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THE MYTH OF THE FEDERAL PRIVATE NONDELEGATION DOCTRINE

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Judges and scholars have often claimed that delegations of governmental power to private parties are constitutionally prohibited. However, such a "private nondelegation doctrine" is elusive, if not nonexistent.

To understand why, first we need to realize that there are actually several distinct nondelegation doctrines. I develop a taxonomy that makes sense of these various doctrines by focusing on the different reasons why a delegation might be problematic. A nondelegation doctrine might be "giver-based" (can Congress delegate this power?), "recipient-based" (can the recipient exercise this power?), or "application-based" (will the application of this power be unjust?).

Once we distinguish these doctrines, it becomes apparent that none of them rules out private delegations. On the contrary, some doctrines actually facilitate privatization, because they provide that certain private delegations are exempt from certain constitutional requirements. As for the other doctrines, they do not embody any categorical antiprivate rule.

Private status may be practically relevant in some cases, because the factors that matter to the various doctrines (e.g., how much a delegate is constrained, or the presence of bias) might tend to play out differently between the public and private sectors. But this is an empirical question; the same factors can in principle also invalidate public delegations; and attentiveness to these factors shows how to structure private delegations so they are constitutionally permissible. Constitutional law should continue looking to specific objectionable factors rather than the formal public-versus-private question.

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INTRODUCTION

It's almost blackletter law that delegations of governmental power to private parties are unconstitutional.

In 1935, the Supreme Court dismissed the very idea that "Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries."[1] "Such a delegation of legislative power," it wrote, "is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress."[2]

The very next year, the Court was equally negative about allowing a majority of the coal industry (producers and unions together) to impose an industry-wide code. This was, it said, "legislative delegation in its most obnoxious form; . . . *in the very nature of things*, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor."[3]

This attitude—including its invocation of "the very nature of things"—isn't just a relic of the late *Lochner* days, jettisoned along with everything else in 1937. These two cases, *A.L.A. Schechter Poultry Corp. v. United States* and *Carter v. Carter Coal Co.*, are still good law and are cited regularly.[4]

In 2013, the D.C. Circuit invalidated a delegation to Amtrak, which Judge Brown held was private: "Even an intelligible principle," Judge Brown wrote (citing *Schechter Poultry* and *Carter Coal*), "cannot rescue a statute empowering private parties to wield regulatory authority."[5] The Supreme Court avoided the issue because it held that Amtrak was in fact governmental, but Justices Alito and Thomas (citing those same cases) opined in separate concurrences that private parties can never wield federal regulatory authority—for the simple reason that they are not part of Articles I, II, or III, and therefore are not vested with federal legislative, executive, or judicial authority.[6] On remand, Judge Brown readopted her private delegation analysis as to a different aspect of the regulatory scheme.[7]

These ideas have continued to percolate. In 2021, the Fifth Circuit considered whether, under the Affordable Care Act, Congress

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1 A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935).

2 *Id.*

3 Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) (emphasis added).

4 *See, e.g.*, cases cited *infra* notes 5–12.

5 Ass'n of Am. R.Rs. v. U.S. DOT, 721 F.3d 666, 671, 670–71 (D.C. Cir. 2013), *vacated sub nom.* DOT v. Ass'n of Am. R.Rs., 575 U.S. 43 (2015).

6 *See Ass'n of Am. R.Rs.*, 575 U.S. at 60–62 (Alito, J., concurring); *id.* at 87–88 (Thomas, J., concurring in judgment).

7 *See* Ass'n of Am. R.Rs. v. U.S. DOT, 821 F.3d 19, 37 (D.C. Cir. 2016).

could incorporate the standards of the American Academy of Actuaries and the Actuarial Standards Board to determine whether a state's contracts with managed care organizations were "actuarially sound."[8] Judge Haynes avoided that issue,[9] but Judge Ho, dissenting from denial of rehearing en banc, insisted (citing, of course, *Schechter Poultry* and *Carter Coal*) that "the Constitution vests legislative power in Congress and does not permit delegation of that power—especially not to private parties."[10] Justice Alito, joined by Justices Thomas and Gorsuch, "reluctantly concur[red] in the denial of certiorari" because of various procedural complications, but reiterated the "need to clarify the private non-delegation doctrine in a[] . . . future case."[11]

And most recently, in 2022, the Fifth Circuit struck down a delegation of regulatory power to the Horseracing Integrity and Safety Authority—a private nonprofit entity deputized by Congress to regulate thoroughbred horse racing.[12] Because the Authority had sweeping rulemaking power and the FTC had only limited review power, said Judge Duncan (citing, as you'll expect, *Schechter Poultry* and *Carter Coal*), this delegation ran afoul of the "cardinal constitutional principle . . . that federal power can be wielded only by the federal government."[13] That specific conclusion (as to the Horseracing Authority) may no longer hold in light of a recent statutory amendment,[14] but you see the idea.

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8 *See* Texas v. Rettig, 987 F.3d 518, 524–25 (5th Cir. 2021).

9 *See id.* at 530–33.

10 *See* Texas v. Rettig, 993 F.3d 408, 410, 412 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing en banc).

11 Texas v. Comm'r, 142 S. Ct. 1308, 1308–09 (2022) (mem.) (statement of Alito, J., respecting denial of certiorari).

12 *See* Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 53 F.4th 869 (5th Cir. 2022).

13 *See id.* at 872, 880, 882–88.

14 Congress responded to the Fifth Circuit ruling within six weeks: in December 2022, it amended the Horseracing Integrity and Safety Act to provide that the FTC, by notice-and-comment rulemaking under section 4 of the Administrative Procedure Act (APA), "may abrogate, add to, and modify" the Authority's rules. Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, § 701, 136 Stat. 4459, 5232, 5231–32 (2022) (to be codified at 15 U.S.C. § 3053(e)). A few months later, in a parallel challenge, the Sixth Circuit held that this statutory amendment, by beefing up FTC oversight, cured the nondelegation problem. Oklahoma v. United States, 62 F.4th 221, 225 (6th Cir. 2023). Meanwhile, in the Fifth Circuit, the district court, on remand after the amendment, upheld the scheme against private nondelegation and Appointments Clause challenges. *See* Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, No. 21-CV-071, 2023 WL 3293298 (N.D. Tex. May 4, 2023). As of this writing, the appeal from that district court opinion is pending in the Fifth Circuit. Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, No. 23-10520 (5th Cir. argued Oct. 4, 2023). I have filed an amicus brief in support of the Appointments Clause aspect of the challenge. Brief for Amici Curiae Reason Foundation et al. in Support of Appellants, *Black*, No. 23-10520, 2023 WL 4679876.

So everyone agrees: the nondelegation doctrine forbids delegations to private entities. Whether or not the Court revives the nondelegation doctrine after *Gundy v. United States*,[15] there seems to be a consensus on this subcategory of delegations.

* * *

There's just one problem with this consensus: it's mostly wrong. First, there is a sloppiness, in that judges and scholars alike often use the term "nondelegation doctrine" indiscriminately to refer to several disparate doctrines; we would do well to disentangle the doctrines and be clear on each one's domain. Second—and more fundamentally—once we disentangle the doctrines, we find that none of them rules out private delegations as such.

In Part I, I put some order into the welter of doctrines that relate to delegation. My taxonomy, which consists of three basic categories, is novel but also commonsensical: it focuses on *why* particular delegations might be thought to be unconstitutional. Here are some easy examples:

1. The classic Nondelegation Doctrine (which I'll capitalize) stems from Article I's Vesting Clause: because Article I vests "[a]ll legislative Powers herein granted"[16] in Congress, Congress must exercise legislative power itself and can't delegate it to anyone else. This is a *giver-based* doctrine: legislative power can't be delegated because Congress is disabled from giving it away.[17]
2. The Appointments Clause requires that all "Officers of the United States"[18]—officials who exercise "significant authority pursuant to the laws of the United States"[19]—be nominated by the President and confirmed by the Senate (with an exception for "inferior Officers"). This is a *recipient-based* doctrine: Congress can't delegate significant federal authority to people who are improperly appointed because such people are disabled from exercising that authority.[20]
3. The Due Process Clauses protect various miscellaneous substantive and procedural personal rights.[21] One of them is the right not to be deprived of a life, liberty, or property interest by someone with a financial interest in the outcome—for instance, a judge who sits on a case while investing in (or

15 139 S. Ct. 2116 (2019).
16 U.S. CONST. art. I, § 1.
17 *See infra* Section I.A.
18 U.S. CONST. art. II, § 2, cl. 2.
19 Buckley v. Valeo, 424 U.S. 1, 126 (1976).
20 *See infra* Section I.B.
21 *See* U.S. CONST. amend. V; *id.* amend. XIV, § 1.

> receiving a bribe from) one of the parties. Another is the right not to be deprived of such an interest unless proper procedures are used. These are *application-based* doctrines: there's nothing wrong with the delegation as such and nothing wrong with the delegate as such, but there's something unconstitutional about the circumstances under which the power is applied.[22]

We could call all these doctrines "nondelegation doctrines," but we shouldn't let the similar nomenclature confuse us into thinking that they're the same doctrine.

This isn't just needless formalism, or some academic desire to put things in boxes: it makes a difference. Due process applies against all levels of government, including the states; the Article I Nondelegation Doctrine or doctrines rooted in Articles II or III only apply to the federal government.[23] A victorious due process challenge can lead to damages under § 1983 or *Bivens*;[24] Article I Nondelegation Doctrine or Appointments Clause challenges can't.

Or consider the incorporation of outside rules (whether private standards or state law) into federal law. This can raise Article I Nondelegation Doctrine issues if the incorporation is dynamic, i.e., if the rules are binding no matter how they might change in the future. But it doesn't follow that those outside rule makers (who may have adopted the rules for their own purposes, and who may even be state officials) are necessarily exercising significant federal authority for Appointments Clause purposes. And whether there's a violation of due process depends on whether the rule maker has anything to gain by setting one standard rather than another; sometimes this might be true, sometimes not.

Because this taxonomy depends on *why* a delegation might be unconstitutional, it also helps us answer the question: *What would it take to make that delegation constitutional?* Change the scope of the delegation? Change the entity that receives the delegation? Change the procedures, compensation system, or other aspects of how the delegated power is used?

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22 *See infra* Section I.C.

23 Of course, states may also have their own nondelegation doctrines under state constitutional law. *See, e.g.*, Tex. Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454 (Tex. 1997). For an interesting recent private nondelegation case, see *Paulin v. Gallego*, No. CV 2023-000409, 2023 WL 1872272 (Ariz. Super. Ct. Feb. 3, 2023).

24 42 U.S.C. § 1983 (2018); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971); *see also* Alexander Volokh, Keynote Article, *The Modest Effect of* Minneci v. Pollard *on Inmate Litigants*, 46 AKRON L. REV. 287 (2013).

Disentangling these various doctrines is useful in its own right. But in Part II, I go further and show that these various doctrines don't embody any per se rule against delegation to private parties.

In the first place, there are two major ways in which constitutional law is *pro–private delegation*. A couple of doctrines—the state action doctrine, and the exemption from Appointments Clause requirements of anyone whose duties aren't "continuing and permanent"—actually *facilitate* private delegation, because they remove some private delegates from the scope of some constitutional provisions.[25]

But putting those aside, there is no constitutional bar against delegating to private parties. To return to my three-part categorization and the examples listed above:

1. *As to giver-based doctrines:* any congressional delegation to a private actor can be brought into conformity with the classic Article I Nondelegation Doctrine merely by providing an "intelligible principle" for the delegate to follow—same as for public actors. The Supreme Court has *never* used this doctrine to strike down a private delegation. On the contrary, it has *upheld* private delegations at least four times, and its reasoning implies there's no stricter doctrine for private entities. *Schechter Poultry* has been thoroughly misread to suggest a hostility to private delegations that isn't present in the caselaw (and, despite its rhetoric, isn't even present in that case!).[26]
2. *As to recipient-based doctrines:* any delegation of significant federal authority on a "continuing and permanent" basis to a private party can be brought into conformity with the Appointments Clause merely by properly appointing the delegate—same as for traditional federal employees. If Justices Alito and Thomas are right that all federal power must be wielded by someone within Articles I, II, or III, such an appointment would generally bring a private delegate within Article II.[27]
3. *As to application-based doctrines:* any use of coercive power by a financially self-interested private actor can, in principle, be brought into conformity with the Due Process Clause by changing that actor's compensation structure—same as for public actors. *Carter Coal* was right that (private) coal companies regulating their competitors is unconstitutional—but

25 *See infra* subsections II.B.1, II.C.1.

26 *See infra* Section II.A.

27 *See infra* Section II.B.

> so is having (public) judges be compensated from fines assessed on the defendants they convict.[28]

Some of these doctrines might in practice turn out differently because of a delegate's private status. For instance, the sorts of administrative procedures that might save a delegation under the Article I Nondelegation Doctrine might be less likely to be present in private organizations; the Appointments Clause prevents corporations or associations (like the Horseracing Integrity and Safety Authority) from being officers of the United States; and perhaps financial bias is more likely to be present in the private sector. But none of this requires any special private doctrine, and none of this implies any per se prohibition against private delegations.

Understanding the various nondelegation doctrines is thus important for questions of public-private governance. American law often relies on the participation of private parties, whether industry associations, contractors, or citizen plaintiffs and private attorneys general. Some arrangements are controversial among some constituencies, but everyone loves *some* private delegates. Some like private prisons.[29] Others like private attorneys general and *qui tam* relators (though maybe some have soured on the idea in light of Texas Senate Bill 8, Texas's abortion law).[30] Many are neutral to positive on whether American Medical Association standards should be used to evaluate impairment under workers' compensation statutes[31] or whether electrical codes promulgated by an industry association should be incorporated into building codes.[32] And everybody loves delegating the (admittedly not very significant) power to officiate at weddings to ministers.[33]

A wholesale "no private delegation rule" risks invalidating too many of these public-private partnerships too indiscriminately. By contrast, specific, targeted doctrines can ask specific, targeted functional questions: How narrowly or broadly did Congress delegate? What kind

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28 *See infra* Section II.C.

29 I have criticized certain anti-prison-privatization arguments in my prior work. *See, e.g.*, Alexander Volokh, *Prison Accountability and Performance Measures*, 63 EMORY L.J. 339 (2013) [hereinafter Volokh, *Prison Accountability*]; Sasha Volokh, *The DOJ's Misguided Withdrawal from Private Prisons*, NAT'L REV. (Aug. 25, 2016, 8:00 AM), https://www.nationalreview.com/2016/08/private-prisons-justice-department-ban-bad-idea/ [https://perma.cc/2ABE-9GEL].

30 *See, e.g.*, John C.P. Goldberg & Benjamin C. Zipursky, *Tort Theory, Private Attorneys General, and State Action: From Mass Torts to Texas S.B. 8*, 14 J. TORT L. 469 (2021).

31 *See* Protz v. Workers' Comp. Appeal Bd., 161 A.3d 827, 841–44 (Pa. 2017) (Baer, J., dissenting).

32 *See* Tex. Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 469 (Tex. 1997).

33 *See id.*

of power is this delegate exercising, and is there sufficient political control? Is there a risk of deprivation based on financial self-interest?

Asking these specific questions, each with its own doctrinal framework, helps us understand which delegations are problematic, and why—and how to fix them.

To take one concrete example: consider the Horseracing Authority case I discussed above.[34] The Fifth Circuit invalidated the delegation of regulatory power to the Authority based on a view that the Article I Nondelegation Doctrine rules out all delegations to private parties per se.

I think this is wrong as a matter of the Article I Nondelegation Doctrine: that doctrine is a *giver-based* doctrine that asks how much power Congress has given up; there was certainly enough of an "intelligible principle" in the statute, so that the Authority would have been clearly upheld if it were a government agency, and the same result should apply to private agencies.[35] But the Fifth Circuit reached the right result for the wrong reason: the Authority is actually unconstitutional because of the Appointments Clause.[36] Because it wields significant federal power, its members need to be appointed by the appropriate constitutional appointment process, which in this case means presidential nomination and Senate confirmation.[37]

Why do I care whether the Fifth Circuit had the right reasoning, if the result was right? Because it affects how Congress can properly save the Authority: just provide for its members to be properly appointed. But you wouldn't necessarily find an emphasis on appointments anywhere in the Article I Nondelegation Doctrine, so you might instead conclude that the only proper way to save the Authority would be to narrow the delegation.

So getting the specific doctrines right is important. And because these doctrines generally don't distinguish between public and private—but, rightly, turn on these functional considerations—their proper application allows us to avoid many tricky questions about the fuzzy public-private line. These questions are especially tricky in an age where government often operates through mixed entities that are hard to characterize, and where different doctrines have different definitions of what it means to be public.[38] We'll find that certain sorts of

34 *See supra* text accompanying notes 12–13.

35 *See infra* Section II.A.

36 *See infra* Sections I.B, II.B.

37 In this case, it doesn't matter whether the Authority members are principal or inferior officers, since Congress hasn't vested their appointment "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. CONST. art. II, § 2, cl. 2.

