Conclusion

At the outset, it was stated that the aim of this book was threefold: first to review how the law in three jurisdictions, the US, England, and the EU, responded to the delegation of governmental power to private parties; second, to consider those features of each legal system which render it more or less difficult for the legal system to control private delegation effectively; and third, to identify those legal conditions which are effective in responding to such delegation. The challenge of private delegation involves seeking to achieve the benefits of efficient and effective governance, while minimizing and avoiding risks to democracy, accountability, and human rights. No attempt is made here to summarize the many arguments that have been considered throughout the course of the book. Nor does this chapter provide a blueprint for a successful legal response to private delegation. It does, however, seek to reiterate a number of crucially important observations that have emerged from this comparative analysis—observations which, it is argued, provide useful guidance on how a legal system should respond to delegation of governmental power to private parties.

Structurally, these observations are presented in three parts. First, given the comparative nature of this study, it seems helpful to briefly shift the focus from the dichotomy between controls on delegation and controls on private parties, which has provided the organizing framework so far, to the individual jurisdictions. The first two aims of this study are jurisdictionally-focused and, consequently, this first part of the chapter will undertake an assessment of how each individual legal system has responded to the challenge of private delegation and a consideration of why it is that each jurisdiction has responded accordingly. The third aim will then be addressed in the second part of this chapter and, given the multifaceted nature of this study, it is important to elucidate the relationship between the different legal control mechanisms. Finally, four concluding remarks, going to the core of the question of delegation of governmental power to private parties, will be made.

9.1 Reviewing the Legal Systems

As has been seen throughout this book, the study of legal responses to private delegation in the three legal systems under review has provided useful insight into the three legal systems more generally, and, in turn, into the way in which many of the contextual factors highlighted in Chapter Two appear to have had a
significant effect on the ability of these systems to respond to private delegation. Of course, attempting to explain the response of any legal system to a particular question is fraught with hazard and the aim here is merely to provide tentative suggestions. To adopt Tushnet’s framework, the focus is not so much on determining why the particular legal systems have particular rules but, rather, on considering ‘the ease or difficulty’ with which the different systems respond to private delegation.¹

9.1.1 England

Private delegation in England occurs in the context of an unwritten constitution, which exhibits a fluid distribution of powers between the legislature, executive, and judiciary, but executive dominance of the legislature and an increasingly independent judiciary, and which relies on the rule of parliamentary sovereignty to determine hierarchy. At least in its initial manifestation, private delegation was premised on the Thatcherite ideological commitment to restraining public expenditure, but was continued without the ideological fervour by the Labour government.²

In very simple terms, the English legal response to private delegation, at least insofar as doctrinal law is concerned, could be described as entailing weak controls on delegation and weak controls on private parties. As was emphasized in Chapter One, this description does not take account of particularized regulatory schemes which may govern specific types of private delegate and, as was discussed in Chapter Three, England does appear to have a more effective system of private prison regulation than, for instance, the US. However, there is no underpinning constitutional control on delegators in the English system, and while EU procurement controls on delegators govern the process of delegation, the scheme governing grants is, at best, skeletal.³ Importantly, the limitations on the types of statutory function for which delegation is possible in England, as found in the Deregulation and Contracting Out Act 1994, are narrow.⁴ Meanwhile, on the one hand, English courts are hesitant to extend ‘public’ law administrative law and human rights controls to private delegates. On the other hand, even though examples of English standard contracts suggest that many of the challenges of designing contracts to ensure financial and performance accountability to government are being addressed, the application of English contract law to government contracts by English courts, with little or no modification to account for the particular characteristics of such contracts, has obvious shortcomings. Most importantly perhaps, it means that contract law often provides little in the way of

² Above 1.2.3 and 2.4.2.1.
³ Above 5.4.1—5.4.3.
⁴ Above 4.4.3.1 and 5.4.1.1(a).
Conclusion

an alternative to public law control of the private delegate since third-party beneficiaries can be, and usually are, excluded with ease.⁵

