2 The Jurisdictional Context of Private Delegation

2.1 Introduction

As was noted in Chapter One, it is important to provide context for the comparison undertaken here and, as will be discussed in Chapter Nine, unsurprisingly, the context in which private delegation occurs in each jurisdiction has an important influence on the legal controls on private delegation which exist in each jurisdiction. The aim of this chapter is therefore to engage in an overview of the setting in which delegation of governmental power to private parties occurs in each of the three jurisdictions. Obviously, a general comparison of these jurisdictions could prove endless. The focus here, therefore, is on those aspects of each jurisdictional setting which most obviously have an impact on private delegation. As such, the structure is threefold and the jurisdictions will be reviewed according to: first, constitutional framework; second, the distribution of governmental power; and third, experience of private delegation. The first section (ie, section 2.2), on constitutional framework, considers the legal and political implications of the particular constitutional setting. The section on governmental power (2.3) reviews both the horizontal distribution of governmental power between the executive, legislative, and judicial actors in each legal system and the vertical distribution of power between different levels of government. The third section (2.4), considering experience of private delegation, presents each jurisdiction’s experience of private delegation from three perspectives: the historical, ideological, and political contexts of private delegation; the uses made of private delegation; and the processes by which private delegation is implemented. Most of the material in this chapter will be well-known to those familiar with the individual legal systems, but providing this background will nonetheless help to illuminate and clarify the discussion in Parts II, III, and IV of this book on the specific legal controls used in each jurisdiction. It will also assist in responding to certain of the risks identified in Chapter One in respect of the use of comparative methodology and, in particular, will facilitate, to revert to Legrand, an appreciation of the ‘mentalité’ of each of the three legal systems.¹

¹ P Legrand, ‘European Legal Systems Are Not Converging’ (1996) 45 ICLQ 52, 60. See above 1.2.1.
2.2 Constitutional Framework

2.2.1 United States

When reviewing constitutional frameworks, the obvious starting point is probably the US. Of the legal systems under scrutiny, it is the only system which—at both state and federal level—possesses constitutions in what might broadly be considered the conventional sense, namely, ‘in the sense of legal rules embodied in one document’.² As Tribe has put it, the US federal Constitution, which dates back to 1789, ‘controls the deployment of governmental power and defines the rules for how such power may be structured and applied’.³ In brief, and as is well-known, the US Constitution establishes a federal system of government⁴; distributes federal power according to a model of separation of powers⁵; and articulates an explicit principle of the supremacy of federal law.⁶

In political terms, the US has a strong national government and a national political community,⁷ of which it has been noted ‘the citizenry is the country and the country is its citizenry’.⁸ Insofar as the federation is concerned, the rights of the states as ‘independent nations’ have been ‘surrendered’, and they are considered as ‘no longer being nations, either as between themselves or towards foreign nations’.⁹ The amendments to the Constitution, which derive primarily from the post-Civil War period, entrench political and civil rights, such as freedom of speech and religion,¹⁰ due process and equal protection,¹¹ and, aside from the Thirteenth Amendment prohibition on slavery,¹² these rights are protected only against infringement by state and federal action. As Strickland has observed, there is a strong sentiment in the US that the central function of the Constitution is to ‘provide a framework for national republican self-governance’, and that the Constitution governs American governments and not Americans.¹³ As will be seen in Chapter Six, this philosophy has had an important impact on the extent to which private delegates of governmental power can be required to comply with constitutional rights.¹⁴ Although contested,¹⁵ the Constitution is also generally

² KC Wheare, Modern Constitutions (2nd edn, OUP, Oxford 1966) 2.
⁴ US Const Art I s 8 and Amend X.
⁵ US Const Arts I–III.
⁶ US Const Art VI cl 2.
⁹ New Hampshire v Louisiana 108 US 76, 90 (1883).
¹⁰ US Const Amend I.
¹³ See below 6.3.3.
deemed to be ‘liberal’ in the sense of restraining governmental action, rather than imposing ‘welfare’ duties or affirmative obligations on the federal government.¹⁶ On such questions as the appropriateness of the delegation of governmental power to private parties, the Constitution has nothing explicit to say, although direct provision of certain governmental services by governmental bodies is envisaged in limited contexts. The US Mint, the Bureau of the Census, the Customs Service and the armed services all derive their authority from specific references in the US Constitution itself.¹⁷ As will be discussed in Chapter Four, however, a non-delegation doctrine with potential to affect private delegation has been inferred from the Constitution, albeit that the doctrine has not been enforced rigorously.¹⁸

US state constitutions are mostly modelled on the federal Constitution, with provisions defining the composition and powers of organs of the state and bills of rights. There are, of course, many variations in state constitutions: they often tend to be more detailed than their federal counterpart,¹⁹ while they can also differ in specific ways from the federal Constitution to reflect local circumstances. For example, the Texas Constitution of 1876 has been described as an ‘intensely anti-government document’,²⁰ sponsored by Confederate veterans angry at Reconstruction, who were fearful of newly enfranchised former slaves and ‘had acquired an abiding prejudice against centralized government of the state and against the powers of government at any level’.²¹ As a result, they sought to fragment governmental power as much as possible and did so with an extremely strongly worded separation of powers clause and a requirement for elected judges.²² Certain of the earlier state constitutions also enshrine very sharp separation of government functions, such as the Massachusetts Constitution of 1780.²³ Similarly, states are entitled to provide greater protection of rights than the federal Constitution, and, for example, a significant number of states

¹⁸ Below 4.2.1.
¹⁹ See, eg, NY Const Arts XIV (Conservation), XV (Canals), XVII (Social Welfare), and XVIII (Housing).
²² Schenkkan (n 20) 300.
enshrine explicit protection against gender discrimination in their state constitutions, which has no equivalent at the federal level.²⁴

Most importantly, though, unlike the federal Constitution, state constitutions are not a grant of power, but a limitation on power²⁵:

The people of the State are the source of all the governmental authority of the State . . . The authority of the people is original. The authority of the government is only derivative.²⁶

All states retained sovereignty on entering into the Union, except insofar as that sovereignty was limited by the US Constitution.²⁷ Thus, unlike Congress, which enjoys enumerated legislative power, the legislative authority of each state possesses inherent sovereignty and all the powers possessed by the Parliament of England²⁸ and can do anything which it is not prohibited from doing by the constitutions of the state or the US.²⁹ That said, though, given the extent to which federal law is able to override state constitutions, state constitutions may seem ‘subsidiary’.³⁰ There is also a division of opinion between those who view state constitutions as being positioned within federalism³¹ and those who understand state constitutions as existing largely independently of the federal constitution. This latter perspective has been criticized as ‘romantic subnationalism’,³² but it has been endorsed by a number of state Supreme Court judges and scholars writing in the tradition of New Judicial Federalism.³³ Moreover, as will be seen

²⁵ See, eg, Huron-Clinton Metropolitan Authority v Boards of Superiors of Wayne, Washtenaw, Livingston, Oakland and Macomb Counties 1 NW2d 430, 433 (Mich 1942).
²⁷ See, eg, Tex Const Art I s 1; Cal Const Art III s 1; Mass Const Preamble.
³⁰ J Rossi, ‘The Puzzle of State Constitutions’ (2006) 54 Buffalo L Rev 211, 211–12. Rossi notes that even a state constitution which provides for stronger privacy protections than the US Constitution could be pre-empted by federal legislation authorizing federal officials to invade the privacy of individuals, for example, during a time of war or to respond to a terrorist crisis.
³² Ibid 21; see also 53–79.
³³ Rossi (n 30) 217–18. This is the view frequently associated with Justice Brennan’s call for state courts to ‘step into the breach’ left by conservatism in the US Supreme Court’s rights jurisprudence: WJ Brennan Jr, ‘State Constitutions and the Protection of Individual Rights’ (1977) 90 Harvard L Rev 489, 503. See also JS Kaye, ‘Dual Constitutionalism in Practice and Principle’
throughout the course of this book and particularly in Chapter Four, in many respects, private delegation is treated quite differently at the state level from the federal level, which may indeed add some support to the proponents of ‘romantic subnationalism’.34

2.2.2 England

As Tomkins has noted, ‘[t]he first thing anyone learns about English public law is that in England the constitution is unwritten’.35 Rather than being a framework of comprehensive overarching principles which can be found in a written document, the English Constitution is ‘the product of experience and experiment’36 and has evolved historically from multiple sources. Thus, there are rules which have been described as ‘customary in origin’37; rules that are derived from statute; rules which have developed in case law; and rules that are principles of conduct, such as constitutional conventions, which are considered politically binding though they are not justiciable.38 Recently, there has been an emergence in UK constitutional law of statutes which may be considered to be of a ‘higher legal order’39 or ‘constitutional’ in nature,40 perhaps signifying a move away from the primarily political and ‘pragmatic empiricist’ nature of UK constitutionalism to a more ‘ideologically driven’41 and ‘law-based constitutionalism’.42 A ‘constitutional’ statute conditions the legal relationship between citizen and state in some general, overarching manner, or enlarges or diminishes the scope of what are regarded as fundamental constitutional rights.43 Examples of such statutes include the European Communities Act 1972, the Human Rights Act 1998 ‘the

[34] See, eg, below 4.2.
[37] Munro (n 36) 1.
[42] D Oliver, ‘The Modernization of the United Kingdom Parliament’ in Jowell and Oliver (n 41) 256, 258; see also D Oliver, Constitutional Reform in the UK (OUP, Oxford 2003) ch 20.
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HRA), and the 1998 devolution acts. However, constitutional statutes can still be overridden by subsequent statutes; and it remains the case that the UK:

is unusual among modern democratic states in its system of government, in that it lacks a comprehensive constitutional charter which establishes and gives limited powers to the institutions of government; confers and protects the civil and political rights of citizens and others within the United Kingdom; may be repealed or amended only in accordance with special procedural requirements; and enjoys particular sanctity.⁴⁶

Unlike in other jurisdictions, where constitutions are prior to the system of government and ‘involve an authority outside and above the order they establish’, in England constitutional law is often criticized for ‘being a body of descriptive law which functions by collapsing what ought to be into what is’. It is capable of offering an account of how government has come to be ordered, but if seeking ‘governing principles’ in English constitutional law, ‘we find ourselves listening to the sound of silence’. Naturally, it is true that there is ‘silence’ in most written constitutions on many issues of fundamental importance that are eventually resolved by courts and, more specifically, it is also true that, apart from a few exceptions, most constitutions including the EU and as noted above, the US constitutions, are silent on the exact issue of delegation of governmental power to private parties. Nonetheless, as will be seen in Chapters Four and Five, the absence of strong constitutionalism has had a marked effect on legal control of private delegation in England. As Graham and Prosser have noted in the context of privatization, the British government ‘has been remarkably free of legal constraints in its policy-making’.⁵³

⁴⁴ The Scotland Act 1998 and the Government of Wales Act 1998 are specifically mentioned by Laws J in Thoburn (n 43) [62]. Presumably, the Northern Ireland Act would also be included. Additional examples are Magna Carta 1297 (25 Edw 1); the Bill of Rights 1689 (1 Will & Mary sess 2 c 2); the Union with Scotland Act 1706 (6 Anne c 11); and the Reform Acts which redistributed and enlarged the franchise (Representation of the People Acts 1832 (2 & 3 Will 4 c 45), 1867 (30 & 31 Vict c 102) and 1884 (48 & 49 Vict c 3)): Thoburn (n 43) [62].

⁴⁵ At most, the subsequent statute would have to expressly override the earlier ‘constitutional statute’, as, according to one theory, such statutes are not subject to the doctrine of implied repeal: Thoburn (n 43) [63] (Laws J).


⁴⁷ Ridley (n 38) 103.


⁴⁹ Ibid 270.


⁵² See below 4.4, 4.5 and 5.4.1.1.

⁵³ C Graham and T Prosser, Privatizing Public Enterprises: Constitutions, the State and Regulation in Comparative Perspective (Clarendon Press, Oxford 1991) 1.
2.2.3 European Union

At the other end of the spectrum from the US, of the three legal systems it is in the EU context that the discussion of constitutionalism is most contentious and, indeed, ‘the very idea that the EU is the type of entity that ought to be conceived in constitutional terms is itself a matter of ideological controversy’. The EU is based on a number of founding treaties, principally the Treaty establishing the European Community (‘EC Treaty’) (as amended) and the Treaty on European Union (‘TEU’). The TEU, as amended, sets out the broad decision-making framework for the EU, in which there are three broad ‘pillars’ or spheres of public policy: the first pillar is the European Community; the second pillar is Common Foreign and Security Policy; and the third pillar is Police and Judicial Cooperation in Criminal Matters.