38 In the specific context of the Horseracing Authority: as I discuss below, *see infra* subsection II.B.3, one could argue that having Authority members be properly appointed

entities *are* problematic—for instance, perhaps certain federal delegations to corporations are invalid after all—but for reasons that don't have much to do with their private status.

I. OUR MANY NONDELEGATION DOCTRINES

Nondelegation is easy to get wrong because there's more than one nondelegation doctrine. Everyone knows about the *classic* doctrine—the one that's usually *called* the Nondelegation Doctrine, which derives from Article I's Vesting Clause. But other doctrines also have implications for delegations, and the Supreme Court and others sometimes talk about them using the word "delegation." This isn't wrong: these doctrines really are relevant to delegations. But we shouldn't confuse these similar-sounding doctrines.

Here's a way to illustrate the different doctrines:

- Consider Gary Lawson's "Goodness and Niceness Commission" hypo. Congress passes a Goodness and Niceness Act, where section 1 outlaws transactions not promoting goodness and niceness, and section 2 lets the Commission promulgate regulations defining the content of the statute.[39] The problem is from the giver's side: *Congress has given up too much power.*
- Now suppose Congress creates specialized Article III courts and gives them jurisdiction over cases where plaintiffs lack standing, or that fall outside the Article III jurisdictional categories. Congress hasn't given up too much power; perhaps the set of cases is very narrowly defined (and maybe even there would be no problem with those cases being heard by non–Article III administrative tribunals). The problem is

would thereby make them "public" (even if the Authority is labeled "private" by statute and is organized as a private organization under state law, and even if its members don't formally work for the government). After such appointments, even the Fifth Circuit would probably agree that the Authority was public and that the ordinary "intelligible principle" test from the ordinary Article I Nondelegation Doctrine would therefore apply—and that would save the Authority. So perhaps everyone will still ultimately get to the right result, and so the incorrect categorization will end up having been ultimately harmless. But one can't be too sure about that: what counts as "public" isn't precisely the same under different doctrines. *See, e.g.*, Ass'n of Am. R.Rs. v. U.S. DOT, 721 F.3d 666, 676, 676–77 (D.C. Cir. 2013) ("[J]ust because . . . Amtrak [is] a government agency for purposes of the First Amendment [and other rights provisions] does not dictate the same result with respect to all other constitutional provisions."), *vacated on other grounds sub nom.* DOT v. Ass'n of Am. R.Rs., 575 U.S. 43 (2015).

39 Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 238 (2005).

that Article III courts are constitutionally prohibited from hearing such cases; i.e., *the recipient lacks the power to act.*[40]

- Now imagine Congress tells an agency how to conduct adjudications. (The guidance is detailed, so Congress hasn't given up too much power, and the adjudications are within the agency's powers.) Under that guidance, the parties are deprived of liberty or property interests with no notice or procedural rights. The problem is that, for rights/justice/fairness reasons, individuals' rights under the Due Process Clause are being violated, i.e., *the use of the delegated power is unconstitutional.* The same would be true with any other due process issue, like if the adjudicators received bonuses when they ruled against a claimant. More generally, something about the *application* of the delegated powers would be improper.

This taxonomy divides nondelegation rules into three categories: (1) *giver-based*, i.e., don't delegate power that you can't grant; (2) *recipient-based*, i.e., don't delegate power to entities that can't exercise it; and (3) *application-based*, i.e., don't delegate power where the circumstances of its application will be unjust.[41] (Perhaps this third category is a residual category for everything not fitting into the other two.) This Part looks at each in turn.

A. Giver-Based

1. The Article I Nondelegation Doctrine

The main giver-based nondelegation doctrine is the classic Nondelegation Doctrine stemming from Article I's Vesting Clause—"[a]ll legislative Powers herein granted shall be vested in a Congress of the United States"[42]—which holds that Congress can't give up legislative power.[43] The caselaw elaborates on this principle in several ways:

- Because the doctrine stems from Article I, it applies only to *congressional* delegations, not state delegations—though

40 *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–60 (1992) (discussing some constitutional limitations on Article III courts).

41 The distinction between giver-based and recipient-based is analogous to the distinction between separation-of-powers delegation theories and sovereignty-based delegation theories, as discussed in Benjamin Silver, *Nondelegation in the States*, 75 VAND. L. REV. 1211, 1226 (2022).

42 U.S. CONST. art. I, § 1.

43 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001); Field v. Clark, 143 U.S. 649, 692 (1892); Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 956 (2014).

many states have constitutional nondelegation doctrines of their own.[44]

- Delegations of power aren't wrong as such—only delegations of *legislative* power. And these are defined not formalistically (i.e., as the power to vote on laws in legislatures) but functionally, as the power to make law in an unconstrained way.[45] Accordingly, delegations don't cross the line into *legislative* delegations unless Congress has failed to provide an "intelligible principle"[46] to guide the delegate's discretion.
- The presence of (congressionally mandated) procedures and judicial review can prevent a violation of this doctrine, because if an agency can't act without following particular procedures, and can get reversed for exceeding its authority, that constrains its scope of action.[47]
- This doctrine applies to *any* delegate. While most Nondelegation Doctrine cases concern executive agencies,[48] others concern the judiciary,[49] Indian tribes,[50] or even (as discussed below) private parties;[51] and (except as discussed below) the doctrine doesn't differ depending on who is involved.[52]
- When the delegate already has inherent authority over the subject matter, the intelligible principle doctrine is weakened or dropped entirely. (I've dubbed this the "Inherent-Powers Corollary.")[53] This applies, for instance, when Congress delegates to the executive branch in areas of foreign

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44 *See, e.g.*, Ga. Franchise Pracs. Comm'n v. Massey-Ferguson, Inc., 262 S.E.2d 106, 108 (Ga. 1979); Protz v. Workers' Comp. Appeal Bd., 161 A.3d 827, 833 (Pa. 2017); Tex. Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 467 (Tex. 1997). *See generally* Silver, *supra* note 41.

45 *Compare* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002) (arguing this formalist position), *with* Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1304–17 (2003).

46 J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

47 *E.g.*, Yakus v. United States, 321 U.S. 414, 426 (1944); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 539 (1935).

48 *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116 (2019); *Am. Trucking*, 531 U.S. 457.

49 *See, e.g.*, Mistretta v. United States, 488 U.S. 361 (1989); Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 69–70 (1911); Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825). *See generally* Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405 (2008); Aaron Nielson, Erie *as Nondelegation*, 72 OHIO ST. L.J. 239 (2011); Alexander Volokh, *Judicial Non-Delegation, the Inherent-Powers Corollary, and Federal Common Law*, 66 EMORY L.J. 1391 (2017).

50 *See, e.g.*, United States v. Mazurie, 419 U.S. 544 (1975).

51 *See infra* subsection II.A.1.

52 *Cf.* Silver, *supra* note 41, at 1229–30.

53 *See generally* Volokh, *supra* note 49.

affairs or military governance,[54] to Indian tribes in matters of regulation of Indian country,[55] or to courts in certain procedural areas,[56] or when Congress dynamically incorporates state law in various areas.[57]

- Some commentators have argued that delegations should be scrutinized more carefully when the delegate fares poorly on a menu of "functional considerations," such as "relative expertise, accountability, flexibility, accessibility, and . . . ability to achieve uniformity."[58]

The doctrine isn't explicitly used often[59]—the Supreme Court has applied it only twice, both times in 1935[60]—though it operates behind the scenes, in constitutional avoidance decisions[61] or delegation-constraining administrative doctrines like *Chevron* minimalism or the major questions doctrine.[62] And *Gundy v. United States*[63] suggests that the doctrine might be revived in the near future (and perhaps that the specific "intelligible principle" formulation might be replaced with something else).[64]

Nonetheless, for the moment, the test is whether Congress has provided an "intelligible principle" to accompany the delegation; and so, whenever a delegation is problematic under this theory, a solution would be "Just narrow the delegation."

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54 *E.g.*, Loving v. United States, 517 U.S. 748 (1996); United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936); *see also* Mark Nevitt, *Delegating Climate Authorities*, 39 YALE J. ON REGUL. 778, 796–807 (2022).

55 *See Mazurie*, 419 U.S. 544.

56 Volokh, *supra* note 49, at 1426–28; Jonathan Remy Nash, *Courts Creating Courts: Problems of Judicial Institutional Self-Design*, 73 ALA. L. REV. 1, 29–35 (2021).

57 United States v. Sharpnack, 355 U.S. 286, 293–94 (1958); Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 RUTGERS L. REV. 331, 362 (1998). But other principles might limit Congress's ability to assimilate state law, for example, admiralty uniformity. *See id.* at 365 n.203.

58 Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 423 (2012); *see also id.* at 423–45.

59 *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000).

60 *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935); Pan. Refin. Co. v. Ryan, 293 U.S. 388, 430 (1935).

61 *E.g.*, Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 646 (1980) (plurality opinion); Nat'l Cable Television Ass'n v. United States, 415 U.S. 336, 341–42 (1974); *cf.* Arizona v. California, 373 U.S. 546, 626–27 (1963) (Harlan, J., dissenting in part).

62 *E.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2372–75 (2023); West Virginia v. EPA, 142 S. Ct. 2587, 2607–09 (2022); Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 668–70 (2022) (Gorsuch, J., concurring); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1629–30 (2018); *see also* West Virginia v. EPA, 142 S. Ct. at 2616–26 (Gorsuch, J., concurring).

63 139 S. Ct. 2116 (2019).

64 *See id.* at 2130–31 (Alito, J., concurring in judgment).

2. Some Other Giver-Based Doctrines

Other, less famous, giver-based doctrines have also shown up in cases or scholarship:

- The void-for-vagueness doctrine is rooted in due process, not Article I—thus applying equally to state laws. (A version of this doctrine is also rooted in the First Amendment.)[65] This doctrine is also aimed at avoiding delegating standardless authority to the police, judges, and juries.[66]
- The Constitution lets Congress "define and punish . . . Offences against the Law of Nations."[67] Can Congress delegate that power, or must any definition of new offenses come from Congress? When the Alien Tort Statute grants federal courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations,"[68] does this let federal courts develop an evolving federal common law of law-of-nations torts? Can Congress authorize military tribunals to develop new war crimes? Perhaps the Offenses Clause makes this an exclusive congressional power,[69] not available to military tribunals[70] or federal courts.[71]
- The Constitution lets Congress create lower federal courts.[72] Does this prevent Congress from delegating to courts the power to create other courts, as when judicial councils create bankruptcy appellate panels, or as with proposals to similarly allow "judicial councils to create district court appellate panels"?[73]
- The Constitution provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of [presidential] Electors"[74] and that "[t]he Times,

65 *E.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 603–04 (1967); NAACP v. Button, 371 U.S. 415, 432 (1963).

66 *E.g.*, Sessions v. Dimaya, 138 S. Ct. 1204, 1228 (2018) (Gorsuch, J., concurring in part and concurring in judgment); *id.* at 1242, 1248 (Thomas, J., dissenting); Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972).

67 U.S. CONST. art. I, § 8, cl. 10.

68 28 U.S.C. § 1350 (2018).

69 *See generally* Eugene Kontorovich, *Discretion, Delegation, and Defining in the Constitution's Law of Nations Clause*, 106 NW. U. L. REV. 1675, 1739–50 (2012); Volokh, *supra* note 49, at 1395, 1406, 1430, 1451–53.

70 *See* Hamdan v. Rumsfeld, 548 U.S. 557, 601–02 (2006) (plurality opinion); Volokh, *supra* note 49, at 1404–06.

71 *See* Kontorovich, *supra* note 69.

72 U.S. CONST. art. I, § 8, cl. 9; *id.* art. III, § 1.

73 Nash, *supra* note 56, at 4 (quoting COMM'N ON STRUCTURAL ALTS. FOR THE FED. CTS. OF APPEALS, FINAL REPORT 64 (1998)); *id.* at 3–6, 28–35.

74 U.S. CONST. art. II, § 1, cl. 2.

Places and Manner of holding [congressional] Elections . . . shall be prescribed in each State by the Legislature thereof."[75] Does this prevent a state legislature from delegating the elector-appointing power or the district-drawing power to state courts?[76] The theory of the *Bush v. Gore* concurrence,[77] or of the petitioners in *Moore v. Harper*,[78] suggests that these state legislative powers would be nondelegable, though the Supreme Court has rejected a strong version of this theory.[79]

B. Recipient-Based: The Appointments Clause and More

The second class of nondelegation doctrines is recipient-based: even if Congress can delegate a power and is suitably specific, the recipient can't exercise that power. Whenever a delegation is problematic under this theory, a solution would be to "just delegate to someone else."

Many separation-of-powers doctrines can be thought of as recipient-based nondelegation doctrines (though they're often not presented with the "delegation" label)[80]:

- Congress can't delegate significant federal authority to someone, unless that someone is appointed according to the rules governing officers of the United States (i.e., the Appointments Clause)[81] and is properly removable.[82] (But Congress could delegate that same power to someone else who was properly appointed and removable.)
- One could similarly argue that a private attorney general, like a *qui tam* relator, can't validly get the power to enforce federal law (though Congress could delegate that same power to an actual prosecutor).[83]

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75 *Id.* art. I, § 4, cl. 1.

76 On drawing congressional districts, see *Moore v. Harper*, 143 S. Ct. 2065 (2023).

77 *See* Bush v. Gore, 531 U.S. 98, 111–22 (2000) (Rehnquist, C.J., concurring).

78 *Compare* Brief by State Respondents at 16–26, *Moore*, 143 S. Ct. 2065 (No. 21-1271), 2022 WL 14052447, at *16–26, *with* Brief for Petitioners at 44–50, *Moore*, 143 S. Ct. 2065 (No. 21-1271), 2022 WL 4084287, at *44–50.

79 *See Moore*, 143 S. Ct. at 2081–88; *see also* Vikram David Amar & Akhil Reed Amar, *Eradicating* Bush*-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1, 33–36.

80 The doctrines here are broader than just delegation: appointment and removal issues arise even when the officer is appointed as an exercise of the President's inherent Article II power. *See* Silver, *supra* note 41, at 1263–64.

81 *See* U.S. CONST. art. II, § 2, cl. 2; Lucia v. SEC, 138 S. Ct. 2044, 2051 (2018).

82 *See* Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2197–207 (2020).

83 *See* United States *ex rel.* Polansky v. Exec. Health Res., Inc., 143 S. Ct. 1720, 1741–42 (2023) (Thomas, J., dissenting); *id.* at 1737 (Kavanaugh, J., concurring) (quoting *id.* at

- Congress can't delegate certain types of adjudicative power to non–Article III tribunals[84] (but could delegate it to Article III courts).
- Congress can't delegate power to federal courts to hear cases where the plaintiffs lack standing[85]—and, relatedly, can't delegate prosecutorial power to would-be plaintiffs who lack standing.[86] (But it could delegate such power to non–Article III tribunals.)
- Congress might not be able to delegate to Article III courts powers that aren't "appropriate to the central mission of the Judiciary,"[87] and might not be able to delegate to any branch the power to appoint inferior officers where there's some "incongruity" between the functions of the appointing branch and the functions of the appointed officer.[88] (But it could delegate to a different party where the incongruity would not be present.)
- Congress can't delegate power to one (or both) of its own houses that would allow that house to alter the rights or responsibilities of actors outside of Congress[89] (though it could delegate that power to an agency).

More generally, the "separation of powers principle," which prevents aggrandizement of one branch at the expense of another, could be thought of as recipient-based.[90]

1741 (Thomas, J., dissenting)); Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 778 n.8 (2000) (noting the question but not deciding it); PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT 106–14 (2007); Evan Caminker, *The Constitutionality of* Qui Tam *Actions*, 99 YALE L.J. 341, 374–80 (1989); Kinkopf, *supra* note 57, at 387–90; *see also* Cochise Consultancy, Inc. v. United States *ex rel.* Hunt, 139 S. Ct. 1507, 1514 (2019) (citing *Stevens*, 529 U.S. at 773 n.4) (noting that a *qui tam* relator is not "the official of the United States" under the False Claims Act, but rather is a private person (quoting 31 U.S.C. § 3731(b)(2) (2018))).

84 *E.g.*, Stern v. Marshall, 564 U.S. 462 (2011). In the state context, see Silver, *supra* note 41, at 1239–40 (quoting Alaska Pub. Int. Rsch. Grp. v. State, 167 P.3d 27, 35–36 (Alaska 2007)).

85 *E.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992).

86 *E.g.*, Jonathan Remy Nash, *Nontraditional Criminal Prosecutions in Federal Court*, 53 ARIZ. ST. L.J. 143, 161–63, 168, 172–77, 180–81, 184–90, 193–97 (2021).

87 Mistretta v. United States, 488 U.S. 361, 388 (1989); *see also* Nash, *supra* note 56, at 35–36.

88 Morrison v. Olson, 487 U.S. 654, 676, 675–76 (1988) (quoting *Ex parte* Siebold, 100 U.S. 371, 398 (1880)).

89 *See* INS v. Chadha, 462 U.S. 919, 952 (1983).

90 *See* Kinkopf, *supra* note 57, at 348–57; *see also id.* at 374 n.248 (discussing a theory based on the Emoluments Clause).