As for the aspects of the English legal order which affect its ease of response to the challenge of private delegation, three deserve special mention. First, the unwritten nature of the English constitution is significant. This feature of English constitutionalism renders it difficult to devise limits both to executive power in general and to executive delegating power in particular. The consequence is that the executive can rely largely on its prerogative power of contracting as a technique of private delegation, and need only resort to legislation when it anticipates a negative public reaction, as in the prison context.⁶ Second, as Wade and Forsyth have noted, ‘[t]he sovereignty of Parliament is a peculiar feature of the British constitution which exerts a constant and powerful influence’,⁷ and this holds true in the private delegation context. Parliamentary sovereignty effectively facilitates the delegation of any task the legislature—or, in the case of strong executive dominance, the executive—should choose to delegate.⁸ Third, when allied with the public law-private law divide, parliamentary sovereignty, as manifested in the ultra vires doctrine, has also had a far-reaching impact on the way in which English courts have responded to private delegation. Perhaps ironically, the public-private distinction in English law was being consolidated in the early 1980s, just as the blurring in the distinctions between public and private actors became more pronounced in the light of Thatcherite reforms. The way in which the divide has been managed by the courts has contributed to the challenge of responding to private delegation—and the influence of parliamentary sovereignty is evident. English courts have struggled with the extension of human rights obligations and the substantive requirements of administrative law beyond those bodies which are clearly statutory in origin or which derive their power from a statutory source—even though they have been given a licence to apply these legal constraints to those exercising ‘functions of a public nature’ or ‘public functions’. The over-emphasis of the English judiciary on identifying a statutory source of power—and the too-ready association of contract with private law—only serves to distract from the very obvious functional equivalence between the governmental actor and the private delegate.⁹ Indeed, the association of contract with private law is particularly anomalous in the English context given the increasing use of contract for public purposes, whether as a regulatory instrument, for quasi-markets in public services, or to achieve social control.¹⁰

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⁵ Above 8.3.2.2(a).
⁶ Above 2.4.2.3.
⁸ Above 2.3.2.1, 4.4.2, and 4.4.3.
⁹ Above 6.3.2.1, 6.3.2.4 and 7.4.3.1.
This association of contract with private law has also meant that the courts have been reluctant to exercise judicial review of procurement decisions.¹¹ Moreover, a strong prioritization of legality and vires, on occasion at the expense of legal certainty in the contractual context, may have the undesirable effect of undermining the confidence of potential private delegates in engaging with government.¹²

Arguably, though, the English response to private delegation is at an important juncture. There have been developments recently heralding the beginnings of a transition from pragmatic and empirical constitutionalism to what was described in Chapter Two as ‘law-based constitutionalism’.¹³ Although, realistically, the courts are unlikely to be persuaded, the HRA could potentially give rise to controls on the process of delegation, as was suggested in Chapters Four and Eight.¹⁴ Furthermore, the emphasis on ultra vires in the judicial review context may be waning. Recent cases in which the courts revived the exercise of supervisory jurisdiction over non-public bodies—Mullins and Bradley¹⁵—may have repercussions for private delegates acting pursuant to government contracts and, potentially, would provide a useful means of applying substantive administrative law standards to private delegates. Doubt has been expressed at the highest level regarding the predominance of parliamentary sovereignty.¹⁶ With this evolving constitutional context, it is particularly regrettable that the House of Lords did not seize the opportunity presented in the YL case to adopt a generous interpretation of section 6(3)(b) of the HRA,¹⁷ and thereby deal effectively with one of the major challenges created by delegation of governmental power to private delegates—undermining of human rights protection. This is especially the case, given the widespread doubts expressed about Leonard Cheshire,¹⁸ including by Buxton LJ in the Court of Appeal and in two reports published by the Joint Committee on Human Rights,¹⁹ and given also that the Guidance on Contracting for Services in the Light of the Human Rights Act 1998 is highly unsatisfactory.²⁰ On this issue though, there has at least been significant public debate in England, in a way that does not seem to be taking place in the US, for instance. This public debate has

¹¹ Above 5.4.4.
¹² Above 8.3.2.3.
¹³ D Oliver, ‘The Modernization of the United Kingdom Parliament’ in JL Jowell and D Oliver (eds), The Changing Constitution (5th edn, OUP, Oxford 2004) 256, 258; see also D Oliver, Constitutional Reform in the UK (OUP, Oxford 2003) ch 20. See also above 2.2.2.
¹⁴ Above 4.4.1.1 and 8.3.1.3.
¹⁵ Above 7.4.2.1 and 8.2; Mullins v McFarlane [2006] EWHC 986 (QB); Mullins v McFarlane [2005] EWHC 2197 (Admin); Bradley v Jockey Club [2005] EWCA Civ 1056.
¹⁶ R (Jackson) v AG [2005] UKHL 56, [2006] 1 AC 262 [102], [104].
¹⁷ YL v Birmingham City Council [2007] UKHL 27.
¹⁸ R (Heather) v Leonard Cheshire Foundation [2002] EWCA Civ 366, [2002] 2 All ER 936; and see above 6.3.2.1.
²⁰ Above 8.3.1.3.
obviously been enhanced by the two JCHR reports. Furthermore, the intervention of the Secretary of State for Constitutional Affairs in *YL*, to contend that private contractors operating care homes should be included within the definition of a ‘public authority’, indicates that the government is responding on some level to the concerns raised in this area.\(^{21}\) No doubt though, the public debate on this issue will continue, with attention now shifting to the progress of the Human Rights Act (Meaning of Public Authority) Bill.

