Constitutional Controls on Delegation

4.1 Introduction

Private delegations clearly raise even more troubling constitutional issues than their public counterparts... Thus, we believe it axiomatic that courts should subject private delegations to a more searching scrutiny than their public counterparts.¹

Chief Justice Phillips
Texas Supreme Court

A central issue in the discussion of delegation of governmental power to private actors is the extent to which governmental actors enjoy a capacity to delegate their power in the first instance. Quite simply, if governmental actors lack expansive delegation capacity, private delegation, and its associated challenges, may be less likely to arise. In this chapter, the role of constitutional law in limiting this delegation capacity is examined.² As will be seen, the experiences of the three jurisdictions under scrutiny seem to suggest that the ability of constitutional law to regulate delegation capacity will vary according to three factors: first, what could be called the constitutional source of restraint, that is, the existence of constitutional principles on which to construct constitutional doctrines of delegation control; second, control techniques, such as, for instance, choices between limiting the power that governmental actors can delegate and, alternatively, allowing governmental actors to delegate power but attaching conditions to the exercise of the power; and third, judicial attitudes to the appropriateness of intervening in governance choices that may be perceived to be taken more appropriately by the legislature or executive. All three factors are inter-related: even if there is a clear source of constitutional restraint on private delegation, whether that will be developed into an operational restraint depends largely on judicial attitude. Structurally, this chapter is straightforward, with each jurisdiction considered in turn.

4.2 United States

In the US, there are two constitutional doctrines relevant to controlling governmental delegators. One, the non-delegation doctrine, derives from the

¹ Texas Boll Weevil Eradication Foundation Inc v Lewellen 952 SW2d 454, 469 (Tex 1997).
² The term 'constitutional law' is used in respect of the EU to refer to fundamental principles of the Treaties. For discussion of the vigorous debate surrounding the use of the term 'constitutional' in the EU context, see above 2.2.3.

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constititutional principles of separation of powers and due process in both state and federal constitutions, and is applied with varying intensity. For the most part, this doctrine deals with delegation by legislative delegators of legislative power, although there have also been cases addressing legislative delegation of executive or judicial power⁴ and executive delegation of executive power.⁴ The other constitutional doctrine which aims to protect the civil service from dissolution exists only (in constitutional form at least) at state level⁵ and only addresses delegation by executive delegates of executive power.

4.2.1 The federal non-delegation doctrine

4.2.1.1 Constitutional source

That, in theory, the federal Constitution provides a potential mechanism of constitutional control of private delegation through the non-delegation doctrine, is clear. Where private delegation is concerned, the doctrine invokes two constitutional bases. The first is the separation of powers principle of the federal Constitution, which, as was noted in Chapter Two, distributes the three distinct functions of government between the three separate organs of government, vesting ‘All legislative Powers’ and ‘the executive Power’ of the US in Congress and the President respectively,⁶ and by Article III, vesting ‘the judicial Power’ of the US in ‘one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish’. In its strict form, this constitutional principle requires that the institution to which power has been assigned exercise that power, and it has been used to invalidate a private legislative delegation on the basis that such delegation is ‘utterly inconsistent with the constitutional prerogatives and duties of Congress’.⁷ The second constitutional basis for controlling private delegation is provided by the due process requirements of the Fifth Amendment, which applies to federal delegators, and the Fourteenth Amendment, applying to state delegators. In accordance with these requirements, private delegation has been found to be particularly ‘obnoxious’ because private actors’ ‘interests may be and often are adverse to the interests of’ those over whom they exercise control.⁸