Mistretta v. United States,[91] which considered the constitutionality of the U.S. Sentencing Commission, illustrates how the Supreme Court has distinguished between giver-based and recipient-based theories. The Court considered whether the statute contained an intelligible principle that would satisfy the Article I Nondelegation Doctrine—but then it also had a separate section discussing whether the delegated power could be wielded by the Sentencing Commission, an entity within Article III.[92] The Court answered yes to both questions; on the second question, Justice Scalia, in dissent, wrote that delegation to "all manner of 'expert' bodies" would be bad "not because of the scope of the delegated power, but because its recipient is not one of the three Branches of Government."[93] Everyone on the *Mistretta* Court understood that two different sorts of delegation problems were at play.

Not that Article I nondelegation and recipient-based theories can't talk to each other: one can readily imagine a recipient-based theory nested within (or closely related to) a giver-based theory. For instance, what if the Article I Nondelegation Doctrine *limits* Congress in its ability to delegate generally, but *absolutely bars* its ability to delegate to particular disfavored recipients? An Article I *private* nondelegation theory (which would prohibit, among other things, dynamic delegations of standard-setting power to private expert organizations) would be an example of such a theory.[94] So would be a view that the federal government can't delegate to "foreign" governments (including not only other countries but also municipal governments or other state governments, or the federal government if the delegator is a state government),[95] for instance by dynamically incorporating another government's law.[96] Some delegates might be acceptable (the theory would say), but *these* aren't, because they can't exercise the power they're asked to exercise. Such theories could even rule out delegations back to the people, in the form of plebiscites or referenda.[97]

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91 488 U.S. 361.

92 *Id.* at 371–79 (discussing Article I Nondelegation Doctrine); *id.* at 380–411 (discussing separation of powers).

93 *Id.* at 422 (Scalia, J., dissenting).

94 Silver, *supra* note 41, at 1241 (discussing "sovereignty"-type theories, which hold "that certain governmental functions must be exercised by public officials acting in their official capacities").

95 *Id.* at 1248–49. On municipal governments, see *id.* at 1252–53. On delegations by treaty of adjudicatory power to international tribunals, see John Harrison, *International Adjudicators and Judicial Independence*, 30 HARV. J.L. & PUB. POL'Y 127, 128–29 (2006) (noting Article II and Article III problems with such delegations).

96 *E.g.*, Silver, *supra* note 41, at 1249.

97 *See id.* at 1249–52.

Recipient-based theories might be based on "political accountability" rationales—a government can't delegate to anyone it can't control or that can't be removed by the (relevant jurisdiction's) people at the next election, or that are beyond the reach of the (relevant jurisdiction's) checks and balances.[98]

Or a recipient-based theory could be based on the idea that only proper elements of the federal government can be proper recipients of federal delegations, because nobody else is allowed to exercise federal power. Justice Scalia's *Mistretta* dissent has that flavor: there, he argued that "the power to make law cannot be exercised by anyone other than Congress, except in conjunction with the lawful exercise of executive or judicial power."[99] In Justice Scalia's view, delegations to the executive or judiciary could be valid because "a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action"[100]—but the U.S. Sentencing Commission had no functions other than rulemaking ("a sort of junior-varsity Congress"),[101] so there was no excuse for delegation in that case.

Recipient-based theories also show up outside of administrative law:

- A legislature can't write sentencing rules that delegate to a judge the power to find facts that increase a sentence beyond the maximum that would be justified based on facts found only by a jury—this would violate the criminal jury trial right,[102] though delegating the same factfinding power to the jury itself would be fine.
- A legislature can't delegate a zoning-type power to churches to veto the licensing of bars—this would violate the Establishment Clause if churches were singled out as preferred recipients of the power,[103] though it could delegate the same zoning power to a broader group of landowners that happened to include churches.[104]

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98 *Id.* at 1242.

99 Mistretta v. United States, 488 U.S. 361, 417, 416–22 (1989) (Scalia, J., dissenting).

100 *Id.* at 417.

101 *Id.* at 427.

102 U.S. CONST. art. III, § 2, cl. 3; *id.* amend. VI; United States v. Booker, 543 U.S. 220, 230–44 (2005); Apprendi v. New Jersey, 530 U.S. 466 (2000).

103 *See* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 120–27 (1982); Alexander Volokh, *The Constitutional Possibilities of Prison Vouchers*, 72 OHIO ST. L.J. 983, 1015–20 (2011); Note, *The Vagaries of Vagueness: Rethinking the CFAA as a Problem of Private Nondelegation*, 127 HARV. L. REV. 751, 767–68 (2013); *see also* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 702–10 (1994); B. Jessie Hill, *Due Process, Delegation, and Private Veto Power*, 108 IOWA L. REV. 1199, 1201, 1214–15 (2023).

104 *Cf.* Thomas Cusack Co. v. City of Chi., 242 U.S. 526 (1917).

C. Application-Based: The Due Process Clause

Finally, there's the third category of nondelegation challenges. I call these "application-based," because the power is one that the giver can give and that the recipient can exercise, but something about the *application* or *use* of the power is unconstitutional.

Not all rights-related issues fall into this category: we've seen that some jury-trial-right and Establishment Clause issues can be considered recipient-based. This is a residual category, encompassing whatever doesn't fall within the other two. Often the problem is due process—for instance, the doctrine preventing people from wielding coercive power when they have bias, especially financial bias.[105]

1. Due Process and the Structure of Delegations

Due process usually constrains specific actions that any governmental actor might take. For instance: Has the government deprived me of something without notice or a hearing?[106]

This is typically unrelated to the *structure* of delegations: if a statute *permitted* an agency to deprive me of liberty without due process, the agency could conceivably cure the problem by voluntarily adopting adequate procedures. This is *not* the case with giver- or recipient-based doctrines: A delegate's own voluntary actions can't enlarge Congress's power to delegate[107] or give itself a power it doesn't have.

But sometimes, due process is relevant to the structure of delegations.

First, suppose a legislature passes a statute *requiring* an agency to use specific (inadequate) procedures when depriving people of certain interests. The offending procedures are statutory, so the agency can't cure the problem by adopting different ones. The due process problem inheres in the delegation itself.[108]

Second, consider delegations that are entirely standardless. Even when the delegates are disinterested public servants, such delegations can be unconstitutional merely by their structure (whether under due process or under some other doctrine, like equal protection or the First Amendment), because there is no constraint against the public

105 Bias can also be relevant not only directly, in showing a Due Process Clause violation, but also indirectly, in justifying an exception to abstention under *Younger v. Harris*, 401 U.S. 37 (1971). *See, e.g.*, Gibson v. Berryhill, 411 U.S. 564, 577 (1973); Esso Standard Oil Co. v. Cotto, 389 F.3d 212, 218–19 (1st Cir. 2004); United Church of the Med. Ctr. v. Med. Ctr. Comm'n, 689 F.2d 693, 697 n.3, 699 (7th Cir. 1982).

106 *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970).

107 Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 473 (2001).

108 This is a procedural due process example, but similar issues can arise with substantive due process. *See, e.g.*, Hill, *supra* note 103, at 1224, 1230–35.

officials' giving free rein to racist, speech-discriminatory, or other impulses[109]—or yielding to similar impulses of others.[110]

Third, consider *Tumey v. Ohio*,[111] where a mayor also acted as a judge.[112] His compensation was suspect: he was paid, in part, out of fines assessed on defendants he convicted, so he had an interest in convictions.[113]

If you were convicted under this system, you could complain of a due process violation based on the judge's pecuniary bias—even if you got every imaginable procedure, and even if you couldn't point to any way the judge's bias manifested itself or any decision tainted by his bad incentives. Bias is subtle and hard to detect; the test isn't whether the decisionmaker is *actually* biased, but whether "the *probability* of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."[114] Justice must also "satisfy the appearance of justice."[115] Acting badly is bad, but the bias caselaw doesn't demand proof of actual bad acts; it condemns biased structures that make bad acts more probable, and the appearance of such bias.

2. Indirect and Nonfinancial Bias

Because bias cases rely on questions of degree like the probability of bias and the appearance of impartiality, the Supreme Court hasn't insisted on any specific mechanism of bias, like payments to identifiable decisionmakers. If an entity as a whole—particularly in the judicial or quasi-judicial context—has stood to benefit financially from its decisions, the Court has condemned the arrangement without requiring a showing that decisionmakers were under pressure from elsewhere in the organization to achieve a particular result. Usually, it's been

109 *See, e.g.*, Freedman v. Maryland, 380 U.S. 51, 59–60 (1965); Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886); *see also* Hill, *supra* note 103, at 1207–13 (discussing various cases, including private delegations involving medical licensing and abortion clinics).

110 *See* Hill, *supra* note 103, at 1215–17 (discussing cases like *Palmore v. Sidoti*, 466 U.S. 429 (1984), and *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), raising issues of whether government officials can take private animus into account).

111 273 U.S. 510 (1927).

112 We'll assume that this is a delegation case, because we'll assume that the judge has his authority to try the cases by virtue of a state statute.

113 *See Tumey*, 273 U.S. at 520; *cf.* Connally v. Georgia, 429 U.S. 245, 250 (1977). Such systems used to be quite common in the United States—by explicit design. *See* NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940 (2013); *infra* Section II.C.

114 Withrow v. Larkin, 421 U.S. 35, 47 (1975) (emphasis added); *cf.* Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 807 n.18 (1987).

115 Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)); Marshall v. Jerrico, Inc., 446 U.S. 238, 243 (1980) (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)).

enough to observe that the entity's self-interest was implicated, in the sense that the entity as a whole could be made better off by its decisions.[116]

In fact, in conducting the necessary "realistic appraisal of psychological tendencies and human weakness,"[117] the Court has relied on behavioral factors to find a probability of bias excessive—unapologetically calling this a process of "informed" "speculation."[118]

In *Tumey*, the mayor-judge's direct incentive was enough to find a due process violation,[119] but the Court also gave another reason: as chief municipal executive, he was responsible for municipal finances.[120]

In *Caperton v. A.T. Massey Coal Co.*,[121] the Court held that it violated due process for an elected state supreme court justice to hear a case where a party had spent millions to get him elected. The justice's compensation didn't depend on his ruling, and the donor had no power to get him removed, so what was the source of bias? Just the "debt of gratitude" he would feel toward his benefactor.[122]

Likewise, in *Williams v. Pennsylvania*,[123] the problem was that a state supreme court justice hearing a case had been involved in the same case as a prosecutor years earlier. One could reasonably fear that the justice "'would be so psychologically wedded' to his . . . previous position as a prosecutor that [he] 'would consciously or unconsciously avoid the appearance of having erred or changed position.'"[124] In *In re Murchison*—where a judge acted as a "one-man grand jury" under Michigan law, charged a witness with contempt, and tried that contempt proceeding—one of the concerns was that the judge "cannot be, *in the very nature of things*, wholly disinterested in the conviction or

116 *See, e.g.*, Esso Standard Oil Co. v. Cotto, 389 F.3d 212, 218–19 (1st Cir. 2004); United Church of the Med. Ctr. v. Med. Ctr. Comm'n, 689 F.2d 693, 699–700 (7th Cir. 1982); Meyer v. Niles Twp., 477 F. Supp. 357, 362 (N.D. Ill. 1979). *But see* Hill, *supra* note 103, at 1227–28 ("In cases of financial self-dealing, the Court has generally required the showing of corruption to be fairly direct and overwhelming, as in the case of a judge who received a supplemental payment for each fine imposed under a particular law, or another judge who had received extraordinary amounts of campaign contributions from a company shortly before adjudicating a case involving that company." (footnote omitted) (first citing *Tumey*, 273 U.S. at 532; and then citing Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 884–86 (2009))).

117 *Withrow*, 421 U.S. at 47.

118 *Young*, 481 U.S. at 807.

119 273 U.S. at 532.

120 *Id.* at 532–34. This alternative holding was confirmed in *Ward v. Vill. of Monroeville*, 409 U.S. 57, 60 (1972), and *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973).

121 556 U.S. 868.

122 *Id.* at 882.

123 136 S. Ct. 1899 (2016).

124 *Id.* at 1906 (quoting Withrow v. Larkin, 421 U.S. 35, 57 (1975)).

acquittal of those accused" and might have "the zeal of a prosecutor."[125] And in *Morrissey v. Brewer*, the Court said that a "determination that reasonable ground exists for revocation of parole should be made by someone not directly involved in the case," i.e., not the supervising parole officer, because "[t]he officer directly involved in making recommendations cannot always have complete objectivity in evaluating them."[126]

The emphasized phrase from *In re Murchison*—"*in the very nature of things*"—echoes the same phrase from *Carter Coal* that we saw in the Introduction.[127] The Supreme Court has assumed, realistically, that people can be tempted in subtle, complex, and hard-to-detect ways, which don't always involve financial gain.[128] Therefore, especially since we also care about the appearance of justice, we should avoid tempting arrangements.

3. Curing Bias Through Disinterested Review

How can bias be cured? Perhaps some bias could be cured by the official's voluntary acts (could the *Tumey* judge announce, before trying a case, that he would forgo any fine-based compensation?). But not all cases can be cured this way (could the *Caperton* justice announce that he would feel no gratitude toward his benefactor?).

While financial bias can be addressed by changing the compensation structure, another general cure is to have a disinterested party ratify the decision; there's generally no due process violation when the self-interested party's power is limited by the involvement of a neutral decisionmaker by the time of the first adjudication.[129] So, as we'll see,

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125 349 U.S. 133, 137 (1955) (emphasis added).

126 408 U.S. 471, 485–86 (1972); *cf.* Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (concluding welfare official previously involved in the case should not have participated in making the determination under review); *id.* at 269 (reasoning that because caseworker usually gathers the facts, an impartial presentation of the recipient's side of the controversy cannot safely be left to him).

127 *Compare Murchison*, 349 U.S. at 137, *with* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).

128 Recall, too, that this doctrine is similar to concerns that show up in First Amendment or equal protection cases involving standardless delegations to officials. *See* Hill, *supra* note 103, at 1221–23; *supra* text accompanying notes 109–10.

129 *See* Marshall v. Jerrico, Inc., 446 U.S. 238, 247 (1980). In the context of substantive due process, see Hill, *supra* note 103, at 1231–32. In the related context of antitrust state-action immunity, see *North Carolina State Board of Dental Examiners v. FTC*, 574 U.S. 494 (2015); see also, for example, Alexander Volokh, *Antitrust Immunity, State Administrative Law, and the Nature of the State*, 52 ARIZ. ST. L.J. 191 (2020); Alexander Volokh, *Are the Worst Kinds of Monopolies Immune from Antitrust Law?:* FTC v. North Carolina Board of Dental Examiners *and the State-Action Exemption*, 9 N.Y.U. J.L. & LIBERTY 119 (2015); Volokh, *supra* note 43, at 985–92.

due process generally isn't implicated when private parties can merely set (disinterested) legal machinery in motion[130]—even when they're frankly self-interested, as when they're motivated by the prospect of rewards.[131]

If this were always true, perhaps prosecutorial bias would be harmless as long as the judge is neutral. But in *United States v. James Daniel Good Real Property*,[132] the Supreme Court insisted on a predeprivation hearing before a seizure of real property, in light of the government's "direct pecuniary interest in the outcome of the proceeding"[133]: the government's "financial stake in drug forfeiture."[134] Was any official directly compensated from drug forfeiture proceeds? Presumably not—but there was a memo from the Attorney General urging U.S. Attorneys to meet the DOJ's budget targets.[135] The Court was concerned with structural bias, not just individual compensation arrangements—*even though the seizure had been approved by a (neutral) magistrate judge*.[136] Thus, while due process imposes lesser constraints on prosecutors and plaintiffs than on judges and quasi-adjudicative officials,[137] some constraints do exist.

D. Why Should We Care?

1. Good Functional Reasons

Does this three-part categorization matter? In the D.C. Circuit's first Amtrak decision, Judge Brown suggested that "the distinction evokes scholarly interest" but wouldn't "effect a change in the inquiry."[138]

130 *See infra* subsection II.C.2.

131 *See* Tumey v. Ohio, 273 U.S. 510, 535 (1927); *Jerrico*, 446 U.S. at 249. There's another exception for popular referenda, when even self-interested voters can come together and become The Polity As A Whole. *See, e.g.*, City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668 (1976); James v. Valtierra, 402 U.S. 137 (1971); *see also* Hill, *supra* note 103, at 1228, 1233.

132 510 U.S. 43 (1993).

133 *Id.* at 56 (citing Harmelin v. Michigan, 501 U.S. 957, 979 n.9 (1991) (opinion of Scalia, J.)).

134 *Id.* at n.2.

135 *Id.*

136 *Id.* at 73 (O'Connor, J., concurring in part and dissenting in part).

137 Marshall v. Jerrico, Inc., 446 U.S. 238, 247–48 (1980).

138 Ass'n of Am. R.Rs. v. U.S. DOT, 721 F.3d 666, 671 n.3 (D.C. Cir. 2013), *vacated sub nom.* DOT v. Ass'n of Am. R.Rs., 575 U.S. 43 (2015).

But we should care.[139] Each of these doctrines corresponds to a particular constitutional concern, hinted at in the rubrics of "giver-based," "recipient-based," and "application-based." Congress can't give up too much power; officers can't exercise executive power without proper appointment; nobody can deprive someone of life, liberty, or property through biased decisionmaking.