For the ECJ, description of the EU treaty structure as ‘constitutional’ has never been problematic, and as far back as 1987 the ECJ described the (then) EEC Treaty as constituting ‘the basic constitutional charter’ of the Community. However, for the peoples of Europe, conceiving of the EU in constitutional terms has been difficult, as illustrated most obviously in the failed ratification of the Draft Treaty establishing a Constitution for Europe (‘Draft Constitutional Treaty’) in French and Dutch referenda in 2005, with the result that it was subject to a ‘period of reflection’. Many theories have been offered to describe the nature of the EU and its evolution and, of course, whether the entity can be described as ‘constitutional’ is dependent on one’s understanding of this ‘much contested’ concept. At this stage, though, it is probably generally agreed by most that the basic Treaties forming the Union—most notably the EC Treaty and the TEU—together with the jurisprudence of the ECJ, ‘display the minimal content of a constitution’, albeit that the term might not necessarily be written

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55 TEU Title V.
56 TEU Title VI.
59 Draft Treaty establishing a Constitution for Europe Art IV-443(4); Declaration of the European Council (18 June 2005). The Treaty will not now be adopted and instead a ‘Reform Treaty’ will be proposed: see Council of the European Union, Presidency Conclusions, 21/22 June 2007 11177/07.
61 J Scott and J Holder, ‘Law and New Environmental Governance in the European Union’ in de Búrca and Scott (n 54) 211, 236.
with a capital letter.\textsuperscript{63} Certainly, in a minimal sense, the Treaties perform the primary function performed by any national constitution in the sense of legalising political rule.\textsuperscript{64}

However, one important feature missing from the EU’s constitutional architecture is that, while the TEU notes that the EU is ‘founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States’,\textsuperscript{65} the EU as an entity has never been validated by a process of constitutional adoption by a European \textit{demos}.\textsuperscript{66} The EU’s political power is not derived directly from the people of Europe, but is mediated through the Member States.\textsuperscript{67} It has been noted many times that there is no European civil society as such and that influence and responsibility tend to run vertically from the national governments to their supranational representatives, rather than horizontally through transnational party structures or interest groups.\textsuperscript{68} It is also only to a very limited extent that Europeans regard themselves as being part of a common polity,\textsuperscript{69} which renders notions of European citizenship problematic.\textsuperscript{70}

Furthermore, the ‘traditional link between constitutionalism and statehood’\textsuperscript{71} adds to the contentiousness of the use of ‘constitutional’ in reference to the EU.

\textsuperscript{63} Andenas and Gardner (n 62) 3.


\textsuperscript{65} TEU Art 6.


\textsuperscript{67} Grimm (n 64) 291.


\textsuperscript{69} Moravcsik (n 68) 178; Grimm (n 64) 294–6; E Fisher, ‘The European Union in the Age of Accountability’ (2004) 24 OJLS 495, 502.

\textsuperscript{70} See EC Treaty Arts 17–22; Grimm (n 64); but see D Kostakopoulou, ‘Ideas, Norms and European Citizenship: Explaining Institutional Change’ (2005) 68 MLR 233 (especially the discussion on constructive citizenship at 242–3).

\textsuperscript{71} Walker (n 54) 17.
Founded in 1951 as a European Coal and Steel Community among six Member States, 'the EU has grown in fits and starts through a series of Treaty revisions and the adoption of common policies'. While the market may remain fundamental to the evolution of the EU legal order, it certainly no longer provides an adequate account, and the tension between the economic and social and political goals of the EU has been documented extensively. Moreover, while certain commentators continue to adhere to a primarily internationalist account of the EU, or describe the EU as a limited purpose 'regulatory state' engaged in 'regulatory federalism', there are those who note that there 'simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community'. Again, the last narrative finds particular support in the jurisprudence of the ECJ, which in the 1960s described the Community as a 'new legal order for the benefit of which the States have limited their sovereign rights, albeit in limited fields' and has since referred to Member States having limited their sovereign rights 'in ever wider fields'. In terms of Europe's future, some wish for further integration; some fear bureaucratic despotism if integration deepens; and others see an evolution to unity, without a corresponding evolution to statehood. There are also those who contend that the EU demonstrates similar qualities to the emerging US federation of the 1700–1800s. Here again, the absence of a 'Staatsvolk' or 'Demos' distinguished from others by a sense of social cohesion through a common language, culture, creed, and origin and connected to a state is important, and for some means that a state-like entity can never be viable for the EU.

It is clearly beyond the remit of this chapter to proffer a position on how the entity of the EU should be described, but it is helpful to highlight certain features of the EU system which generate the debate. Certainly the EU exhibits certain

72 JD Donahue and MA Pollack, 'Centralization and Its Discontents: The Rhythms of Federalism in the United States and the European Union' in Nicolaïdis and Howse (n 66) 73, 95.
74 See, eg, P Davies, 'Market Integration and Social Policy in the Court of Justice' (1995) 24 Industrial L J 49.
76 G Majone, Regulating Europe (Routledge, London 1996); Moravcsik (n 68) 163.
77 K Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 American J of Comparative L 205, 220.
84 For an extensive discussion of this theory, see JHH Weiler, 'Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision' (1995) 1 Eur L J 219.
statal and federal qualities, at least in ‘a broad sense’. It is a multidimensional polity that recognizes different levels of governance, each with the power to regulate within a sphere of competence, which the Draft Constitutional Treaty would have made more explicit. Due to the principles of supremacy and direct effect, developed by the ECJ although not envisaged by the original Treaty, Community law has primacy over national law and Community law can be enforced by individuals in national courts against Member States and, as will be seen in Chapter Six, against a range of non-Member State actors. The EU exercises power within the territory of the Member States; it has the capacity to enter into treaties; it is not subject to the sovereignty of any entity external to the EU; it is empowered to regulate movement across and within its borders; it grants citizenship, albeit that this is dependent on nationality of a Member State rather than derived from the EU directly; and it confers various rights on those citizens. Nonetheless, the EU lacks sovereign power in such matters as foreign policy, security and defence policy, and criminal matters. The EU does not claim to be a state on the international plane; it is not recognized as a state by other states, and it could be said to lack a fully effective government, as evidenced, among other things, by the lack of any central taxation. Moreover, it appears that there is no clear political will in the Member States for the EU to be a fully-fledged state, at least in light of the failed ratification of the Draft Constitutional Treaty.

In the end, perhaps one is required to accept Walker’s assessment:

We cannot find firm epistemological ground beyond the world-views of the different disciplines upon which to declare that the new order is either international (and intergovernmental) or constitutional (and supranational), or even that is more of one than of the other, for it is entirely in keeping with the canons of internal consistency for internationalists to conceive of it one way and for constitutionalists to conceive of it the other.

In spite of their indeterminacy, these debates are very relevant for any discussion of private delegation. First, to some extent the very notion of delegation itself has been deeply embedded in the evolution of the EU with, as noted above, power being mediated from the people to the EU through Member States. However, if the EU conceives of itself in constitutional terms, it is making a claim ‘of being a political community in its own right rather than

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85 Meltzer, (n 7) 39.
87 Van Gend en Loos (n 78). See also below 6.3.3.2.
88 Van Gerven has deemed this, alongside the absence of a desire for statehood on the part of the Member States, to be determinative in concluding that the EU is not a state: W van Gerven, *The European Union: A Polity of States and Peoples* (Hart, Oxford 2005) 38.
89 Ibid 38–9.
91 Above 2.2.3.
merely a delegated and subordinate form of political authority’.\(^9^2\) On the delegation account, private delegation constitutes another layer of delegation in an already complex system of delegated powers; on the constitutional account, it can perhaps be considered to be more easily traceable to the ‘political community’.\(^9^3\) Second, where private delegation is concerned, as will be discussed further in Chapter Three, the absence of a sense of demos can undermine one of the primary justifications for private delegation, namely, the enhancement of participatory democracy through greater involvement of citizens in governance.\(^9^4\) In this respect, such provisions as Articles I-46 and I-47 of the Draft Constitutional Treaty would have had potential relevance in proposing respectively, first, that ‘decisions shall be taken as openly and as closely as possible to the citizen’, and, second, that Union institutions ‘maintain an open, transparent and regular dialogue with representative associations and civil society’. Such provisions have the potential to constitutionalize private delegation or, at least, certain forms of private delegation.

### 2.3 Distribution of Governmental Power

#### 2.3.1 United States

##### 2.3.1.1 Horizontal distribution of governmental power

Reflecting the belief of the Framers that the best form of republican government includes the regular distribution of powers into distinct departments\(^9^5\) and their concern not to replicate the unlimited executive power of the prerogative exercised by George III,\(^9^6\) the federal Constitution distributes federal power horizontally in accordance with the doctrine of separation of powers.\(^9^7\) Influenced by the writings of English commentators on the Glorious Revolution,\(^9^8\) the Framers believed it to be essential that no department, branch, or level of government be empowered to achieve dominance on its own,\(^9^9\) and envisaged the doctrine of separation of

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\(^9^2\) Walker (n 54) 34.

\(^9^3\) See further below 3.3.6.

\(^9^4\) See further below 3.3.1.


\(^9^6\) *Youngstown Sheet & Tube Co v Sawyer* 343 US 579, 641 (1952) (Jackson J concurring). Alexander Hamilton traced the history of power in the King’s hands and distinguished the new constitution from the British system of government: A Hamilton, ‘The Federalist No 26’ in Ball (n 95) 119, 120–21.

\(^9^7\) US Const Arts I–III.

\(^9^8\) Sarvis, (n 28) 318.

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powers ‘as the absolutely central guarantee of a just Government’.¹⁰⁰ The doctrine is implemented in a ‘partial’ sense,¹⁰¹ such that while legislative, executive, and judicial powers are vested in the legislature, executive, and judiciary respectively, each organ of the state also exercises checks and balances on the others. Examples of the checks include the executive veto power¹⁰² and Congress’ Appointments Clause,¹⁰³ and, although not explicit in the Constitution, the judiciary has the power to invalidate laws for unconstitutionality.¹⁰⁴

Of course, in practice, the doctrine of separation of powers has been given a pragmatic interpretation in US constitutionalism,¹⁰⁵ since, as Wertkin has put it, following ratification of the new Constitution in 1789 ‘the legal and political norms that coalesced so nicely in nondelegation theory proved unmanageable in practice’.¹⁰⁶ It was accepted quickly that, to enable society to function effectively, it would be necessary to delegate legislative power to other institutions¹⁰⁷; and it was also accepted quickly that administrative agencies would be required, with the first two agencies being established in 1789¹⁰⁸ and the high-profile Interstate Commerce Commission following in 1887.¹⁰⁹ The rise of the administrative ‘fourth’ branch of the state was most pronounced in the New Deal era, and resulted in the creation of administrative agencies, which perform legislative, executive, and to some extent judicial tasks, and which do ‘not embody what most Americans would recognize as the constitutional doctrine of separation of powers’.¹¹⁰ Commentators now also increasingly direct attention to the new challenges posed by the role of private actors in administration.¹¹¹ As will be explored in detail in Chapter Four, the separation of powers enshrined in the


¹⁰² US Const Art I s 7.

¹⁰³ US Const Art II s 2.

¹⁰⁴ *Marbury v Madison* 5 US 137 (1803).

¹⁰⁵ P Nelson, ‘Power to the People? Local Government’s Triumph over Legislative Intent in FM Properties Operating Co v City of Austin’ (2002) 38 Houston L Rev 1521, 1523; see, eg, *Opp Cotton Mills Inc v Administrator of Wage & Hour Division of Department of Labor* 312 US 126, 145 (1941) (Stone J noting: ‘In an increasingly complex society Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy.’).


US federal Constitution has provided the foundation for a constitutional non-delegation doctrine; however, that doctrine has been applied very flexibly when faced with the practical realities of governing.

With regard to the content of the separated powers, the US Constitution only delineates a small number of constitutional executive powers and by contrast with Article III's detailed account of the law-making powers of the two Houses of Congress, Article II of the US Constitution mainly provides that the President is to be Commander in Chief, is to take care that the laws are faithfully executed, is to make treaties with the advice and consent of the Senate, and is to make certain ambassadorial appointments.¹¹² Thus the focus of the US Constitution is very much on controlling federal legislative power, rather than on controlling federal executive power.¹¹³

As for the judiciary, considering how often we hear of the involvement of the US Supreme Court in controversial issues of federal policy such as abortion and equality, it is perhaps surprising to learn that the constitutional position of lower federal courts is not entirely secure. First, Article III of the federal Constitution grants Congress discretion to create lower federal courts and to define the jurisdiction of the tribunals it establishes.¹¹⁴ As a result, a federal court may only adjudicate a case if there is both constitutional and statutory authority for federal jurisdiction,¹¹⁵ the latter requirement reflecting Congress's power to determine the jurisdiction of lower federal courts.¹¹⁶ Second, while Article III, section 2 grants original jurisdiction to the Supreme Court in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, in all other cases the Supreme Court enjoys only appellate jurisdiction with such exceptions and under such regulations as Congress shall make. Thus the very existence of US federal courts, placed at the discretion of Congress by Article III of the federal Constitution, is relatively precarious.¹¹⁷ Indeed, the ‘traditional’ view of Article III has been that ‘Congress may deprive the lower federal courts, the Supreme Court, or all federal courts of jurisdiction over any cases within the federal judicial power, excepting only those few that fall within the Supreme Court’s original jurisdiction’¹¹⁸—albeit that adherents to this view almost never advocate the use of such jurisdiction-stripping power.¹¹⁹ Scholars differ in their accounts of the degree to which Congress may

¹¹² Noted in P Craig and A Tomkins, ‘Introduction’ in Craig and Tomkins (n 23) 2; and ibid, EA Young, ‘Taming the Most Dangerous Branch: The Scope and Accountability of Executive Power in the United States’ 161, 164–5.
¹¹³ Tomkins (n 35) 132.
¹¹⁴ US Const Art III s 1.
¹¹⁶ Chemerinsky (n 115) 260–61 § 5.1. See also 7.2 below.
¹¹⁹ Dubinsky (n 117) 301.
withhold Article III jurisdiction from the Court, but the opinion that significant withholding could occur is almost universal.¹²⁰ As will be seen in Chapter Seven, in particular, these jurisdictional limitations of the federal courts have had an impact on their ability to respond to private delegation: for example, federal courts have been constrained in the scope of their application of administrative law obligations to that permitted by legislation.¹²¹

That said, of course, unlike in England, it is the judicial branch which ‘has the last word’,¹²² largely due to Chief Justice Marshall’s opinion in Marbury v Madison.¹²³ The Supreme Court’s exercise of its ‘strong-form review’¹²⁴ has often brought it into controversy, perhaps most notably in the Lochner era jurisprudence,¹²⁵ which has been described by Dworkin as the ‘whipping boy’ of American constitutional law.¹²⁶ As is well-known, the Lochner era involved a series of cases, starting in 1897¹²⁷ and ending in 1937,¹²⁸ during which the Supreme Court repeatedly championed liberty of contract through a substantive due process doctrine and adopted a restrictive interpretation of the Commerce Clause, at the expense of legislative efforts for social reform. The Lochner cases have generated much academic commentary, including revisionist and even counter-revisionist movements¹²⁹; and have generally cast a significant shadow over judicial constitutional thinking,¹³⁰ often being treated as a ‘central’ example ‘of how courts should not decide constitutional cases’.¹³¹ Bernstein has even documented the large number of occasions on which Supreme Court Justices


¹²¹ Below 7.2.