In addition, in England, more effective responses to private delegation can be seen in particular statutory frameworks dealing with governmental contracts, such as the Local Government (Contracts) Act 1997 which has modified the emphasis on legality. Meanwhile, there have also been interesting innovations in contract design in England, particularly in the PFI context, which indicate that the government is aware of the challenges associated with private delegation and is responding accordingly.\(^ {22}\) As such, certain of the present inadequacies of the English legal response may be undergoing a process of evolution; and it certainly appears that it will be worth revisiting the English response over the next few years.

### 9.1.2 European Union

In legal doctrinal terms, the EU system seems to fall at the opposite end of the spectrum to the English system, and could be described, in theory at least, as being strict on delegation and strict on private parties. The *Meroni* non-delegation doctrine is particularly important in two respects: it prohibits delegators from delegating discretionary power, and it dictates that a delegator may not delegate more power than it enjoys itself—and thereby requires attachment of any legal controls on the power when exercised by the delegator to the power when transferred to the delegate.\(^ {23}\) The first principle, when allied with Article 57 of the Financial Regulation,\(^ {24}\) limiting the range of powers that may be delegated by the Commission to private actors to non-discretionary and ancillary tasks, provides a significant restraint on the freedom of EU delegators to delegate. The second *Meroni* principle has the potential to control both delegators and delegates, since it means that delegates should be subject to the same legal controls as delegators. Of course, many of the arguments put forward in this book regarding the extent to which *Meroni* should result in administrative, human rights, and damages remedies being available against private delegate have not been tested, and it has to be acknowledged that the ECJ’s application of *Meroni* has usually been very

\(^{21}\) *YL v Birmingham City Council* [2007] EWCA Civ 26, [2007] 2 WLR 1097 [4]; and (n 17) [83].

\(^{22}\) Above 8.3.1.2.

\(^{23}\) Above 4.3.1.

half-hearted. Nonetheless, the strict logic of the doctrine requires that the full rigour of controls imposed on Community institutions be extended to private delegates. As for the Financial Regulation, while to a large extent this represents a specific response to a specific situation, namely the Commission’s difficulties with controlling private delegation, Article 57 demonstrates a clear awareness of the risks associated with private delegation and an effort to control those risks. Added to this is the fact that in the EU many legal obligations which promote accountability, such as rights or administrative law duties, are actually horizontally directly effective—and bind all private actors, including private delegates.

Private delegation in the EU occurs within the context of an entity of contested characterization, which has evolved from an international order to what increasingly resembles a sovereign state. Such delegation has generally also been driven by functional and pragmatic concerns, rather than ideological concerns, in response to the need for expertise, staff, or enforcement capacities by an EU administration which is limited in both size and budget. In many ways, these two features of the EU legal order have rendered it particularly well-equipped to devise appropriate controls of private delegates. First, the Meroni judgment was delivered early in the EU’s history, at a time when an internationalist account of the EU as an entity carried greater weight. Indeed, the third Meroni principle, which requires that a delegation be explicit and not implicit, is part of the wider law of international institutions. The EU, particularly in the absence of ratification of the Draft Constitutional Treaty, has probably not quite yet made a claim ‘of being a political community in its own right rather than merely a delegated and subordinate form of political authority’, and, consequently, delegation is still treated with some circumspection in the EU legal order.

Second, another ambiguity in the EU legal order has enhanced its ability to supervise private delegates, namely the ‘mutating’ distinction between public and private. The ECJ is not so concerned with notions of ‘public’ or ‘private’, but rather with the effectiveness of EU law. The ECJ has given strong horizontal effect to EU legislation and to its own principles, with the aim of ensuring the effectiveness of EU law, and this has had the entirely incidental effect of controlling private delegates. As was explored in Chapter Six, this concern for effectiveness means that often private actors will be bound by EU human rights norms, simply

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25 Above 4.3.1.3.  
26 Above 5.2.1.1 and 5.5.2.  
27 Above 6.3.3.2 and 7.1.  
28 Above 1.2.3 and 2.4.3.1.  
30 Above 2.2.3.  
31 N Walker, ‘EU Constitutionalism and New Governance’ in G de Búrca and J Scott, *Law and New Governance in the EU and the US* (Hart, Oxford 2006) 34. See also above 2.2.3 and 2.3.3.2.  
by virtue of acting within the scope of Community law.³³ When viewed, in turn, in the context of EU administration, the ECJ’s approach seems justifiable. The EU is heavily dependent on national administrations for the implementation of EU law and policies, with the result that many obligations of EU law have had to have far-reaching effect in national legal orders in order to bind the actual EU administrators. As such, the ECJ has also been concerned not to permit national orders to evade EU constraints due to the national organization—whether public or private—of the implementation of a particular EU function.³⁴

9.1.3 United States

In the US, private delegation is framed by a written and entrenched constitutional order, at both state and federal levels, by separation of powers and federalism, and by human rights protections against the federation and the states. There has also been a long history of private participation in governance in the US, albeit that recent private delegation has resulted in the role of government being diminished even further.

