, i.e., sheer aversion to governmental encroachment upon social and economic areas previously regarded as off-limits. But the change in the nature of legislation also raised more serious and perennial concerns, which have to do with the possibility of constitutionalism and constitutional adjudication to redraw the lines of assessment and replace those initial presuppositions and practices with workable substitutes. These concerns are still valid at present, since they pertain to the foundations of public law adjudication and legal rationality and, therefore, with the systemic capacity of constitutions to constrain power, enable collective agency, and ensure freedom.

After the war, irrespective of their form, attempts to regulate constitutionally the legislative reservation simply translated, as a matter of judicial enforcement of delegation provisions in constitutions, the new legislative reservation, namely fundamental rights. This happened in all Western democracies, in America as well as in Europe. The question whether this new legislative reservation is a functional substitute for the disappearance of the classical presuppositions and distinctions has to be kept in abeyance and await its answer in the fourth chapter

[286] Ernst Forsthoff, *Die Verwaltung als Leistungsträger* (Stuttgart und Berlin: W. Kohlhammer, 1938), *esp*. 38 ff.

of this book. The claim as to delegation debates and practices reflecting the departure from a normative notion of legislation will be exemplified in what follows.

3.2.3 Sole and Despotic Dominions*: The Common Law and Parliamentary Sovereignty*

3.2.3.1 Hewart's Interjection!

> Between the 'Rule of Law' and what is called 'administrative law' (happily there is no English name for it) there is the sharpest possible contrast. One is substantially the opposite of the other.
>
> Lord Hewart of Bury, *The New Despotism* (1929)

At the peak of post-revolutionary Whig constitutionalism, William Blackstone described both property and the sovereignty of Parliament as absolute, in an eerily symmetric, mirror-image manner. Property is "a sole and despotic dominion" exercised by a man over a thing in complete exclusion of the entire universe and ultimately derived from the divine ordinance in *Genesis* 1: 28, whatever "airy metaphysical notions may have been started by fancy writers upon this subject."[287] Likewise, Parliament has an "absolute despotic power" to undertake legally anything that is possible naturally. Nothing can stay in the way of its untrammelled will: "true it is, that what parliament doth, no authority in the world can undo."[288] The Holmesian "page of history" will help us understand how these two despots came into conflict and why this conflict raised at the same time serious, ongoing constitutionalist concerns and loud but ultimately futile cries of unconstitutional delegation.

In England, the distinction between legislation proper and the independent normative authority of the King's Council crystallized around the formal requirement of consent by the three estates. During the reign of Edward III, the practice began to settle in that further modifications of the *jus terrae*, the so-called *statuta nova*, needed to obtain the consent of all three estates, while all other matters could be regulated independently by the king, through the means of ordinances and proclamations. It also began to be an accepted practice, from the thirteenth century onward, that enactments of a permanent and general nature ("que sont perpetuels," dealing with "pointz a durer") as opposed to those of a particular or local character ("que non sont mye perpetuels"), need to be assented by the three estates, passed in

[287] 2 *Blackstone's Commentaries* 3 (1979 Chicago original facsimile edition).

[288] 1 *Blackstone's Commentaries* 156.

the form of a statute, and are to be selected and entered upon the Statute Roll, for the cognizance of the courts of justice.[289]

The practice slowly became entrenched[290] and the only major known departure prior to the Revolution dates back to the Tudor period, when Parliament delegated the power to legislate, i.e., to unilaterally depart from and modify the common law through royal proclamations, to Henry VIII: "The King, for the time being, with the advice of his Council, or the more part of them, may set forth proclamations under such penalties and pains as to him and them seem necessary, which shall be observed as though they were made by Act of Parliament; but this shall not be prejudicial to any person's inheritance, offices, liberties, goods, chattels, or life; and whosoever shall willingly offend any article contained in the said proclamations, shall pay such forfeitures, or be so long imprisoned, as shall be expressed in the said proclamations; and if any offending will depart the realm, to the intent he will not answer his said offence, he shall be adjudged a traitor."[291]

The act was quickly repealed in the reign of Edward VI[292] and this kind of particularly offensive and unorthodox practice subsequently subsided.[293]

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[289] The older rules of prospective application, *statuta vetera*, enacted in the aftermath of the Magna Charta, were deemed to be part of the law of the land irrespective of the originating authority. *See*, on these issues, Rudolph Gneist, *The History of the English Constitution*, Philip A. Ashworth translation (New York: G. P. Putnam's Sons, 1886), Vol. II, *esp.* pp. 19–25. Gneist considers 15 Edward II to be the first express recognition of Parliament as a legislative assembly: "Revocatio novarum ordinationum anno 1223; les choses, qui serount à establir, soient tretées accordées et establies en parlaments par notre Sr. le Roi et par l'assent des Prelats, Countes et Barouns et la communaulté du roialme." (FN 3, at p. 21). *See also* Charles Howard McIlwain, *The High Court*, at p. 313 and François Pierre Guillaume Guizot, *History of the Origin of Representative Government in Europe*, Andrew R. Scoble translation (London: Henry G. Bohn, 1852), at pp. 482–483: "Ordinances were not inscribed, like statutes, upon the rolls of Parliament; they were less solemn in their character, although their object frequently had reference to matters equally legislative and of equally general interest, such as the enactment of jurisdiction or of penalties. It is not more easy to clearly distinguish ordinances from statutes, than great councils from Parliaments properly so called. All that we can say is, that less importance and stability were attributed to this class of legislative measures."

[290] The statute of York, in 1322, already provides that "thenceforward all laws respecting the estate of the crown, or of the realm and people, must be treated, accorded, and established in Parliament by the king, by and with the assent of the prelates, earls, barons, and commonalty of the realm." In Guizot, *supra*, at p. 461.

[291] 31 Henry VIII., c. 8 (1539). One can *see* that the "delegation" is actually checked by a fair number of legal safeguards, even by modern standards. For a study of the legislative activity of the Parliament during the reign of Henry VIII, challenging with many examples the received view that the Parliament was brow-beaten into submission by the king, *see* S. E. Lehmberg, "Early Tudor Parliamentary Procedure: Provisos in the Legislation of the Reformation Parliament," Vol. 85 (No. 334) *The English Historical Review* 1–11 (Jan. 1970).

[292] Stat. I Edw. VI. C. 12.

[293] Blackstone is particularly critical of the practice: "Indeed, by the statute 31 Henry. VIII. c. 8. it was enacted, that the king's proclamations should have the force of acts of parliament: a statute, which was calculated to introduce the most despotic tyranny; and which must have proved fatal to the liberties of this kingdom, had it not been luckily repealed in the minority of his successor, about five years after." 1 Blackstone's *Commentaries on the Laws of England* 261 (Facsimile of the First Edition, Chicago & London: Chicago University Press, c1979).

Nonetheless, two caveats are important, if these historical references are to be perceived in their proper context. First, the royal pretensions of inherent normative authority grounded in prerogative were hedged in more slowly and finally curbed only by an incremental evolution, marked, on its crucial points, by the authoritative pronouncement of Lord Chief Justice Coke in the 1610 *Case of Proclamations,*[294] the abolition by Parliament of the Star Chamber in 1641, and the developments surrounding and following the Civil War. Dicey gives the interesting example of Lord Chatham's attempt, as late as 1766, to prohibit the importation of wheat by means of a proclamation. This unrestrained executive assertion was immediately sanctioned by Parliament, which passed in the same year an Act of Indemnity to remedy the otherwise ensuing illegality on the part of the Crown.[295]

Second and more relevantly for our inquiry, parliamentary sovereignty does become an undisputed tenor of the constitution both in law and in fact once the last Stewart king, James II, is rushed with short ceremony from the throne by the Glorious Revolution. But Parliament itself was to take a longer time to become a primarily legislative body, a law-making assembly proper, in the sense we now understand it. Lord Bacon's insightful admonition that "[n]ew laws are like the apothecaries' drugs; though they remedy the disease, yet, they trouble the body"[296] reflects fairly well the activity of the British Parliaments up to the first half of the nineteenth century. The eighteenth and early nineteenth-century Parliaments, far from epitomizing the Lockean ideal of bodies relegated to the enactment of general rules of prospective application, preserved a primarily medieval, judicial character, fairly evident in the character of the acts that were passed. For instance, even though the particularly objectionable practice of attainder bills would lapse after

[294] *Case of Proclamations* (1610) 12 Co. Rep. 74, K. & L. 78. In this landmark case, Coke's opinion was demanded by the Crown in Privy Council as to whether the king could regulate by proclamations, under a penalty of a fine and imprisonment, the trade in starch and building restrictions in London. In a major inroad on royal prerogative, Coke advised that the king can, by proclamation, "for the Prevention of Offenses," only require the subjects to obey the law (and then the proclamation *ad terrorem populi* would constitute an aggravating circumstance) but cannot create new crimes, enlarge the criminal jurisdiction of the Star Chamber or exceed a specific statutory authorization by an *ultra vires* act: "But a thing which is punishable by the Law, by fine and imprisonment, if the King prohibit it by his Proclamation, before that he will punish it, and so warn his subjects of the peril of it, there if he commit it after, thus as a Circumstance aggravates the Offence; but he by Proclamation cannot make a thing unlawful, which was permitted by the Law before; And this was well proved by the ancient and continuall form of Indictments, for all Indictments conclude, *Contra legem & consuetudinem Angliae*, or *Contra leges & statuta*, &c. but never was seen any Indictment to conclude *Contra Regiam proclamationem*."

[295] A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (London; N.Y.: Macmillan & Co., 1965), at pp. 50–54.

[296] Francis Bacon, *The Works of Francis Bacon* [7] (Newcastle: Cambridge Scholars Publishing, 2010), p. 251.