¹²³ Above n 104.


¹²⁷ Allgeyer v Louisiana 165 US 578 (1897).

¹²⁸ West Coast Hotel v Parrish 300 US 379 (1937).


across the political spectrum have used *Lochner* ‘as a negative touchstone with which they verbally bludgeon their colleagues’.¹³² As will be seen in Chapter Four, this negative reaction to the *Lochner* era jurisprudence has arguably also had an important influence on the federal judiciary’s unwillingness to apply the constitutional non-delegation doctrine vigorously.¹³³

Three further points should be made regarding the federal judicial order. First, again as will be considered in Chapter Four, an important distinction is drawn in federal constitutional jurisprudence between Article III courts and tribunals established by Congress pursuant to its Article I powers.¹³⁴ The life tenure and salary protection conferred on Article III judges seek to guarantee political independence, in a way which is not sought in respect of the members of Article I tribunals.¹³⁵ Second, ‘interpretivism remains a dominant force in constitutional interpretation in America’, by contrast with the EU where, as will be seen, ‘teleological or purposive interpretation has gained acceptance…—largely without criticism’.¹³⁶ Third, the legal order clearly recognizes a public-private distinction, evidenced most notably by the state action doctrine, which only imposes constitutional obligations on ‘state actors’. The importance of interpretivism and the public-private distinction emerges most notably in Chapter Six, where the question of binding private actors by human rights obligations is considered,¹³⁷ while the public-private distinction is also relevant to the Chapter Eight discussion of tortious actions involving private delegates of governmental power.¹³⁸

Meanwhile, at the state level in the US, for the most part, the people of each state have delegated the government’s powers to three separate departments: legislative, executive, and judicial.¹³⁹ Similarly to the federal Constitution, most constitutions provide for bicameral legislatures and for separation of powers—although, as noted above,¹⁴⁰ the separation and accompanying checks and balances are sometimes stronger than those found in the federal Constitution.¹⁴¹

¹³² Bernstein (n 129) 1 fn 2. See also S Choudhry, ‘*The Lochner Era and Comparative Constitutionalism*’ (2004) 2 Intl J of Constitutional L 1.

¹³³ Above 2.2.1 and below 4.2.1.3.

¹³⁴ Article I s 8 cl 9.

¹³⁵ US Const Art III s 1.


¹³⁷ Below 6.3.1.1; and see also below 9.1.3.

¹³⁸ Below 8.4.2.1(a).

¹³⁹ See, eg, *Bonner v Bel sterling* 138 SW 571, 574 (Tex 1911) (on delegation by the people) and NY Const Arts III, IV and VI; Cal Const Arts IV, V and VI; Miss Const Arts IV, V and VI; and Alaska Const Arts II, III and IV.

¹⁴⁰ Above 2.2.1.

¹⁴¹ See, eg, Or Const Art III s1; Tex Const Art III ss 3, 4, 22; Art IV ss 2, 9, 24; Art V ss 2, 4, 6, 7, 11, 15, 30; *Vinson v Burgess* 773 SW2d 263, 266 (Tex 1989); HA Calkins, ‘The Need for Constitutional
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That said, just as with the federal government, states have generally embraced government by administrative agency, combining legislative and adjudicative powers with executive powers. An important point of distinction between state and federal horizontal distribution of power, however, is found in the internal structure of each of the three branches of government. While the federal executive is a unitary executive, entirely under the command, direct or indirect, of the President, most states have a divided executive, with perhaps an executive council and separate elections for the Governor or other key officials, such as an attorney general. The federal Congress is full-time, and in more or less continuous session, but the legislatures of most states are part-time. While federal judges are appointed for life, many states’ judges are elected or are appointed for only fixed terms. However, state courts ordinarily have original concurrent jurisdiction over claims based on federal law and original exclusive jurisdiction over federal issues that arise by way of defence or counterclaim to a state law cause of action.

2.3.1.2 Vertical distribution of governmental power

The Constitution structures the federation vertically by enumerating the specific powers available to the federal government. Most significantly, Congress has the power to ‘regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes’, and provision is made for federal spending powers. As discussed above, residual sovereignty is reserved explicitly to state government and to the people by the Tenth Amendment. It is also implicit from such constitutional clauses as the prohibition on any involuntary reduction or combination of a state’s territory, the Privileges and Immunities Clause,


¹⁴² Schenkkan (n 20) 297; Johnson (n 108) 458–79.
¹⁴³ See, eg, Johnson (n 108) 460 (New Hampshire has an Executive Council and Governor).
¹⁴⁷ US Const Art I s 8.
¹⁴⁸ Ibid cl 3.
¹⁴⁹ US Const Art I s 8 cl 1–7.
¹⁵⁰ For useful discussion, see Printz v US 521 US 898, 918–19 (1997).
¹⁵¹ US Const Art IV s 3.
which refers to the ‘Citizens’ of the states,¹⁵² the amendment provision which requires the votes of three-fourths of the states to amend the Constitution,¹⁵³ and the Guarantee Clause, which ‘presupposes the continued existence of the states and . . . those means and instrumentalities which are the creation of their sovereign and reserved rights’.¹⁵⁴ This federal-state distribution of powers was considered by the founders to enhance the quality of electoral representation,¹⁵⁵ and an important principle of federal constitutional law, expounded most notably by the Rehnquist court and based on the Tenth Amendment, is the ‘anti-commandeering doctrine’. This doctrine prevents Congress from compelling states to enact, administer or enforce a federal regulatory programme.¹⁵⁶ The main reason for the anti-commandeering principle is that both the federal and state government should bear entire responsibility for their own acts when facing the electorate. It would therefore be unacceptable to oblige the elected state officials to pass legislation which they were not free to decide upon but for which the voters could hold them politically accountable.¹⁵⁷

Nonetheless, in the post-New Deal era of expansive federal power and in spite of the Rehnquist court’s attempted revival of federalism in its strict application of the anti-commandeering doctrine, the balance has tilted in favour of national power¹⁵⁸ and states are increasingly called upon to implement federal programmes. In general, US federal programmes can be executed by federal agencies, either by themselves or through contracts with private actors; or they can be implemented through engagement of the assistance of states. The former method of administration may promote ‘dual federalism’, according to which states are deemed to be autonomous actors separated from federal government,¹⁵⁹ and federal and state authority are divided into ‘two uncoordinated domains’,¹⁶⁰ each with their own programmes in a particular area. This concept of federalism no longer

¹⁵² US Const Art IV s 2.
¹⁵³ US Const Art V.
¹⁵⁴ US Const Art IV s 4.
¹⁵⁵ See, eg, J Madison, ‘The Federalist No 10’ in Ball (n 95) 40 (suggesting that the delegation of national and international issues to the federal government and local issues to the state governments produces a class of representatives that are acquainted with and responsive to both sets of issues).
¹⁵⁷ *New York* (n 156) 168–9.
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enjoys widespread support in either practice or federal court jurisprudence.\(^{161}\) Alternatively, execution of federal programmes by federal agencies may exemplify ‘pre-emptive federalism’, as found in regimes such as the Employee Retirement Income Security Act (‘ERISA’),\(^{162}\) where federal agency action will pre-empt and preclude all state administrative action in the relevant field.

By contrast, where the assistance of states is enlisted to execute federal programmes, what is known as ‘cooperative federalism’ is promoted.\(^{163}\) As Rossi notes, ‘[o]ften the federal government offers a “carrot” for state or local compliance, providing funding for programs such as welfare, Medicaid, or public school standards and testing.’\(^{164}\) The assistance will be awarded—either through a grant or what is known as a cooperative agreement—to the state, for the performance of the federal task, which the state may perform itself or contract out.\(^{165}\) By offering assistance in return for state implementation the federal government cannot be said to be ‘commandeering’ state officials, since the state will have the option of refusing the assistance.\(^{166}\) Notable programmes engaging state assistance include the Personal Responsibility and Work Opportunity Reconciliation Act 1996,\(^{167}\) which provides for grants to states to administer welfare programmes,\(^{168}\) and the Telecommunications Act 1996,\(^{169}\) which institutes a regulatory regime conferring authority on both federal and state agencies to open local telephone markets to competition. In such cooperative federalism regimes:

Congress and the federal agency bear responsibility for setting forth the basic framework within which state agencies can act, defining relevant federal statutory terms, and instituting uniform minimum standards. State agencies then can supplement that framework and experiment with regulatory approaches that are consistent with it.\(^{170}\)

The anti-commandeering doctrine and the general emphasis on state sovereignty in the US legal order are important for the consideration of private delegation, and may mean that private delegation, as part of a scheme of cooperative federalism, can have a ‘political advantage’\(^{171}\) over other forms of governance.

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\(^{162}\) 29 USC §§ 1001 et seq; see also Weiser (n 160) 1697.

\(^{163}\) Weiser (n 160) 1692.


\(^{165}\) The anti-commandeering doctrine and the general emphasis on state sovereignty in the US legal order are important for the consideration of private delegation, and may mean that private delegation, as part of a scheme of cooperative federalism, can have a ‘political advantage’ over other forms of governance.

\(^{166}\) See, eg, South Dakota v Dole 483 US 203, 210 (1987); New York (n 156) 166–7 and 174.

\(^{167}\) 42 USC §§ 601 et seq.

\(^{168}\) Ibid § 602.

\(^{169}\) Pub L No 104-104, 110 Stat 56 (codified as amended in scattered sections of 47 USC).

\(^{170}\) Weiser (n 160) 1697–8.

\(^{171}\) CK Leman, ‘Direct Government’ in Salamon (n 17) 48, 63.
This can be, first, because state resources will not necessarily be available to the federal government for implementation of federal programmes, and the option of private delegation means that state administrative resources will not have to be used; and, second, because states, while willing to accept federal conditions imposed on their arrangements with private delegates, would be unlikely to tolerate a similarly large federal role ‘if it were exerted directly’ on them.¹⁷²

2.3.2 England

2.3.2.1 Horizontal distribution of governmental power

The principle of separation of powers does exist in English constitutionalism, and was articulated in 1611 in the *Case of Proclamations*.¹⁷³ Traditionally, it has not fared particularly well, with overlapping of both personnel and functions between the organs of state. In terms of overlapping personnel, the most prominent examples of undermining of the principle include executive dominance in the legislature and, in the past, the much-criticized role of the Lord Chancellor, as head of the judiciary, member of Parliament in the House of Lords, and minister in the Cabinet who has even fund-raised for the government.¹⁷⁴ Functionally, perhaps the most significant breach of the principle is exemplified by the executive’s ever more extensive exercise of delegated legislative powers¹⁷⁵—a natural development given the increasing complexity of modern government¹⁷⁶—and, in particular, Henry VIII clauses, which permit the executive to amend primary legislative acts.¹⁷⁷

All this said, it is undeniable that, as certain commentators have contended, the English constitution demonstrates a partial separation of powers with checks and balances between the institutions¹⁷⁸ and, more particularly, that it demonstrates an increasing emphasis on judicial independence.¹⁷⁹ Article 6 of the

¹⁷² Ibid. For examples of federal controls on private delegation arrangements in these types of programme see below 8.3.2.2(b).
¹⁷³ (1611) 12 Co Rep 74, 75–6.
¹⁷⁸ Barendt (n 101) 614–15.
¹⁷⁹ Le Sueur (n 174) 337 (noting that the principle of judicial independence provides a ‘firmer basis for British constitutional arrangements’).
ECHR, incorporated by the HRA, has been interpreted as intended to uphold the rule of law and separation of powers and to ensure that executive bodies do not exercise judicial sentencing powers.¹⁸⁰ The Constitutional Reform Act 2005 also seeks to further the principle of judicial separation, first, by requiring the Lord Chancellor, ministers of the Crown, and all with responsibility for matters relating to the judiciary or the administration of justice to ‘uphold the continued independence of the judiciary’ and, second, by establishing a new Supreme Court, separate from the House of Lords.¹⁸¹