And each category implies a fix for unconstitutional delegations. Has Congress given up too much? *Narrow the delegation.* Has Congress given power to someone incapable of wielding it? *Give the power to someone else.* Has a legislature given power to someone with financial bias? *Change the compensation structure.*

If we miscategorize a delegation, we'll not only misunderstand the constitutional problem, we'll also misunderstand how to salvage the delegation.

Thus, consider Judge Brown's original holding in the Amtrak case—that, because Amtrak was private, the delegation violated the Article I Nondelegation Doctrine.[140] Though that doctrine is generally giver-based (*Congress can't give up too much power*), a supposed subdoctrine specifically against private delegations would be recipient-based. If she were right, then one solution would be to instead delegate to a public entity.

The Supreme Court held that Amtrak was in fact public, and sent it back to Judge Brown for reevaluation under this new understanding.[141] So was everything now constitutional? No: on remand, Judge Brown correctly identified the real problem, which was Amtrak's pecuniary bias. Public or not, the statute required Amtrak to maximize profits, which required it to act adversely to the freight railroads that were its competitors for scarce track. Judge Brown reached the same result as before, but on the better ground of due process.[142]

The same scenario shows up repeatedly. A popular account of the Article I Nondelegation Doctrine is that it's about preventing "arbitrariness" and "uncontrolled discretionary power." This theory folds the doctrine into something like due process, and suggests that Article I nondelegation problems can be cured by the agency's unilaterally adopting adequate procedures.[143]

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139 *See* Hill, *supra* note 103, at 1202–04 (also arguing that different sorts of "nondelegation" doctrines should be kept distinct); *id.* at 1202 & n.10 (citing, among others, Volokh, *supra* note 43, at 977–78 (arguing the same)).

140 *See supra* note 5 and accompanying text.

141 *Ass'n of Am. R.Rs.*, 575 U.S. 43.

142 *See* Ass'n of Am. R.Rs. v. U.S. DOT, 821 F.3d 19, 27–36 (D.C. Cir. 2016).

143 Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 713 (1969).

But beyond the difference in doctrinal philosophy (Article I nondelegation is about separation of powers, while due process is about fundamental fairness),[144] this recharacterization has real effects. For instance, due process theories (unlike Article I theories) would apply against the states[145] and would open up the possibility of *Bivens* damages.[146] And, more fundamentally, one theory is giver-based while the other is application-based, which means the fixes are different. When we ask how we can cure the problem, it's important to know whether the solution is *make Congress delegate a narrower power* or *provide better procedures*.

And indeed, the Supreme Court has squarely rejected the Article-I-nondelegation-as-due-process theory, noting that, if Congress has delegated too broadly, separation of powers has already been breached.[147] If an agency gets excessive power and then clearly announces that it will voluntarily limit itself, that self-limitation is itself a forbidden exercise of power[148]—even though there's no unfairness (and no due process violation), since everyone's on notice as to the conduct required or prohibited.

A violation of the Article I Nondelegation Doctrine thus needn't violate due process (or even implicate arbitrariness). The same is true in reverse: If Congress passes a hyperspecific statute allowing welfare benefits to be withdrawn without process, due process will be violated[149] but there will be no impermissible delegation under Article I.

2. Overlap Is Not a Problem

This doesn't mean the theories can't overlap. Consider the Inherent-Powers Corollary to the Article I Nondelegation Doctrine: no intelligible principle is necessary when the delegate already has some inherent power over the subject matter.[150] Thus, for instance, no intelligible principle is necessary when delegating to Indian tribes a power to regulate commerce in Indian country, because Indian tribes have

144 *See* Hill, *supra* note 103, at 1205 (contrasting approaches "that resonate[] with a discourse of individual rights, equality, and equal citizenship" with ones that involve "more abstract, second-order concerns about separation of powers and political accountability"); *id.* at 1221–22.

145 David N. Wecht, Note, *Breaking the Code of Deference: Judicial Review of Private Prisons*, 96 YALE L.J. 815, 825 n.57 (1987); Note, *supra* note 103, at 764.

146 *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971); *see also* Volokh, *supra* note 24, at 326.

147 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472–73 (2001).

148 *Id.* at 473.

149 *See* Goldberg v. Kelly, 397 U.S. 254, 261–64 (1970).

150 *See supra* text accompanying notes 53–57.

"attributes of sovereignty."[151] But an identical (standardless) delegation to the Bureau of Indian Affairs (BIA) might violate the Nondelegation Doctrine because the BIA lacks such sovereignty. If Congress made such a standardless delegation to the BIA, would this be a giver-based problem (because Congress gave up too much power—*just narrow the delegation by specifying a standard next time!*) or a recipient-based problem (because Congress gave this power to a nonsovereign entity—*just delegate to the Tribe next time!*)?[152]

Why not both? Congress can have multiple ways of salvaging a delegation.

Similarly, recall that the presence of procedures can save a delegation under the Article I Nondelegation Doctrine.[153] But some of those procedures might also be mandated by due process. If those procedures are absent, is this a giver-based problem (because the absence of procedures made the delegation unbounded and thus a delegation of legislative power) or an application-based problem (because the absence of procedures violated rights)?

On the appointments side: insisting on power being wielded by properly appointed officers can be thought of as a structural protection for the executive branch (a recipient-based problem). But it can also be thought of as a fairness protection for the would-be targets of non–politically accountable enforcement (an application-based problem). Indeed, that's the standard defense of structural constitutional doctrines like separation of powers or federalism: they're good not in themselves but because they preserve liberty.[154]

All these options can be valid. But we should still keep the doctrines *analytically* distinct. The procedures that save a delegation from being "legislative" under the Article I Nondelegation Doctrine are ones that constrain discretion, for instance by enforcing rationality under "hard look" review.[155] But the procedures that save a delegation under due process are ones that ensure fairness, for instance by minimizing bias or providing notice.[156] Maybe there's some overlap, maybe not.

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151 United States v. Mazurie, 419 U.S. 544, 557 (1975).

152 One can say the same of arguments that nondelegation scrutiny should be greater for agencies with less expertise or that are otherwise worse equipped to use their delegated power well. *See* supra text accompanying note 58.

153 *See supra* text accompanying note 47.

154 Stern v. Marshall, 564 U.S. 462, 483 (2011); Bowsher v. Synar, 478 U.S. 714, 722 (1986).

155 *See* 5 U.S.C. § 706(2)(A) (2018); Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983); Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

156 *See, e.g.*, 5 U.S.C. §§ 554, 556–557 (2018) (APA formal adjudication procedures).

And couldn't we characterize any giver-based doctrine as a recipient-based doctrine? If Congress *must retain* its legislative power and can't give it away (that's giver-based), isn't it also true that no one else may exercise legislative power (that's recipient-based)? Sure. But this categorization isn't about abstract elegance; it's about useful functional questions like *Should Congress narrow the power?* or *Should Congress find a different delegate?* If there turns out to be more than one way to salvage an unconstitutional delegation, so much the better.

II. NO PRIVATE NONDELEGATION DOCTRINES

Do any of these doctrines prohibit private delegations? If, per the conventional wisdom discussed in the Introduction, *Schechter Poultry* and *Carter Coal* prohibit Congress from delegating to private parties (without regard to the traditional "intelligible principle" doctrine for delegations to public parties) . . . and if (perhaps also due to *Carter Coal*) you can't give power to private parties . . . and if (as Justices Alito and Thomas say) private parties can't exercise federal power because they're not within the government . . . then aren't private delegations invalid, maybe for several different reasons?

As it happens, though, private delegations have been widely misunderstood. Contrary to popular belief, there is no Article I prohibition against private delegations, though *Schechter Poultry* is often misread to imply one. The prohibition is also often inferred from *Carter Coal*, but *Carter Coal* is best read as a due process case—and one that also doesn't impose any per se prohibition on delegations to private parties. Likewise, recipient-based theories might invalidate certain private delegations, but not *because* the parties are private. Private status might be correlated with some relevant factors, but it generally isn't part of the actual test.

Understanding how the theories differ—and why they don't rule out private delegations—thus opens the door to various types of privatization that would otherwise be thought impermissible.

A. No Private Article I Nondelegation Doctrine

Nothing in the Article I Nondelegation Doctrine bars private delegations.[157] Several Supreme Court cases have upheld private

157 This Section focuses on the Article I Nondelegation Doctrine and not on the other giver-based doctrines because in the other ones discussed above, *see supra* subsection I.A.2—the void-for-vagueness doctrine, the power to define the law of nations, and the power to appoint presidential electors—the question of private delegates is extremely unlikely to arise, whereas the question of private delegation under the Article I Nondelegation Doctrine arises regularly and is extensively discussed in the literature.

delegations, and no Supreme Court cases have struck them down (or have even analyzed them differently), under that doctrine. Some cases that have been thought to establish such a doctrine have been thoroughly misread.

This result makes sense. The Article I Nondelegation Doctrine is a *giver-based* doctrine: Congress isn't supposed to *give up* too much power. Provided the "too much" question is answered properly, why should it matter, under that doctrine, who gets that power? The doctrine might play out slightly differently when private parties are involved, but that's a result of the neutral application of the doctrine as currently formulated—it doesn't make sense to have a different formulation of the Article I Nondelegation Doctrine that applies differently in private cases.

1. Upholding Private Delegations

Congress has delegated power to private parties since the earliest days of the republic.[158] But, more to the point: the Supreme Court, far from invalidating private delegations under the Article I Nondelegation Doctrine, has upheld them at least four times: in *Butte City Water Co. v. Baker* (1905),[159] *St. Louis, Iron Mountain & Southern Railway Co. v. Taylor* (1908),[160] *Currin v. Wallace* (1939),[161] and *United States v. Rock Royal Co-operative, Inc.* (1939).[162]

In two cases—*Butte City Water* and *Rock Royal*—the Court simply upheld the delegation. Two other times—in *St. Louis Railway* and *Currin*—the Court went further and upheld the delegation by explicitly analogizing it to a similar case where the delegate was the President or an executive official.

We shouldn't ignore these cases just because they're old. No later Supreme Court decision has taken a contrary approach; and in 1935, the two oldest cases were explicitly cited in *Schechter Poultry* as examples of cases where private delegation is constitutional.[163] (*Schechter Poultry* itself has never been questioned and continues to be cited regularly.)[164]

So there's no per se rule against private delegations, and the rule for private delegations is the same as for public ones.

158 John Vlahoplus, *Early Delegations of Federal Powers*, 89 GEO. WASH. L. REV. ARGUENDO 55, 57–61 (2021) (describing 1789 and 1790 statutes).

159 196 U.S. 119 (1905).

160 210 U.S. 281 (1908).

161 306 U.S. 1 (1939).

162 307 U.S. 533 (1939).

163 A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 & nn.14–15 (1935).

164 *See, e.g.*, sources cited *supra* notes 5–6, 10, 13.

Let's look at these four cases in detail. *Currin* concerned a challenge to the Tobacco Inspection Act of 1935.[165] The Act authorized the Secretary of Agriculture to establish uniform standards for tobacco, and designate tobacco markets where no tobacco could be sold unless it was inspected and certified according to those standards. But the Secretary couldn't designate a market unless two-thirds of the growers in that market voted in favor of the designation in a referendum.[166] Industry members thus held an "on-off" power to decide whether predetermined regulations would go into effect.

Is this a delegation subject to the Article I Nondelegation Doctrine? Yes: an "on-off" power to determine the applicability of legal norms isn't a trivial power, and it becomes a (forbidden) delegation of legislative authority if not adequately circumscribed. At least once—in *Panama Refining Co. v. Ryan*[167]—the Supreme Court struck down a delegation of an "on-off" power to the President on those grounds, holding that the President lacked statutory guidance as to whether to exercise the power.[168] In other cases, the Supreme Court has upheld the delegation of such an "on-off" power, but it was clear that the validity of the delegation had to be analyzed under the Article I Nondelegation Doctrine.[169]

The *Currin* Court upheld the delegation to the industry members. The Court held that the delegation was comparable to the delegation *to the President* of the power to determine the difference in production costs between countries and set tariffs that equalized those costs—which had been upheld in *J.W. Hampton, Jr., & Co. v. United States*.[170] Therefore, the delegation of power to industry did "not involve any delegation of legislative authority."[171]

Did the *Currin* Court say anything negative about the industry members' being private citizens? No, and in fact it implied the contrary: in analogizing the case to *J.W. Hampton*, it explicitly treated a federal official (the President!) and private citizens as equivalent in terms of whether Congress could delegate an "on-off" power to them:

> Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an Executive, or, as

165 *Currin*, 306 U.S. at 5.

166 *Id.* at 15.

167 293 U.S. 388 (1935).

168 *See id.* at 430.

169 *See, e.g.*, Field v. Clark, 143 U.S. 649, 694 (1892); Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 386 (1813). *Contra* Kinkopf, *supra* note 57, at 363–64.

170 276 U.S. 394 (1928); *see also Currin*, 306 U.S. at 16.

171 *Currin*, 306 U.S. at 15.

> often happens in matters of state legislation, it may be left to a popular vote of the residents of a district to be effected by the legislation.[172]

In upholding this private delegation, the *Currin* Court closely followed its earlier analysis from *St. Louis Railway*.[173] A statute authorized a private group, the American Railway Association, to "designate to the Interstate Commerce Commission [(ICC)] the standard height of draw bars for freight cars."[174] The ICC was then directed to promulgate that height as law.[175] This was challenged as "an unconstitutional delegation of legislative power to the Railway Association and to the [ICC]."[176]

The Supreme Court rejected this argument in one paragraph, analogizing the case to *Buttfield v. Stranahan*[177]—a case about delegating tea-inspecting authority to the Secretary of the Treasury. Thus, in *St. Louis Railway*, too, it was clear that the Court didn't consider the delegate's private status relevant. Decades later (a few years before *Currin*), in *Schechter Poultry*, the Court explicitly listed *St. Louis Railway* as a case where private delegations were unproblematic.[178]

Another case cited in *Schechter Poultry*[179] as an example of an unproblematic private delegation was *Butte City Water*.[180] There, the Supreme Court upheld the power of Congress, as part of its power to make regulations for public lands, to delegate rulemaking authority to miners in local mining districts.[181]

Finally, a few months after *Currin*, the Supreme Court upheld another private delegation in *Rock Royal*.[182] *Rock Royal* concerned a challenge to the Agricultural Marketing Agreement Act of 1937, a statute aimed at assisting in the marketing of agricultural commodities.[183] The Act authorized the Secretary of Agriculture to make orders restoring parity prices for farmers of specific farm products.[184] Orders could become effective in two ways: (1) consent of the handlers; or (2) two-thirds support from the producers (if the Secretary of Agriculture, with the President's approval, determined that the handlers' failure to

172 *Id.* at 16 (quoting *J.W. Hampton*, 276 U.S. at 407).
173 St. Louis, Iron Mountain & S. Ry. Co. v. Taylor, 210 U.S. 281 (1908).
174 *Id.* at 286 (quoting Act of Mar. 2, 1893, ch. 196, § 5, 27 Stat. 531, 531).
175 *See id.*
176 *Id.* at 287.
177 192 U.S. 470 (1904).
178 *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 & n.15 (1935).
179 *Id.* at 537 & n.14.
180 Butte City Water Co. v. Baker, 196 U.S. 119 (1905).
181 *Id.* at 125–26.
182 United States v. Rock Royal Co-op., Inc., 307 U.S. 533 (1939).
183 *Id.* at 542–43.
184 *Id.* at 574–75.

consent obstructed the policy of the act).[185] The Court held that a delegation to private parties of this "on-off" power to put an order into effect didn't violate the nondelegation doctrine.[186] Again, no mention of private status.

In short, the Supreme Court has upheld delegations to private parties against Article I nondelegation challenges at least four times, twice before *Schechter Poultry* and twice after. In *Schechter Poultry*, it explicitly cited the two prior cases as examples of unproblematic private delegations. And none of these cases have been repudiated. So there's no per se rule against such delegations.

And in *Currin* and *St. Louis Railway*, the Court upheld the private delegations by explicitly analogizing them to delegations to public officials, without expressing any reservations based on private status. This means that the Article I Nondelegation Doctrine doesn't distinguish between public and private parties. This makes sense: with giver-based doctrines, it's all about how much power Congress has given up, not who gets the power.[187]

2. Two Completely Misunderstood Precedents

a. *Schechter Poultry*

But what about *Schechter Poultry* itself, with its negative take on Congress's "delegat[ing] its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries," and its statement that "[s]uch a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress"?[188]

One can be forgiven for thinking that the case was about private delegations. The whole thrust of the National Industrial Recovery Act was to rely on private industry,[189] and in a few later cases, the Supreme Court distinguished that delegation as having been to private parties.[190]

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185 *Id.* at 547.

186 *See id.* at 577–78.

187 *See* Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 71 (1990).

188 A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935).

189 *See* DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940, at 57 (2014); *see also* Paul J. Larkin, Jr., *The Dynamic Incorporation of Foreign Law and the Constitutional Regulation of Federal Lawmaking*, 38 HARV. J.L. & PUB. POL'Y 337, 405–07 (2015).