1697, judicial decrees in the form of a statute were very common throughout most of the eighteenth century.[297]

A perusal of the Statute books can provide us with the most interesting and edifying examples. The one for the year 1770 contains ninety-nine acts, out of which only four are of a general law-making character. The rest of them, even if not technically tabulated as Private Acts, concern purely local or private matters (road improvement here, canal-building there, the repair of Magdalen Bridge, in Oxford, naturalizations, change of names, divorces, etc.).[298] In this vein, Maitland would famously remark later that the eighteenth-century British Parliament "seem[ed] afraid to rise to the dignity of a general proposition."[299] Among contemporary observers, Blackstone, in the *Commentaries,* despaired of the legislative drafting techniques or better yet the lack thereof, while Bentham was exasperated by the incapacity of Parliament to simply legislate the Crime of Theft rather than pass a law about stealing turnips, one about stealing horses, another about stealing turnips at night and a fourth one concerned with stealing horses during day-time.

Part of the reason why this strange situation obtained could be found in the institutional autonomy of Parliament, the corresponding relative distrust of the Crown, and—moreover—the sheer lack of government as such, in the present-day acceptance of modern, professional, streamlined administrative machinery. On a related point, the familiarly modern Benthamite notion that things can be done, changed, prompted, by legislative means, was so strange and unappealing that Lord

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[297] In 1697, capital punishment for treason was meted on Sir John Fenwick by an Act of Parliament *Act 8 & 9 Will. III c. 4*. *See* discussion on attainder in F. W. Maitland Maitland, *The Constitutional History of England* (Cambridge: Cambridge University Press, 1963), p. 386, giving later examples of bills of pains and penalties, which will continue to be used even after the harsher practice of attainder bills is discontinued (the banishment of Atterbury in 1720, the 1876 disfranchisement for bribery, by act of parliament, of certain voters for the City of Norwich). More generally on attainder, "The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause" Note, 72 *Yale Law Journal* 330 (1962–1963).

[298] *See*, for a detailed list, the statistics in P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979), pp. 91–95. *Also see* Maitland 1963, at p. 383, for an equally edificatory taxonomical breakdown of the Statute book for the year 1786: "There are 160 so-called public acts, and 60 so-called private acts. But listen to the titles of a few of the public acts: an act for establishing a workhouse at Havering, an act to enable the king to license a playhouse at Margate, an act for erecting a house of correction in the Middlesex, an act for incorporating the Clyde Marine Society, an act for paving the town of Cheltenham, an act for widening the roads in the borough of Bodmin. Fully half of the public acts are of this petty local character. Then as to the private acts, these deal with particular persons: an act for naturalizing Andreas Emmerich, an act for enabling Cornelius Salvidge to take the surname Tutton, an act for rectifying mistakes in the marriage settlement of Lord and Lady Camelford, an act to enable the guardians of William Frye to grant leases, an act to dissolve the marriage between Jonathan Twiss and Francis Dorrin. . ..One is inclined to call the last century the century of *privilegia*." Similar statistics and comments relevant to our argument are also provided by the introduction to David Lieberman's *The Province of Legislation Determined-Legal theory in eighteenth-century Britain* (Cambridge: Cambridge University Press, 1989), pp. 1–28.

[299] Maitland 1963, at p. 383.

Mansfield is reported to have said: "What! Pass a judgment to do mischief and then bring in a bill to cure it!"[300] And yet, in spite of the legislative shortcomings, the legal system as such corresponded to the Lockean ideal of a general framework of public, uniform, predictable, normative rules. But this was primarily a function of the common law, which developed as a predictable standard of private conduct in spite of or perhaps in part due to legislative inactivity. With the exception of the 1601 Poor Law, protective, corporatist, and interventionist provisions in the extant feudal legislation were either interpreted restrictively by the courts or, simply left unenforced administratively and judicially, eventually fell into obsolence. Parliament seldom interfered with this evolution, save in order to occasionally repeal legislation restrictive of private ordering and freedom of contract.[301] The sixteenth century Statute of Artificers, last bastion of feudal protectionism, was abolished in 1814.[302] But, as soon as feudal restrictions were fuly swept aside, the situation began to slowly change in the opposite direction, in lockstep with the growing importance of the Commons and the maturing of the modern parliamentary system.

Whereas in 1741 Walpole had refused to step down upon losing the confidence of the Commons, 1782 marked the first cabinet (Lord North) entirely replaced by a vote of non-confidence; in 1803, Pitt settled the modern convention that the leader of the majority in the Commons forms the Cabinet. The Reform Act of 1832 is the crucial landmark, since, from that year onward, Parliament lost its medieval, judicial character completely, becoming a modern legislative machine. The Poor Law Amendment Act of 1834 is not only an excellent example of a modern statute but also a "delegating" enactment, at least in one of the senses legislative delegation is understood nowadays: administration of the poor laws passed from the county justices to commissioners given large discretion to make general prospective regulations pursuant to the statutory authorization. The overall character of legislation changed suddenly after the Reform Act: the Statute Book for the year 1844, for instance, comprises 113 Public General Acts, out of which a total of 55 are of a general, public-regarding character.[303]

By this time, nonetheless, it becomes somewhat misleading to say that Parliament "makes" the law that the executive enforces, since the executive is now in true fact becoming more and more the primary initiator and the original drafter of legislation. If in 1836 Lord Melbourne could still venture to say that "the duty of the Government is not to make legislation but to rule," a mere decade later, in 1847, the Prime Minister is reminded by Sir George Lewis that "the business of legislation is now more exclusively in the hands of the government than at any previous time."[304]

Walter Bagehot's nineteenth-century account of the English Constitution, a snapshot of the constitutional changes occurring prior to the Reform Act of 1867,

[300] *Fletcher v. Lord Sondes*, unreported decision, cited by Atiyah, *Rise and Fall*, at p. 96.

[301] Atiyah, p. 69 ff. Grimm, *Recht und Staat*, pp. 170–175, 195 ff.

[302] Grimm, p. 174.

[303] Atiyah, at pp. 250–255.

[304] *Id.*, at pp. 253–254.

captured all these transformations by describing both the mixed and balanced constitution and the separation of powers as obsolete concepts, redolent of a false Constitution ("the literary theory," in his words).[305] In the real one, he stated, by virtue of practical developments, the former prerogatives of the Crown had been diminished to the point of irrelevance by legislation, legislation had come to be in fact primarily exercised by the House of Commons, while the referred power (the executive, the Cabinet), fused at the hip with the Commons, had become the real law-maker. From that point onward, any notion of a balanced constitution would be built on recondite chimeras. The developments noted by Bagehot subsequently matured, as it is commonly known, in the Parliament Act of 1911, by virtue of which the Lords are reduced to the practical status of—to use Dicey's contemporary quip—a "Debating Society."[306]

Therefore, when Lord Chief Justice Hewart published his acidulous tract in 1929, suggesting that Parliament was delegating its legislative powers to the Executive, prompted by and as part of a surreptitious attempt by the Executive to use parliamentary sovereignty in order to undermine both Parliament and the Rule of Law, and, further, that the Executive itself was gullibly at the hands of a subterraneous bureaucratic cabal, which he resoundingly stamped as a "new despotism," his argument was flying in the face of all the transformations noted above.[307] The Committee on Ministers' Powers, promptly appointed at the request of the Lord Chancellor, dismissed the conspiratorial charge on the bona fides of the Civil Service, for lack of evidence, and issued an extensive report on the matter of secondary legislation.

As a practical issue, the Committee opined, any root-and-branch condemnation of delegation as such had already become unwarranted, given the sheer scope of modern government, and the corresponding lack of parliamentary time, fluctuating nature of the domains to be regulated, and technical, expertise-intensive subject-matters of modern legislation. If by delegation one would understand the sheer need and amount of subordinate legislation pursuant to initial statutory authorization, as such, delegation was to be condoned as a practice "indispensable, inevitable, legitimate and constitutionally desirable for certain purposes, within certain limits, and under certain safeguards."[308] If delegation-related arguments were meant to

[305] Walter Bagehot, *The English Constitution*, revised American edition (New York: D. Appleton & Company, 1892).

[306] *See*, for a thorough discussion, Vile 1967, Chapter VIII, "The Rise and Fall of Parliamentary Government," pp. 212–238.

[307] Rt. Hon. Lord Hewart of Bury, *The New Despotism* (London: Ernest Benn, 1929). For a more restrained contemporary pamphlet, *see* Carleton Kemp Allen, *Bureaucracy Triumphant* (London: Humphrey Milford: Oxford University Press, 1931).

[308] "The truth is that if Parliament were not willing to delegate law-making power, Parliament would be unable to pass the kind and quantity of legislation which modern public opinion requires." *Committee on Ministers' Powers Report*, H.M.S.O. (Cmd. 4060) (1932), at p. 23. For contemporary comments on the Report, *see* John Willis "The Delegation of Legislative and Judicial Powers to Administrative Bodies-A Study of the Report of the Committee on Ministers' Powers," XVIII *Iowa Law Review* 150 (1932–1933) and Arthur Suzman "Administrative Law in

express rule-of-law concerns with administrative discretion, then, as rule-of-law and accountability-oriented remedies, the practice of extensive secondary rule-making and quasi-adjudication pursuant to enabling legislation needed to be reined in by a variety of safeguards, such as better publication standards, parliamentary scrutiny, and general access to judicial review of the vires. Certain practices were deemed to be particularly problematic and the Committee urged their more cautious usage for the future: delegation of the power to modify an Act of Parliament,[309] privative clauses (exclusion, by the enabling act, of the reviewing power of the courts), delegation of the power to legislate on matters of principle, and delegation of the power to impose taxation.

As a *constitutional* argument, nonetheless, Lord Hewart's attack could be very easily dismissed and the refutation is as clear and valid now as it was in 1932. To state, as he had, that "it is the task of Parliament to make the laws, and the real business of the Executive is to govern the country in accordance with the laws which Parliament has made"[310] constitutes, in light of the constitutional premises of the British parliamentary system, at best a political or ideological argument, with little if any legal-constitutional clout, and at worst a meaningless tautology. Given the flexible, unwritten nature of the constitution and the state of normative quasi-irrelevance to which the prerogative has been reduced,[311] no substantive legal baseline exists along which one could assess what would constitute legislation proper. In light of the main tenet of the British Constitution, parliamentary sovereignty, Parliament itself is under no constitutional obligation to legislate with a certain degree of specificity or on certain specific matters. Thus, the notion of delegation as such is unintelligible from a legal-constitutional standpoint, as

England: A Study of the Report of the Committee on Ministers' Powers," XVIII *Iowa Law Review* 160 (1932–1933).