The federal and state regimes require separate characterization—although both tend to fall somewhere between the English and EU extremes. At the federal level, the system seems to have moderate controls on delegation and weak controls on private parties. Although the constitutional non-delegation doctrine has been virtually abandoned, the A-76 Circular, discussed in Chapter Five, at least controls and limits executive delegates. The Circular is of uncertain legal enforceability, but if applied properly the ‘inherently governmental’ exclusion from delegation goes beyond procedural limitations on delegators and actually limits the types of task that may be delegated. This, of course, should not be overstated. While valuable, the ‘inherently governmental’ limitation is narrow in scope, and, as was seen, operation of prisons does not fall within it.³⁵ In its response to private delegates, the US federal system is very clearly weak: the state action doctrine is interpreted restrictively, and the Administrative Procedure Act 1946 does not apply beyond federal government agencies. However, one positive is that, by permitting choice of private delegates which is not limited by economic considerations, the US does at least create the possibility that private delegation may be used to enhance participatory democracy.³⁶

The responses of the US states to private delegation obviously vary enormously. However, certain states require characterization as strict on delegation, given their rigorous application of state constitutional non-delegation doctrines—such as was found in the Texas Boll Weevil case discussed in Chapter Four³⁷—and given their

³³ Above 6.3.3.  
³⁴ Ibid and above 2.3.2.2 and 2.4.3.3.  
³⁵ Above 5.3.1.1(a).  
³⁶ Above 5.1, 5.3.1.1(a), and 5.5.1.  
³⁷ Texas Boll Weevil Eradication Foundation Inc v Lewellen 952 SW2d 454, 469 (Tex 1997); and see above 4.2.2.2 and 4.5.
regulatory controls of delegation, which often mirror those in operation at the federal level. States could also generally be described as being moderately controlling of private parties: their administrative procedure acts and state constitutions will rarely apply to private delegates, although they are able to achieve a degree of administrative control of private delegates through recourse to common law rules, and, insofar as they resort to these common law administrative controls, state courts are much stricter on private delegates than their English counterparts.³⁸

At the federal level, a number of factors have contributed to the lack of rigour of the controls. The non-delegation doctrine has been significantly undermined by its association with the *Lochner* era, which, as was outlined in Chapter Two, the Supreme Court seems to regard as the most unimpressive in its history.³⁹ In terms of controls of private delegates, the absence of a federal common law has rendered it difficult for federal courts to develop administrative law principles with application beyond the strict confines of the Administrative Procedure Act 1946.⁴⁰ Meanwhile, the influence of liberalism and interpretivism on constitutional jurisprudence has resulted in narrow understandings of functions ‘traditionally’ performed by the state, and limited the ability of the state action doctrine to impose human rights obligations on private delegates.⁴¹ This was exhibited strikingly in the far-reaching search for a ‘traditional’ state function in the *Spencer v Lee* case⁴² and in judicial consideration of the constitutionality of the qui tam action.⁴³ Contractual controls on private delegates are limited due to similar constraints to those found in England—albeit that third-party beneficiary rights are more developed in the US. An emphasis on legality has also had a similar effect on commercial certainty, as in England.⁴⁴

With regard to states, one important point that can be taken from the different legal reactions of states to private delegation is that there is support for the concept of ‘romantic subnationalism’, discussed in Chapter Two.⁴⁵ In particular, the strict Texas non-delegation doctrine may perhaps have its roots in the strong anti-government tenor of the Texas Constitution, with its emphasis on fragmentation and monitoring of governmental power.⁴⁶ In the context of controls on delegators, at least, given state non-delegation doctrines and civil service mandates, states have not unthinkingly followed their federal counterparts, although it is perhaps regrettable that they have done so in the state action context. This is particularly the case given that many of the reasons which justify verticality at the federal level do not always translate directly to the state context.⁴⁷