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⁴ See, eg, Thomas v Union Carbide Agricultural Products Co 473 US 568, 571 (1985) (congressional delegation of judicial power); Friends of the Earth v Laidlaw Environmental Services Inc 528 US 167, 173, 197 (2000) (congressional delegation of executive power). On rare occasions, the doctrine has been invoked to address delegation by other branches of government of their power; see, eg, In re Donnovan 68 CalRptr2d 714, 715–16 (Cal Ct App 1997) (judicial delegation of judicial power).
⁵ Below 4.2.1.2(b).
⁶ A form of the core aspect of the civil service mandate, the ‘merit’ principle, is found in the federal Civil Service Reform Act 1978 Pub L No 95-454, 92 Stat 1111 (1978) (codified in various provisions of Title 5 of the United States Code). See below 4.2.4.
⁷ US Const Arts I–II.
That, in practice, however, the federal delegation doctrine provides little scope for controlling private delegation is widely accepted. Private delegations by federal and state legislatures have been invalidated by the Supreme Court in the past, but since the Court retreated from its initial opposition to New Deal initiatives, it has consistently, even almost unquestioningly, upheld congressional delegations of power to both public and private actors. Apart from a few exceptions, sweeping private delegations have been upheld, such as a delegation to private tobacco growers to veto any action by the Secretary of Agriculture designating a tobacco market, and a delegation to private milk producers to veto any agricultural marketing order proposed by the Secretary of Agriculture with the approval of the President. At times, the fact that a delegation to a private as opposed to a public actor has been made, has barely been acknowledged and, if acknowledged, has not been considered to raise any difficulties. In reality, now, practically any delegation to an agency or private entity, no matter how vague, will survive federal constitutional scrutiny.

4.2.1.2 Control technique

The control technique adopted seems to depend on the nature of the power being delegated and different approaches can be identified in the courts’ jurisprudence, depending on whether the delegated power is judicial, executive or legislative.

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10 Carter (n 8) (invalidating the Bituminous Coal Conservation Act 1935 as an unconstitutional delegation of legislative power to large coal producers); Schechter Poultry (n 7) (invalidating delegation to the President to approve codes of fair competition devised by trade associations and industry groups); Eubank v City of Richmond 226 US 137, 143–4 (1912) (invalidating a Richmond ordinance that required the city’s Building Committee to establish a building line when requested to do so by two-thirds of adjacent property owners).


12 Young v US ex rel Vuitton et Fils SA 481 US 787, 801–9 (1987) (while accepting the power of a court to delegate prosecution authority to a private attorney, the particular appointment to prosecute the violation of a court order of a private attorney representing the beneficiary of the order was invalidated).

13 Currin (n 11) 6.


15 Thomas (n 3) 585–91 (analysing a statutory scheme requiring private arbitration in the same manner as a delegation of adjudicatory power to an administrative agency).

16 Ibid 590 (noting that transferring valuation tasks from public to private actors ‘surely does not diminish the likelihood of impartial decision-making’).
(a) Judicial power
Where delegation of judicial power to a non-Article III tribunal is at issue,¹⁷ the preference has been for a combination of the two types of control suggested above¹⁸; and there are both limits to the scope of power which may be delegated and conditions attached to the exercise of any delegated power. The Supreme Court’s approach on this question has, however, evolved over time and is currently in a state of uncertainty.¹⁹ Generally, the emphasis is on distinguishing between judicial powers, which should be exercised by Article III courts, and adjudicative powers, which may be exercised by tribunals, sometimes referred to as ‘legislative courts’, which are created pursuant to Congress’ Article I powers.²⁰ Even where private delegates are concerned, the Court has simply tended to use the same tests as are used in drawing the distinctions between Article I and Article III,²¹ without acknowledging the different situation of the private delegate.