[309] Sometimes referred to as "Henry VIII clauses," these are provisions in statutes allowing for the modification of the enabling act by secondary legislation (statutory instruments), without parliamentary authorization. *See* discussion above.

[310] Hewart 1929, at p. 75. *Also*, in Kemp 1931, at p. 8: "In all these matters, legislative and judicial, what is really happening is that Parliament is getting rid of its own responsibilities. It is a short and easy method of legislation to delegate wide and ill defined powers to subordinate bodies, etc."

[311] The prerogative, to which we have already referred, is the sovereign and original power of the Crown to legislate, by Order in Council, independent of the authority of the Houses of Parliament. It was used in the past to legislate for a newly conquered territory and could still be invoked to regulate trade and commerce during war-time (e.g., the 'Second Reprisals Order,' of 16th of February 1917, an Order in Council establishing a blockade of enemy territory), although the most common modern means of dealing with emergencies of all kinds is the sweeping enabling act. The judiciary could historically be relied on, moreover, to remind the Executive that the Crown cannot alter the law of the land by Order in Council (*see*, for instance, *The Zamora* [1916] 2 A.C. 77).

opposed to a polemical-political benchmark.[312] The only constraints on legislation are those of manner and form; as a matter of constitutional law, no normative constraints on the legislature itself could be envisioned. Thus, the constitutional problematics related to the validity of the enabling law per se reverts into a second-order, administrative law problem: a presumption against sub-delegation, statutory interpretation in substantive review of the *vires*, and due process ("natural justice") constraints on the exercise of discretion.

3.2.3.2 Dicey's Dilemma

The problem had already been put to legal test in the course of an appeal from Canada. Since Canada was constitutionally, until the 'Patriation' of the Constitution in 1982, under the British North America Act (the Constitution Act) of 1867, a claim could be theoretically made that the constitutional limitation on the Dominion would be exceeded not only by a federal 'interdelegation,' whereby transfers of authority upset the federal division of powers[313] but also when the Dominion Parliament or the legislatures of the provinces "delegate" excessive discretion and thus legislative power to the respective executive branches (the Governor General, Ministers, Federal Boards at the federal level or Lieutenant Governors, Provincial Ministers, Provincial Boards at the provincial level, respectively), by failing to legislate with specificity.

This contention was rejected in 1883, by a Privy Council decision on appeal. The appellant, Archibald Hodge, proprietor of a tavern in the city of Toronto, was held by a police magistrate in breach of a police resolution of the License Commissioners of Toronto (he had kept his shop open after seven o'clock

[312] For instance, a Royal Commission on Carrots, empowered by an Act of Parliament to make regulations and issue quality standards respecting carrots, to inspect carrot farms, and prohibit the commercialization of substandard carrots, the observance of its rules and regulations made a misdemeanor subject to a fine, is not a delegate of Parliament in a constitutional sense, since Parliament is under no constitutional obligation to either legislate at all or legislate in a substantively recognizable way or with a given degree of specificity. Conversely, without parliamentary authorization, the Commission could not have existed in the first place. In the unlikely case such Commission would have been created by a prerogative Order in Council, its nosy inspectors could have been legally chased off the farm and even shot for trespass by a hypothetical carrot farmer. For this lively exemplification and a score of other helpful comments and sobering conversations, I am indebted to Stephen Scott, Professor Emeritus of Constitutional and Public Law (private conversation, McGill University, Winter 2003).

[313] The Constitution Act of 1867 primarily governs the division of legislative powers between the Federal Government and the Provinces. Inter-delegation (between the legislatures) was declared unconstitutional in a decision by the Supreme Court of Canada on a complementary delegation to effect a cooperative provincial-federal old age pension scheme. *Nova Scotia Inter-delegation* case of of 1950, *Attorney-General of Nova Scotia v. Attorney General of Canada* [1951] S.C.R. 31. *See* comments in Peter W. Hogg, *Constitutional law of Canada* (Scarborough, Ont.: Carswell, c2003), 14-Delegation, pp. 327–356.

at night on a Saturday, 'suffering billiards to be played therein,' against the regulation), fined twenty dollars and, in case of non-payment, ordered to be imprisoned for fifteen days with hard labor. The resolution had been passed on the basis of a provincial temperance law (Liquor License Act), which gave commissioners power to pass regulations on licensed houses. Hodge claimed, among other things, that the Act was unconstitutional since the provincial legislature, by virtue of its being a delegate of the Imperial Parliament, had to make the law itself and was not to delegate its delegated (through the B.N.A. Act of 1867) legislative power to a municipal body. The Privy Council rejected this particular claim with rather short ceremony: "It appears to their Lordships, however, that the objection thus raised by the appellants is founded on a misconception of the true character and position of the provincial legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province. . .it conferred powers in no sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. . ..It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take matters directly in its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for Courts of law, to decide."[314]

This goes to introduce the nature of the Diceyan dilemma and show why modern administrative law in most common law jurisdictions is still, to paraphrase a modern Canadian commentator, a more than "slightly dicey business."[315] I must

[314] *Archibald G. Hodge v. The Queen* (1883), 9 AC 117, at 132. In one of the war-time 'delegation' decisions, *In Re Gray*, 57 S.C.R. 150 [1918], an Order in Council passed under the authority of the War Measures Act of 1914, was attacked on nondelegation grounds, since derogating from a statutory provision in the Military Service Act of 1917. The Justices of the Supreme Court of Canada, while sustaining the executive measure, indicated that, in principle, 'abandonment,' 'abdication' or 'surrender' by Parliament of its legislative powers would, nonetheless, be unconstitutional: " Parliament cannot, indeed, abdicate its functions, but within reasonable limits at any rate it can delegate its powers to the executive government." (Per Fitzpatrick, C.J.). *But cf.* Hogg 2003, at p. 330: "In effect, the War Measures Act transferred to the federal cabinet virtually the whole legislative authority of the parliament for the duration of the war. The Court held that even a delegation as sweeping as this one was valid. . ..[S]ince none of the majority judges regarded the War Measures Act as an unconstitutional abdication, abandonment, surrender, it is not easy to imagine the kind of delegation that would be unconstitutional. Nor did the judges indicate how their suggested limitation was to be reconciled with the Hodge doctrine of plenary and ample power; or, to put the question in another way, what principle of constitttional law dictated the suggested limitation."

[315] W. H. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business," 17 (1) *Osgoode Hall Law Journal* 1 (April 1979).

begin by stating that my own use of the quip is not to be understood in a pejorative sense. Although contemporary commentary reviles Dicey as a matter of course for having "effectively interred the idea of administrative law in England by denying its existence,"[316] this ritualized profession of academic antipathy is largely misdirected. Dicey essentially pointed out an inescapable trend in modern law and the tensions that would arrive from it.[317] Blaming him for pointing out the troubles to come does seem somewhat unfair, much like the proverbial shooting of the messenger.

Albert Venn Dicey's classic, *The Introduction to the Study of the Law of the Constitution*,[318] presents the characteristics of the English rule of law as involving "three distinct though kindred conceptions": legal equality ("the universal subjection of all classes to one law administered by the ordinary Courts"; the state as such has the position of an individual in any legal proceeding); the 'inductive' character of English constitutionalism (the general principles of the constitution derive gradually and spontaneously from adjudication "as to the rights of given individuals," so that individual rights are the source of the constitution rather than the opposite); and, most importantly, the avoidance of arbitrariness by virtue of the fact that "no man is punishable or can be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land."[319] For Dicey, as for Locke, legislation is essentially a rule with normative force, addressed to the individual. The primary implementation mechanism is a court (conversely, law is defined as "any rule which will be enforced by the courts"). In consequence, the executive (the government) is reduced to a ministerial (non-discretionary) role: "[The rule of law] means. . .the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government."[320] Dicey presented the essential legal elements of the English constitution in a somewhat duplicative manner. They resided in the sovereignty of Parliament, the rule of law, and the inductive-incremental development of the constitution itself by means of adjudications on rights rather than, as was the case on the Continent, by deduction from pre-established rules.

One of the main considerations which he thought distinguished starkly British law from the continental system of administrative law, whose very name was

[316] Paul R. Verkuil, "Crosscurrents in Anglo-American Administrative Law," 27 *Wm. & Mary L. Rev*. 685 (1986), 686: "In his influential 1908 treatise, A. V. Dicey, Vinerian Professor of English Law, effectively interred the idea of administrative law in England by denying its existence."

[317] For a more sympathetic reception, *see*, for instance, John A. Rohr, "Dicey's Ghost and Administrative Law," 34 (1) *Administration and Society* 8–31 (March 2002).

[318] A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (Indianapolis: Liberty Fund, 1982 (1915)).

[319] *Id*., p. 110.

[320] *Ibid*., p. 120.

according to him unknown to common lawyers in "countries which, like the United States, derived their civilization from English sources" (as he famously put it, "the want of a name arises at bottom from our non-recognition of the thing itself"), was equality of all subjects before the law. No special legislation and no privileges would be acceptable under the English Constitution. A public servant would come before the court like a private person; if if he should act outside the limits of his power, with no authority, then official status alone would not bind the court in any way.[321] There was in England no public interest in the sense that the administration would sit in independent judgment on it, like a court of law. The interest of the state would be decided by the court on an equal basis with and in opposition to the interest of the individual. Dicey, when condemning the *droit administratif* of France, was fully aware of (and had in fact laudatory words with respect to) the evolution of the French Council of State into a judicial body bound by a consistent system of principle and precedent. It was rather the principle of the state being given special status as a guardian of the public interest that he mostly reviled.[322] Martin Shapiro, describing Dicey's position, sums it up aptly, as follows: "Government could not act against individuals when it pleased, how it pleased, or for whatever reason it pleased. It could only act according to preexisting general laws passed by a representative body like Parliament or Congress. For Dicey, one of the central features of the rule of law was that, when a dispute arose between government and an individual about whether government had acted according to law, that dispute would be submitted to the regular courts as a normal law suit. The government would be treated as simply one of the parties, granted no more consideration by the judge than any other party. In this way, the rule of law could be enforced on government as it was on individuals, by the courts."[323]

What held these assumptions together was a concept of legislation that would soon become untenable. The law can be generally characterized as a rule if legislation is in fact most of time limited to the regulation of questions of rights as between individuals (torts, property, contracts) or claims of wrong by the state against an individual (criminal law). Dicey defined, after all, law and legislation as being one and the same thing, namely "any rule which will be enforced by the courts." What would soon happen was that the first element of his constitutional paradigm (sovereignty of Parliament) would enter into conflict with the second (the Rule of Law), posing big problems to the third (adjudication).