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³⁸ Above 7.4.1.2, 7.4.2.2, 7.4.3.2, and 7.4.4.2.
³⁹ Above 2.3.1.1.
⁴⁰ Above 7.2 and also 2.3.1.1.
⁴¹ See, generally, Tushnet (n 1); and above 2.3.1.1 and 6.3.1.1(c).
⁴² 864 F2d 1376 (7th Cir 1989). Above 6.3.1.1(c).
⁴³ *Vermont Agency of Natural Resources v United States, ex rel Stevens* 529 US 765, 773–7 (2000). Above 2.4.1.2 and 4.2.1.2(b).
⁴⁴ Above 8.3.2.3.
⁴⁵ Above 2.2.1.
⁴⁶ Ibid.
⁴⁷ Above 6.2.2.
9.1.4 Overview of the legal systems

Clearly, therefore, of all three systems, it is the EU system which, in theory at least, seems to have developed the most comprehensive response to private delegation and which appears to be the most controlling of this phenomenon. To appreciate why this means that it is the EU which is, in turn, more likely to respond most effectively to private delegation, in accordance with the criteria presented in this book, it is necessary to understand how these different legal controls inter-relate.

9.2 Reviewing the Legal Controls

It was suggested in Chapter One that a proper comparative methodology necessitated a multifaceted review of the three legal systems under scrutiny, since functions performed by constitutional law in one system may well be performed by a statutory regime or administrative law in another. However, as was anticipated, this multifaceted review has not only facilitated the comparative analysis, but it has also served an important purpose of its own. What it has illustrated is that, when responding to private delegation, a complex array of legal controls is required. The relationship between these legal controls requires explication in three stages: first, the relationship between different controls on delegation; second, the relationship between the different controls on the private parties; and third, the overarching relationship between the two categories of control. In the end, each legal mechanism considered in the book plays a unique and important, yet ultimately limited, role in regulating private delegation. Moreover, complex and delicate balancing is often required between the different forms of control, since addressing one concern with private delegation may have the consequence of exacerbating another concern with private delegation.

9.2.1 Controls on delegation

In controlling the power of governmental delegators to delegate to private actors, a non-delegation doctrine of constitutional order, such as the non-delegation doctrine in the US or the EU’s Meroni doctrine—considered in Chapter Four—clearly has the potential to reinforce democratic responsibility, by limiting the extent to which elected actors can delegate important tasks or controversial decisions to private delegates. In this way, a constitutional non-delegation doctrine, like any constitutional control, can operate in a ‘counter-cultural’ way, by protecting against innovations which may be popular—as Chapter Two indicated private delegation has been—but potentially harmful, as Chapter Three

48 Above 1.2.4.
suggested private delegation could be.⁴⁹ Conversely though, such doctrines, where the delegation survives scrutiny, can actually have the more positive effect of conferring legitimacy. As Graham and Prosser have noted, constitutional law is not just a ‘block on the autonomy of governments’, but has an ‘important dimension of legitimization in the formulation and implementation of governmental policy’.⁵⁰ This potential for positive legitimization is absent in England and to a large extent at the US federal level, but has some resonance at the US state level, if a private delegation survives constitutional challenge.

Given the far-reaching consequence of violating a constitutional non-delegation doctrine—usually judicial invalidation—such a doctrine, if effectively enforced, should have a notable influence on government delegators. However, three limitations seem to be inherent in constitutional non-delegation doctrines. First, a non-delegation doctrine may be focused on delegation of only one particular type of power. Although the EU Meroni doctrine is of general application, in the US, at both state and federal level, the focus has been largely on delegation of legislative power. Even though a doctrine, such as that found in the Texas Boll Weevil case, is enormously sophisticated and helpful in controlling private delegation, its potential is limited by the fact that it only applies to legislative power, and does not speak to delegation of executive or judicial power.

Second, based on the systems considered here, the focus of constitutional non-delegation doctrines generally seems to be, although, of course, need not necessarily be, limited to the substance of the delegation, and they do not seem to speak to the process of delegation. Third, operating as a primarily ex post facto control of delegation, a constitutional non-delegation doctrine is dependent on judicial review actually being sought. Thus, as was considered in Chapters One and Two, in the EU, prior to the fall of the Santer Commission, in spite of the theoretically strict Meroni doctrine, widespread delegation in violation of the Meroni doctrine was taking place without legal challenge. This may have been due to a lack of general awareness of what was taking place, caused in turn by the lack of transparency of the delegation process, about which Meroni had nothing to say. Hence, the importance of the specific, regulatory controls examined in Chapter Five emerges. The regulatory controls on delegation in the three systems introduce substantive, procedural, and supervisory controls on governmental delegators, thereby extending well beyond the reach of constitutional doctrine.