One approach identified in earlier and more recent cases, a ‘category-based’ approach, draws a sharp distinction between delegation of the adjudication of ‘public rights’ and ‘private rights’.²² According to this approach, adjudication of ‘public rights’, defined as those rights which ‘must at a minimum arise “between the government and others”’,²³ may be delegated without attaching a requirement of judicial review, while adjudication of ‘private rights’ may only be delegated if accompanied by judicial review by an Article III court, which has to be de novo as to questions of law and constitutional or jurisdictional fact.²⁴ Given that, as explored in Chapter Two, private delegation occurs most obviously in the context of the administration of government programmes,²⁵ involving issues of ‘taxation, immigration . . . public health . . . pensions’ and rarely involving ‘the

¹⁸ Above 4.1.
²⁰ Article I s 8 cl 9.
²¹ See Thomas (n 3) and comment at n 15 above.
²² Murray’s Lessee v Hoboken Land and Improvement Co 59 US 272, 284 (1855); Crowell v Benson 285 US 22, 50 (1982); see also Northern Pipeline Construction Co v Marathon Pipeline Co 458 US 50, 84 (1982) (invalidating a statute that assigned breach of contract issues in bankruptcy proceedings to bankruptcy judges not appointed pursuant to Art III since the case involved ‘private rights’ which could only be decided by Art III judges); Granfinanciera SA v Nordberg 492 US 33, 52–3 (1989).
²³ Northern Pipeline (n 22) 69.
²⁴ Crowell (n 22) 51–61; see also: Thomas (n 3) 592 and Levy and Shapiro (n 19) 508–9.
²⁵ Above 2.4.1.2, 2.4.2.2, and 2.4.3.2.
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liability of one individual to another’ it will be much more likely to implicate ‘public’ rights than private rights.²⁶ Moreover, pursuant to the ‘category-based’ approach, only adjudication of obviously ‘private rights’ appears to require de novo judicial review and if there is uncertainty as to the categorization of the right, extremely limited review, for instance, review of a private arbitrator’s decision for fraud, misconduct or misrepresentation, suffices for a finding of constitutionality.²⁷ As such, the ‘category-based’ approach poses minimal impediment to the private delegation of judicial power.

A second approach identified in the Supreme Court’s jurisprudence, involving a balancing test, determines the constitutionality of a delegation of adjudicative functions to a non-Article III tribunal by considering: the extent to which the non-Article III forum exercises a ‘range of jurisdiction and powers normally vested only in Article III courts’; the ‘origins and importance of the right to be adjudicated’; and the ‘concerns that drove Congress to depart from the requirements of Article III’.²⁸ The underpinning concern of the balancing test is to ensure that the ‘essential attributes of judicial power’ are reserved for Article III courts and to invalidate any delegation which ‘impermissibly threatens the institutional integrity of the Judicial Branch’.²⁹ So, for example, the more voluntary the submission to the delegated adjudicative scheme is, the greater the likelihood of it being found constitutional.³⁰ The outcome of the balancing test in any concrete context is difficult to predict³¹ but, overall, the test has been criticized for leaving open ‘the possibility of the protections of the judiciary being undermined’.³² In short, whichever approach is adopted, there are minimal restrictions on delegation of judicial power to private delegates at the federal level.

(b) Executive powers

The jurisprudence on the delegation of executive powers has generally focused on the power to execute the law and, in particular, on the qui tam actions discussed in Chapter Two and on other forms of citizen suits. Here, courts appear to have been broadly concerned to ensure that the power has not been delegated to an entity under the control of Congress,³³ that the private delegate has standing within the meaning of Article III,³⁴ and that the private delegate is adequately

²⁶ Crowell (n 22) 51.
²⁷ Thomas (n 3) 587–9, 592.
²⁸ Commodity Future Trading Commission v Schor 478 US 833, 851 (1986); see also Thomas (n 3) 587, 590, citing Crowell (n 22) 46.
²⁹ Schor (n 28) 851.
³⁰ Kinney and Sage (n 17) 123. See also: Thomas (n 3) 589; Schor (n 28) 849; CT Struve, ‘The FDA and the Tort System: Postmarketing Surveillance, Compensation, and the Role of Litigation’ (2005) 2 Yale J of Health Policy L and Ethics 587, 634–5.
³¹ LH Tribe, American Constitutional Law § 1-3, 7 (3rd edn, Foundation Press, New York 2000) 297; see also Matson (n 17) 518–19.
³² Matson (n 17) 494.
³⁴ Friends of the Earth (n 3) 185.
supervised by an executive officer in the conduct of the litigation.\textsuperscript{35} As such, the emphasis is both on limiting the scope of delegable power, the theory being that if the private delegate is adequately supervised a delegation cannot be said to have taken place, and on attaching conditions to the delegated power, by requiring private delegates to satisfy standing requirements in order to be able to act as private law enforcers.