In terms of the balance of power between the three organs of state, in legal theory at least, it is the doctrine of parliamentary sovereignty which continues to dominate. Historically, the great advocate of the doctrine was Dicey, for whom ‘the legally sovereign power is assuredly … nothing but Parliament’.¹⁸² A ‘classic’ statement of the doctrine is found in the case of *Madsimbamuto v Lardner-Burke*, in which Lord Reid indicated that it may be unconstitutional or improper for Parliament to do certain things for moral or political reasons, but this did not mean that it was beyond the power of Parliament to do such things.¹⁸³ In more recent times, the doctrine (and Dicey) has been subject to harsh criticism and, as has been noted, ‘Dicey is not fashionable these days’.¹⁸⁴ Commentators point to the fact that, actually, it is the executive that controls the legislature and that, due to inadequacies of time and procedure, legislation and delegated legislation are frequently enacted without being subjected to adequate parliamentary scrutiny. Arguably, there has been a move from ‘parliamentary government’ to ‘government by party’.¹⁸⁵ Other commentators dispute the very idea that parliamentary will is sovereign, especially in the light of such developments as the European Communities Act 1972 and devolution.¹⁸⁶ There are even those who argue that parliamentary sovereignty is no more than a relatively recent innovation of ‘Oxford men’¹⁸⁷ and others who doubt whether the principle should have taken

on the prominence it has.¹⁸⁸ Despite the doubts as to its importance, as will be seen in Chapters Four, Six, and Seven in particular, parliamentary sovereignty plays an extremely important role in the English response to private delegation of governmental power, in both its ability to control the scope of such delegation and in its ability to control the private delegate of the power.¹⁸⁹

As for the courts, the justification for judicial review is subject to intense academic controversy. Traditionally, judicial review of executive action was justified on the basis of parliamentary sovereignty and the ultra vires doctrine, according to which the court’s only role is to ensure that parliamentary intention is enforced.¹⁹⁰ A competing notion of shared sovereignty between the courts and Parliament has gained increasing popularity,¹⁹¹ due to the fact that courts have reviewed the exercise of prerogative powers and actions of non-statutory bodies, review which cannot be explained by reference to parliamentary intention.¹⁹² Generally, the courts have become increasingly visible in the constitutional settlement in England, particularly given the new powers exercised in judicial review pursuant to the HRA, the European Communities Act 1972, and the devolution settlements.¹⁹³ This view was also bolstered somewhat by the recent important House of Lords case of Jackson, in which criticisms were made of the notion of unbridled parliamentary sovereignty, most notably by Lord Steyn, who deemed the Diceyan version of parliamentary sovereignty to be ‘out of place in the modern United Kingdom’.¹⁹⁴ Notwithstanding these challenges, the importance of the underlying principle of parliamentary sovereignty in English judicial thinking should not be underestimated.¹⁹⁵ In Jackson itself, the principle was described by another Law Lord, Lord Bingham as ‘[t]he bedrock of the British constitution’.¹⁹⁶ Moreover, as will be seen, the influence of the principle has been particularly evident in judicial thinking on the distinction between public law and private law.¹⁹⁷

¹⁸⁹ See below 4.4.3, 6.3.2.1, 6.3.2.3 and 7.4.3.1. See also 9.1.1.
¹⁹⁰ C Forsyth, ‘Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review’ in Forsyth (n 188) 29; M Elliott, ‘The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law’ in Forsyth (n 188) 83.
¹⁹² Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 (HL) (prerogative powers); R v Panel on Take-overs and Mergers, ex p Datafin [1987] QB 815 (CA) (non-statutory body).
¹⁹³ See also A Tomkins, ‘The Struggle to Delimit Executive Power in Britain’ in Craig and Tomkins (n 23) 16, 26–7.
¹⁹⁶ Jackson (n 194) [9].
¹⁹⁷ See below Ch Seven.
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This distinction, which only emerged clearly in England in the early 1980s, has since become firmly entrenched, albeit that there have been recent tentative indications that the relevance of the distinction may be waning slightly.

Yet, of course while in strict legal theory Parliament is supreme, in terms of the exercise of real power, it is the executive which is the most powerful organ of state in England. Not only does the executive dominate Parliament, but when considering the power of the English executive, given the unwritten nature of the English constitution, it becomes very difficult to ascertain precisely how much power is at its disposal—although, as was noted above, the US Constitution is similarly terse on executive power. Powers of the police and local government are detailed in statute, but generally ‘British public law knows no definition of the executive as such’. Its powers fall into a number of categories that have been subject to different descriptions—prerogatives, statutory powers, and, for some, there is a third residual category of common law powers. The most important executive power in the private delegation context is its contracting power. Yet there is division on the issue of how the power to contract should be categorized—not to mention, how it should be controlled. For Dicey, the power to contract would be a prerogative power, as ‘the residue of discretionary power left at any moment in the hands of the Crown’. For Blackstone, Wade, and Harris, on the other hand, it would constitute a common law or ‘third source’ power—that is, powers enjoyed by ordinary persons and not prohibited by law. Indeed, it has also emerged recently that the English executive is happy to exploit this confusion and, in exercising common law or prerogative powers such as the power of contract, the executive’s operating assumption, known as the ‘Ram doctrine’, is that it does not require parliamentary authority, unless the proposed action may substantially interfere with human rights. Again, when considering the question of controlling the power of the government to delegate, in Chapters Four and Five of Part II of this book, it will be seen that constitutionally undefined executive power renders the formulation of delegation constraints extremely difficult.

¹⁹⁸ For an account see M Freedland, ‘The Evolving Approach to the Public/Private Distinction in English Law’ in M Freedland and J-B Auby (eds), The Public Law/Private Law Divide: Une Entente Assez Cordiale? (Hart, Oxford 2006) 93.
¹⁹⁹ See, eg, Bradley v Jockey Club [2005] EWCA Civ 1056; below 7.4.2.1 and 8.2.
²⁰⁰ Craig and Tomkins (n 112) 1.
²⁰² Tomkins (n 193) 16.
²⁰⁴ Wade (n 203) 58–62.
²⁰⁵ Ibid.
²⁰⁸ Below 4.4.1 and 5.4.1.1(a).
2.3.2.2 Vertical distribution of governmental power

While devolution has altered the vertical distribution of governmental power in the UK more generally, England was not included in the devolution settlement. As such, it remains unequivocally unitary in nature. Certain powers are devolved to local authorities, which range from county and district councils to unitary councils in cities and large towns, metropolitan councils, London boroughs, and the Greater London Authority. There are also a range of local authorities which are service specific, dealing with police, fire and civil defence, waste disposal, and transport. The principal activities conducted at the local authority level include: education, social services, roads and transportation, street cleaning, waste collection and disposal, libraries and leisure services, housing, and various regulatory services such as planning, building control, environmental health, and trading standards. Local authorities exercise only statutorily-prescribed powers and do not enjoy any inherent powers; and although, as is evident from the list just given, many functions are delegated to local authorities, in general, England has quite a centralized system of government, with many functions performed by the states in the US being performed by central government in England. The powers statutorily conferred on local authorities can often be worded broadly, such as the power to do anything which the local authority considers likely to promote or improve the economic, social or environmental well-being of its area but, particularly in the context of private delegation, as will be seen, the discretion is heavily regulated.

2.3.3 European Union

2.3.3.1 Horizontal distribution of governmental power

The horizontal organization of powers in the EU has been described as ‘complicated and haphazard’ and it is well-established that ‘[i]n the Community system the modes of governance and distribution of powers simply do not divide neatly into traditional constitutional categories—legislative, executive and judicial’.

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209 For discussion of the impact of devolution on the unitary nature of the UK, see Walker (n 186).
212 Local Government Act 2000 s 2(1).
213 P Vincent-Jones, The New Public Contracting: Regulation, Responsiveness and Relationality (OUP, Oxford 2006) 188; I Leigh, Law, Politics and Local Democracy (OUP, Oxford 2000); and below 5.4.3 and discussion of procurement rules in 5.4.1.2 and TUPE regulations in 5.4.1.3.
215 Lindseth, (n 68) 140.
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The emphasis of the EU is on law-making but horizontally, between the Council and the Commission, there is a division of executive and legislative power, while the relationship between the Commission and the Parliament is possibly more akin to that between a government and a national parliament.²¹⁶ While the difference between legislative and executive power is highly contested in any event,²¹⁷ in the EU the distinction is even more ‘problematic’²¹⁸ and is procedural rather than substantive. A legislative act is one adopted by the Community institutions interacting in accordance with the decision-making procedure laid down in the Treaty provision which serves as the legal basis for the act, while an executive act is one adopted by the Member States, the Commission or the Council implementing a legislative act (or an earlier executive act) which serves as the legal basis for the act.²¹⁹ Thus a different overarching principle to separation of powers has evolved to regulate the distribution of governmental power at the EU level, namely, the ‘substitute’²²⁰ principle of enumerated powers or institutional balance. This principle has been described by the ECJ as ‘characteristic of the institutional structure of the Community’.²²¹ It does not imply that the authors of the Treaties established a balanced distribution of powers—it refers simply to the fact that the Community institutional structure is based on the division of powers between the various institutions, as established by the various Treaties.²²² It prohibits the encroachment by one institution on the powers allotted to another institution²²³ and is derived from Article 7(1) EC, which states that ‘[e]ach institution shall act within the limits of the powers conferred upon it by this Treaty’.²²⁴ The principle of institutional balance has been extremely important in the evolution of the ECJ’s approach to delegation.²²⁵

Law-making and executive processes in the EU are complex and involve different forms of interaction between the European Council, the Commission, the Council, the Parliament, the Member States, and EU agencies. As will be seen in Chapter Three, private delegation of governmental power has the potential to affect democratic participation and, given the contentiousness of this issue in the EU, it is worth elaborating on the EU’s complex processes here. The composition of the core EU institutions is as follows: the European Council consists

²¹⁹ Ibid.
²²⁰ Jacqué, (n 216) 384.
²²² Jacqué (n 216) 383. See also below 4.3.1.
²²⁴ It was derived initially from EEC Treaty Art 4(1).
²²⁵ See below 4.3.1.
of the heads of the Member States, assisted by foreign ministers; the Council consists of ministerial delegates of Member States; the Commission is composed of nationals of Member States, individually approved by the Council and then approved ‘as a body’ by the European Parliament; and the Parliament consists of ‘representatives of the peoples of the States brought together in the Community’ and is the only directly elected institution.

In general terms, there has been a shift in the horizontal balance of powers between the Commission, the Council, and the Parliament from ‘dialogue’ between Council and Commission to something more akin to a ‘trialogue’ between the Parliament, the Commission, and the Council. While the legislative process almost always requires a proposal from the Commission and final approval from the Council, the role of the Parliament varies in different procedures and, recently, the Parliament has undertaken a more important role. In total, six ways of enacting legislation can be identified in the Treaty, the two most important being the consultation and co-decision procedures. The consultation procedure, used for example in respect of the Common Agricultural Policy and harmonization of indirect taxation, involves a legislative proposal by the Commission, consultation of the Parliament and then the Council takes the final decision. Increasingly, the Council grants its final approval through majority rather than qualified majority or unanimity voting, which has obviously reduced the power of individual Member States. Meanwhile, pursuant to the co-decision procedure, the Commission submits a proposal to both the Council and the Parliament at the same time and the final legislation is adopted jointly by the two institutions, thereby involving the Parliament more effectively in the law-making process. Law-making in the EU also takes the form of ‘soft law’ or the Open Method of Coordination (OMC), which has been ‘defined as an experimentalistic approach to EU governance based on iterative benchmarking of national progress towards common European objectives and organized

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227 EC Treaty Arts 213 and 214.
228 EC Treaty Arts 189 and 190.
231 P Craig, ‘The Locus and Accountability of the Executive in the European Union’ in Craig and Tomkins (n 23) 315, 316.
232 EC Treaty Art 37.
233 EC Treaty Art 93.
234 For discussion, see Wyatt and Dashwood (n 230) 57–61 [3-003]–[3-005].
235 Ibid 68–70 [3-009].
236 EC Treaty Art 254. For discussion, see Wyatt and Dashwood (n 230) 61–6 [3-006]–[3-007].
mutual learning.²³⁷ The OMC method is used primarily where the EU Treaty powers are limited, where there is insufficient consensus among Member States to enact legally binding directives, such as in the immigration context, and where there is too much national diversity for harmonization at European level to be a credible option, such as in employment or social protection.²³⁸

Just as there is no single legislative organ in the EU, there is also no single institution charged with executive process, and so, in each case, it has been for the legislature to determine the appropriate executive action.²³⁹ At the EU level, executive power is shared between the Commission, the Council, and the European Council.²⁴⁰ The European Council plays an important role in setting the policy priorities and legislative agenda for the EU,²⁴¹ while foreign and security policy, insofar as the EU has such competence, is determined by the European Council and the Council.²⁴² Executive power in relation to setting of a financial framework is shared between the Commission, the Council, and the European Parliament.²⁴³ More generally, primary executive responsibility for implementing legislation rests with the Commission,²⁴⁴ but implementing acts can be undertaken by the Council.²⁴⁵ Broadly, there are two forms of executive action available to the Commission: ‘direct’ or ‘centralized’ management and ‘shared management’.²⁴⁶ Direct management involves EU programmes implemented at the EU level, but without doubt the ‘greater part’ of the EU’s administration involves ‘shared management’ and the assistance of Member States.²⁴⁷ Unlike in the US, where the anti-commandeering principle has an important impact, as will be discussed below, the Member States are ‘the mainstream “executive branch” of the Community government’²⁴⁸ and, in


²⁴² Craig (n 231) 326–8 and TEU Art 13.