190 *E.g.*, Fahey v. Mallonee, 332 U.S. 245, 249 (1947); Rice v. Bd. of Trade, 331 U.S. 247, 253 n.4 (1947); Yakus v. United States, 321 U.S. 414, 424 (1944); *see also* Mistretta v.

But those later cases were wrong: *Schechter Poultry* itself didn't involve private delegations. (Fortunately, those later characterizations of *Schechter Poultry* were just dicta. So the strongest case for a Supreme Court Article I private nondelegation doctrine rests on dicta in cases mischaracterizing a previous case.)

The *Schechter Poultry* Court never found a private delegation—nor could it have, since private industries could only *propose* a code of fair competition: no code could actually go into effect without being promulgated by the President.[191] The President wasn't required to approve any code at all, even if a trade group proposed one; if a trade group proposed one, the President could approve it with "such exceptions . . . and exemptions . . . as the President in his discretion deem[ed] necessary to effectuate the policy" of the statute; and the President could also just decline to approve a proposed code and instead "prescribe one . . . on his own motion."[192] The Court actually invalidated the delegation because the statute insufficiently constrained *the President* when he approved those codes. Thus, no part of the *Schechter Poultry* holding concerns private delegations, and any comments about the validity of private delegations were just dicta.

But even suppose that *Schechter Poultry*'s private-delegation dicta were binding. That still wouldn't establish that delegations to private parties are per se invalid—or even that private delegations are subject to a stricter rule than public ones. The Court was right: of course Congress can't "delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries."[193] But that's not a statement against private delegation as such—it's a statement against *unrestricted* private delegation. And *Schechter Poultry* holds that Congress is equally forbidden from delegating comparable authority to the President. Unrestricted delegations are invalid, no matter the delegate. *Schechter Poultry* acknowledged that delegation of authority (even to private

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United States, 488 U.S. 361, 373 n.7 (1989) (referring to private delegations as *Yakus*'s analysis of *Schechter Poultry*); United States v. Robel, 389 U.S. 258, 275 (1967) (Brennan, J., concurring in result); Clinton v. City of New York, 524 U.S. 417, 486 (1998) (Breyer, J., dissenting).

191 *Schechter Poultry*, 295 U.S. at 552 (Cardozo, J., concurring) ("Their function [i.e., that of the trade or industrial associations] is strictly advisory; it is the *imprimatur* of the President that begets the quality of law.").

192 *Id.* at 523 (majority opinion). The administration of the codes did involve "industry advisory committee[s]" to be appointed by industry members, *id.* at 524, but the Court's nondelegation discussion concerned the promulgation of the codes themselves, not the administration.

193 *Id.* at 537.

parties) could be acceptable,[194] but it distinguished this particular delegation to the President as being excessive and crossing the line into a delegation of "legislative authority."

So *Schechter Poultry* adds nothing to our understanding of whether Congress can delegate power to private parties. To the extent it says anything about private delegations, it amounts to nothing more than "'intelligible principle' for everybody." Delegations, to be valid, must be accompanied by an "intelligible principle,"[195] and this is true whether the delegate is public or private.

b. *Carter Coal*

How about *Carter Coal*? There, the Court said, referring to the delegation to the majority of the coal industry of the power to make binding standards: "The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question."[196] This sentence was followed by a string cite to three cases, including *Schechter Poultry*.[197]

Some have characterized *Carter Coal* as an Article I Nondelegation Doctrine case,[198] and the word "delegation" in the quote—and the *Schechter Poultry* citation—can certainly encourage that belief.[199]

But the mere recitation of the word "delegation" doesn't mean much, because the Supreme Court has used the word "delegation" for several nondelegation doctrines that have nothing to do with Article I.[200] The reference, in the same sentence, to due process considerations suggests that the Court is talking about the due process nondelegation doctrine; moreover, right after citing *Schechter Poultry*, the Court cites two (private) due process cases that we'll discuss soon, *Eubank v. City of Richmond* and *Washington ex rel. Seattle Title Trust Co. v. Roberge*.[201] The focus on financial bias in those cases is a good fit with

194 *Id.* at nn.14–15 (first citing Butte City Water Co. v. Baker, 196 U.S. 119, 126 (1905); and then citing St. Louis, Iron Mountain & S. Ry. Co. v. Taylor, 210 U.S. 281, 286 (1908)).

195 J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

196 Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).

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

198 Volokh, *supra* note 43, at 978–79 & nn.275–79.

199 *See* David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 473–74 & nn.205–07 (2011).

200 *E.g.*, Larkin v. Grendel's Den, Inc., 459 U.S. 116, 123 (1982).

201 *Carter Coal*, 298 U.S. at 311–12 (first citing *Schechter Poultry*, 295 U.S. at 537; then citing *Eubank*, 226 U.S. at 143; and then citing *Roberge*, 278 U.S. at 121–22).

the concerns in *Carter Coal*, so it makes more sense to read *Carter Coal* as a due process case, not an Article I Nondelegation Doctrine case.[202]

But even suppose we read *Carter Coal* as an Article I Nondelegation Doctrine case. It would make no difference, because that case is explainable in very ordinary terms. The delegation to the coal producers was unlimited; the majority of coal producers could impose whatever conditions they wanted on the dissenting minority. In other words, there was no intelligible principle. This delegation would have been struck down even if the delegates were public. (Thus, Chief Justice Hughes wrote a separate opinion relying on *both* nondelegation *and* due process, and his nondelegation discussion didn't even mention private status.)[203] Whichever way we slice it, neither *Schechter Poultry* nor *Carter Coal* supports the idea that the Article I Nondelegation Doctrine distinguishes between public and private delegates.

The failure to properly categorize *Carter Coal*, *Schechter Poultry*, and the other cases leads to ongoing confusion. For instance, Paul Larkin combines the due process cases *Eubank*, *Cusack*, *Roberge*, and *Carter Coal* together with *Schechter Poultry* in a doctrine that he calls the "private nondelegation doctrine,"[204] even though some of these (as state-government cases) are only due process cases, while *Schechter Poultry* has no due process holding, rests on the Article I Nondelegation Doctrine (among other grounds), and doesn't rest on private status. What about cases like *Currin* and *Rock Royal*, which allow private delegations? Larkin distinguishes them as being merely about delegations of a power to *halt* government regulation, not an affirmative power to regulate individuals. But even if this matters, it still fails to distinguish *Butte City Water* or *St. Louis Railway*, where the Court had no problem with the private delegation.

So this isn't a situation where some antiquated Supreme Court doctrine has been undermined by later caselaw. The original doctrine has never been repudiated and hasn't been undermined by later Supreme Court precedent; in fact, the contrary lower-court cases are quite recent, i.e., Judge Brown's re-adoption of her private-delegation theory in the Amtrak remand[205] and the Fifth Circuit's recent horseracing opinion.[206]

202 Volokh, *supra* note 43, at 979–80.

203 *See Carter Coal*, 298 U.S. at 318 (separate opinion of Hughes, C.J.).

204 *See* Larkin, *supra* note 182, at 401–11.

205 *See supra* text accompanying note 7.

206 *See supra* text accompanying note 13.

3. How Private Status Can Be Relevant

Still, could the doctrine play out differently in practice for private delegates? Yes, and I'll give two examples: one is the existence of administrative procedures and judicial review, and another is the Inherent-Powers Corollary. But neither of these suggests any per se constitutional problem with privatization.

a. Administrative Procedures and Judicial Review

In *Schechter Poultry*, the Court distinguished the delegation to the President from the Interstate Commerce Act's delegation to the Interstate Commerce Commission. The ICC, the Court wrote,

> in dealing with particular cases, is required to act upon notice and hearing, and its orders must be supported by findings of fact which in turn are sustained by evidence. . . . The authority conferred has direct relation to the standards prescribed for the service of common carriers and can be exercised only upon findings, based upon evidence, with respect to particular conditions of transportation.[207]

If a delegate needs to follow certain procedures before doing something, that constrains the delegate's scope of action. And if that delegate's actions are then subject to judicial review—which is facilitated by the presence of procedures[208]—a court can strike down actions that don't comport with the principle or that aren't substantively rational, which further constrains the delegate's scope of action. In other words, the presence of administrative procedures and judicial review (either separately or together) *reduces what the delegate can get away with*. And that's just another way of saying that less power has been delegated.

From this perspective, it's easy to see why public delegations might be more likely to be constitutional than private ones. The reasoning involves two steps, which have opposite constitutional effects, so let's go through this carefully.

First, *privatization will often mean that certain procedures are no longer mandatory*.

Public actors will almost always be state actors, and private actors often won't be; if so, procedural due process will apply to the public actors and not the private ones, and so public actors will be subject to constitutionally mandated procedures that private actors will evade.[209]

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207 A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 539–40 (1935).

208 The idea that agency procedures facilitate judicial review is a classic idea of federal administrative law. *E.g.*, Ethyl Corp. v. EPA, 541 F.2d 1, 67 (D.C. Cir. 1976) (en banc) (Bazelon, C.J., concurring).

209 See *infra* subsection I.C.1 for more on the state action doctrine.

Statutory mandates, too, like those of the Administrative Procedure Act (APA), the Freedom of Information Act (FOIA), or the National Environmental Policy Act (NEPA), are also less likely to apply.[210]

If this step were all, then privatization would make a given setup *more* likely to be constitutional, because there would be fewer applicable constitutional norms to violate.

This is where the second step comes in: *that lack of procedures (whether constitutional or statutory) would also make a delegation broader, in a way that might violate the Article I Nondelegation Doctrine.* So taking oneself out of publicness under some doctrines might invalidate the delegation under another doctrine.

Perhaps this will make some difference in how the doctrine plays out as between public and private delegates in some cases. But this doesn't require a special doctrine for private delegations—it just means that the ordinary doctrine will tend to play out differently, and needs to be applied with an understanding of how procedures and judicial review affect the scope of a delegation.

Moreover, this argument doesn't necessarily rule out private delegations. Procedural requirements and judicial review are only one way to narrow a delegation. Their absence needn't doom a delegation provided the "intelligible principle" is detailed enough. And even if their absence would doom a private delegation, the remedy (aside from making the principle more intelligible) might just be to structure the delegation to have more procedural requirements and judicial review, either by statute or by contract. For instance (as a matter of constitutional law), private prisons are already considered state actors, subject to the full panoply of constitutional rights[211]—and in § 1983 suits (as a matter of statutory interpretation), public prison guards get qualified immunity while private prison guards don't.[212] So in some ways, private incarceration can be even more robustly accountable

210 The APA applies to "agencies," and "agency" is defined as "each authority . . . of the United States." Administrative Procedure Act § 2(a), 5 U.S.C. § 551(1) (2018). FOIA expands that definition somewhat, to include certain entities like "Government corporation" and "Government controlled corporation." 5 U.S.C. § 552(f)(1) (2018). NEPA applies to "all agencies of the Federal Government." 42 U.S.C. § 4332 (2018). Whatever these terms mean, they exclude at least some private parties. *See, e.g.*, Nicole B. Cásarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U. MICH. J.L. REFORM 249, 270 (1995).

211 *See, e.g.*, Rosborough v. Mgmt. & Training Corp., 350 F.3d 459, 460–61 (5th Cir. 2003); Smith v. Cochran, 339 F.3d 1205, 1215–16 (10th Cir. 2003); Skelton v. Pri-Cor, Inc., 963 F.2d 100, 102 (6th Cir. 1991); *cf.* West v. Atkins, 487 U.S. 42, 54–57 (1988).

212 *See* Richardson v. McKnight, 521 U.S. 399 (1997).

than public incarceration.[213] If, in any particular instance, we don't like some private accountability regime, legislation or contracts could subject private delegates to whatever requirements we like—FOIA, APA, or anything else, including some custom-made accountability regime designed for the specific case.[214]

The Article I Nondelegation Doctrine thus has the seeds of an argument that could be used against particular private delegations, but it doesn't embody any rule against such delegations, and the doctrine itself applies neutrally.

b. The Inherent-Powers Corollary

The next reason why private delegations might look different under the Article I Nondelegation Doctrine is the Inherent-Powers Corollary. As I've noted, when the delegate has some inherent authority over the subject matter, the intelligible principle doctrine is greatly weakened, or dropped entirely.[215] For instance, Congress can delegate to the President in military or foreign-affairs matters without providing an intelligible principle.[216]

But what if Congress took a standardless foreign-affairs delegation to the President and converted it to an identical standardless delegation to a private military corporation like Blackwater?[217] Blackwater lacks any inherent power, so a constitutional delegation to the President would become an unconstitutional private delegation.

This isn't an especially broad category, because usually delegations to the Executive are made where the President has a derivative power (i.e., his "take Care" power), not an inherent power like the Commander in Chief power.[218] Thus, if a delegation to the President in, say, meat inspection (where the President lacks inherent power) were converted to a delegation to a private corporation, identical in

213 But only some; constitutional remedies against federal private prisons based on *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), are limited. Minneci v. Pollard, 565 U.S. 118 (2012); Volokh, *supra* note 24.

214 *E.g.*, Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (2003); Cásarez, *supra* note 210, at 292–302.

215 *See supra* subsection I.A.1. *See generally* Volokh, *supra* note 49.

216 *E.g.*, Loving v. United States, 517 U.S. 748 (1996); United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936).

217 Blackwater has gone through a number of renamings (including Xe Service and ACADEMI) and is now owned by a holding company called Constellis. *See* Mike Stone, *Exclusive: Constellis, Owner of Former Blackwater, Up for Sale - Sources*, REUTERS (June 6, 2016, 1:00 AM), https://www.reuters.com/article/us-constellis-m-a/exclusive-constellis-owner-of-former-blackwater-up-for-sale-sources-idUSKCN0YR105 [https://perma.cc/Q487-NLYA].

218 *Compare* U.S. CONST. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed . . . ."), *with id.* art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States . . . .").

every way—including procedures and accountability mechanisms—the constitutionality of those delegations would be identical.

This argument doesn't apply uniquely to private actors; it would apply to any delegate that lacks inherent power. (Consider the hypo above about Indian tribes versus the Bureau of Indian Affairs.)[219] Moreover, it's not a per se argument against private delegation—the problem is just with *standardless* delegations to delegates that lack inherent power. Private delegations would simply require the same sort of "intelligible principle" that's otherwise required outside of the Inherent-Powers Corollary.

B. No Private Separation-of-Powers Doctrine

Now for the recipient-based theories. I will focus here on the Appointments Clause, which is the most significant recipient-based theory—though much of the discussion of appointments also carries through to issues of removal.[220]

Anyone wielding "significant authority pursuant to the laws of the United States"[221] is an officer of the United States and therefore must be appointed by one of the two methods of officer appointment: presidential nomination plus Senate confirmation, or (optionally for inferior officers) by the President, courts, or heads of departments.[222] (This is only *approximately* true: see the "continuing and permanent" discussion below.) The requirement of wielding significant federal authority is functional, not formalistic: if someone who could be labeled "private" wields such authority, they are an officer and require the appropriate appointment process.

How does my view above relate to the strong separation-of-powers antiprivatization view? That view would hold that private delegates can never be valid because, not being part of the government, they can never exercise governmental power. The difference between these two views is less than it may appear, and is perhaps merely semantic.

The latter view would presumably hold that, if the invalid private parties go through the constitutional appointment process, that would cure the problem—indeed, the previously private parties would have then become part of the federal government. My view wouldn't care

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219 *See supra* text accompanying note 152.

220 In essence, if someone is an officer for purposes of the Appointments Clause, then they should also be removable, at least if they fall within the rule of *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020). Officer status also relates to oath requirements and susceptibility to impeachment. *See* Jennifer L. Mascott, *Private Delegation Outside of Executive Supervision*, 45 HARV. J.L. & PUB. POL'Y 837, 848 (2022).

221 Buckley v. Valeo, 424 U.S. 1, 126 (1976).

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

much about the labeling; perhaps, if the private parties were officers and directors of a private corporation traded on the stock market (which did mostly nongovernmental work), it might seem unnatural, as a matter of common usage, to stop calling the company "private." I would just say that, public or private, one can wield significant federal authority as long as one is constitutionally appointed.

Both views would agree that appointment cures the problem. But, I would stress, this is exactly the same thing we would say about federal employees: even a traditional federal employee can't wield significant federal authority without going through the constitutional appointment process. In short, the public-private labeling—and whether the person involved would have been called "public" or "private" before the appointment—shouldn't much matter.

The bottom line is that the Appointments Clause poses no barrier to privatization or outsourcing. Anyone—employee, contractor, random guy, or other—can equally be the recipient of federal power if subjected to the requisite political accountability through the constitutional appointment process.

1. The "Continuing and Permanent" Limitation

The idea that the Appointments Clause is neutral as between public and private actors is only approximately true. Because of a line of nineteenth-century caselaw, certain sorts of private actors—even when they wield significant government authority—are entirely excluded from the Appointments Clause's scope. This introduces a certain pro-privatization bias into the Appointments Clause.