In 1915, Dicey would write an article entitled suggestively "The Development of Administrative Law in England," in which he made the observation that a recent

[321] "[An English official] who exceeds the authority given him by the law incurs the common law responsibility for his wrongful act; he is amenable to the authority of the ordinary courts." *Law of the Constitution 389*.

[322] Martin Shapiro, *Who Guards the Guardians-Judicial Control of Administration* (Athens and London: Georgia University Press, c1988), at p. 37: "What condemned continental administrative law in the eyes of English liberals was that it provided a special status for the state."

[323] *Id*., at p. 36.

decision of the House of Lords, *Local Government Board v. Arlidge,*[324] had been "a considerable step to the introduction among us of something like the *droit administratif* of France."[325] *Arlidge* dealt with an order of the Hampstead Borough Council that had closed a dwelling house as "unfit for human habitation," based on the authority given borough councils by the Housing and Town Planning Act of 1909. Arlidge followed the procedure in the act and appealed to the Local Government Board (a government department headed by a Minister), which had been given power by the act to determine its procedures as to appeals, provided that appeals were not dismissed without holding a public inquiry. A public inquiry was subsequently held by an inspector appointed by the board, who then made a report confirming the borough council's decision (the closing order). Arlidge repaired the house, again appealed, and after another public inquiry the order was again confirmed. Arlidge had asked to be given reasons (to see the report made), to have the actual decision maker in the board disclosed to him, and to be authorized to present his case orally (to be heard). He had been denied all these requests and sought *certiorari* on these grounds. On appeal in the House of Lords he ultimately lost his case. The Lords decided that since the Minister, the head of the board, was politically responsible to Parliament, members of the board were not compelled to act like judges.

The problem with this argument, according to Dicey, was that property being a common law right, an interference with it, albeit in exercise of—to use the American consecrated term, for purposes of comparison and reminder—police power, was understood as requiring the highest substantive and procedural (natural justice) protections. The common law had functioned on the understanding, expounded so forcefully by Dicey's classic, that interferences with rights would be diminished by the protection of the full set of substantive and procedural guarantees awarded by the judicial process. Conversely, non-normative issues, such as claims of privilege (for instance a liquor license) and political matters (for instance a deportation order) would meet with minimal judicial interference with the decision maker, since they are discretionary in their nature. Bringing in a political justification for non-disclosure, the House of Lords had upset settled understandings as to what would be political and discretionary and what would be legal and determined according to the judicial process: "This reference to the so-called ministerial responsibility is somewhat unfortunate. It is calculated to promote the belief that that such ministerial responsibility is a real check upon the action of a Minister or Cabinet when tempted to evade or override the law of the land. But any man who will look plain facts in the face will see in a moment that ministerial liability to the censure not in fact by Parliament, nor even by the House of Commons, but by the party majority who keep the Government in office, is a very feeble guarantee indeed against the action which evades the authority of the

[324] [1915] AC 120 (Eng. HL).

[325] 31 *Law Quarterly Review* (1915) 148–153.

law courts. A Cabinet is rarely indeed tempted to defy the wishes of the majority of the House of Commons, since it is the support of that majority which keeps the cabinet in office. If a Minister or the Government is tempted to evade in some form or other the authority of the law, the temptation must arise from the fact that that his action is desired, or at lowest will not be censured, by the majority of the House of Commons."[326]

Since the sovereignty of Parliament is legally unlimited, in face of a statute granting discretion explicitly, the judge is essentially bound by the legislative command and limited to the testing of the outward limits of discretion, hence the Diceyan dilemma of reconciling the rule of law with the sovereignty of parliament in the case of a head-on collision.[327]

Dicey and Hewart are commonly associated by contemporary critics, their positions deemed to be part and parcel of the same, ultraconservative and knee-jerk reflexive enmity to the modern welfare state. Yet the two had distinct standpoints and their arguments have different conceptual-legal stakes and weights. Hewart's shrill cries of delegation and acrimonious accusations of bureaucratic conspiracies were then (and are all the more in hindsight) a mere ideological interjection, a product of failure to understand change and seek legitimate ways to adapt to it. But not all worries about the future are expressions of desire to go back to a condemned past and not all irreversible changes have to be welcomed simply because they are inevitable. A few Victorian idiosyncrasies notwithstanding, Dicey's dilemma is in its core a subtle and emphatically legal argument, and insofar it is still fully pertinent to us today. What he observed was a blurring of the received legal categories and the impact of this confusion of distinctions and criteria on judicial practices. Once policy and political considerations are accepted as legitimate arguments in the judicial determination of rights, the end-result may well be a legalization of discretionary policy and politics. But it could equally signify the politicization of justice and the instrumentalization of freedom.

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[326] *Id*., at p. 152: *See*, in the same key, *Dyson v. Attorney-General* [1911] 1 K.B. 410, at p. 424: "If ministerial responsibility were more than the mere shadow of a name, the matter would be less important, but as it is, the Courts are the only defence of the liberty of the subject against departmental aggression." (per Farwell, L.J.).

[327] "In the Diceyan, common law understanding of the rule of law, the legislature has a monopoly on law-making authority, while the judges have a monopoly on interpretation. . ..However, the judges' interpretive monopoly is still subordinate to the monopoly on legislation. Judicial interpretations of the law must always defer to clear expressions of parliamentary intent-the common law will give way to legislation, no matter how offensive the statute is to the values of the common law or to moral sensibilities. Indeed, the common law has ultimately the same extra-legal guarantees against legislative disruption as general moral sensibilities, for when the common law does have to give way to statute, the remedy for the disruption to its order is to be found outside the law, in the source from which the disruption emanated-in democratic politics."David Dyzenhaus and Evan Fox-Decent, "Rethinking the Process/Substance Distinction: *Baker v. Canada*" 51 *U. Toronto L. J*. 193 (Summer, 2001), at p. 198.

3.2.4 *France: Law as the Expression of General Will*

> Mais là ou n'existe pas une semblable constitution, la délégation du pouvoir législatif, quoique critiquable rationellement, ne soulèvera point d'objection juridique, elle sera possible en droit. Dans un tel milieu en effet le pouvoir législatif statue librement, souverainement, sur n'importe quel objet. Il peut modifier les relations des divers pouvoirs publics, il peut librement retoucher et modifier la Constitution. Ne peut-il faire moins, intervertir momentanément les rôles que celle-ci a distribués?
>
> Adhémar Esmein, "De la délégation du pouvoir législatif-A l'occasion du projet dit 'des pleins pouvoirs' presente par M. Crispi au Parlement italien" *Revue politique et parlementaire*, 1894[328]

> En effet, la délégation du pouvoir législatif, comme de toute autre prerogative que la Constitution attribue aux Chambres, est juridiquement impossible.
>
> Adhémar Esmein, *Éléments du droit constitutionnel français et comparé* 1921[329]

France's archetypal constitutional model of legislation, inherited in equal measure from the legacy of Rousseauian sovereignty-related aphorisms, the inexperience in governing of the 1789 revolutionists, and the post-revolutionary distrust of the king, rests on the idea of a complete subordination of the executive to the command of the law. The decree of November 3, 1789 already provided that the executive could not adopt any self-standing normative ordinances, but only enforcement "proclamations" consistent with the letter of the law.[330] Even the regulation of the military and navy was done exhaustively through parliamentary legislation. This attempt to suppress all independent executive decree-making authority culminated in the Jacobin constitution of 1793, whereby the whole exercise of state power had to be legislatively mediated by the National Convention. The force of facts eventually took revenge on this extreme example of doctrinal Rousseauian purism and power soon completely reverted to the Committee of Public Safety. This is, to cite George Jellinek's wisely prudent words, a good if particularly brutal example for the way in which "constitutions and statutes cannot decree away the nature of the State, since they alone cannot gainsay that legislation (*Gesetzgebung*) can never replace government (*Regierung*)."[331] Albeit such an extreme understanding of the supremacy of parliamentary legislation yielded to more pragmatic arrangements, this general principle remained an undisputed central tenet of French

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[328] [Where such a constitution does not exist, the delegation of legislative power, however criticizable rationally, will raise no juridical objection, and thus will be legally permissible. In such a [constitutional] context the legislative power disposes liberally, in a sovereign manner, over whichever subject. It can modify the relationship between the public powers, it can freely amend and change the constitution. Why could it not also do less and momentarily interchange the roles assigned by the said constitution?]

[329] [In effect, the delegation of legislative power, just like the delegation of any other constitutional prerogative, is juridically impossible.].

[330] Georg Jellinek, *Gesetz und Verordnung: staatsrechtliche Untersuchungen auf rechtsgeschichtlicher und rechtsvergleichender Grundlage* (Freiburg I.B.: Mohr, 1887), p. 85 ff.

[331] *Id.*, at p. 90.

constitutionalism. When Charles X tried in 1830 to break with constitutional conventions and common understandings and suspend the freedom of the press by ordinance, based on Article 14 of the *Charte constitutionnelle* of 1814, the result was in fact a huge public outcry, revolution, the ousting of the king, and the instauration of the July Monarchy. The reviewed Charter of Louis-Philippe explicitly limited the ordinance-making power of the monarch to provisions that would neither suspend nor derogate from the law ("sans pouivor jamais ni suspendre les lois elles-mêmes ni dispenser de leur exécution").