²⁴³ Craig (n 231) 329 and EC Treaty Arts 269 and 272.

²⁴⁴ Craig (n 231) 322; and EC Treaty Art 202.


²⁴⁸ Lenaerts (n 218) 27.
fact, ‘every legislative act of the Community implies a conferral of executive powers on the Member States’.²⁴⁹

With direct management, there are five options: programmes can be directly managed within the Commission;²⁵⁰ management tasks can be undertaken by executive agencies;²⁵¹ implementation can be entrusted to an EU agency or an executive agency; tasks can be delegated to networks of national agencies;²⁵² and certain activities can be contracted out.²⁵³ Established EU agencies include the European Environment Agency²⁵⁴ and the European Training Foundation,²⁵⁵ while executive agencies are ‘legal persons under Community law created by Community decision’ for specific purposes.²⁵⁶ For example, with the Leonardo da Vinci programme, which promoted transnational projects based on cooperation in vocational training, the Commission entrusted the Directorate-General for Education and Culture to make grants for projects in pursuance of the programme’s aims and contracted out administration tasks.²⁵⁷ However, the successor programme, the Lifelong Learning Programme, is implemented by the new Education, Audiovisual and Culture Executive Agency, in association with national agencies.²⁵⁸

As for the ECJ, in short, it is a powerful court of which ‘[t]he authority . . . in principle to undertake creative law-making is today hardly in dispute’.²⁵⁹ The ECJ has consistently undertaken a strongly integrationist role in the context of the evolution of the EU—particularly in the face of the dilatoriness of both the EU institutions and the Member States.²⁶⁰ This role may well be changing in response to the changing demands of the EU,²⁶¹ but it has nonetheless had a huge impact on the evolution of the ECJ’s jurisprudence to date. Unlike in the US, the use of teleological

²⁴⁹ Ibid.
²⁵¹ Ibid 37–50.
²⁵² Ibid 50–51.
²⁵³ Ibid 52–3.
²⁵⁶ Financial Regulation (n 246) Art 55(1); see also Art 54.
²⁶⁰ Dubinsky (n 117) 295.
reasoning is not contentious in the EU, and the need for uniformity to achieve effectiveness in the application of Community law has been a regular theme in the ECJ’s jurisprudence, of which examples abound.\footnote{262} Effectiveness of EU law as a motivating principle has resulted, for instance, in a general doctrine of Member State liability in damages for violation of EC law\footnote{263}; by contrast, US states generally possess sovereign immunity from private damage claims for violations of federal law and US federal courts have resisted efforts to limit that immunity.\footnote{264} Effectiveness, as a principle, has also been useful in enabling the EU to respond to the challenges of private delegation.\footnote{265} Further, it is important to remember that the EU’s judiciary includes, of course, the Court of First Instance\footnote{266} but also all national courts when they are applying and enforcing Community law pursuant to their Article 10 EC obligation of fidelity.\footnote{267} Damages actions are even available in respect of violations by national courts of Community law.\footnote{268}

Linked perhaps to the importance of effectiveness in the ECJ’s jurisprudence is the absence of a sharp distinction between public and private law. As will be discussed in detail in Chapter Six, EU concepts of ‘public’ and ‘private’ are ‘complicated and mutating’.\footnote{269} This is because the EU has had to reconcile the different approaches to the public-private division as between Member States, and also due to the fact that, as will be discussed in the next section, the EU administration has generally had to rely on Member State administrations to constitute its ‘public sector’.\footnote{270} The result has been that the ECJ has tended to define notions of ‘public’ and ‘private’ not as self-contained concepts but, rather, broadly or narrowly depending on the repercussions of any given categorization for the effective application of EU law. As such, there has arguably been greater fluidity in the concepts of ‘public’ and ‘private’ in the EU legal order than in the other legal systems. In Chapters Six and Seven it will be seen that this fluidity has often enabled the European legal order to control private delegates more effectively than has been the case in England and the US, where the public-private distinction is arguably more rigid.

\footnote{262} Case C-213/89 \textit{R v Secretary of State for Transport, ex p Factor taine} [1990] ECR I-2433 [20]–[22].
\footnote{265} See 6.3.3.3(b).
\footnote{266} EC Treaty Art 225(1).
\footnote{267} Lenaerts (n 239) 18.
\footnote{268} Case C-224/01 \textit{Köbler v Austria} [2003] ECR I-10239.
\footnote{270} Ibid. Below 2.3.3.2.
2.3.3.2 Vertical distribution of governmental power

As with the debate on whether the EU can be conceived in ‘constitutional’ terms, the organization of power between the EU and the Member States is simply incapable of uncontested characterization, and both the evolution and the characterization of the EU at any one time are subject to ongoing debate. In particular, whether the EU is akin to a federal state, like the US, has exercised many commentators,²⁷¹ perhaps especially given that in the US ‘federalism’ is invoked as a ‘decentralizing concept’ while in the EU it is ‘synonymous with central government’ and resisted.²⁷² Similarly to the US federal order, the EU ‘is not a self-authenticating order’.²⁷³ Power is delegated from the Member States to the EU according to three principles: first, ‘the principle of the attribution of powers’ or ‘of conferred powers’,²⁷⁴ as set out in Art 5(1) EC; second, the principle of subsidiarity, as articulated in Art 5(2) EC; and third, the principle of proportionality, as set out in Art 5(3) EC. The principle of subsidiary is obviously a principle which has the potential to have an impact on the extent of private delegation in any given context and in Germany, for example, the principle is enshrined in the Basic Law and has meant that the state has often been obliged to turn first to ‘free welfare associations’ to address social needs before enlisting state institutions.²⁷⁵ The principle has received minimal attention from the ECJ and has not been used effectively as a control on EU competence.²⁷⁶ However, as Fisher notes in the environmental law context, ‘[s]ubsidiarity has been a catalyst for a more flexible approach to regulation and enforcement that has incidentally accommodated a greater role for private actors’.²⁷⁷

Unlike the US arrangement which is articulated relatively concisely in Article I of the Constitution, provisions attributing competence to the EU are specific and

²⁷¹ See, eg, Nicolaïdis and Howse (n 66).
²⁷² Ibid 4–5.
²⁷³ Dashwood (n 229) 357.
detailed and provide a legal basis authorizing action in a particular policy area or in pursuit of a particular objective.²⁷⁸ The specificity and detail of the attributed competences, which have evolved piecemeal over time,²⁷⁹ have resulted in significant differentiation between areas of competence. Dashwood, for instance, has identified: structural differentiation, depending on the pillar of the Union in which the competence is located; participatory differentiation, including the example of the UK and Denmark being outside the single currency; and procedural differentiation, which refers to the different procedures for law-making in different competences.²⁸⁰ Competences can be cross-sectoral²⁸¹ or relate to particular policy fields.²⁸² They are also either exclusive or non-exclusive,²⁸³ although, in the latter category, von Bogdandy has further identified concurrent, parallel or non-regulatory powers.²⁸⁴ With exclusive competences, the mere existence of an EU norm prohibits the Member States from acting in the area,²⁸⁵ and it is generally presumed that competences are not exclusive, with such competences existing only in the context of monetary²⁸⁶ and common commercial policy.²⁸⁷ With non-exclusive concurrent competences the Member State can legislate if the Union has not made use of its competence, but once the Union acts the Member States are prevented from adopting different rules. This is similar to the notion of pre-emption in the US.²⁸⁸ Non-exclusive parallel powers arise where both the Union and the Member State can act in the same field, assuming no opposition between the two levels of legislation. The Treaty provisions which facilitate this arrangement envisage the EU ‘complementing²⁸⁹ or ‘contributing’ to the achievement of common objectives.²⁹⁰ Non-exclusive non-regulatory powers or complementary powers of the EU involve the Member States retaining primary legislative competence and entail the EU acting through targeted subsidies, pilot projects, and symbolic action.²⁹¹

²⁷⁸ Dashwood (n 229).
²⁸⁰ Dashwood (n 229) 362–4.
²⁸¹ EC Treaty Arts 88, 94, 95, 308.
²⁸² EC Treaty Arts 37, 175.
²⁸³ EC Treaty Art 5(2).
²⁸⁴ Von Bogdandy and Bast (n 214) 242.
²⁸⁶ EC Treaty Art 106.
²⁸⁷ Common commercial policy has been identified as exclusive by the ECJ (Opinion 1/75 Local Cost Standard [1975] ECR 1255 [31]), although this is not uncontested: contrast Von Bogdandy and Bast (n 214) 241 and Dashwood (n 229) 369–71.
²⁸⁹ EC Treaty Art 164.
²⁹⁰ EC Treaty Art 157(3).
²⁹¹ EC Treaty Arts 129 (employment), 149(4) (education), 151(5) (culture), and 152(4)(c) (health).
As indicated above, the regular power of the EU is that of enacting legislation, and the EU is highly dependent on the Member States for the implementation of EU legislation. There is no equivalent of the anti-commandeering principle, and except in a few areas, such as competition law, the task of legally or administratively implementing EU regulations falls to national legislatures and administrations.

As noted above, once legislation is enacted, if it does not provide for a specific mode of execution, it will be for the Member States to ‘take all appropriate measures, whether general or particular’ to ensure its effective application and enforcement within the national legal order. Consequently, Member States can be required to enact and implement laws to give effect to EU policies, as typified by their obligation to enact national rules to give effect to Directives.

Member States may also be called upon to manage EU programmes. Such ‘shared management’ refers to:

the management of those Community programmes where the Commission and the Member States have distinct administrative tasks which are inter-dependent and set down in legislation and where both the Commission and national administrations need to discharge their respective tasks for the Community policy to be implemented successfully.

‘Shared management’ is sometimes also described as ‘composite’ or ‘cooperative administration’. For instance, under the Structural Funds, grants are made to national bodies which distribute the funding to support projects boosting economic development in under-developed areas of the Union, while, pursuant to Article 13 of Regulation 355/77, applications for aid from the European Agricultural Guidance and Guarantee Fund must be made to the Commission through the Member State and Member State approval is a necessary pre-condition to payment of aid.

The arrangement has been described as ‘executive federalism’, since the division of powers between the central government and the component entities is not just defined in terms of areas in which each government holds substantive competence, but relates also to the split between central government holding the legislative power and the component entities holding the executive power in a given area. There are both pragmatic and political reasons for this difference from the vertical distribution of power in the US. Pragmatically, by contrast with the

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292 Von Bogdandy and Bast (n 214) 240 and above 2.3.3.1.
294 EC Treaty Art 10 and above 2.3.3.1. 295 EC Treaty Art 249.
296 CIE Second Report (n 246) [3.2.2].
300 Ibid Art 13(3); Case C-97/91 Oleficio Borelli SpA v Commission [1992] ECR I-6313 [1]–[4].
301 Lenaerts (n 218) 28.
US federal government, the EU’s implementation abilities are severely restricted by its extremely limited fiscal capacity and by the ‘extraordinarily small size of the Brussels bureaucracy’.³⁰² Politically, in its original conception, Member States could regard the exercise of Community powers ‘as another mode of assuming their own sovereignty, no longer through autonomous, but through joint decision-making’,³⁰³ such that the implementation of decisions made at the Community level did not raise the democratic accountability concerns which promoted the anti-commandeering principle in US constitutional law. Of course, as discussed above, increasingly the EU is regarded as a sovereign entity, parallel to that of the Member States,³⁰⁴ which, in turn, actually raises the same democratic concerns that have been raised in the US context. The impact of private delegation on this complex democratic balance will be considered in Chapter Three.³⁰⁵

### 2.4 Experience of Private Delegation

With regard to the delegation of governmental power to private parties, as was noted in the introduction to this chapter, it is important to consider: first, the historical, ideological, and political contexts in which delegation occurred; second, the extent of governmental power delegated; and, third, the techniques of delegation. There are ‘deep historical roots for virtually any form of privatization that now exists’³⁰⁶ and it will not be possible here to review every individual example, but a general overview of each jurisdiction’s experience of private delegation is helpful. Moreover, as Fisher has noted in the environmental law context, any interaction between public and private may be justified on many grounds, including ‘pragmatic resource need, crude ideology, or deeper understandings of democratic legitimacy’: all three of these justifications emerge from this review of the jurisdictions.