In *United States v. Hartwell*,[223] a Treasury clerk challenged whether he was an "officer" subject to the criminal penalties provided for officers in an embezzlement statute. The Supreme Court apparently assumed that an "officer" under the statute was the same as an officer under the Appointments Clause,[224] and distinguished the category of officers from that of contractors. "An office," the Court wrote, "is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties."[225] A "government contract," by contrast, "is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other."[226] By that standard, and because the defendant's duties were "continuing and

223 73 U.S. (6 Wall.) 385 (1868).
224 *See id.* at 393–94 & n.*.
225 *Id.* at 393.
226 *Id.*

permanent,"[227] the defendant was an officer and thus subject to the statutory penalties.

In *United States v. Germaine*, a surgeon appointed by the Commissioner of Pensions to examine pensioners was prosecuted for violating an extortion statute that applied to "officer[s] of the United States."[228] The Supreme Court again assumed that this statutory category tracked the constitutional category,[229] and endorsed the *Hartwell* factors of continuing and permanent duties. This surgeon, the Court observed, took no oath; his compensation wasn't governed by any regular appropriation; and his duties were only "occasional and intermittent," because he was engaged on an as-needed basis whenever some pensioner needed to be examined; therefore, he wasn't an officer.[230]

And in *Auffmordt v. Hedden*,[231] an importer challenged the appointment of a merchant appraiser on the grounds that the appraiser was an officer and should have been appointed under Article II. (Finally, a case that directly implicates the constitutional category of officers rather than a statutory designation.) The Supreme Court said the Appointments Clause didn't apply: the merchant appraiser was selected on an ad hoc basis for cases where appraisals were requested; he didn't fall within the civil-service law; the statute just required that he be a "discreet and experienced merchant"; and he lacked the *Hartwell/Germaine* factors of tenure, duration, continuing emolument, and continuous duties.[232] (These cases, particularly *Germaine* and the "occasional and temporary" versus "continuing and permanent" distinction, continue to be cited in Supreme Court cases[233] and in an Office of Legal Counsel opinion.)[234]

Because of the *Hartwell/Germaine/Auffmordt* trilogy, certain "occasional and temporary" agents can be used without having to be appointed under Article II.[235] The Supreme Court has never directly stated whether private attorneys general or *qui tam* relators need to be appointed under Article II,[236] but this longstanding caselaw suggests

227 *Id.*

228 United States v. Germaine, 99 U.S. 508, 509 (1879) (quoting Act of Mar. 3, 1825, ch. 65, § 12, 4 Stat. 115, 118 (current version at 18 U.S.C. § 872 (2018)).

229 *Id.* at 510.

230 *Id.* at 512.

231 137 U.S. 310 (1890).

232 *Id.* at 326, 326–27 (quoting 34 Rev. Stat. § 2930 (1875) (repealed 1890)).

233 *See, e.g.*, Lucia v. SEC, 138 S. Ct. 2044, 2051 (2018); Buckley v. Valeo, 424 U.S. 1, 125–26 & n.162 (1976).

234 Officers of the U.S. Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 107 (2007).

235 *See* U.S. CONST. art. II, § 2, cl. 2; *see also* Kinkopf, *supra* note 57, at 341–43, 371–72.

236 *See* United States *ex rel.* Polansky v. Exec. Health Res., Inc., 143 S. Ct. 1720, 1741–42 (2023) (Thomas, J., dissenting); *id.* at 1737 (Kavanaugh, J., concurring) (citing *id.* at

that they don't.[237] (That said, there is some disagreement about how far this doctrine extends: the D.C. Circuit held that the appointment of an arbitrator to resolve Amtrak-related disputes violated the Appointments Clause, even though that arbitrator's duties seemed temporary.)[238]

Perhaps all this is wrong, and the government should be more limited in hiring contractors—or deputizing private attorneys general—to perform significant governmental functions.[239] (Texas's recent experiment with antiabortion bounty hunters shows that the concern over private law enforcement can be bipartisan,[240] though this state scheme doesn't raise Article II questions.) In my view, the applicability of the Appointments Clause should turn on the function that someone performs—someone who exercises significant federal authority should be appointed as an officer, even if they only exercise that authority occasionally and for a limited time. Perhaps the *Hartwell/Germaine/Auffmordt* cases can be limited because the supposed officers in those cases didn't have very significant duties in any event.

But we don't need to resolve those questions right now. For purposes of this Article, it suffices to observe that there's no special doctrine prohibiting private contractors—if anything, quite the

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1741 (Thomas, J., dissenting)); Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 778 n.8 (2000) (noting the question but not deciding it); *see also id.* at 801 (Stevens, J., dissenting).

237 *See also* Citizens for Resp. & Ethics in Wash. v. Am. Action Network, 410 F. Supp. 3d 1, 26–28 (D.D.C. 2019); Michael G. Collins & Jonathan Remy Nash, *Prosecuting Federal Crimes in State Courts*, 97 VA. L. REV. 243, 296–99 (2011); Nash, *supra* note 86, at 159–60, 160 n.113, 180–81.

238 *See* Ass'n of Am. R.Rs. v. U.S. DOT, 821 F.3d 19, 36–39 (D.C. Cir. 2016); James A. Heilpern, *Temporary Officers*, 26 GEO. MASON L. REV. 753, 755–56 (2019) (also questioning whether *Morrison v. Olson*, 487 U.S. 654 (1988), was consistent with the "occasional and temporary" doctrine). Heilpern suggests a distinction based on *United States v. Maurice*, 26 F. Cas. 1211 (C.C.D. Va. 1823) (No. 15,747), under which a position would be "continuous" (and thus subject to the Appointments Clause) if it persisted beyond the incumbency of any particular person. Heilpern, *supra*, at 771. But the precise distinction is not important here.

239 *Compare* Pamela H. Bucy, *Private Justice and the Constitution*, 69 TENN. L. REV. 939 (2002), *with* James T. Blanch, Note, *The Constitutionality of the False Claims Act's* Qui Tam *Provision*, 16 HARV. J.L. & PUB. POL'Y 701 (1993). According to Jennifer Mascott, "[i]t would be odd" if "only those officials who both serve in ongoing positions and exercise 'significant authority' [were] subject to Appointments Clause requirements":

> Taken to its logical end, the conclusion that an individual could exercise significant governmental authority free from Article II constraints so long as they served outside of an ongoing position could lead to severe results, potentially freeing from Article II constraint even the most impactful exercises of executive power, like federal prosecutions.

Mascott, *supra* note 220, at 848.

240 *See, e.g.*, Goldberg & Zipursky, *supra* note 30.

contrary. The government seems to be able to escape at least some accountability through contracting out. Even if this is bad on policy grounds,[241] this doctrine is, to some extent, pro–private delegation.[242]

2. Does This Exempt All Contractors?

There's still an open question in the doctrine. What if the government calls on people occasionally to perform federal functions—which apparently triggers the "occasional and temporary" exemption—but the work comes up so often that it's enough to occupy particular people full time, so that in practice, those people support themselves doing nothing but this federal work? Or what if the government contracts with a private person or private organization to perform federal work on an ongoing basis—work that, if performed by employees, would make us call those employees officers? Or what if Congress delegates such standing power to a private organization (as in the case of the Horseracing Integrity and Safety Authority)?[243] Should such people be subject to the Appointments Clause, even taking *Hartwell/Germaine/Auffmordt* as given?

This seems to be an unresolved question. On the one hand, the Supreme Court often contrasts officers with mere "employees," which suggests that officers are particularly exalted federal employees, and that someone who isn't even a federal employee could never be an officer.[244] Indeed, in *Buckley v. Valeo*, the Court wrote (citing *Auffmordt* and *Germaine*) that "[e]mployees are lesser functionaries subordinate to officers of the United States,"[245] and much more recently, in *United*

241 *Cf. Morrison*, 487 U.S. at 718 (Scalia, J., dissenting) ("The Ambassador to Luxembourg is not anything less than a principal officer, simply because Luxembourg is small. . . . If the mere fragmentation of executive responsibilities into small compartments suffices to render the heads of each of those compartments inferior officers, then Congress could deprive the President of the right to appoint his chief law enforcement officer by dividing up the Attorney General's responsibilities among a number of 'lesser' functionaries.").

242 One related point: in *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787 (1987), the Court held that a federal district court could appoint a private attorney to prosecute a criminal contempt action. *Id.* at 793–96. This, too, is a pro-private-delegation holding: Justice Brennan wrote that a government prosecutor isn't required, because the judiciary must have "a means to vindicate its own authority without complete dependence on other Branches." *Id.* at 796. But this holding should be understood as fairly limited, and deriving from federal courts' "inherent power to maintain order and respect." Nash, *supra* note 86, at 167.

243 *See supra* text accompanying notes 12–14.

244 *E.g.*, Lucia v. SEC, 138 S. Ct. 2044, 2049 (2018) (quoting U.S. CONST. art. II, § 2, cl. 2); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 506 (2010); Freytag v. Comm'r, 501 U.S. 868, 880 (1991).

245 424 U.S. 1, 126 n.162 (1976) (first citing Auffmordt v. Hedden, 137 U.S. 310, 327 (1890); and then citing United States v. Germaine, 99 U.S. 508 (1879)).

States v. Arthrex, Inc., Chief Justice Roberts contrasted officers with "'lesser functionaries' such as employees or contractors."[246] On the other hand, none of those statements definitively rules out the possibility of nonemployee officers. Moreover, those statements are just dicta, because the agents whose status was disputed in those cases (like in the vast majority of Appointments Clause cases) were unambiguously federal employees.

This situation is distinguishable from the *Hartwell/Germaine/Auffmordt* trilogy. The "occasional and temporary" subdoctrine is not a blanket pro-privatization rule. If private status were enough to exempt one from the Appointments Clause, *Germaine* and *Auffmordt* could have been radically simplified and one wouldn't have had to look at "occasional and temporary" factors. *Some* private contractors are exempt from the Appointments Clause under this doctrine, but not all.

The better position is that officer status should follow function, regardless of the specific contractual arrangement. After all, even government employment is just a particular sort of contract. There is no strong difference (or at least there shouldn't be a strong difference for constitutional purposes) between a government employee, a government contractor exercising the same power, or a private organization that is given such power by statute.[247]

Moreover, the Supreme Court has recently stressed, in *United States v. Arthrex, Inc.*, that the exercise of executive power "acquires its legitimacy and accountability to the public through 'a clear and effective chain of command' down from the President, on whom all the people vote."[248] *Arthrex* involved traditional government employees, but the focus on the importance of presidential control—and Congress's inability to avoid such control by assigning power to agents not controllable by the President—strengthens the case that *anyone* can be an officer if their powers are significant enough.[249]

Therefore, formally private actors who perform federal work on a regular basis should count as officers and be subject to the Appointments Clause.

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246 141 S. Ct. 1970, 1980 (2021) (quoting *Buckley*, 424 U.S. at 126 n.162).

247 *See generally* Alexander Volokh, *Privatization and the Elusive Employee-Contractor Distinction*, 46 UC DAVIS L. REV. 133 (2012).

248 141 S. Ct. at 1979 (quoting *Free Enter. Fund*, 561 U.S. at 498).

249 *See* Mascott, *supra* note 220, at 852 ("This more crystallized focus in *Arthrex* on the character of the authority itself rather than the precise identity of the actor exercising it is perhaps a game-changer on all manner of questions related to the force of electoral accountability via supervision over exercises of functions related to the Executive Branch. These questions include the proper role of private actors who carry out functions integral to executive action for the Executive Branch.").

The Office of Legal Counsel (OLC), after surveying the caselaw and a lot of historical evidence, has taken the same view: "[I]t is not 'within Congress's power to exempt federal instrumentalities from . . . the Appointments Clause'; . . . Congress may not, for example, resort to the corporate form as an 'artifice' to 'evade the "solemn obligations" of the doctrine of separation of powers . . . .'"[250] A key element in whether one is an officer is whether one has "delegated sovereign authority," which "one could define . . . as power lawfully conferred by the government to bind third parties, or the government itself, for the public benefit. . . . [S]uch authority primarily involves the authority to administer, execute, or interpret the law,"[251] and generally includes "functions in which no mere private party would be authorized to engage."[252]

How does this apply to delegations of power to private parties? "A person's status as an independent contractor does not per se provide an exemption from the Appointments Clause,"[253] though most contractors turn out to be exempt because they usually merely provide goods and services rather than wield power, and "in most cases . . . their actions . . . have no legal effect on third parties or the government absent subsequent sanction."[254]

Appointments Clause constraints, the OLC stressed, *do* apply "in those rare cases where a mere contractor [*does*] exercise delegated sovereign authority (and [does] so on a continuing basis)."[255] (Thus, in *United States v. Maurice*, Justice Marshall (riding circuit) held that James Maurice, an "agent of fortifications" and apparently a mere contractor, was in fact an officer, and thus invalidly appointed, because of his "important duties.")[256]

There is thus no antiprivatization rule for Appointments Clause purposes. Aside from the "occasional and temporary" doctrine, which is a limited *pro-privatization* rule, the rule is neutrality between the public and private sectors. Anyone with continuing duties who satisfies *Buckley*'s requirement of "exercising significant authority pursuant to

250 Officers of the U.S. Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 75 (2007) (quoting Const. Separation of Powers Between the President & Cong., 20 Op. O.L.C. 124, 148 n.70 (1996)).

251 *Id.* at 87.

252 *Id.* at 90.

253 *Id.* at 96.

254 *Id.* at 98.

255 *Id.* Likewise, whether someone is paid by the government is not relevant to whether they are an officer. *Id.* at 119–22.

256 26 F. Cas. 1211, 1214, 1214–16 (C.C.D. Va. 1823) (No. 15,747); *see also* E. Garrett West, *Clarifying the Employee-Officer Distinction in Appointments Clause Jurisprudence*, 127 YALE L.J.F. 42, 46–48 (2017).

the laws of the United States"[257] is an officer and—whether public or private—must therefore be properly appointed. Or maybe—if one prefers this formulation—the fact that someone exercises such authority should be enough for us to label them "public," thus sidestepping public-private questions entirely.

3. A General Separation-of-Powers Critique

But now let's consider a popular version of the separation-of-powers critique, which holds that, to be a legitimate recipient of a federal delegation, one needs to be a member of Articles I, II, or III.[258] Private parties, according to this critique, supposedly don't qualify because they're not part of any of those branches of government.

The idea that all federal power must reside in one of the three branches gets some support from *Printz v. United States*,[259] where the Court struck down a statute commandeering state officers to enforce federal law: this arrangement not only violated federalism (i.e., state-federal relations) but also disturbed the equilibrium of powers within the three federal branches (i.e., giving executive power to someone outside the executive).[260]

Thus, for instance, one can object on Article II grounds to the delegation to individuals of the power to enforce federal statutes, for instance through *qui tam* suits.[261] Even if the occasional nature of such delegations makes them constitutional under the "continuing and permanent" doctrine,[262] one can imagine more regular arrangements, for instance if state prosecutors are authorized to prosecute federal crimes

257 Buckley v. Valeo, 424 U.S. 1, 126 (1976).

258 *See, e.g.*, DOT v. Ass'n of Am. R.Rs., 575 U.S. 43, 60–62 (2015) (Alito, J., concurring); *id.* at 87–88 (Thomas, J., concurring in judgment). *But see* Larkin, *supra* note 189, at 411–23 (locating this theory within due process). Even in a nonfederal context, one could craft an inside-versus-outside-government critique based on the Republican Form of Government Clause or the principles behind it. *See, e.g.*, *id.* at 422.

259 521 U.S. 898 (1997).

260 *Id.* at 922–23; Larkin, *supra* note 189, at 420–21 (quoting *Printz*, 521 U.S. at 922). Thomas Merrill, similarly, suggests that private delegations might run afoul of deep structural considerations (in addition to other provisions like "the Appointments Clause, Article III's guarantee of judicial independence, or the Due Process Clause"). Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2168 (2004) (footnotes omitted).

261 If there is such a principle, the Article III standing doctrine may enforce it to some degree. Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 J. CONST. L. 781, 783, 790, 822–29 (2009).

262 *See supra* Section II.B.

in state court[263]—or if Congress creates a whole agency, run by private parties, to regulate thoroughbred horse racing.[264]

This is a dormant theme of *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,[265] though the point wasn't squarely presented there.[266] As Justice Kennedy wrote:

> Difficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States.[267]

One might think that this theory is diametrically opposed to the view I expressed above, which is that there is no bar to private parties' receiving delegated federal power. But in fact, the difference may be merely semantic; these are just two ways of saying the same thing.

This strict separation-of-powers view opposes delegations to private parties because they're not part of the government. But presumably, if those private parties went through presidential nomination and Senate confirmation, the problem would be cured, because that appointment would have made them part of the federal government (most likely part of the executive branch). Perhaps a proponent of that view would say that this "private" party had thereby become "public."

And my view is essentially the same: any private party can validly wield federal governmental power, provided they are properly appointed. I don't particularly care whether we label them "public" or "private," because I don't think this labeling should matter much. Maybe the Horseracing Integrity and Safety Authority members would be "public" if properly appointed—or maybe we should respect their statutory labeling as "private" and the fact that the Authority is organized as a private organization under state law. Hypothetically, if we appointed the directors and officers of a private corporation (perhaps even a publicly traded one), it would seem unnatural to say these officers are now "public" or "governmental," especially if the corporation mostly does nongovernmental work. I would be happy to continue

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263 Collins & Nash, *supra* note 237, at 296–99.