In substantive terms, the constitutional controls discussed in Chapter Four and the legislative and regulatory controls discussed in Chapter Five may complement each other. A strict regulatory regime may have the effect of counteracting, at least to some degree, weak constitutional controls. So, for instance, arguably the US Circular A-76 prohibition on outsourcing of ‘inherently governmental’

⁵⁰ C Graham and T Prosser, Privatizing Public Enterprises: Constitutions, the State and Regulation in Comparative Perspective (Clarendon Press, Oxford 1991) 250.
Conclusion

Tasks may compensate, in certain circumstances, for the weakness of the federal non-delegation doctrine. Conversely, as already illustrated by the EU example, constitutional principles, even if they are strict, can be undermined if delegation is poorly regulated. The substantive focus of regulatory regimes also extends beyond the function being delegated, to the delegator’s choice of delegate, and in this way contributes to achieving the goal of efficiency or the alternative goal of participatory democracy, by regulating the criteria available to the delegator for its choice. Regulatory regimes also tend to address the government’s use of its dominium power as a means of delegation, rather than its use of legislation as a means of delegation.

Procedurally, as was seen in Chapter Five, procurement regimes in all three jurisdictions strive to achieve transparency and financial accountability, such as through advertising rules, or detailed methods of cost calculation when awarding contracts. Where a regulatory regime provides for supervision of the governmental delegator, perhaps through requiring demonstration of the success of a particular contract award, it promotes the political accountability of governmental delegators to the electorate; where it requires post-contractual supervision of the delegate by the delegator, it promotes the internal accountability of the delegate to government. Moreover, although obviously ex post facto in its enforceability, a regulatory regime actually provides a very specific ex ante framework of control of the process of delegation.

Yet regulatory regimes also have their inadequacies. First, by their very nature, unlike a constitutional doctrine, they generally only apply to private delegation by executive or, as in the EU case, Commission delegators, and not legislative delegators. Second, as was seen in all three jurisdictions, arbitrary distinctions can be drawn, such as between contract and grant, with the process for awarding the former being much more heavily regulated than the process governing the latter—when, in effect, contract and grant simply constitute different delegation instruments, by which governmental delegators often achieve similar results. Third, without adequate accompanying enforceability mechanisms, regulatory controls can also be ineffective. An inadequate enforceability system has created dissatisfaction with the US A-76 Circular, for example, particularly among federal employees.⁵¹

Further, on regulatory controls, it should be noted that the effects of even one type of control can be variable. Different procurement regimes, for instance, with slightly different emphases, can have different effects for private delegation. Procurement regimes—such as that which applies in the EU and England (because of the EU)—which emphasize ‘economic’ or ‘international’ values will prioritize choice of delegate on the basis of cost, and thereby promote the efficiency and effectiveness goals of private delegation. By contrast, a more ‘political’ model of procurement which adopts a system of set-asides, such as is found in the US, may promote participatory democracy through private delegation, by

⁵¹ Above 5.3.4.2.
ensuring that at least some of the government’s partners are representative of the community in which the particular delegated power will be exercised.⁵²

Finally, employment law controls, such as the state civil service mandate considered in Chapter Four or the TUPE regulations discussed in Chapter Five, require governmental delegators to at least consider whether the principles of ‘openness, merit and independence’, which underpin the civil service, are important for the performance of a particular function.⁵³ They also prevent private delegation being used, or at least being used aggressively, simply as a political tool to break the power of unions.⁵⁴

9.2.2 Controls on private parties

As for the relationship between the different controls on private parties, obviously, extension of human rights obligations to private delegates would, as Chapter Six suggested, eliminate the human rights deficit currently generated by private delegation. Yet the administrative law and freedom of information controls, examined in Chapter Seven, are also necessary for their ability to require reasoned, procedurally fair, and open decision-making on the part of private delegates, in a way that human rights obligations will not necessarily achieve. Indeed, given the extent to which private delegates exercise discretionary choices, the importance of imposing administrative law obligations becomes strikingly evident. What is also particularly important about extending human rights law and administrative law to private delegates is that it provides a means of direct legal accountability of the private delegate to the individual citizen. By contrast, contract law, assuming an appropriately drafted contract, is capable of providing a mechanism for holding the delegate accountable to the government but, as was seen in Chapter Seven, it is much less capable of rendering private delegates directly accountable to citizens. The ability to exclude enforceable third-party beneficiary rights means that, even if contractors are required by contract to comply with human rights obligations, for instance, their incentive to do so will be qualified by the fact that the penalty for breach will not be to face an action in court at the behest of an injured citizen, but rather to suffer a contractual penalty—such as a reduction in the fee paid by government to the contractor for provision of the service. Indeed, even if enforceable third-party beneficiary rights were available, their usefulness would be contingent on there being, at the delegation stage, a degree of democratic participation to ensure that the contract contains terms that are meaningful to citizens—which leads directly to the relationship between the two categories of controls on delegation and controls on private parties.