#### 2.4.1 United States

##### 2.4.1.1 The historical, ideological, and political contexts of private delegation

The involvement of private actors has been a constant feature of US governance, although it has experienced cycles of popularity. In general, the US has

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³⁰² Moravcsik (n 293) 608.
³⁰³ Lenaerts (n 218) 32. For further comments, see K Lenaerts, ‘Constitutionalism and the Many Faces of Federalism’ (1990) 38 American J of Comparative L 205, 230–33.
³⁰⁴ Lenaerts (n 218) 33. Cf J Weiler, ‘The Community System: The Dual Character of Supranationalism’ (1981) 1 Ybk of Eur Law 267. See also above 2.2.3.
³⁰⁵ Below 3.3.6.
experienced relatively less privatization than other countries, because ‘historically fewer assets have been state-owned’.³⁰⁸ That is not to say that the importance of the public interest has been overlooked; rather, the American tradition has been one of regulation via independent agencies, while in Britain and Europe public ownership, in the form of nationalization or municipalization, once served as the ‘functional equivalent’.³⁰⁹ The historical use of private actors in the US has contributed to the characterization of the US as a ‘capitalist democracy’, by contrast with the more ‘social’ democracies of Europe³¹⁰; although this is obviously a difference which is much less marked in the post-Thatcher/Reagan era than previously.³¹¹ There have been ‘longstanding and complex interactions between public and private social provision’ in the US³¹² and examples of public-private partnerships can be found as far back as 1816, in institutions owned partially by the federal government and partially by private actors.³¹³ Moreover, the involvement of private actors in prison management in the US has a long lineage.³¹⁴

In short, the nineteenth century in the US, at both state and federal levels, was a time of ‘rising confidence in private initiative’.³¹⁵ So pervasive was this confidence that, until the end of the nineteenth century, the New York City Charter mandated contracting out for all work done for the city.³¹⁶

Even with the failures of the unregulated market and the rise of the New Deal or Great Society model of US government—the tools of which included centralized government and entitlement programmes with primary authority at the federal level³¹⁷—the US federal government did not completely abandon delegation to private actors, and many significant rate-setting and law-making functions were assigned to private trade associations as part

³¹³ M’Culloch v Maryland 17 US (4 Wheat) 316 (1819) (considering a bank which was created in 1816 with 80% private and 20% federal government ownership); discussed in Dannin (n 306) 112 and RC Moe, ‘Exploring the Limits of Privatization’ (1987) 47 Public Administration Rev 453, 454–5.
³¹⁵ Minow (n 312) 1237.
of the New Deal.⁸ In the last twenty-five years, however, there has been a marked expansion of delegation of remaining governmental powers to private actors. The management focus of the Reagan-Bush era was on privatization and the use of private actors, and although the Clinton-Gore administration shifted the emphasis to proposals to ‘banish bureaucracy’ through ‘entrepreneurial government’, the Reagan-Bush policy was effectively continued.⁹

Unsurprisingly, the second Bush administration has also promoted private delegation aggressively, even to the point of advocating direct job conversion from public to private, which would bypass competitive sourcing.¹⁰

Admittedly, some private delegation has been at least partially functionally rather than ideologically driven and, for example, prison privatization was largely prompted by an urgent need to combat overcrowding in state sector prisons as a result of stricter sentencing and rising crime rates in the 1970s and 1980s.¹¹ Similarly, in the policing context, a liberal democratic perspective interprets the growth of the private security industry as an inevitable consequence of the increasing demands placed on the public police.¹² More generally, however, as Minow has suggested, the recent delegation of governmental power to private actors in the US has been unique in a number of respects.¹³ Precisely because current efforts occur now—after the twentieth-century build-up of government institutions and social provision—the new forms of private delegation reverse trends that many saw as ‘laudable extensions of the social safety net and the ambit of public responsibility’.¹⁴ Moreover, the new injection of market-style language and concepts into sectors such as education, social services, and prisons assumes that competition and choice are pertinent, effective, and preferable to governance.

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¹⁴ Minow (n 312) 1238–42.

¹⁵ Ibid 1240.
by democratic and constitutional values. Unlike with the New Deal, recent regulatory failures have not resulted in an assertion of governmental activity. Although responsibility for airport security was partially converted from private to governmental performance in the aftermath of 11 September 2001 and limits have been introduced to the ability of the Department of Defense to contract out fire-fighting and security guard functions at military installations, other failures of private initiative, such as the failure of self-regulation by the accounting industry exemplified by the Enron scandal, did not shake faith in the private sector; regulation was simply transferred from the industry to an independent private non-profit corporation. Finally, it is also important to acknowledge that private delegation in the US is located in the context of federalism and can be useful precisely because it enables the federal government to avoid the strictures of the anti-commandeering doctrine discussed above, and because it can promote federalism by promoting decentralization and the idea that ‘all government tasks are best carried out at the level closest to those affected by them’.

At the state level, of course, attitudes to privatization vary and, for instance, Aman has observed the different emphases found in state prison privatization statutes. Certain states, such as Colorado, have an explicit policy to encourage the use of private contractors for personal services to achieve increased efficiency in the delivery of government services whereas, by contrast, the Massachusetts’ prison privatization statute states that the legislature hereby finds and declares that using private contractors to provide public services formerly provided by state employees does not always promote the public interest. Relevant factors for the differences include the strength of organized labour and fiscal policies: for example, private state prisons tend to be most common in the West and the South of the US, where organized labour is weak and fiscal conservatism is strong.

2.4.1.2 The extent of private delegation
The range of executive powers delegated to private actors in the US is vast. Discretionary powers are exercised across the full gamut of social programmes from collection of child support payments to management of medical programmes, federal student loan programmes, probationary services, schools,

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326 Ibid 1241.
328 10 USC § 2465.
330 Above 2.3.1.2.
331 Trubek (n 317) 245.
332 Aman (n 322) 533–4.
334 Mass Gen Laws Ann ch 7 s 52.
335 Pozen (n 322) 260.
Delegation of Governmental Power to Private Parties

and prisons.³³⁶ Citicorp Services has contracts to manage the electronic benefit payment systems in more than thirty states while Maximus Inc administers welfare-to-work programmes, child support enforcement programmes, enrolment of Medicaid recipients in managed care programmes, and disability centres.³³⁷ Some states even outsource the very function of outsourcing to private delegates.³³⁸ Delegation of regulatory powers is commonplace,³³⁹ as typified by such bodies as the Internet Corporation for Assigned Names and Numbers (‘ICANN’), a private non-profit California corporation, which controls domain name policy under contract with the Department of Commerce.³⁴⁰ Meanwhile, federal regulators increasingly avail themselves of the results of the editorial peer review process in biomedical literature ‘as a short-cut for making judgments about important matters of public health’.³⁴¹ Peer review is also a mechanism used regularly to determine access to benefits in federal programmes such as Medicare.³⁴² There have even been proposals to outsource the processing of Freedom of Information Act requests.³⁴³

In the military context, use of private delegation has been far-reaching and ‘[t]he war in Iraq has been either an outsourcing nightmare or bonanza depending upon whether you are the government or a private contractor’.³⁴⁴ Private actors are no longer mere providers of military equipment, but are now engaged as providers of military services, including translation and even ‘intelligence and technical support’ services, which, in the Abu Ghraib context, resulted in private contractors from CACI Inc and Premier Technology Group Inc being employed as interrogators.³⁴⁵ Historically, private non-profit groups have played an extremely important role in operating facilities for juvenile offenders in the US, although the privatization of adult prisons is numerically more significant and tends to be for-profit.³⁴⁶ Additionally, detention of illegal immigrants has been contracted

³³⁸ Salamon (n 311) 2 (citing the example of Arizona).
³³⁹ See generally Shapiro (n 329).
³⁴² Ibid 687–8; Freeman (n 111) 610–15.
³⁴⁴ Verkuil (n 111) 441.
out to the private sector. Generally, private prisons tend, by comparison with the public sector, to house medium and minimum or low security prisoners, rather than maximum security prisoners.

However, as Krent notes ‘[p]erhaps the most striking delegation of authority, lies in Congress’ creation of qui tam actions’. Through these actions, individuals can sue on behalf of the federal government and share any remedy obtained with the government. Unlike other congressionally created causes of action, qui tam actions do not depend on the existence of individuated injury—rather, injury to the government as a whole is the only prerequisite. These actions can arise even where the damages available are so large as to be viewed as punitive. The most notable example is found in the civil False Claims Act 1863, which is used to combat fraud by federal government contractors, including healthcare providers, defence contractors, and oil and gas companies. A number of states have passed similar statutes. Pursuant to these statutes, private persons who wish to file suit are not required to obtain governmental permission before suing, although there will usually be a requirement that the private individual alert governmental officials about the cause of action and an option for the government to join the lawsuit. Even if the relevant governmental authority declines to join the lawsuit as plaintiff, the private party, known as a ‘relator’, is allowed to continue the case. These actions involve delegation to private actors of powers to determine when to institute suit on behalf of the US to challenge violation of federal laws, which theories to plead, and which penalties to seek. As such, they involve an undisputed delegation of ‘quintessential’ executive prosecutorial powers.

As for the exercise of legislative power by private actors, standard-setting by private organizations is commonplace: through delegation both of the power to approve legislative standards to those affected by regulation and of the authority

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347 Ibid.
348 Ibid 268.
350 Bucy, ‘Moral Messengers’ (n 349) 328.
351 31 USC §§ 3729 et seq; Bucy, ‘Private Justice’ (n 349) 43–4.
353 31 USC § 3730(b).
354 Bucy, ‘Moral Messengers’ (n 349) 328. For general discussion of the procedure see, further, Bucy, ‘Private Justice’ (n 349) 49–51.
355 31 USC § 3730(c)(3).
356 Krent (n 349) 90.
358 Ibid. See also Heckler v Chaney 470 US 821, 832 (1985) (noting that a decision to prosecute falls within the ‘special province of the Executive Branch’).
to formulate legislative standards.\textsuperscript{360} Private participation in standard-setting also occurs through negotiated rule-making, agency adoption of standards developed by private organizations, and agency use of enforcement discretion to encourage the development of private codes of conduct.\textsuperscript{361}

Judicial power has also been delegated to the Joint Commission on Accreditation of Healthcare Organizations, a not-for-profit corporation, which has the power not only to establish professional standards but also to evaluate hospitals and thereby to determine whether patients in such hospitals are eligible to receive Medicare, Medicaid, and other social security benefits.\textsuperscript{362} Certain legislative schemes provide for compulsory private arbitration, such as the Federal Insecticide, Fungicide, and Rodenticide Act, which imposes private arbitration, subject to only very limited judicial review by an Article III court,\textsuperscript{363} for determination of disputes concerning the value of compensation paid to a manufacturer whose product data, which was required to be registered with the Environmental Protection Agency, was used by a second and usually competitor firm. Similarly, the terms of the Department of Commerce agreement with ICANN conferred authority on ICANN to establish a dispute resolution programme—although the result of any arbitration is subject to de novo judicial review.\textsuperscript{364} State ‘lemon laws’ also regularly impose binding private arbitration on manufacturers in disputes with consumers over faulty goods.\textsuperscript{365}

\textbf{2.4.1.3 The techniques of private delegation}

As was noted in Chapter One, there are many different instruments of private delegation,\textsuperscript{366} but legislation and contract are two extremely important techniques at both the US federal and state levels. In addition, the US federal government may award assistance—either through a grant or what is known as a cooperative agreement—to a state for the performance of the task, incorporating a power for


\textsuperscript{362} 42 USC § 1395x(e) and see DL Weimer, ‘Public and Private Regulation of Organ Transplantation: Liver Allocation and the Final Rule’ (2007) 32 J of Health Politics, Policy and Law 9, 14.

\textsuperscript{363} See 7 USC § 136a(c)(1)(F)(iii) (providing judicial review of the arbitrator’s finding and determination for fraud, misrepresentation or other misconduct); see also Thomas v Union Carbide Agricultural Products Co (1985) 473 US 568; ED Kinney and WM Sage, ‘Resolving Medical Malpractice Claims in the Medicare Program: Can it be Done?’ (2005–2006) 12 Connecticut Insurance L J 77; below 4.2.1.2(a).


\textsuperscript{366} Above 1.1.1.
the state to contract-out. Federal programmes such as social welfare, housing, and medical assistance are usually implemented in this way, the most notable example being the Personal Responsibility and Work Opportunity Reconciliation Act 1996 (‘PRWORA’), which provides for grants to states to administer welfare programmes, and includes the option of private provision ‘through contracts with charitable, religious, or private organizations—an option of which states have availed themselves. The government may also award assistance—again via either a grant or a cooperative agreement—to a private actor to pursue a programme with a public purpose. It has been said that cooperative agreements in particular ‘are one of the fastest growing techniques in Government contracting.’ A survey of the 2006 Catalog of Federal Domestic Assistance indicates that certain grants are not paid to the ultimate intended beneficiaries, but rather are paid to intermediaries, who are in turn responsible for using the funds for the good of the intended beneficiaries—one example being the State Department Middle East Partnership Initiative, where the intended beneficiaries are various Middle Eastern countries, but the grant is paid to organizations to run reform efforts. The differences between grants and cooperative agreements will be explored in Chapter Five below.

2.4.2 England

2.4.2.1 The historical, ideological, and political contexts of private delegation

As in the US context, in England in the early nineteenth century the private performance of many functions now deemed ‘governmental’ was commonplace. In particular, there was significant private sector involvement in prison management in the eighteenth century, although this was taken over by the state and centralized during the nineteenth century. More generally, a trend of governmental action marked the early twentieth century and was consolidated in the post-world war era with the rise of a strong British Welfare State. Recent delegation of governmental power to private actors has occurred squarely within a shift away from

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367 Pub L No 104-193.
368 Ibid § 103.
369 Ibid § 104.
373 Below 5.3.
375 Wade (n 195) 3–4.
the centralization of the Welfare State, and particularly within the framework of the New Right ideology of the Thatcher era. Although strain in the organizational structures of the British government had been highlighted in the 1960s, it was the election of the Thatcher government in 1979 which heralded the beginning of a period of enormous change in UK public administration. The Thatcher government was heavily inspired by Hayekian principles, with the result that the focus was on tackling the problems of economic weakness through control of inflation, reform of industrial relations, and, most significantly for present purposes, separation of policy-making from service delivery, and reduction in the cost of public services. And so there was a transition from 'traditional bureaucratic methods and structures in favour of market-based and business-like regimes of public service', subsequently described by commentators as the New Public Management (‘NPM’).