The two mottoes at the beginning of this section are excerpts from two works of the famous French constitutionalist Adhémar Esmein, in which he advanced the argument that, unlike the sovereign parliament of England, the French one was bound by the constitution (the 'constitutional laws,' in fact) of 1785. He was relying, in support of his claim, on the express grant of power in the *Loi constitutionnelle du 25 fevrier 1785, rélative à l'organisation des pouvoirs publics*, which read, similar to the U.S. Constitution Vesting Clause of Art. I: "Le pouvoir législatif s'exerce par deux assemblées: la Chambre des députés et le Sénat." ("The legislative power shall be exercised by the two houses, the Chamber of Deputies and the Senat.") He was also relying on the precedent in the 1795 Directorial Constitution, whose Art. 45 expressly prohibited delegation: "En aucun cas, le Corps législatif ne peut déléguer à un ou plusieurs de ses membres, ni à qui que ce soit, aucune des fonctions qui lui sont attribuées par la présente Constitution." ("Under no circumstances shall the Legislative Body delegate, either to one or a plurality of its members, or to any other body, either of the functions which are attributed to it by the present Constitution.") That meant, for most French theorists, that executive legislation, in the sense of autonomous normative decree-making power, would be possible only as a strictly delineated exception. The claim had grounding in constitutional history and practices. But most of all Esmein relied, just like his English colleagues, on a normative ideal and practice of legislation, which would be soon put to the test.

The Great Depression brought about the practice of *décrets-lois*, law-decrees, rules of derogatory force, through which statutory provisions could be amended or abrogated. The decree-laws were first used during the WWI and afterwards entrusted to the Poincaré government during the transition to peace-time conditions. They 'entered into normality' during and after the overproduction crisis.[332] A *décret-loi* is based on an initial authorization by the parliament through a *loi de pleins pouvoirs*, authorizing the government to legislate within the confines of a defined subject-matter and prior deadline. With the passage of time, the domain of authorization became more generous and the parliamentary checks more symbolic. While the initial procedure provided for control by obligatory ratification and hence parliamentary incorporation (if the decree laid before parliament were

[332] *See* Bourdeau 1995, at pp. 366–385.

approved) into the legislative order, this practice was soon to be abandoned in fact.[333]

As mentioned, according to the traditional logic of post-revolutionary France, the executive enjoyed almost no independent normative decree-making power, except for limited domains like rules of administration and colonial matters. Private rights would be determined by *loi* and only secondary or effective implementing measures could be determined by *règlements d'administration publique* (decree of public administration). As the laws started 'delegating' in matters traditionally considered the domain of legislation, the cleavage between the normative (and constitutional) constraint on legislation (*loi materielle*) and the reality of formal legislation (*loi formelle*) whose actual substantive content was in fact fleshed out by the executive gave rise to a set of both constitutional-theoretical and practical legal quagmires. The 'constitutional theory,' as represented in constitutional theory by Esmein, considered delegations as flat-out unconstitutional.[334]

Another set of opinions maintained that enabling laws were not 'delegations of legislative power' but in fact 'attributions of competence' and thus permissible (this playing around the problem by means of linguistic labeling is redolent of the American debates discussed above). To wit, Léon Duguit, the main exponent of this position, argued nonetheless that a number of constitutional limitations would need to restrict the scope and content of the enabling act, thus: (1) the criminalization of conduct; (2) taxation; restriction on individual liberty in the general sense and comprising physical liberty, freedom of contact, commercial freedom, freedom of work; (3) restrictions on property.[335]

A third set of positions claimed that *delegations* were in fact a form of *legislation*. In the logic of this standpoint on the matter, if executive decrees passed under the authority of an enabling act would be considered a form of delegated legislation, this would in effect mean that no judicial review of administrative action was

[333] As Maurice Duverger describes the evolution: "[C]elui-ci [the parliament] ne veut pas prendre de responsabilite à cet égard, sachant qu'il est impossible d'abroger les décrets-lois et n'acceptant pas de les cautioner. Les décrets-lois continuent donc à s'appliquer sans être ratifiés." Also, further "Le procédé des décrets-lois est contraire à la Constitution, car les compétences ne se délèguent pas en droit public: le Parlement n'a pas le droit de déléguer son pouvoir legislatif au gouvernement. La nécessité pousse à modifier ainsi la Constitution par l'usage, par la coutume, et les décrets-lois finissent par être considérés comme normaux." Maurice Duverger, *Le système politique français* (Paris: Presses Universitaires de France, 1990), pp. 125–126. *Also see* a more thorough legal analysis in Joseph Barthélemy and Paul Duez, *Traité de droit constitutionnel* (Paris: Librairie Dalloz, 1933), "Le Règlement," pp. 772–782. *See also*, more generally, Otto Kirchheimer, "Decree Powers and Constitutional Law in France under the Third Republic," 34 (6) *American Political Science Review* 1104 (Dec., 1940).

[334] The common problem is of course specifying what delegation means in a given context, given that a certain amount of discretion is indispensable.

[335] Léon Duguit, "Des règlements faits en vertu d'une compétence donnée au gouvernement par le législateur," *Revue du droit public et de la science politique en France et à l'étranger*, p. 313–349, at p. 327.

available, since the *Conseil d'Etat* could not review the constitutionality of legislation.

The modern evolution of French administrative law and its increasing effectiveness in curbing administrative arbitrariness and executive power, in contrast to the traditional fleetingness of French constitutionalism, do much justice to Otto Mayer's well-known observation that "constitutional law passes, whereas administrative law stays."[336] An action for excess of power (*recours pour excès de pouvoir*) came before the Council of State in 1907, in relation to a government modification of the terms of a public contract made with a number of railroad companies. The government had taken measures by a 1901 decree of public administration, on the legal basis of two laws, of 1842 and 1845, enabling the government to adopt by regulation 'necessary measures for the police, safety, conservation, usage, and exploitation of railroads.' The 1901 decree had modified an earlier *règlement d'administration publique,* from 1846. The railroads argued that the earlier decree had exhausted the legal basis and the government would need to go to the parliament for another enabling act and that their contractual rights, as guaranteed by the earlier regulation, had been infringed. The alternative position would have been that the Council could not review the decree, since it was equivalent in constitutional status to its legislative authorization and thus unreviewable per se in *contentieux administratif*. In *Compagnie des chemins de fer de l'Est et autres*, while rejecting the action of the railroads on merits, the Council, to the dismay of theoretical purists, called the act a legislative delegation and declared the decree annullable as a regulation. It mattered not what the terminology was. As long as an act would emanate from the administration, it would always be reviewable on an 'organic criterion' (*critère organique*), based on the nature of the promulgating organ: "Considering that, whether the acts of the Head of State constituting public administration regulations are carried out by virtue of a legislative delegation and consequently include the full exercise of powers attributed by the legislature to the Government in this particular case, they are however not by virtue of this fact shielded from review, since these are the acts of an administrative authority; and it is the purview of the Council of State, in its jurisdictional capacity, to examine whether the acts adopted by means of public administration regulations are within the limits of legality."[337]

Yet the judicial method, while amenable for determinations of claims of right, cannot be generally expected to solve political and systemic problems, aside from the fact that, as David Currie pointed out, judicial review "is not an end in itself but a means of enforcing (constitutional and statutory) limitations on executive

[336] "Verfassungsrecht vergeht, Verwaltungsrecht besteht." Otto Mayer, Deutsches Verwaltungsrecht, 3. Aufl. 1924, Vorwort.

[337] C.E. 6 déc 1907, Rec. 913, concl. Tardieu, reported and commented in M. Long, P. Devolvé, G. Baibant, P. Weil, B. Genevois, *Les grands arrêts de la jurisprudence administrative* (Paris: Sirey (Éd. Dalloz), 10th edition, 1993), pp. 100–105, at p. 100.

authority; if there are no limitations, there is nothing to review."[338] Discussing, in 1931, the implications of the constitutional transformations, which had intervened by means of the changing nature of parliamentary enactments, on a constitutionally tenable concept of law, Raymond Carré de Malberg systematically showed that the only distinctions between legislation (*loi*) and executive (*règlement* or *décret-loi*) remained by then, of necessity, those of a formal (and not a material) nature. In terms of constitutionality, the law prevailed over executive decree by virtue of its superior place in the normative hierarchy and its benefit of spontaneous and initial delimitation of a legislative framework within which the executive would subsidiarily flesh out secondary rules.[339] The end of the Third Republic came about abruptly, through a legislative delegation to Marshall Pétain, giving him power to amend the constitution itself or adopt a new one.[340]

In response to these events, an express constitutional limitation would be thus set forth by Art. 13 of the 1946 Constitution: "L'Assemblée nationale vote seule la loi. Elle ne peut déléguer ce droit." ("The National Assembly has an exclusive right to adopt legislation. It cannot delegate this right.") In spite of this provision, delegation would persist throughout the Fourth Republic. Institutional instability, coupled with the need for efficient government after WWII, gave way to just more elaborate manners of bypassing the constitutional prohibition. The Fourth Republic developed two more delegation instrumentalities: the framework-law (*la loi-cadre*) and the extension of regulatory power (*extension du pouvoir règlementaire*). A framework-law would only set forth the general principles of a particular subject matter, while leaving the manner and details of application to the discretion of the executive. If parliament does not nullify the decrees within a certain deadline, the decrees would be assimilated with an act of legislation. An 'extension of the regulatory power' is, as revealed by its name, a provisional "de-legislation" of a specific domain. Since the regulatory field is "de-legislated," decrees could even modify the existent legislation in the specified area, since this would proceed by virtue of parliamentary sanction. The justification was that parliament could, at any rate, intervene and override the decree by express legislation. This latter procedure was declared by a 1953 *Avis* of the Conseil d'Etat as within the boundaries set by the Constitution, as long as two conditions were duly observed: (1) delegation should not impinge on matters which are reserved by constitution or tradition to legislation (most importantly fundamental rights, reserved to the legislative domain by the 1789

[338] Currie 1994, at p. 131.

[339] Raymond Carré de Malberg, *La loi, expression de la volonté générale* (Paris : Sirey, 1931), at p. 74 : "A un premier point de vue déjà, il ressort du concept actuel de la loi que la puissance législative n'est pas susceptible en soi d'être déléguée. D'après la Constitution, elle a, en effet, pour l'un de ses caractères spécifiques d'être une puissance initiale, s'exerçant spontanément, d'un seul jet, et d'une façon autonome. Une puissance déléguée ne peut donc plus être de la puissance législative. Ainsi, dès que l'on constate que le pouvoir réglementaire ne peut se mettre en mouvement qu'à la suite de et en vertu d'une habilitation, il devient manifeste que le règlement ne rentre plus dans la notion constitutionnelle de pouvoir législatif."