⁵² Above 5.1, 5.3.1.1(a), 5.4.1.1(b), and 5.5.1.
⁵⁴ Ibid 90–94; and above 2.4.2.1, 2.4.3.1, 4.2.4, and 5.4.1.3.
9.2.3 Controls on delegation and controls on private parties

It is possible that substantive functional limitations on the ability of the delegator to delegate may reduce the need for control of private delegates, simply because a prohibition on delegation of discretionary tasks may reduce the scope of the private delegate’s power. However, such a prohibition obviously does not eradicate the possibility of the private delegate violating a human right. Thus, even in the EU context, a private delegate may merely be exercising an ‘ancillary’ task, as required by Article 57 of the Financial Regulation, such as data collection, yet violate an important human right in the course of performing that task, such as the right to privacy. There is no direct correlation between the type of task delegated and the capacity to infringe human rights. As a consequence, while strict functional controls may enhance democracy by, as stated above, forcing governmental actors to exercise their powers, the human rights challenges posed by private delegation can only be properly addressed by extending human rights obligations to private delegates. Conversely, imposing human rights obligations, such as through the state action concept in the US, ‘does not limit the functions that government can delegate. Instead it “constitutionalizes” after-the-fact delegations that amount to the exercise of public authority’.⁵⁵

Another example to illustrate the relationship between the different controls might involve the process of contracting out. Just because the delegator must comply with detailed regulations designed to achieve cost efficiency in the award of the contract, this does not mean that the contract will actually be performed in an efficient or effective manner. If the substantive contract terms advertised are based on inappropriate performance indicators, then any seeming efficiency gains will have been based on a false premise. At this stage, a proper understanding of contract law and remedies is required to help draft contracts that measure success accurately. Similarly, just because the choice of delegate is rigorously regulated through procurement rules will not mean that sufficient monitoring of the delegate will take place post-award.

9.2.4 Overview of controls

It is sometimes argued that private delegates are subject to so many levels of over-lapping control that certain forms of control become redundant.⁵⁶ It is certainly accepted that this may sometimes, or even often, happen. From the legal perspective however, each individual control mechanism really only seems to achieve a limited and narrow effect. Consequently, to respond fully to the challenges posed by private delegation for efficient and effective governance,

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democracy, accountability, and human rights, a complex system incorporating multiple controls seems to be required.

9.3 Concluding Observations

In concluding, four remarks will be made. First, in light of the immediately preceding discussion and as has been argued throughout this book, in responding to the challenges of private delegation it is necessary to harness a broad array of legal controls. Private delegation is a complex phenomenon that requires a complex response.

Second, arguably the most compelling idea to emerge from this comparative analysis is the principle that one should not delegate more power than one has oneself. Articulated judicially in the Meroni case, this principle should ideally provide a forceful guiding principle for the law’s response to private delegation. Unfortunately, though, the principle is disappointingly undervalued and mostly ignored. In its impact, quite simply, the principle requires that private delegates be treated equivalently to their governmental counterparts. One inevitable consequence of adhering to this would be that public law constraints should be extended to private delegates; this is important if the challenges of private delegation are to be seriously addressed. As demonstrated by the multifaceted perspective, private law doctrines play an important role in control of private delegation—but they do not equate with the constraints available through administrative law and human rights law, and private law cannot compensate for the failure to apply public law constraints to private delegates. Furthermore, applying the Meroni principle would not unduly constrain the practice of private delegation, but it would result in better-controlled delegation.

Of course, it is highly unlikely that the Meroni principle could be adopted outside the EU context, particularly given the EU’s more internationalist origins. To return to Chapter One, it was noted there, adopting Allison’s framework, that any external stimulus should only be incorporated into a legal system where domestic legal doctrine can adapt to the external influence without imperilling its functions; where the internal adaptation can be justified in the legal and political theories underpinning the receiving system; and where domestic institutions and procedures can cope with the proposed doctrinal adaptation. In the US, it would not imperil the legal order to adopt this principle and domestic courts, already exercising an invalidation power, could cope with the doctrinal adaptation. Indeed, a similar suggestion has been made by Metzger, who proposes that a delegation doctrine should be adopted which requires that the delegation be