NPM was not solely concerned with private delegation and the concern with separation of policy-making from policy-implementation also resulted in a re-structuring of the Civil Service in the 1988 ‘Next Steps’ initiative, with policy-implementation being transferred from core departments to semi-autonomous executive agencies known as ‘Next Steps’ agencies. However, private delegation was an extremely important element of NPM and, under the Thatcher and Major governments, central government departments were required to assess, using market testing, whether particular activities could be abolished, privatized, contracted-out, given to a Next Steps agency, or have their status quo maintained, while local authorities were governed by the Compulsory Competitive Tendering regime. Allied to the emphasis on private delegation was a transition in the concept of citizenship, as exemplified by the launch of the Citizen’s Charter in 1991. This was an initiative of the Major government, but it followed the substantive policy of the Thatcher administration and established a number of principles to

378 D Faulkner, ‘Public Services, Citizenship and the State—the British Experience 1967–97’ in Freedland and Sciarrà (n 269) 35, 36; Barron and Scott (n 377) 538–43.
381 See generally Craig (n 175) 96–102.
383 Vincent-Jones (n 213) 172.
frame governmental service delivery, such as standard-setting, openness, consultation, choice, value for money, and remedies.³⁸⁵ The Charter conceptualized the relationship between state and citizen as a contractual nexus; services are provided by the state as a quid pro quo for the taxes paid by the citizen.³⁸⁶ The onus is on individual citizens to complain if dissatisfied with the level of service provided, while the Charter has also been criticized for undervaluing participation of the citizen in political life, since it ‘detach[es] the ideal of citizenship from the active participation of the citizen within the institutions of the state’.³⁸⁷

The Labour government adopted much of the strategic thinking that the Conservative government had used in respect of NPM, Next Steps,³⁸⁸ and private delegation, although demonstrating a greater emphasis on quality rather than pure efficiency.³⁸⁹ The Charter innovation was re-launched by the Blair government in 1998 under the title of Service First, The New Charter Programme,³⁹⁰ expanding the principles found in the Charter to standard-setting, information provision, consultation, encouragement of access and promotion of choice, fairness, putting things right when things go wrong, effective use of resources, innovation and improvement, and working with other providers.³⁹¹ This was then followed by a White Paper on Modernising Government, which appeared in May 1999.³⁹² These proposals consolidated and developed changing ideas about the relationship between the citizen, as consumer of public services, and the state, as a service provider or facilitator of service provision. More recently, the government has issued a new policy document, entitled Building on Progress: Public Services, which slightly shifts the emphasis again. The focus on empowering citizens and diversifying supply in public services is still present,³⁹³ but there is a new theme of ‘personalization’, described as a process by which services are tailored to the needs and preferences of citizens.³⁹⁴

As Vincent-Jones has noted, the British experience of NPM has ‘been unusual in both the strength of the political commitment to weakening established bureaucracies, and the manner in which the radical and controversial reforms have been imposed by government from above’.³⁹⁵ Similarly, Freedland has noted

³⁸⁵ Craig (n 175) 108.
³⁸⁶ Barron and Scott (n 377) 543.
³⁸⁷ Ibid 544.
³⁸⁹ See generally Craig (n 175) 138–44 and Drewry (n 379).
³⁹¹ See also Barron and Scott (n 377) 545.
³⁹² Modernising Government Cm 4310 (1999).
³⁹⁴ Ibid 33 [5.1].
³⁹⁵ Vincent-Jones (n 213) 180.
the ‘particular ferocity’\(^{396}\) with which private delegation was pursued in the UK; Harding has referred to the Thatcher government’s ‘pathological . . . antipathy to the public sector \textit{per se}, accompanied by a largely untested belief that the quest for profits automatically increased the economic efficiency of virtually any enterprise’\(^{397}\); while Barron and Scott have noted the ‘ideologically driven obsession of the Thatcher administration with constraining the public sector’.\(^{398}\) This fervour for NPM has been contrasted with the more pragmatic nature of developments and the more dispassionate tenor of debates elsewhere in Europe and in the US.\(^{399}\) Thus, for example, in both the US and England, in the prison context, there were pragmatic concerns about a rapidly increasing incarcerated population, with overcrowding in English prisons also in the 1980s.\(^{400}\) However, in England, prison privatization appeared on the agenda primarily ‘because the New Right want[ed] the state to do less as a matter of principle’.\(^{401}\) Certainly, as has been described, private delegation as a means of governance has been adopted by the Labour government also; but at least initially, in England, it rested on a very firm conservative ideological footing.

\subsection*{2.4.2.2 The extent of private delegation}

Private delegation is used in England in a wide range of circumstances although, as will be evident from the examples, it is perhaps not quite as widespread yet as in the US. The management of governmental programmes is increasingly delegated to private actors, and for-profit and voluntary organizations are central to governmental provision of residential care to the elderly\(^{402}\) and to those in need of welfare accommodation.\(^{403}\) Children’s services, such as foster placements and adoption agencies, are also administered largely by private actors.\(^{404}\) At the local authority level, functions that have been delegated include investment decisions on behalf of public authorities,\(^{405}\) and even identifying persons liable for business

\begin{itemize}
\item \(^{396}\) M Freedland, ‘Law, Public Services, and Citizenship—New Domains, New Regimes?’ in Freedland and Sciarr (n 269) 1, 29.
\item \(^{398}\) Barron and Scott (n 377) 526.
\item \(^{399}\) Vincent-Jones (n 213) 180.
\item \(^{400}\) Pozen (n 322) 263.
\item \(^{401}\) M Ryan and T Ward, \textit{Privatization and the Penal System: The American Experience and the Debate in Britain} (Open University Press, Milton Keynes 1989) 2; see also Pozen (n 322) 261, 267–8.
\item \(^{405}\) Transport for London (Best Value) (Contracting Out of Investment and Highway Functions) Order 2006 SI 2006/91 Art 2; Local Authorities (Contracting Out of Investment Functions) Order 1996 SI 1996/1883.
\end{itemize}
improvement district levies, and preparing and serving demand notices in respect of these levies.\textsuperscript{406}

In the realm of crime and justice, private delegation is commonplace and in prison privatization, for example, England has been described, alongside the US, as a ‘global leader’.\textsuperscript{407} The English debate on prison privatization began in 1991 with the Criminal Justice Act 1991, which facilitated the contracting out of management of new prisons for unsentenced (remand) prisoners.\textsuperscript{408} The Act was extended in 1992 to encompass new prisons for sentenced prisoners\textsuperscript{409} and again in 1993 to facilitate the privatization of existing prisons.\textsuperscript{410} Similarly, private contractors may also be used to manage immigration removal centres.\textsuperscript{411} Aside from incarceration, private policing is on the rise,\textsuperscript{412} and in its crime control policy New Labour has placed significant emphasis on empowering local communities to fight crime and on using public-private partnerships to achieve crime targets.\textsuperscript{413} The Crime and Disorder Act 1998 enabled local authorities to contract out functions relating to applications for anti-social behaviour orders,\textsuperscript{414} while section 25 of the Police and Justice Act 2006 creates a power for local authorities to contract out their powers under the Anti-Social Behaviour Act 2003 to enter into parenting contracts and to apply for parenting orders. The Police Reform Act 2002 (‘the 2002 Act’) offers significant scope for use of private delegation, adopting, to use Loader’s classification, a model of ‘policing through government’, whereby policing services are provided by the government but supplied by private security companies.\textsuperscript{415}

A few of the provisions of the 2002 Act are worth noting. Under section 39 a chief officer may designate as ‘detention officer’ or ‘escort officer’ employees of persons with which the police authority has a contract for providing such services, provided the employees are ‘suitable’, ‘capable’, and have ‘received adequate training’ and provided the contractor is considered ‘fit and proper’ to supervise the individuals.\textsuperscript{416} Powers exercisable by those designated as ‘detention officers’...
include the power to conduct intimate searches of prisoners in police stations\textsuperscript{417} and even to take fingerprints without obtaining consent.\textsuperscript{418} Moreover, under section 39(8), where any power which has been delegated to the private actor is exercisable by a constable with the use of reasonable force, the private delegate ‘shall have the same entitlement as a constable to use reasonable force’. Escort officers, responsible for transporting detainees, are also entitled to use reasonable force to prevent escape.\textsuperscript{419} A system of accreditation means that any individual can be ‘accredited’, provided he is employed and provided the chief officer is satisfied that the employer has adequate mechanisms to supervise the employee.\textsuperscript{420} Security guards in public shopping centres may become ‘accredited’ and accordingly gain broader powers to deal with low-level criminal behaviour.\textsuperscript{421}

Meanwhile, in the area of defence, the UK government, like its US counterpart, relies increasingly on private military companies, which promotes the UK’s defence strategy of diverting resources away from personnel to weapons systems.\textsuperscript{422} Walker and Whyte have noted that private military companies currently engage in a range of activities, including advice on organizational or operational issues, training, logistic support, intelligence-gathering, the supply of personnel,\textsuperscript{423} and the guarding of military bases.\textsuperscript{424}

Mandatory private arbitration schemes have not been adopted in England in the way they have in the US,\textsuperscript{425} while, although prosecutorial powers are delegated to private actors, it is on a more limited basis than that found with the US qui tam action. Thus, the Royal Society for the Prevention of Cruelty to Animals (‘RSPCA’), a private charitable organization, has the power to investigate allegations of cruelty to animals and, if evidence of a crime against an animal is found, the RSPCA will initiate its own prosecution.\textsuperscript{426} Registered social landlords may make applications for anti-social behaviour orders.\textsuperscript{427} Similarly, pursuant to the Broadcasting Act 1990, the BBC was given the responsibility for licence administration and, since 1998, has contracted out its functions to private companies which administer the database of licence-holders, send reminders, process

\textsuperscript{417} Schedule 4 Pt 3 para 28.
\textsuperscript{418} Schedule 4 Pt 3 para 29.
\textsuperscript{419} Schedule 4 Pt 4 paras 34(1)(d)(iv), 35(3)(c).
\textsuperscript{420} 2002 Act s 41.
\textsuperscript{421} Ormerod and Roberts (n 413) 159–60.
\textsuperscript{423} Walker and Whyte (n 422) 652.
\textsuperscript{424} Ibid. See also L Johnston, ‘An unseen force’ (1993) 3 Policing and Society 23.
\textsuperscript{426} Button (n 323) 76–8; C Scott, ‘Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance’ (2002) 29 J of Law and Society 56, 62–3.
\textsuperscript{427} Crime and Disorder Act 1998 s 1(1A).
queries, applications and payments, and search for those who have not purchased a licence. As Scott has noted, private delegates, such as the RSPCA, are also involved in all aspects of the regulatory process, including standard-setting, monitoring, and application of sanctions.

2.4.2.3 The techniques of private delegation

In England, delegation of governmental power to private actors takes place on two levels: central government and local authority. Whilst major privatizations in England have usually required legislation, given the complexity of the process and the difficulty of transferring property rights, statutory authority tends only to be required for private delegation in respect of those powers which involve the coercive force of the state, such that the delegation requires legitimation through parliamentary input. Examples include the Criminal Justice Act 1991, the Immigration and Asylum Act 1999, and the Police Reform Act 2002, discussed above, all of which entailed private delegation of powers which, even on an extremely minimalist account of the state, are usually characterized as inherently governmental. Legislation will also often enable local authorities or other public authorities exercising delegated powers to, in turn, delegate power to private parties.