264 *See* Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 53 F.4th 869 (5th Cir. 2022). For other examples of "private" organizations (i.e., organizations where the government only controls a minority of directors) with continuing duties under federal law, see Kinkopf, *supra* note 57, at 383–86 (discussing the Red Cross and the First and Second Banks of the United States).

265 528 U.S. 167 (2000).

266 *Id.* at 209 (Scalia, J., dissenting).

267 *Id.* at 197 (Kennedy, J., concurring).

calling them private, even while observing that they wield some federal governmental power and must therefore be constitutionally appointed. Most of all, because I don't think the public-private distinction matters for the Appointments Clause, I would adopt a live-and-let-live attitude on the categorization question.

4. How Private Status Can Be Relevant

There are a few ways that private status can end up being relevant as a practical matter, though none of them amounts to a per se antiprivatization rule.

a. The Temporary Contractor Exception

As noted above, private status can actually make certain delegations *more* constitutional: even if the private delegate is a state actor (so that constitutional rights apply), if its exercise of power is temporary or ad hoc, the use of such a delegate may not be subject to the Appointments Clause.[268] I prefer a regime where officer status depends strictly on function, but it seems that under current doctrine, this exception is pro-privatization.[269]

b. What Type of Power Is a Delegate Exercising?

Next, there is the issue of what type of power a delegate is exercising. Some delegates exercise a clearly governmental power, but (even when the delegate is federal) it might not be federal power—which removes that delegate from the scope of the Appointments Clause.

For instance, territorial officers might be exercising the power of an essentially local government—such as Puerto Rico or the District of Columbia—rather than that of the federal government, so the Appointments Clause doesn't govern their selection or appointment. (This is why democratic elections in the territories don't violate the Appointments Clause.)[270] The Appointments Clause doesn't apply here—not because the officials themselves aren't federal (they are!), but because the type of power they're exercising is nonfederal.

Similarly, by setting the rules of state tort law, state judiciaries and legislatures determine the scope of federal sovereign immunity in tort claims against the federal government. This is an explicit delegation from Congress—and a dynamic delegation, because Congress didn't know the full scope of the waiver of sovereign immunity that it would

268 *See supra* subsection II.B.1.

269 *See supra* text accompanying notes 239–42.

270 *See* Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1658–65 (2020).

be agreeing to over time when it passed the Federal Tort Claims Act in 1946.[271] By defining who can and can't get married, and what it takes to be married, state legislatures can determine their citizens' *federal* tax liability.[272] This was a semiexplicit delegation from Congress, because Congress used the term "spouse," which, in the absence of a federal definition, was reasonably interpreted to incorporate state-law definitions[273]—and with the repeal and replacement of the Defense of Marriage Act in 2022, that semiexplicit delegation has now become explicit.[274] Also, state courts can determine the scope of federal statutory rights (subject, of course, to Supreme Court review) by hearing federal-question cases.[275] This is an implicit delegation by Congress: Congress could make federal jurisdiction exclusive (as it has in antitrust),[276] but in most cases hasn't done so.[277]

There, too, state governments are exercising their own state powers (even if those decisions are then dynamically incorporated into federal law),[278] so no Appointments Clause inquiry is necessary there.[279] This could also validate dynamic incorporations of foreign or tribal law into federal law—because the Constitution recognizes that foreign governments, just like Indian tribes,[280] have their own sovereignty.[281]

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271 *See* 28 U.S.C. § 1346(b) (2018).

272 *See, e.g.*, 26 U.S.C. § 2056(a) (2018).

273 *See* United States v. Windsor, 570 U.S. 744, 766 (2013).

274 *See* Respect for Marriage Act, Pub. L. No. 117-228, sec. 5, § 7(a), 136 Stat. 2305, 2306 (2022) (amending 1 U.S.C. § 7 (2018)) ("For the purposes of any Federal law, rule, or regulation in which marital status is a factor, an individual shall be considered married if that individual's marriage is between 2 individuals and is valid in the State where the marriage was entered into . . . .").

275 *See* Larkin, *supra* note 189, at 372–77; *see also* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . .); Testa v. Katt, 330 U.S. 386, 394 (1947).

276 Gen. Inv. Co. v. Lake Shore & Mich. S. Ry. Co., 260 U.S. 261, 286–88 (1922).

277 Tafflin v. Levitt, 493 U.S. 455, 460–61 (1990).

278 *See* Larkin, *supra* note 189, at 372–77. Such incorporation of federal law may pose due process problems, because perhaps there is insufficient notice. *See id.* at 381–401 (discussing laws not readily available to the public, not written in English, not readily understandable by average person, not fixed and precise). But that's a different doctrine.

279 *See id.* at 376 (arguing that the constitutional framework anticipates that states will participate in governance); Vlahoplus, *supra* note 158, at 64.

280 *See* United States v. Mazurie, 419 U.S. 544, 556–57 (1975).

281 *See* Larkin, *supra* note 189, at 339–41 (arguing against the constitutionality of the Lacey Act, which makes it a federal offense to "import, export, transport, sell, receive, acquire, or purchase" fish, wildlife, or plants "in violation of any foreign law," 16 U.S.C. § 3372(a)(2) (2018)). The Act does the same for state and tribal law. 16 U.S.C. § 3372(a)(1)–(2) (2018); *see also* David Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 STAN. L. REV. 1697, 1702–34 (2003). Golove writes that the Founding-era understandings regarding the permissibility of confederations

The situation is different if states directly enforce federal law—for instance, under the Judiciary Act of 1789, which allows state justices of the peace and magistrates to arrest those suspected of committing federal crimes.[282] Presumably, if *commandeering* alters the federal-state balance of power under *Printz*, even *empowering* state governments in this way would do the same.[283] Perhaps state enforcement of federal law is indeed unconstitutional under Article II.[284]

How does all this affect private delegations? There will be some cases where a private delegate lacks the power to do what a state could do. When the state alters someone's federal tax liability by defining marriage, it's exercising a state power. But if a private party were somehow given a similar power to affect someone else's federal tax liability, it would only be exercising federal power, so the Appointments Clause would apply.[285]

Closer to home: If federal law incorporated state horse-racing regulation (making violations of state law into federal offenses), the state regulators would be using their state power and wouldn't need to be federally appointed. But when federal law empowers a private Horseracing Integrity and Safety Authority to promulgate regulations, the Authority members aren't exercising any power other than federal power.

There might be tricky questions about what happens if the federal government simply dynamically incorporates the standards of a private trade organization. What if federal regulations dynamically incorporate American Medical Association standards for impairment?

(i.e., leagues of independent nations) show that there is no "deep inconsistency between Founding notions of popular sovereignty and treaty delegations of legislative, executive, and judicial authority to bodies which are accountable to a wider community than just ourselves." *Id.* at 1726; *see also id.* at 1744–46 (discussing early treaties delegating power, including judicial authority, to non-U.S. officials, e.g., a mixed arbitration tribunal, and noting that Article II–type objections were voiced (by Hamilton, among others) and then abandoned before ratification). For modern-day delegations to international bodies, see Kinkopf, *supra* note 57, at 392–95.

282 18 U.S.C. § 3041 (2018); Krent, *supra* note 187, at 81–82 n.57 (also listing 1790 statute giving state JPs power to arrest and detain deserting seamen, Fugitive Slave Act of 1793, and Alien Enemy Act of 1798); Collins & Nash, *supra* note 237, at 296–99.

283 Collins & Nash, *supra* note 237, at 301 (suggesting that having state prosecutors prosecute federal crimes in state court might "blur the lines of authority . . . and thereby decrease accountability" even if Article II appointment and removal issues were resolved); Kinkopf, *supra* note 57, at 381.

284 *But see* Kinkopf, *supra* note 57, at 347 (arguing that, if Congress delegates power to anyone outside the federal government, the "anti-aggrandizement principle" doesn't come into play, because one branch isn't aggrandizing itself relative to another branch).

285 Presumably one doesn't exercise federal power when one determines someone else's tax liability through the exercise of one's own state-law rights, for instance by divorcing one's spouse.

(Suppose this delegation satisfies Article I Nondelegation Doctrine concerns by providing an intelligible principle enforceable by judicial review. And suppose the organization had been promulgating similar standards long before they were ever given binding legal force. And suppose the private organization isn't given any enforcement powers of its own; the standards merely affect one's eligibility for various federal disability benefits.) One might argue that giving legal force to private standards isn't within the scope of the Appointments Clause, though perhaps the better view is that anyone who can unilaterally alter someone else's rights and duties under federal law requires federal accountability.

But we don't need to resolve those questions right now. Here, it's enough to observe that private status might matter in some cases, because a private party might be exercising federal power in cases where an analogous government party would be exercising state power—which would affect the applicability of the Appointments Clause.

Still, it's important to remember that none of this is a per se rule against privatization: all such problems can be fixed merely by properly appointing the people involved.

c. Contracting with Corporations

In addition, another form of privatization implicates the Appointments Clause: giving a corporation (or any other association or artificial person) substantial federal governmental authority.

It's generally constitutional for Congress to create corporations, because acting through the corporate form is just a method of doing business that Congress might consider necessary and proper to achieve some end.[286] But can a contract grant a corporation the authority to wield power that would otherwise be wielded by appointed officers?[287] Or can a statute grant such power—say, the power to promulgate binding legal rules—to a "private, independent, self-regulatory, nonprofit corporation" like the Horseracing Integrity and Safety Authority?[288]

The concept of "corporate personhood" has been criticized in some quarters.[289] But generally, recognizing corporate personhood—

286 Luxton v. N. River Bridge Co., 153 U.S. 525, 529–30 (1894); *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

287 *See, e.g.*, VERKUIL, *supra* note 83, at 106–13; Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1070–73 (2004).

288 Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 53 F.4th 869, 873 (5th Cir. 2022) (quoting 15 U.S.C. § 3052(a) (2018)).

289 *See, e.g.*, Teneille R. Brown, *In-Corp-O-Real: A Psychological Critique of Corporate Personhood and* Citizens United, 12 FLA. ST. U. BUS. REV. 1 (2013); Nick J. Sciullo, *Reassessing Corporate Personhood in the Wake of Occupy Wall Street*, 22 WIDENER L.J. 611 (2013).

and granting certain rights to corporations—is just a convenient shorthand for referring to actual people.[290] As the Supreme Court wrote in *Burwell v. Hobby Lobby Stores, Inc.*[291]:

> A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations' financial well-being. And protecting the free-exercise rights of corporations . . . protects the religious liberty of the humans who own and control those companies.[292]

However, even though corporations often enjoy the same rights as natural persons, granting powers to corporations can sometimes be constitutionally problematic. Suppose the federal government chooses to contract with Acme Corp. to conduct certain governmental activities, where Acme Corp. would be exercising substantial federal power. Suppose the President and Senate, recognizing that this would make Acme Corp. an officer of the United States, even put Acme Corp. through the presidential nomination and Senate confirmation process. Is anything wrong with that?

What's wrong is that, under corporate law, the shareholders of Acme Corp. can fire their officers and appoint new officers—and hire new employees—at any time. The shareholders can also sell their shares to other people at any time. So Acme Corp. has no fixed identity in terms of actual human beings, whether we're talking about owners, directors, officers, or employees.[293]

But when we say that Acme Corp. is exercising substantial federal power, that just means that certain people connected with Acme Corp. are exercising that power, because a corporation is an abstract entity and can only act through people. Talking about Acme Corp. as an officer of the United States is thus sloppy: really, particular individuals who exercise substantial federal power are officers, and *those* people

290 *See, e.g.*, ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS xiii–xxiv (2018).

291 573 U.S. 682 (2014).

292 *Id.* at 706–07 (emphasis omitted).

293 This is true even if Acme is a nonprofit, though then we should talk more generally about the nonprofit's decisionmakers (e.g., its directors) rather than its "shareholders."

should undergo presidential nomination and Senate confirmation. To appoint the corporation, given the rules of corporate law, would be to sanction the "appointment" of new officers that were never properly appointed—as well as the removal of officers without the consent of the President or of whatever superior officers would normally remove those officers.

So instead of appointing corporations, the President and Senate should nominate and confirm all the corporate officers and employees who would (based on their duties) qualify as officers of the United States; a statute should specify how those officers are removed (or, by default, removal should be at will by the President); those officers should keep their legal powers (regardless of the views of anyone else in the corporation) unless they're removed by the relevant procedure; and any new people that the corporation might seek to put into those positions need a new constitutional appointment process.

But is this anti-corporate-appointment rule a special antiprivatization rule? No: this is no different than any other process that would take appointment of officers out of the hands of the constitutionally required actors. *Lucia v. SEC*[294] holds that the appointment of ALJs can't be delegated to agency employees below the level of "Heads of Departments," because only the constitutionally specified people can appoint officers; and the same is true for the appointment of officers who happen to work for corporations. The President couldn't appoint the EPA as a collective body, assuming the current EPA leadership could hire all EPA policymakers and staff and fill its own vacancies using its own internal rules—and appointing a corporation would suffer from exactly the same infirmity.

Moreover, in principle, one can imagine a process—whether set by statute or by contract—that would let a corporation exercise substantial federal power but would strictly limit any personnel changes among the class of officers to be consistent with the Appointments Clause and removal power, and would require the removal from the corporation of any officer who was removed under the statutory procedure. Would such a corporation still be called "private"? Maybe it would still be natural to call it private, because the corporation could still belong to private shareholders who would collect the contractual payments, and it could even be publicly traded on a stock exchange. But as I've said above, we shouldn't put much stock in this sort of labeling.

294 138 S. Ct. 2044 (2018).

C. No Private Due Process Doctrine

Finally, let's talk about application-based theories; here, I'll focus on the bias branch of due process.

I start here by pointing out that, in some ways, due process doctrine is *pro*-privatization, because a private party is often a nonstate actor—which is not bound by constitutional rights. Whether or not this is desirable on policy grounds, some privatizations are more likely to be constitutional if the delegate is private.

Then, I focus on cases where private parties are exercising coercive power and are thus state actors subject to due process. Under the bias doctrine,[295] the power to deprive someone of a life, liberty, or property interest can't be vested in someone who is biased—especially financially self-interested—in the exercise of that power. This caselaw doesn't draw distinctions between public and private actors.[296]

1. The State Action Doctrine

Private parties generally aren't "state actors"; they're exempt from virtually all constitutional rights.[297] (But not always: for instance, private prison providers are still state actors with respect to inmates, because they perform a traditional public function.) The state action doctrine has been around for over a century and isn't going anywhere soon,[298] though it involves many tricky cases, especially for hybrid entities.

When a nonstate-actor private entity replaces a previously governmental entity, lots of constitutional protections no longer apply. For example, employees are easier to fire—including for nakedly political reasons—and any hearings due process might have required for civil-service employment won't be required in the private context.[299] (And this isn't just a matter of constitutional rights: private parties that enforce federal law, for instance as *qui tam* relators, don't have the same legal constraints that the executive branch has related to faithfully executing the laws.)[300]

This is a common critique of privatization. Surely government can't free itself from constitutional restrictions, and reduce constitutional protections available to service recipients, by offloading those

295 *See supra* Section I.C.

296 Volokh, *supra* note 43, at 940–55; *see also* Krent, *supra* note 187, at 70–71 n.20.

297 *See, e.g.*, Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Flagg Bros. v. Brooks, 436 U.S. 149 (1978). *But see* U.S. CONST. amend. XIII; *id.* amend. XXI, § 2.

298 *But see* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985).

299 *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

300 Grove, *supra* note 261, at 783, 813–20.

responsibilities to private providers? But it can—and does.[301] This constitutional deregulation that results from privatization is often billed as an efficiency advantage; others argue that it may be part of an insidious agenda, and that it is in any event harmful even if unintentional.[302]

The need to maintain constitutional accountability might be a good *policy* argument against privatization—though keep in mind that desirable procedures can still be provided by contract as a condition of privatization.[303] (In other cases, there's no need for government to offer the service at all, and the state action doctrine provides important guarantees for the liberty of the private sector.)

But this isn't a *constitutional* argument against privatization. If anything, the state action doctrine is *pro–private delegation*, because it delimits a public sphere where constitutional rights apply in full force from a private sphere where constitutional rights don't apply. To the extent that privatization thus removes constitutional restrictions that previously applied, privatization makes a particular arrangement more likely to be constitutional. While certain procedures might have been unconstitutional under public provision, after privatization (if the private provider isn't a state actor) the question of constitutionality doesn't even arise.

2. Private Cases: Just like Public Cases

But now let's focus on cases where the state action doctrine doesn't help the private delegate. For instance, where the private party is exercising coercive power, it is probably a state actor under the "traditionally exclusive public function" doctrine;[304] privatization thus doesn't change the applicability of constitutional norms.

In the zoning context, *Eubank v. City of Richmond*[305] and *Washington ex rel. Seattle Title Trust Co. v. Roberge*[306] establish that a legislature can't delegate a power to some property owners to "virtually control

301 *See, e.g.*, Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003); Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169 (1995); Sheila S. Kennedy, *When Is Private Public? State Action in the Era of Privatization and Public-Private Partnerships*, 11 GEO. MASON U. C.R.L.J. 203 (2001).