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structured in such a way as to preserve constitutional accountability⁵⁸; while a very basic statement of the essence of the Meroni principle is found in a different context in the Bousher case, where the Supreme Court noted that the ‘structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess’.⁵⁹ However, US constitutional non-delegation doctrines are predominantly based on separation of powers, a concept which, as has been seen, is more concerned with ensuring that particular types of power are exercised by particular bodies than with the controls which attach to the power, once delegated. Moreover, insofar as a doctrine equivalent to Meroni would entail that private delegates become ‘state actors’ and subject to the relevant constitutional obligations, it is obvious that both state and federal courts would resist it; Meroni does not fit particularly well with the underlying tendency of both state and federal systems to draw a pronounced public-private distinction. Similarly, in England, application of the Meroni doctrine could simply not have a meaningful reception. The judiciary has no power over legislative delegation; and where the executive delegates through contract, the judiciary has been hesitant to intervene, except in the context of local authorities, for example, which exercise limited statutory powers. It is very difficult to envisage how existing procedures could cope with a doctrine equivalent to the Meroni principle. Thus, at best, the Meroni principle can raise awareness about the importance of controlling private delegation; it is not, however, a doctrine which could be easily incorporated into the law of either the US or England.

Third, it is obvious that in the US and England, where there is a strong public-private divide, responding to the challenge of private delegation can be difficult and much will depend on how the divide is defined and understood. In this sense, law is out of step with public administration and sadly it is still the case, as Stone noted over twenty years ago, that despite the ‘growing effacement in traditional distinctions between public and private activities and actors … the law appears determined to work with some distinction along those lines’.⁶⁰ In identifying the reach of human rights and administrative law, the focus should be on the functional equivalence between the private delegate and the governmental actor it is replacing. Nothing more than this should be required. As has been seen, the focus of most substantive controls on delegation has been on whether a task is ‘inherently governmental’ or ‘ancillary’ or ‘discretionary’. Even the rather lax English Deregulation and Contracting Out Act 1994 limits delegation by reference to a functional criterion. Yet, when it comes to controlling private delegates, the importance of functional equivalence diminishes, and other criteria such as source of power, nexus with government, or historical sovereignty take precedence.

⁵⁹ Bousher v Synar 478 US 714, 726.
Also, to be clear, to assert that a private delegate is subject to administrative law and human rights controls insofar as that delegate is performing public functions is not to impose excessive or oppressive controls on that private delegate, or to in some way transform that private delegate into a governmental actor. That private delegate will be free of all such controls when acting outside the scope of any delegated power.\textsuperscript{61} As Freedland has noted in the context of public services, it is necessary for public law to recognize that delegation will involve ‘a redistribution of the responsibility of the State so that it is located in two places instead of one’. If it fails to do this, ‘the State on the one hand and the public-service provider on the other might each be able to escape its responsibility in public law by referring to the other as the proper bearer of that responsibility’.\textsuperscript{62} This recommendation does not even require recourse to Allison’s framework and a functional test is already available to the courts in the US and England. The problem has not been the lack of availability of the test, but rather the courts’ reluctance to apply it.

Finally, and on this very note, in order for these legal systems to respond effectively to the challenges of private delegation, it is necessary for judicial attitudes to change. All of the legal mechanisms discussed in this book are entirely dependent for their effectiveness on judicial attitudes—and, unfortunately, judicial attitudes have rarely been conducive to the control of private delegation. It has often been commented in this book that the judiciary has at its disposal the appropriate mechanisms to control private delegation, but fails to use them. One need only recall the English judiciary’s narrow interpretation of the ‘hybrid’ public body of section 6(3)(b) of the Human Rights Act 1998, the ECJ’s hesitant application of the Meroni doctrine, or the US federal judiciary’s fear of resurrecting the non-delegation doctrine—all testimony to the reluctance of the judiciary to get involved in this context. It is time for the judiciary to realize that the challenge posed by private delegation—to ensure that it promotes efficient and effective governance, without undermining democracy, accountability, or human rights—is a real and serious challenge. As has been seen in this book, there are effective responses to this challenge which fall squarely within the scope of the judiciary’s competence. It can only be through an informed understanding of the various legal controls required, and a vigorous application of these controls by the judiciary, that one can even begin to respond to delegation of governmental power to private parties.

\textsuperscript{61} See CM Donnelly, ‘Leonard Cheshire Again and Beyond: Private Contractors, Contract and s.6(3)(b) of the Human Rights Act’ [2005] PL 785, 805; R v Servite Houses and Wandsworth LBC ex p Goldsmith [2001] LGR 55 (QB) 80 (Moses J referring to ‘the well-settled principle which establishes that merely because some public body is amenable to judicial review it by no means follows that it is reviewable in all its functions’); Freedom of Information Act 2000 s 7(6).

\textsuperscript{62} Freedland (n 32) 7.