[340] Ross 1958.

Declaration and by the Preamble to the 1946 Constitution); and (2) the delegation could not be completely open-ended, as to effect an abdication. Yet delegation went on unabated and the end of the Fourth Republic witnessed even a revival of the particularly disreputable Third Republic practice of *décrets-lois*.

3.2.5 Legislative Reservation in Germany-State and Society

> Je weniger die Teilhabe am Staate sich verwirklichte, desto wichtiger wurde die Freiheit vom Staate.[341]
>
> Ernst Forsthoff, *Deutsche Verfassungsgeschichte der Neuzeit* (1961)

3.2.5.1 Legislative Reservation in the Constitutional Monarchy: The Advance of Society

Old Germanic law defined law-making as resting on an agreement between king or emperor and estates. One of Charles the Bald's *Capitularia* contains thus the indicative sentence: "Law is made by the consent of the people upon the institution of the king." (*Lex consensus populi et constitutione regia fit*.). The king could, on his own authority, edict only "administrative regulations" (*Amtsrecht*) but not law proper (*Volksrecht*), i.e., rules of a legislative character, immediately binding the subjects.[342]

As the political power of the emperor diminished, the application of this principle became a gradually exacerbated feature of the Holy Roman Empire. Towards the end, especially after the Peace of Augsburg, the Imperial Estates (*Reichsstände*) began increasingly to claim not just a right to express consent to the imperial "institution" but also full authority to participate in the act of legislation proper. Eventually, even the decree-making authority of the emperor was relegated to exceptional and restricted implementing orders.[343] With the rise of territorial sovereignty and the correlative decline of the political relevance of the Empire into what Pufendorf would emotively describe as a "monstrosity", territorial rulers acquired a general law-making competence, which was only unequally and to a relatively limited extent checked by the local estates.[344] Indeed, territorial sovereignty and legislative competence begin to be associated in characteristically

[341] The less political participation in the State was actualized, the more important was freedom from the State.

[342] Edictum Pistense, a. 864, § 6, In Jellinek, at p. 101.

[343] *Id*., pp. 101–102.

[344] The rationalization of German absolutism was however checked, until the end of the Holy Roman Empire of German Nation, by the imperial courts, which functioned on a medieval (acquired rights) template. Grimm, *Recht und Staat*, p. 88.

modern absolutist fashion; the eighteenth century jurist Johann Jacob Moser conflates them in his definition: "Who has territorial sovereignty (*Landeshoheit*), has law-making authority (*Gesetzgebungsrecht*), and who has legislative authority, has territorial sovereignty."[345] Exceptionally, in certain principalities, the provincial medieval parliaments managed to preserve portions of autonomy and assert participatory rights. In Eastern Frisia, Württemberg, and Mecklenburg, for instance, the estates exercised their rights to assent to (or in the case of Ostfriesland to take part in the making of) new legislation or amendments of old laws.[346] But, on the whole, no clear and general principle can be derived with respect to the distinction, according to either subject-matter or normative form, between the independent law-making authority of the territorial rulers and law-making with the consent of the medieval estate parliaments, respectively.

Under the influence of the Enlightenment and modern natural law ideas, commentators seek to impose on this disordered, partly medieval and partly modern framework, a coherent template, some rational normative criterion against the yardstick of which the incoherent growth of practices could be evaluated and rationally rearranged. Already in the period of German enlightened absolutism, the idea of separation between the person of the sovereign monarch and the state as sovereign entity led gradually to a general theoretical requirement of the supremacy of law and, consequently, of powers organized and divided according to natural law dictates. But none of the compartmentalizations of state power into analytically distinguished functions or the definitions of law according to an abstract criterion seemed to explain or account for reality, in an even remotely satisfactory way. The early defenses of separation of powers have all the rationalistic pathos of the Enlightenment. In Kant's *Metaphysics of Morals*, for emblematic example, the state is the ideal unity of the three separated powers, each of which is in turn "a moral person" characterized by a dominant trait. The legislative is "irreproachable" (*untadelig*), the executive is "irresistible" (*unwiderstehlich*), whereas the "sentence of the Supreme Judicature" (*Rechtsspruch des obersten Richters (supremi iudicis)*) is marked by its finality (*unabänderlich*). These powers complement each other and act in concert in the form of a syllogism. The legislative rule constitutes the major premise, enforcement of the rule by the executive the minor premise, whereas the judge concludes the syllogism with a right decision in a given case.[347] But even as late as the early nineteenth century, Carl von Rotteck's *Lehrbuch des Vernunftrechts und der Staatswissenschaften* (*Textbook of Rational Natural Law and State Sciences*), for instance, divides state functions into only two, law-making, which would proceed by establishing rules in an abstract way (according to concepts, *nach Begriffen*) and administration, which only executes, enforces those rules according to context and individual circumstance. This division

[345] *Ibid.* p. 103.

[346] *Ibid*, note 15, p. 104.

[347] Immanuel Kant, *Metaphysik der Sitten*, § 45–49.

appeared to him inevitable, since "every directive proceeding from the State power is either of a general and temporally indefinite nature (i.e., thought of in a abstract conceptual way) or constitutes a definite act (adjusted to a concrete case)."[348]

All such abstract logical exercises could of necessity lead nowhere, since they were too remote from both the reality of things and the practical requirements of government. To wit, defining law as a general act and dividing all state functions into administrative and legislative would have at the same time qualified some universal attributions of the legislature as administrative-executive in nature (most notably, the budgetary ones) and completely deprived the executive of its traditional, prerogative regulatory powers over the military, bureaucracy, and foreign affairs.[349] But, whereas the extreme theoretical demands of rational natural law (*Vernunftrecht*) were ricocheting from the reality of state practices, the old medieval methodology of defining state functions according to the traditional attributes of sovereignty (*regalia*) had also become unsatisfactory and anachronistic. Meanwhile, a constitutive rearrangement of government and thus the constitutional decision on the legislative reservation was, so to speak, left in suspension by the force of events. This serves to introduce a German particularity, namely a steady and deep disconnect between the requirements of constitutionalism and the representations of legislation and separation of powers in state and constitutional theory, on the one hand, and the reality of state practice, on the other. Georg Jellinek famously and insightfully quipped that: "all life scorns upon the categories forced upon it from the outside."[350] But this rift, in German constitutional context, is not just a result of the general difficulty of seizing upon the diversity of life through abstract-rational tools; it reflects in equal measure the late, fragmentary, and unequal path of constitutional modernization.

The general ambiguity is already apparent in the way in which legislation is referred to in the late eighteenth century Prussian codification, the *Allgemeines Landrecht für die preußischen Staaten,* where the provisions regarding law-making are products of both late absolutist conceptions (law is the emanation of sovereign will) and the contractualist natural law/rational law representations of the age (law as a general enactment, law as a rule directed at the attainment of common welfare, etc.).[351] In the final text, references to police regulations and legislation are interchangeable. Paragraph 6 of the codification defines thus the right to "give or abrogate laws and general police regulations as well as the authoritative interpretation of the law" as a sovereign right (*Majestätsrecht*), whereas paragraph 7 gives the head of state the right to authorize exemptions (*privilegia*) from the general laws. Under the influence of the French Revolution, moreover, the initial, more liberal

[348] Böckenförde, *Gesetz und gesetzgebende Gewalt*, at p. 108.

[349] *See* general discussion on the nineteenth century German and Austrian state law (*Staatsrecht*) commentaries regarding the proper constitutional "nature" of budget laws (legislative or executive-administrative) in Georg Jellinek, *Gesetz und Verordnung*, pp. 169–177.

[350] "Alles Leben spottet der von Außen an dasselbe herangebrachten Kategorien." *Id*., at p. 223.

[351] *Id*., pp. 79 ff.

versions were drastically curtailed and extensively qualified, which resulted in further incoherence. The 1784 draft (*Entwurf eines allgemeinen Gesetzbuchs für die preußischen Staaten*), for instance, defines (§ 50) "the general welfare" as basis for or reason of the laws.[352] The version from 1791 already rewrites this sentence in a more cautious, statist manner. Now, the corresponding paragraph reads: "The welfare of the State in the first place, and of its inhabitants more particularly, is the purpose of the civil society and the general aim of the laws."[353] In the final, 1794 version of the code, the paragraph is elided altogether, as are many other similarly more liberal provisions in earlier drafts.[354] Further reactionary reflexes would delay the evolution of constitutionalism as such and the development of German parliamentarism into a characteristically modern form.

The German Federal Act, adopted as legal basis for the confederation established after the defeat of Napoleon, declaimed pithily: "All Confederal states will be given an estate-based constitution (*landständische Verfassung*)" (Art. 13). The fact that no specific term, procedure or guideline was attached to the mandate, together with the multifarious interpretations to which the phrase *landständische Verfassung* lent itself, made it from the very onset unclear whether the requirement was for a return to the old estate-based, medieval representations or for the adoption of new, modern constitutions with modern representative legislatures.[355] Even though the constitutions newly adopted until 1848 were a partial break from the past (and some states, especially the southern principalities, introduced modern representative assemblies), they only qualified absolutism, did not usher in a fully new arrangement. Most importantly, this qualification introduced a new type of legitimacy but did not displace the old. Representation simply took an uncomfortable and uncertain second place right next to the monarchic principle. By contrast, in the rest of Europe, even the restoration of monarchy after revolutions, stylistic and declamatory paraphernalia notwithstanding, had to acknowledge and accommodate a completely new order of legitimacy. To wit, the struggle for supremacy had been settled with finality in England during the Civil War. The initial Stuart restoration only delayed an inevitable course of events and, immediately after the Glorious Revolution, William and Mary already took the throne upon clear constitutional conditions set down by Parliament. Even though, in form, the returning Louis XVIII only condescended to bestow ("octroyer") a constitutional charter on the French, those pretensions were made in full and cautious knowledge that he had inherited a different France after the Revolution.[356] More revealing still,

[352] § 50 Das allgemeine Wohl ist der Grund der Gesetze.