302 *E.g.*, Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 735–39 (2010).

303 Freeman, *supra* note 214.

304 *See, e.g.*, Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974); Marsh v. Alabama, 326 U.S. 501, 506 (1946). Jessie Hill writes that state action can also be found in the government's decision to delegate such power in the first place. Hill, *supra* note 103, at 1235.

305 226 U.S. 137 (1912).

306 278 U.S. 116, 121–22 (1928).

and dispose of the proper rights of others" when they can "do so solely for their own interest."[307]

In the context of creditor remedies like wage garnishment or prejudgment replevin procedures, a creditor—obviously a self-interested party—can't freeze a debtor's wages or seize his goods without making some showing before a judge.[308] In 2021, the Supreme Court reaffirmed this rule in the context of landlord-tenant law: the ability of a tenant to unilaterally stave off eviction by self-certifying financial hardship, where the landlord has no access to a hearing to contest that certification, violates the command that "no man can be a judge in his own case."[309]

This is where *Carter Coal* naturally fits.[310] In the context of industrial regulation, a "majority" of industry participants may not "regulate the affairs of an unwilling minority."[311] As the Court wrote: "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."[312] Such a delegation to self-interested parties clearly violates due process because, "*in the very nature of things*, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor."[313]

All these bias cases recite the same principles, whether public or private actors are involved: private self-interested neighbors, creditors, tenants, and coal industry participants are treated just like the public mayor-judge with the fishy compensation scheme in *Tumey v. Ohio*.[314] It all comes from a common skepticism of self-dealing, "the human tendency to distrust those who exercise power when they are known to have a narrow self-interest in its exercise."[315]

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307 *Eubank*, 226 U.S. at 143–44.

308 N. Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 606–07 (1975); Fuentes v. Shevin, 407 U.S. 67, 80–81, 83, 92–93 (1972); Sniadach v. Fam. Fin. Corp. of Bay View, 395 U.S. 337 (1969).

309 Chrysafis v. Marks, 141 S. Ct. 2482, 2482 (2021) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)) (citing United States v. James Daniel Good Real Prop., 510 U.S. 43, 53 (1993)).

310 *See supra* subsection II.A.2.

311 Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).

312 *Id.*

313 *Id.* (emphasis added).

314 273 U.S. 510 (1927); *see supra* Section I.C; *see also* Hill, *supra* note 103, at 1208 ("It did not appear to matter to the Court in *Yick Wo* and *Roberge* whether the one exercising arbitrary power was a public official or another private citizen.").

315 PARRILLO, *supra* note 113, at 352 (discussing the late-nineteenth-century tendency to distrust the motives of both privateers and naval officers who collected "prize money" for capturing enemy vessels; in the view of naval officer Alfred Thayer Mahan, who regretted

This principle also applies in quasi-judicial proceedings like administrative adjudications, as when a state board of optometry controlled by independent optometrists tried to revoke the licenses of corporate-employed optometrists in *Gibson v. Berryhill*.[316] Was the problem that the (public) Board was biased, or that the (private) optometrists on the Board were biased? It didn't matter, because the doctrine asks the functional question of bias, not the formal question of public versus private.[317]

Moreover, what we've seen about *indirect bias* and *sources of bias other than direct financial self-interest* also applies to private delegations.[318] In *Eubank* and *Roberge*, where local residents exercised a quasi-zoning power over their neighbors, who knows whether the residents objecting to their neighbors' land uses cared about property values, neighborhood aesthetics, or not living near a retirement home? (And who cares? There's nothing magical about being motivated by money, as opposed to being motivated by other personal preferences: money is only good because it helps us fulfill our personal preferences.)

Similarly, in *Young v. United States ex rel. Vuitton et Fils S.A.*,[319] a party was thought to have violated an injunction, so the court granted the opposing party's attorney's request to be appointed as special counsel to represent the government in investigating and prosecuting a criminal contempt action. The Supreme Court disapproved this, saying that private prosecutors appointed to prosecute criminal contempt should be as disinterested as public prosecutors.[320] If lawyers representing interested parties acted as private prosecutors, they would act in a biased way (biased toward their own clients, that is) because of "the ethics of the legal profession."[321] (I suspect that lawyers zealously act in their clients' interests for crasser reasons than legal ethics. But either source of bias seems equally objectionable.)

Young also illustrates the limits of the usual rule that disinterested review by the time of the first adjudication cures any bias. Ordinarily,

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this tendency, "people had begun with an aversion to individualized piratical self-seeking and transferred that aversion to state-level seizure").

316 411 U.S. 564, 579 (1973); *see also* Marshall v. Jerrico, Inc., 446 U.S. 238, 248 (1980). *But see* Friedman v. Rogers, 440 U.S. 1 (1979) (challenge to fairness of regulatory board rejected when it didn't arise from a disciplinary proceeding against the challenger).

317 *See* Withrow v. Larkin, 421 U.S. 35, 47 & n.14 (1975) (identifying "pecuniary interest" cases as one type where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable," and citing *Gibson*, 411 U.S. at 579; *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); and *Tumey*, 273 U.S. 510—both private-adjudicator and public-adjudicator cases).

318 *See supra* subsection I.C.2.

319 481 U.S. 787 (1987).

320 *Id.* at 804.

321 *Id.* at 807; *see also* New Jersey v. Imperiale, 773 F. Supp. 747, 751–52 (D.N.J. 1991).

there's no due process problem when private parties' only power is to invoke (disinterested) legal processes[322]—even though, practically, private plaintiffs wield substantial coercive power. You might think the private prosecutor in *Young* would be subject to the same principle, because prosecutors don't succeed unless a judge eventually agrees with them. But the constraints on public prosecutors, which we saw in connection with *United States v. James Daniel Good Real Property*,[323] also apply in cases like *Young*: the private prosecutor's biased behavior can't be adequately policed by later court review because the private prosecutor "exercises considerable discretion" in various matters, and these decisions are "made outside the supervision of the court."[324]

Similar considerations apply to arguments that the government shouldn't be able to contract with private contingency-fee lawyers to enforce state law against private actors.[325] (One can go even further, and argue that private plaintiffs shouldn't be able, without some preliminary judicial review, to coerce defendants to show up in court or lose their case.)[326]

3. How Private Status Can Be Relevant

Again, we can ask: even though there's no separate private doctrine, might due process still play out differently in private cases?

Just as with the other doctrines, sometimes this will be true. If a private actor turns out to be performing state action—so it is subject to due process—then some procedures might be constitutionally required, and if those procedures are more likely to be present in the public sector (because of the APA and other statutes), then public-sector delegations are more likely to be found compliant with due process even though the formal doctrine is the same.

Turning to the bias branch of due process, might it be easier to find disqualifying bias in private cases?

One clear case is when private parties are given unconstrained discretion, as in zoning cases like *Eubank* and *Roberge*, industrial regulation cases like *Carter Coal*, or self-help remedies cases like

322 *E.g.*, Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr., 508 U.S. 602, 618–20 (1993); Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 243 n.6 (1984); New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 109 (1978); Mitchell v. W.T. Grant Co., 416 U.S. 600, 616–17 (1974); Miller v. Schoene, 276 U.S. 272, 281 (1928). *See generally* Volokh, *supra* note 43, at 944–50.

323 510 U.S. 43 (1993); *see also supra* subsection I.C.3.

324 *Young*, 481 U.S. at 807.

325 Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 SUP. CT. ECON. REV. 77 (2010).

326 E. Donald Elliott, Twombly *in Context: Why Federal Rule of Civil Procedure 4(b) Is Unconstitutional*, 64 FLA. L. REV. 895 (2012).

Sniadach and *Fuentes*. We can probably assume that private parties will seek their individual gain, whether strictly financial or not. Public officials, by contrast, are often presumed to be public-minded, take oaths, have some accountability, and so on.[327] But this is only a presumption—perhaps stemming from a tendency to romanticize the public sector, but perhaps often justified by officials' lack of strong monetary incentives.[328] Public-official cases like *Tumey* and *Ward* (and the rest) show that this presumption can be overcome even without showing actual bias[329]—for instance, by showing the details of public-employee or agency compensation arrangements.

But to assert that *all* private delegations *necessarily* exhibit invalid bias is to be insufficiently imaginative about what contractual options are available.[330] Perhaps giving neighbors unreviewable zoning power can never be salvaged. But not all cases are like that. Some have complained that private prison firms have an incentive to be too strict on discipline, to influence parole boards against granting parole to their inmates.[331] This concern isn't unreasonable, and it resembles other concerns surrounding private prisons (even if not exactly due process concerns): for instance, do private prisons underinvest in rehabilitation?[332] But this is an artifact of per diem compensation, which doesn't necessarily create the best incentives for effective and humane incarceration. What if we compensated private prison firms based on whether they achieved good results, like low recidivism rates or low rates of in-prison violence?

Similarly, whenever people complain about private welfare providers' incentives to "park" difficult cases or "cream-skim" easy cases, these problems (to the extent they're any worse than existing problems with public providers) can be alleviated by better compensation arrangements.[333] Whether this is easy or likely isn't crucial here: my point is simply that, rather than assuming bias and insisting on per se rules, we should think about what compensation arrangements can alleviate or exacerbate bias.

The same considerations work in the other direction: to suggest that bias *isn't* present (or is *less* present) in the public sector is to ignore

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327 *E.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936); Washington *ex rel.* Seattle Title Tr. Co. v. Roberge, 278 U.S. 116, 122 (1928); *see also* text accompanying *infra* notes 247–49.

328 On the long American history of providing monetary incentives to government officials, see PARRILLO, *supra* note 113.

329 *See* Wecht, *supra* note 145, at 825–26, 826 n.59.

330 *See* Freeman, *supra* note 214.

331 *See* Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 518–23 (2005).

332 *See* Volokh, *Prison Accountability*, *supra* note 29, at 357–60.

333 *Id.* at 346, 359, 410–12.

the numerous actual cases cited above—and to ignore the history of public-sector monetary incentives. The modern trend toward the salarization of public servants, and the spread of civil-service protections, shouldn't make us forget the historical extent of very problematic incentives in government work.

Nicholas Parrillo writes—to take just one example:

> Customs officers were entitled to a share (moiety) of all goods that were forfeited for intentional evasion. The 1860s and 1870s saw an unprecedented spike in forfeitures and moieties, and there was a sudden flood of complaints that these incentives were pushing officers to construe every mistaken underpayment as intentional . . . .
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> . . . .
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> . . . [I]n 1869 the Treasury Department began hiring full-time customs detectives, nicknamed "moiety men."[334]

These bounties "proved terrifyingly effective at motivating enforcement. Seeking profit, officers went after the merchants as never before, pressing them to agree to harsh settlements, quite often in cases in which the underpayments turned out to be innocent mistakes."[335] These incentives were adopted intentionally, to encourage vigorous enforcement. And they would be considered due process violations if enacted today.

Similarly, consider the history of incentives for public prosecution. In the late 1700s and early 1800s, public prosecutors had incentives that were pro-prosecution, though not proconviction:

> Typically, [public prosecutors] received a fee for every case they brought to trial, regardless of whether the defendant was convicted or not. . . . This arrangement motivated the public prosecutor to impose *some* hardship on defendants, in that he forced them to go through the hassle of a trial, but he had no incentive to convict them.[336]

But around the mid-nineteenth century, the system changed drastically, in a proconviction direction: "[I]n the decades leading up to the 1860s, more than half the states changed public prosecutors' fees so that they were available only if the officer won a conviction (or were much higher if he won a conviction)."[337] This changed prosecutors' incentives in two ways: they became less likely to prosecute losing cases, but they had an incentive to prosecute winnable cases vigorously. The federal government also offered conviction fees in the 1850s; this was most controversial for whisky enforcement in the South and West. In

334 PARRILLO, *supra* note 113, at 40–41.
335 *Id.* at 41–42.
336 *Id.* at 42.
337 *Id.* at 42–43.

1896, responding to the intense unpopularity of such schemes, Congress finally changed the fee system to a salary system: "Conviction fees, concluded congressmen, pushed prosecutors to focus too much on piling up convictions for extremely minor and technical offenses, since the perpetrators were easy to round up and convict, given the overly broad nature of the law."[338]

This history dispels the notion that public employment or public-service provision is *necessarily* disinterested. But aren't we past that, in our age of salarization? No, as the modern public-sector due process bias cases prove. But even if we were past that benighted period,[339] that doesn't imply that private provision must necessarily be more biased in a way that justifies an antiprivatization constitutional norm. After all, salarization, civil-service employment, and the like are just a matter of *contract*. Public servants are just people who choose to work for government under the terms of public-sector employment, i.e., the government's promises of compensation.[340] And if we can have contracts that provide good incentives for public-sector employees, we can also (at least sometimes) write contracts that provide good incentives for private providers. Accountability mechanisms, compensation systems that encourage good behavior, and so on, can be imposed on private providers as a matter of contract. And this means that one can have private delegation, even of coercive functions, without necessarily running into due process problems.

CONCLUSION

Fine, maybe there is no private nondelegation rule. But one could still argue there *should* be, as in some countries and U.S. states. For instance:

- The Israeli Supreme Court has staked out a doctrine under which prison privatization is *inherently* unconstitutional, merely because of the private nature of the delegate and regardless of how prisoners are actually treated.[341]

338 *Id.* at 43; *see also id.* at 44.

339 *See id.* at 362 ("[T]he salary has, through a long process of trial and error, become integral to the vindication of liberal-republican values, the honoring of plural interest-group claims, and the popular acceptance of legislatively enacted programs in a democratic society.").

340 *See, e.g.*, Allen v. City of Long Beach, 287 P.2d 765 (Cal. 1955); ALEXANDER VOLOKH, THE FEDERALIST SOC'Y, OVERPROTECTING PUBLIC EMPLOYEE PENSIONS: THE CONTRACT CLAUSE AND THE CALIFORNIA RULE 9–12 (2013).

341 Volokh, *supra* note 247, at 180–85, 198–202; Alexander Volokh, *The Moral Neutrality of Privatization As Such*, *in* THE CAMBRIDGE HANDBOOK OF PRIVATIZATION 117, 120–22, 124–25 (Avihay Dorfman & Alon Harel eds., 2021).

- Germany follows a more moderate approach: the German Basic Law provides that "[t]he exercise of sovereign authority on a regular basis shall, *as a rule*, be entrusted to members of the public service who stand in a relationship of service and loyalty defined by public law."[342] The German Federal Constitutional Court has taken the words "as a rule" to allow for reasonable exceptions based on policy considerations, provided sufficient accountability is present.[343]
- And various U.S. states, such as Texas[344] and Rhode Island,[345] have also developed various private nondelegation doctrines.

Federal constitutional law *could* follow the lead of these jurisdictions and develop such a doctrine. It could do so on an inherent theory: i.e., there's something inherently wrong with private delegations. Or, it could do so on a prophylactic theory: i.e., private delegations are more likely to be problematic than public ones, and looking to functional considerations on a case-by-case basis is too costly, so a per se rule reduces total error costs. I don't think one should adopt any antiprivatization doctrine for either of these reasons, but making this normative argument is beyond the scope of this Article.[346] For now, the positive analysis leaves us with a few takeaways:

- A few doctrines of federal constitutional law are *pro-privatization*, meaning that private delegations can reduce the number of constitutional restrictions that apply and thus decrease the chance that anything unconstitutional is going on. Perhaps those doctrines are ill-thought-out (I have my doubts as to the exclusion of occasional contractors from the Appointments Clause), but in any event, they're not antiprivatization.
- Otherwise, we don't have doctrines that rule out private delegation as such. The main doctrines that people often point to—the Article I Nondelegation Doctrine, the Appointments Clause, and the Due Process Clause—may rule out some

342 Grundgesetz [GG] [Basic Law], art. 33, para. 4 (emphasis added), translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html [https://perma.cc/E3V6-XYCM].

343 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 18, 2012, 130 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 76 (114–18), *abridged translation at* https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/2012/01/rs20120118_2bvr013310en.pdf [https://perma.cc/6MJQ-XAY8].

344 *See* Tex. Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 465–75 (Tex. 1997).

345 *See* Jennings v. Exeter-W. Greenwich Reg'l Sch. Dist. Comm., 352 A.2d 634, 638–40 (R.I. 1976).

346 I have criticized the Israeli approach in the sources cited *supra* note 341.

private delegations, but only based on the same neutral analysis that also rules out some public delegations.

- And if the neutral operation of these ordinary doctrines ends up ruling out private delegations more often than public ones (e.g., maybe bias is more present in the private sector)—well, that could just mean that the neutral doctrines are working. The neutral doctrines successfully point to the presence of particular factors that we care about, not public or private status as such.

Any given private delegation might still be unconstitutional. But this requires focusing on particular features: Did Congress give up too much power? Are people who exercise federal authority sufficiently accountable, in the sense of being appointed and removed through the proper political processes? Are people with coercive power subject to unacceptable bias?

The only thing the analysis in this Article rules out is the tendency, in some judicial or scholarly quarters, to paint with an overly broad brush and say that private delegation is ruled out a priori, due to a supposed constitutional "private nondelegation doctrine." There is no such thing.