Contract and grant are the more usual techniques of private delegation. Within the contractual framework there are many different models, some of which involve creating partnerships and joint ventures, rather than strict delegation relationships, between government and private actor—although usually it will be the private actor that will be performing the relevant function in return for a longstanding payment obligation on the part of the government. In particular, public-private partnership (‘PPP’) and private finance initiative (‘PFI’) arrangements entail a particular type of partnership relationship between public and private or voluntary bodies, characterized by risk-sharing agreement directed at the attainment of specific policy objectives. The PFI and PPP regulatory frameworks permit a high degree of central control to be exercised by the Treasury, while avoiding the burden on the Public Sector Borrowing Requirements that would otherwise accompany public financing and procurement. With PPP's

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429 Scott (n 426).
430 Graham and Prosser (n 53) 38.
431 Above 2.4.2.2 and see also 1.1.2.
432 See, eg, National Assistance Act 1948 s 26.
433 Certain specific techniques of delegation which only apply in certain areas are not considered in this book, eg, large-scale voluntary transfers in the housing sector. For specialist treatment see, eg: J Driscoll and I Doolittle, ‘Large Scale Voluntary Transfers of Local Authority Housing: A New Social Rented Sector’ (2000) 4 Landlord and Tenant Rev 99.
434 Vincent-Jones (n 213) 175.
435 Ibid.
there are two options: a Design Build Operate (DBO) contract, where finance is publicly provided, or alternatively a Design Build Finance Operate (‘DBFO’) contract, where the private sector provides part or all of the finance in accordance with PFI guidelines.\textsuperscript{436} The PFI model usually involves the government engaging a private contractor, which mostly takes the form of a special purpose company, to both build an asset and provide support services in relation to the asset during the contract period, resulting in a construction phase followed by an operational phase. The government will not pay for the asset at the time of construction, and instead the contractor receives payment throughout the contract period, either from the government itself, often referred to as the ‘unitary payment’, or from users of the asset or a combination of both.\textsuperscript{437} Local authorities are also able to enter into PFI arrangements.\textsuperscript{438}

As for the term ‘grant,’ this covers contributions to both particular bodies and for particular purposes. There are a huge number of ‘grant-aided bodies’, which are basically off-shoots of central government departments and which exist ‘to provide services formerly delivered by central or local government’.\textsuperscript{439} Categorizing these ‘grant-aided bodies’ as either public or private is incredibly difficult. Sometimes, they are established as private companies but describe themselves as ‘grant-aided public bodies’ because they receive ‘core funding’ from a governmental department.\textsuperscript{440} Other times, they are established by executive or legislative action.\textsuperscript{441} Grants are also made directly to clearly private recipients, either as ultimate intended beneficiaries or as intermediaries operating programmes to benefit others. So, for instance, statutory provision has been made for Rural Development Boards, in accordance with arrangements approved by the appropriate Minister and the Treasury, to make grants to owners of agricultural land or forest for developing tourist facilities,\textsuperscript{442} and specific statutory authorization has been provided for the Higher Education Funding Council for Wales to award grants to designated bodies for the provision of teacher training facilities.\textsuperscript{443}

\textsuperscript{442} Agriculture Act 1967 s 47.
\textsuperscript{443} Education Act 2005 s 85.
2.4.3 European Union

2.4.3.1 The historical, ideological, and political contexts of private delegation

There are two points to make about private delegation of governmental power in the EU: first, it has probably attracted more negative attention than in the other two legal orders; and second, private delegation in the EU has been almost entirely functionally driven, responding to the needs of the EU at various times and in various contexts.

As was explained in Chapter One, following a period of dissatisfaction in the media and in the European Parliament with the Commission’s management of its financial resources and its programmes, a Committee of Independent Experts was established to investigate fraud, mismanagement, and nepotism and to determine the responsibility of the Commission or individual Commissioners for such matters.⁴⁴⁴ Central to the Committee’s report was the Commission’s mismanagement of contracting-out,⁴⁴⁵ which, as Craig has observed, actually embodied many of the errors often made by governments when contracting out, namely:

- the blurring of the line between policy formation and policy implementation;
- the difficulty of ensuring proper financial accounting in relation to the activities undertaken by the private contractor;
- the importance of a proper line of management within the public body; and
- the fact that the private contractor will normally not be imbued with a public ethos in its decision-making.⁴⁴⁶

Although the errors in private delegation made by the Commission mirrored those made by governments generally, the Commission’s lack of political capital⁴⁴⁷ meant that the result of the independent report was that the Commission resigned en bloc. The Commission’s initial negative experience of private delegation, as highlighted in the report, did not, however, result in the demise of such delegation, and it was subsequently acknowledged in both a second report of the Committee of Independent Experts⁴⁴⁸ and in a White Paper on Reform of the Commission⁴⁴⁹ that contracting-out was necessary for the effective implementation of many of the EU’s policies. However, as will become apparent in Chapter Five, the legal controls over contracting-out were noticeably intensified in response to this early experience.

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⁴⁴⁴ For a detailed discussion see Craig (n 250) 4–16.
⁴⁴⁶ Craig (n 250) 5.
⁴⁴⁷ Craig and Tomkins (n 112) 12.
⁴⁴⁸ CIE Second Report (n 246) Vol I [2.3.1]; see also at [2.0.1] and [2.3.8].
With regard to the second point, perhaps it is fitting in an institution which has such a contested character, that the motivations for delegation of governmental power to private parties have been ‘eclectic’, rather than being driven by an ideological agenda. In terms of political context, interestingly, while, as we have seen, private delegation in England, and in the US to a lesser extent, has been located within the context of right-wing thinking on governance, private delegation in the EU has occurred in a political context which is almost moving in an opposite direction to that of England and the US. It is undisputed that the EU’s initial concern was with establishing a free and competitive ‘common’, and later ‘internal’, market. However, with the disintegration of the social welfare model in EU Member States and the evolution in the Member States towards neo-liberalism from the 1980s onwards, Freedland notes that those policy-makers who wished to retain the ideals of the welfare state turned to the EU as a residual guardian of those ideals, resulting in an ‘ironical reversal of the original role of the Community’. In the private delegation context, a particularly pertinent example of this tentative ‘reversal’ of the role of the EU is found in the Acquired Rights Directives, which affected the Thatcher government’s goal of using private delegation to cut costs by protecting the rights of transferred employees. Other examples include Article 2 of the EC Treaty, which sets as one of the Community’s objectives ‘the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States’ and the specific reference in Article 7d of the TEU to the role of services of general economic interest ‘in promoting social and territorial cohesion’. The Charter of Fundamental Rights of the European Union contains chapters on solidarity and citizenship rights (Chapters IV and V), while ECJ cases addressing access to information on abortion, access to higher education, and access to

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450 Craig (n 250) 32.
451 EEC Treaty (original version) Arts 2 and 8.
452 TEU Art 7a.
453 Freedland (n 269) 28.
454 Ibid. See, generally, de Búrca (n 237).
456 Freedland (n 396) 14–19; EM García, ‘Public Service, Public Services, Public Functions, and Guarantees of the Rights of Citizens: Unchanging Needs in a Changed Context’ in Freedland and Sciarrà (n 269) 57, 76; W Sauter, ‘Universal Service Obligations and the Emergence of Citizens’ Rights in European Telecommunications Liberalization’ in Freedland and Sciarrà (n 269) 117.
cross-border medical assistance have led commentators to assert the existence of a ‘European social model’ or ‘a new pan-European solidarity space’. This more general shift in the EU has been reflected in specific examples of private delegation and, for instance, Craig notes that with MED programmes ‘there was a desire to involve civil society in service delivery’.

More commonly though—while no doubt influenced by shifts in public management, legal, and political theory—particular examples of private delegation in the EU have clearly been motivated by particular ‘pragmatic resource’ needs. As Craig explains, in the nuclear safety area expertise was the ‘key factor’, while in the context of humanitarian assistance it was thought that specialized organizations would be better placed than the Commission to deliver aid. To the extent that private actors are engaged in the process of environmental regulation in the EU, it is largely because citizens are a ‘powerful new force in achieving environmental results’. Similarly, for the Commission, much private delegation has been necessitated by staff shortages and inadequacies of resources at the EU level, as noted above, and at times this need has been exacerbated by the Commission’s tendency to launch programmes without having the requisite staffing and resources at its disposal to implement the programmes.

Furthermore, private standard-setting bodies were engaged due to an early realization in the EU that different technical standards in different Member States could thwart the free circulation of goods across borders, and that the Community was unlikely to be able to legislate sufficiently efficiently to keep pace with technical developments.

458 de Búrca, ‘Towards European Welfare?’ in de Búrca (n 237) 1, 3; C Barnard, ‘Solidarity and New Governance in Social Policy’ in de Búrca and Scott (n 54) 153.
460 Craig (n 250) 32. See also European Economic and Social Committee, The role and contribution of civil society organizations in the building of Europe (CES 851/99, 22 September 1999).
461 Fisher (n 277) 228–9.
462 Ibid 215.
463 Craig (n 250) 32.
465 CIE Second Report (n 246) [2.7.7], [2.9.1] (tourism projects); CIE First Report (n 445) [5.2.2], [9.2.7].
2.4.3.2 The extent of private delegation

Private delegation is used at both the direct or centralized and the shared level of EU administration. The most prominent example is probably standard-setting, deemed to constitute the ‘third regulatory model of Community health and safety regulation’. There are a number of private standardization bodies, the most notable including CEN and CENELEC. CEN is a non-profit-making international association, governed by Belgian private law, which seeks to eliminate barriers by standardizing technical requirements, apart from in the areas of electrotechnology and telecommunications. CENELEC is similarly composed and deals with standardization of the electrotechnical sector. Together, they are sometimes referred to as the Joint European Standards Institution. The European Telecommunication Standards Institute is a trade association, composed of national telecommunications administrations and major suppliers and purchasers of telecommunications equipment, established to develop standards in this area. Where specific standards developed by CEN or CENELEC are incorporated into EU legislation, in what Vos has described as the ‘rigid (strict)’ reference to standards, it is questionable whether a delegation has taken place, since the legislature is able to verify the content of the technical standard before incorporating it into the legal provisions. By contrast, a ‘sliding (dynamic or general)’ reference to a standard will refer to the standard in its most current form, through the use of an indefinite term such as ‘the state of the art’ in the legal text. This will actually mean that the final decision-making authority on particular standards will rest with the private standardization body, albeit that non-conformity with the standards only creates a refutable presumption, rather than a legally binding conclusion, of lack of compliance with EU law. Private delegates are also often involved in the implementation and management of Commission programmes, as outlined in the previous section. On occasion, there is direct private delegation from the Commission to national private bodies and, for instance, law enforcement powers are exercised by consumer associations, pursuant to EC directives.

467 Above 2.3.3.
468 Vos (n 466) 251. The other two models of regulation involve comitology and use of agencies.
469 An abbreviation for Comité Européen de Normalization, in English, European Committee for Standardization, and in German Europäisches Komitee für Normung; CEN Statute Art 2.
470 The European Committee for Electrotechnical Standardization. For a detailed overview of how CEN and CENELEC operate see Vos (n 466) 256–68; see also S Farr, Harmonization of Technical Standards in the EC (2nd edn, John Wiley, Chichester 1996) ch 4.
471 CEN Statute Art 1.
472 CEN Statute Art 4.
473 Farr (n 470) [4.3].
474 Ibid [4.13]
475 Vos (n 466) 281 (emphasis in original).
476 Ibid.
477 Ibid (emphasis in original).
480 Ibid 285.
2.4.3.3 The techniques of private delegation

Once again, legislation, contract, and grant emerge as the primary methods of private delegation at both the direct and the shared management levels in the EU. For example, in the shared management context of EU administration, grants, such as the Structural Funds, are often paid to national bodies which distribute the funding to support projects boosting economic development in underdeveloped areas of the Union.⁴⁸² There are three possibilities for private delegation here: first, the Member State could contract out its assigned task to a private actor; second, the Commission could contract out its assigned task to a private actor; third, when the national body disburses the funds to a private actor, that disbursement could involve private delegation where the private actor’s project involves discretionary choices as to expenditure of Union funds in furtherance of Union objectives.

In the direct management context of the EU, delegation from the Commission to a private actor will usually take place using contract or grant. Thus, as noted above, with the Leonardo da Vinci programme, promoting vocational training by encouraging transnational cooperative projects, the Commission has, in the past, contracted out administration tasks.⁴⁸³ Alternatively, there may be a national intermediary that operates similarly to national intermediaries in the shared management context⁴⁸⁴: the Phare programme, for example, which assists Central and Eastern European countries with accession, is implemented primarily through grants to national authorities, which are in turn responsible for disbursing the funds—again, through either grant or contract.⁴⁸⁵ Given the option for the Commission to delegate to executive agencies, created by the Financial Regulation applicable to the general budget of the European Communities,⁴⁸⁶ the possibility has also evolved of delegation from executive agencies to private actors. Finally, of course, private delegation can be implemented by legislation, for example, through a ‘sliding scale’ reference to standards of private standard-setting bodies in directives, or through empowering private actors directly, as in the example given above of consumer associations.

⁴⁸² Commission (EU) EU Structural Funds (n 298).
⁴⁸³ Above 2.3.3.1.
⁴⁸⁴ Craig (n 246) 845.
2.5 Conclusion

In any survey which seeks to provide an overview of different legal systems, it is always extremely difficult to draw hard-edged conclusions. At best, general trends can be identified. This survey suggests that private delegation occurs in the three legal systems in quite different circumstances. In the US, it occurs in the context of legal order based on a written and entrenched constitution, a federal system based on a strong separation of powers, and a long-established tradition of private participation in governance. In England private delegation operates in the framework of an unwritten constitution, in which the distribution of governmental powers is often unclear and, in its recent manifestation at least, it has also operated as a core element of an ideological rejection of strong government and welfarism. Meanwhile, the EU, a system of contested characterization in which governmental power is distributed according to a complex system of conferred competences, provides an environment in which private delegation has mostly been engaged as a response to the functional requirements of the EU enterprise. Moreover, as was noted in Chapter One, in all three legal systems, private delegation occurs in a context where a distinction is drawn between ‘public’ and ‘private’, albeit that in the EU, as will be seen, this distinction is often less relevant and more ‘mutating’.⁴⁸⁷ Throughout this book, the influence of these different jurisdictional settings on legal responses to private delegation will be explored and the overview provided in this chapter will be revisited in Chapter Nine. First, though, it is necessary to provide further context for the ensuing chapters, by reviewing the challenge created by the ‘concrete social problem’⁴⁸⁸ of delegation of governmental power to private parties.

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⁴⁸⁸ Above 1.2.2.