[353] § 77 Das Wohl des Staates überhaupt, und seiner Einwohner insbesondere, ist der Zweck der bürgerlichen Vereinigung, und das allgemeine Ziel der Gesetze.

[354] In Conrad, *Die geistigen Grundlagen*, at p. 47. *See* general discussion in same, *passim*.

[355] Forsthoff, *Deutsche Verfassungsgeschichte*, 93 ff.

[356] *See* Jellinek, *Gesetz und Verordnung*, p. 94: "Der ganze Bau der Staatsverwaltung bleibt so bestehen, wie ihn die Revolution vorbereitet und bereits das Consulat ausgeführt hatte. Insofern war es allerdings eine hohle Phrase, wenn Ludwig XVIII. die aus seiner Gnade entspringende Verfassung anknüpfen wollte an die legislatorische Thätigkeit seiner Vorfahren von Ludwig dem Dicken bis Ludwig XVI."

Napoleon III and nineteenth century Italian kings were reigning "by the Grace of God *and* the Will of the Nation."[357] Obversely, in all the German states, even those that had been exposed to French-modeled constitutionalism prior to the defeat of Napoleon and the Restoration, the monarchical principle was paramount and undisplaced. The Bavarian Constitution from 1818 formulated the principle, in Title II, §1, as follows: "The King is the Head of the State and joins in his person all the rights of state power, exercising them according to the stipulations established by him in this constitutional document."[358] Under these general conditions, legislation was, in principle and residually, the product of the sovereign's will, to which as a matter of exception the consent of the legislature would be required in specified fields. How extensive the portion of authority carved out in this way was differed from place to place, albeit, as a general rule, it is now set forth that laws affecting the property and liberty of the subjects cannot be adopted, abrogated, amended, or authoritatively interpreted without the agreement of the representative assembly or, the estates, respectively. The Constitution of Bavaria provided for instance that: "Without the counsel and agreement of the kingdom's estates no new general law concerning personal freedom or the property of the citizens can be adopted, nor can an existing one be amended, authentically interpreted, or abrogated."[359] Some constitutions further included procedural law and organization law, exceptionally even law concerning the military, in the subject-matters to which the consent of the representatives must be required. In all cases, the right of initiative belonged to the monarch.

The next wave of constitution-making, around and after the 1848 revolution, gave a right of initiative in law-making to the legislatures and generalized the modern representative assembly model.[360] Art. 62 of the 1850 Prussian Constitution provided: "The legislative power shall be exercised jointly by the king and the two houses. The agreement of the king and the houses is necessary in each case," whereas Art. 45 attributed the executive power to the king and expressly recognized the latter's authority to adopt implementing decrees. Nonetheless, legislation proper still remains at this stage an exceptional normative activity and it is relegated to a confined normative domain. This is a result of the fact that the king posseses original decreemaking (legislative) power within the fields that are regarded as executive in their nature, primarily the bureaucracy and the army. Within this area, deemed to constitute the core of the State, legislative and thus judicial interference

[357] *Cf.* Dietrich Jesch, *Gesetz und Verwaltung: Eine Problemstudie zum Wandel des Gesetzmäßigkeitsprinzipes* (Tübingen: J.C.B. Mohr (Siebeck), 1961), p. 83.

[358] Grimm, *Deutsche Verfassungsgeschichte*, p. 114 ff.

[359] Böckenförde, *Gesetz und gesetzgebende Gewalt*, p. 71 ff, Grimm, *Deutsche Verfassungsgeschichte*, p. 113 ff., Jellinek, *Gesetz und Verordnung*, p. 110.

[360] The normative division between ordinances and legislation in the imperial constitution of 1871 (*Verfassung des Deutschen Reiches*, commonly referred to as *Bismarksche Reichsverfassung*) reflected the federal partition of power between the Reich and the member states. It is therefore of no relevance to this argument.

is not admissible. A normative dichotomy was thus created, by virtue of which the representative assembly and parliamentary legislation occupied constitutionally a sphere separated from the state proper. The result was a clear-cut delineation between law and discretionary power, legislation and administration, monarchical principle and popular representation, state and society: "Executive and Parliament, State and society, monarch and people are antipodes; both spaces are separated from each other and, in the inner core of their respective purviews, mutually free from encroachments or external influence. The inner space of the executive is free from the society just as the society itself is protected from inroads into the protected area of freedom and property."[361]

3.2.5.2 The Qualified Retraction of the State

As we have already seen in the case of the other jurisdictions, the constitutional guarantee of the classical legislative reservation and therefore the rationality of the fundamental legal distinctions predicated upon it depended not only on the restriction of legislation to a constitutionally specified normative field and subject-matter. It also required, as a "mirror" or flip-side premise, the retraction of the administration and the executive from the field of legislation proper into the confines of their newly defined purview. To put it another way, just as the society and the legislature were constitutionally permitted to carve a defined space of legal regularity into a normative domain previously occupied by the absolutist state, the administration was also constitutionally required to progressively relinquish control over this societally secured area of property and freedom and withdraw to the newly delimited confines of the state.[362] This realignment correspondingly resulted in a clear delineation between law and politics, i.e., between ministerial administration according to the law and discretionary powers unchecked judicially, respectively.

Already in the *Allgemeines Landrecht* one can detect the beginnings of an incipient contradiction or at least clear rift between the older purview of police power, the promotion of general welfare and public felicitousness (*Glückseligkeit*, *cura promovendae salutis*), and the modern constitutional paradigm. In the logic of the latter framework, individual welfare is a matter for individual and social (self-) regulation, whereas the police prerogative of the administration in this respect is reduced to policing *stricto sensu*, i.e., preventing for the future and generally noxious uses of private liberty and property (*cura advertendi mala futura*).[363]

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[361] Jesch, *Gesetz und Verwaltung*, p. 91.

[362] Thus related and insightfully, Maier, *Die ältere deutsche Staats- und Verwaltungslehre*, p. 248: "Man mag im Nachhinein geneigt sein, festzustellen, dass die Bindung an das Gesetz als generelle abstrakte Norm (und damit die Entstehung einer Verwaltungsrechtswissenschaft, die wesentlich den rechtsstaatlichen Gesetzesvollzug zum Inhalt hatte) erst möglich wurde mit der Eliminierung des Wohlfahrtszwecks und der Beschränkung der Polizei auf bloße Gefahrenabwehr."

[363] Maier, at p. 245.

The tasks of the state are described extensively in the 1794 codification, in the eudaemonistic key characteristic of the absolutist state: "...to ensure for the establishment of institutions, through which the inhabitants are provided with the means and the opportunity to develop their powers and abilities, and to use those powers to the development of their welfare."[364] But the power of police is already defined in a restrictive, modern way, as the authority to protect the public and prevent public nuisances: "The necessary means to preserve public peace, safety, and order (*Erhaltung der öffentlichen Ruhe, Sicherheit, und Ordnung*) and to prevent dangers to the public or individual members thereof constitute the police power (*das Amt der Polizei*)."[365] This rift between the older and newer conception of police will deepen together with the slow process of constitutionalization. Its decisive turning point is the 1882 "Kreuzberg Decision" of the Prussian Superior Administrative Court.[366]

In 1879, the Royal Police Presidium of Berlin had adopted a regulation concerning the protection of a monument erected in 1878, on a slope of the Kreuzberg Hill, to commemorate victory in the anti-Napoleonic Wars of Liberation from 1813 to 1815. The regulation provided for an administrative building approval procedure, so that the view overlooking the city from the foot of the monument and from the city up to the monument would not be obstructed by civil constructions. A landlord whose application for a building permit had been rejected (only the construction of smaller, mansion-type buildings could be authorized on his plot, in order not to block the view) sought judicial redress against the Police Presidium and eventually won. The defendant Police Presidium relied both on the extensive interpretation of the state purview in the *Allgemeines Landrecht* and, more particularly, on two provisions of Title 8, Part 1 according to which "no construction shall be undertaken that would damage or imperil the public good or deface the cities and public squares" (§ 66) and "streets and public squares are not to be narrowed, polluted, or otherwise defaced", respectively. The court observed however that property had become a fundamental right by virtue of the Constitution of the Kingdom of Prussia, whose article 9 read: "Property is inviolable. The use of property can be restricted or property can be taken only for reasons of public utility, against just compensation according to the law, paid in advance or, in exceptional cases, at least preliminarily determined." Accordingly, the police powers of the administration were to be interpreted restrictively, as directed strictly at the attainment of "public order, peace and safety," rather than extending to "ideal goods" and general esthetic

[364] § 3 II 13 ("...für Anstalten zu sorgen, wodurch den Einwohnern Mittel und Gelegenheit verschafft werden, ihre Fähigkeiten und Kräfte auszubilden, und dieselben zur Beförderung ihres Wohlstandes anzuwenden.").

[365] § 10 II 7. *See* discussion in Peter Badura, *Das Verwaltungsrecht des liberalen Rechtsstaates* (Göttingen: Otto Schwartz & Co., 1967), pp. 34–35.

[366] There are in fact two decisions (*Erkenntnisse*), of June 10, 1880 and June 14, 1882, respectively. In *Preußisches Verwaltungsblatt* (1) 1879/1880, S.401 ff. and (3) 1881/1882, S. 361 ff. They are cited here from the reprint in *Deutsches Verwaltungsblatt* DVBl, 1985, 216, 219.

values. An extension of police power exercise to the views of an institution about the general esthetic harmony of the monument's architectural surroundings was also held to be unjustified. The provisions regarding the "defacement" of public spaces did not imply an administrative legal prerogative of appreciating the beauty of the city but rather had to be restrictively interpreted, as referring strictly to any given building as such and applying solely to "a serious defacement" caused by a particular construction. If the state wanted to undertake an extensive restriction of property, such as the one impugned by the plaintiff, it could only do so by means of either seeking special legislation in parliament or by way of the regular expropriation procedure set forth in the Takings Law, under a showing of public utility and the advance payment of just compensation.[367]

Thus was decided with finality that the administration could not intervene in the sphere of society, i.e., in the constitutionally-secured area of "liberty and property" other than in calculable, legislatively predetermined ways. In 1895, the first edition of Otto Mayer's epoch-making administrative law textbook coined the defining trait of the rule of law administration and hence also determined the proper scientific object of administrative law: *Eingriffsverwaltung* (intervention administration). By evident contrast with the police administration of the absolutist state, the actions of the rule of law state in the field of administration are defined as strictly measurable against the yardstick of parliamentary legislation, by means of applications for judicial review. Furthermore and correlatively, Mayer defines legislation as generally and essentially coextensive with legal norm (*Rechtssatz*), namely with general rules of normative force addressed to the individual: "The most important feature of the constitutionally valid legislation. . .is its intrinsic capacity of speaking in norms. The legal norm is a normative determination addressed to everyone, defining what action is right or wrong, in terms of a generally described factual hypothesis."[368] The imagery as such is revealing, such as for instance when the author describes, through a suggestive analogy, the intervention of the administration in the private sphere, on the basis of the law. A law is not just a restriction of administrative power but also "an enlargement of it to an area, from which until that moment it had been excluded; *the door is therefore opened to the administration*, so that it now can act correspondingly *in that particular, previously closed space*. This effect is attached intrinsically to each law that undertakes an interference with liberty and property." [emphases supplied][369] Therefore, in Mayer's account, the archetypal type of administrative action is the administrative act (such as a notice of tax assessment), which interferes in and with the private sphere, on the basis of a clear legislative rule, in a calculable and readily predetermined manner, ultimately subject to a thorough judicial determination.

[367] *Id.*, p. 222.

[368] Otto Mayer, *Deutsches Verwaltungsrecht*, dritte Auflage, unveränderter Nachdruck (Berlin: Duncker & Humblot, (1924) 2004), at p. 66.

[369] *Id.*, p. 72.

This constitutional-administrative withdrawal of the state from the field of society proper was however, as the title of this subsection indicates, a qualified one. The final cause of this qualification is the general historical evolution of the country, its *Sonderweg,* as an overused cliché goes. Unlike in the rest of Europe, both the emancipation of private law and society from feudal restrictions and the general liberalization of the economy were undertaken to a large extent by the state, namely, by the in roughly equal measures liberally- and state-minded bureaucracy. The limitation of the state was in Germany largely self-imposed and, especially in Prussia, the progressive emancipation of the private sphere from public control constituted a top-down, bureaucratically engineered process: "In contrast with England or France, no coalition between natural law and society against the monarch ever came into being [in Germany]. A pact was made rather between the officialdom and philosophy, whereas the latter became a philosophy of state (*Staatsphilosophie*), in both senses of this term."[370] But even in Southern Germany, where this emancipation was ostensibly undertaken in the first two decades of the nineteenth century, by introducing modern-style representative assemblies and rights charters, the relative lack of attributions rendered parliamentarism rather decorative. Its lack of real power and dearth of responsibilities meant in practice that it could, in Ernst Forsthoff's caustic characterization, "keep arguing on the cheap (*billig räsonieren können*)."[371]

By the same token, it was precisely due to the neutral but unquestionably superior position of the state that the economic impetus of the late nineteenth century could be administratively managed and extensive social protectionism could be introduced.[372] In fact, interventionism by way of trade protectionism and the state support of extensive cartelization (a phenomenon Ralf Dahrendorf appositely called "industrially feudal society") went hand in hand with a peculiar type of social welfare measures (to use Dahrendorf's countervailing quip, the "authoritarian welfare state"). The "New Economic Politics (*Neue Wirtschaftspolitik*)," inaugurated by Bismarck in 1879, through the introduction of the protective tariff, was closely followed by health insurance (1883), accident insurance (1884), and invalidity and old age insurance (1889) legislation.[373] This idiosyncratic German mixture of economic interventionism and authoritarian welfarism coupled with a strict separation between state and society had as a direct legal consequence an extensive and systematic neglect of even larger areas of administrative discretionary powers than in other jurisdictions. Germany acquired a social welfare and administrative state *avant la lettre,* while preserving the administrative law means of the nineteenth century to control it. The separation of state and society and its correlative legal avatar, the dichotomy of lawful

[370] Grimm, *Recht und Staat*, p. 90.

[371] Forsthoff, *Deutsche Verfassungsgeschichte*, p. 110.

[372] *See generally*, Ralf Dahrendorf, *Gesellschaft und Demokratie in Deutschland* (München: Piper & Co., 1965).

[373] Grimm, *Recht und Staat*, pp. 150-151

"intervention administration" vs. purely discretionary executive and administrative attributions not subject to legal control, resulted, along this general evolution of state, economy, and society, in the uncontrolled growth of large areas of administrative action. These zones of state action were fully devoid of judicial supervision or even legal-scientific evaluation: "Where state action is equated with sovereign action, only that kind of exercise of authority which addresses the citizens in a "normative command backed by sanction" (*hoheitlich*) mode fits the theory. Where that was not the case, the purity of the public law was paid for with a narrowing of its view range (*Blickverengung*): all the activities of the state which did not embrace a mandatory form, namely the social welfare functions and the promotion of culture, economic aids, etc., escaped the attention of legal science. Administrative authorities profited from this neglect, since they could thus see themselves to a large extent freed from legal controls."[374]

Even though the separation between the imperial state and the Wilhelmine society was shattered by the Great War,[375] the full constitutional-political import and the greater constitutional and administrative law consequences of the intervening transformations remained obscured during the short-lived Weimar democracy. This occurred on the one hand by virtue of the fact that the presidential office substituted to a certain extent the monarchic principle, and thus the essential constitutional relationship between legislation and administration remained unchanged. Moreover, the state of almost uninterrupted emergency in which the Weimar Constitution operated made recourse to Art. 48 (which enabled the adoption of emergency presidential decrees with legislative force and effect) and open-ended enabling laws inevitable. A parliamentary litany of ever more extensive authorizations preceded the Enabling Law of 1933. The *Ermächtigungsgesetz* of October 13, 1923, for instance, authorized the government of the Reich (in fact the Streseman Cabinet) to adopt delegated legislation derogating from fundamental rights until the end of the cabinet's term or until the dissolution of the political coalition supporting it in the *Reichstag*.

3.3 Rules and Changes

Classical constitutional law presupposed a partial overlap and—within the overlapping area—synonymity between legislation as a practice and the normative category law. This presupposition rested, in terms of its ultimate natural-law

[374] Grimm, *Recht und Staat*, p. 103. *See generally*, Badura, *Das Verwaltungsrecht des liberalen Staates* and Forsthoff, *Verwaltung als Leistungsträger*.

[375] Forsthoff, *Deutsche Verfassungsgeschichte*, p. 185: "Constitutionally speaking, the autonomy of the civil society (*bürgerliche Gesellschaft*) came to an end during WWI. The clear separation between state and society, the dialectical relationship of togetherness and conflict, between the society based on natural human inequality and the state based on civil equality, did not reemerge after the war."

justifications, on the premise of the "natural" character of society and on a level of societal separation from the state proper. Legally, this paradigm required an intense constitutional protection of the general conditions of societal self-regulation of life, liberty, and property.

The nondelegation proviso expressed this foundational and structural expectation, namely that the essential legal framework regulating private conduct would be formed of normative rules of Lockean pedigree (i.e., prospective, general, stable, and clear rules of private and criminal law). A constitutional limitation of the legislature to the enactment of rules of just conduct further implied that what was deemed essentially private could be categorically and systemically separated from what was considered properly public. From this requirement derived a flip-side implication. Just as the sphere of society, and thus of private conduct, was constitutionally sheltered from excessive political discretion, some areas of state action were premised as irrelevant from a judicial public law standpoint. The relational indifference of public law adjudication towards decisions regarding matters deemed essentially political in nature was expressed by way of categorically distinct tests and standards of review in constitutional and administrative law. This resulted in a clear division between areas of law proper and areas of political discretion and in a cluster of germane legal dichotomies between discretionary and ministerial administration, right and privilege, external affairs and internal matters, hence (ultimately) between the mutually exclusive domains of politics and law.

These foundational divisions were both constitutive of fundamental legal practices and reinforced (in the case of the US Constitution) by means of fundamental law. As we have seen, irrespective of what fundamental presuppositions a paradigmatic constitutional system started from (supremacy of the Constitution in the US, monarchical principle in Germany, parliamentary sovereignty in England and related Westminster jurisdictions, preeminence of legislation coupled with the denial of original normative attributions to the executive in France), these presuppositions eventually yielded to or accommodated in various forms the central requirement of separating neatly in terms of public law adjudication between "law proper" and political (administrative and executive) discretion. This requirement was showcased by the delegation notion and, in the US constitutional context, it was also legally expressed by means of the nondelegation doctrine.

The classical constitutional paradigm had been underpinned by general social, economic, and political premises whose correspondence with reality was increasingly more often and ever more intensely put into question during the second half of the nineteenth and the beginning of the twentieth century. The character of legislation changed, reflecting the political, economic, and social changes brought about by the rise of mass society, mass democracy, and standardized, concentrated late capitalism. Once significant discretionary powers devolved upon the executive and administration to intervene, within the wide interstices of open-ended parliamentary mandates, in fields previously regarded as off-limits to unmediated political decision, an immediate political and ideological reaction was to accuse parliaments. These were castigated for "delegating their powers" in alleged dereliction of their constitutional duties. A later and more sober constitutional reflection attempted to

bring constitutionalist presuppositions into line with those phenomenal changes, by imposing on parliamentary enactments a constitutional requirement of specificity and clarity. In the United States, the constitutional reflection and the immediate reaction to contemporaneous change coincided perfectly, as the Supreme Court enforced the nondelegation doctrine in order to sanction specific legislative excesses of the New Deal. In Europe, nondelegation constitutional limitations were a part of the general package of post-WWII "rationalizing" solutions to the pre-war crisis of parliamentarism.

The next chapter of the book will inquire into the functional needs intended to be served by this kind of constitutional rules and into whether limitations on delegation were an adequate constitutional response to the general phenomenon of delegation. The next articulation of this argument will also ask whether and under what conditions a positive rule of fundamental law can compensate for systemic transformations in the nature of constitutionalism.