With regard to the first inquiry, private delegates will inevitably not fall under the control of Congress. On the second standing question, it is well-established that to satisfy the standing requirement of Article III a plaintiff must demonstrate that he has sustained ‘injury in fact’, which is traceable to the defendant’s conduct, and that there is a substantial likelihood that the requested relief will remedy the injury.\textsuperscript{36} A qui tam relator, taking an action pursuant to the False Claims Act,\textsuperscript{37} cannot satisfy these requirements. However, in a noteworthy example of the role of interpretivism in federal judicial responses to private delegation, the Supreme Court, persuaded significantly by the fact that qui tam actions had existed in American colonies at the time of the adoption of the federal Constitution, has accepted that the relator can be considered to be an assignee of the standing interests of the federal government which has been defrauded and, thereby, to have suffered the ‘injury in fact’.\textsuperscript{38} By contrast, where the injury identified is more diffuse in its impact, the Court may be hesitant to find the standing requirements satisfied.\textsuperscript{39} This will not necessarily result in the invalidation of the legislation facilitating the delegation, but it will mean that the purpose of the delegation is defeated, since the private delegate will be unable to pursue the cause of action.\textsuperscript{40} On the third control, executive supervision, the Court has accepted that a delegation can be deemed constitutional where it provides for oversight by the government over the private law enforcer, such that ‘the President is able to perform his constitutionally assigned duties’ and, particularly, his Article II obligation to ‘Take Care’ that the law is executed.\textsuperscript{41} Thus, turning to the qui tam action again, the oversight which is exercised by the government

\textsuperscript{35} \textit{Morrison v Olson} 487 US 654, 696 (1988).

\textsuperscript{36} \textit{Vermont Agency of Natural Resources v United States ex rel Stevens} 529 US 765, 771 (2000). See also above 2.3.1.1.

\textsuperscript{37} 31 USC §§ 3729 et seq.


\textsuperscript{40} \textit{Lujan} (n 39) 577.

\textsuperscript{41} \textit{Morrison} (n 35) 696. See also Friends of the Earth Inc (n 3) 188 fn 4.
over the private delegate—such as through the option to join the case—results in what has been described as only a ‘partial’ assignment and is sufficient to ensure constitutionality.⁴²

Where executive, rather than legislative, delegation of executive powers is at issue, there are also constitutional control options available.⁴³ For example, Verkuil has suggested that outsourcing the work or duties of officers of the US potentially contravenes the President’s general duty to exercise his or her Article II powers and, in particular again, the requirements of the ‘Take Care Clause’,⁴⁴ while in the military context, the President’s role as Commander in Chief is also compromised.⁴⁵ There are, however, obstacles to the usefulness of these options.⁴⁶ In particular, in most cases, it will not be the duty of the President or the officers of the US that will be delegated, but rather delegation of functions over which the relevant constitutional officers will remain nominally in charge.⁴⁷ This then places the onus on the judiciary to consider agency decisions concerning workload, budget, and policy matters in assessing the extent of the delegation, a role that is usually disfavoured by the courts.⁴⁸ Additionally, challenges to private delegation of military or ‘Commander in Chief’ functions would most likely fail to overcome the threshold doctrines of standing and justiciability.⁴⁹ Overall, therefore, although some judicial control is exercised in the context of private law enforcement,⁵⁰ these delegations have been upheld readily,⁵¹ with the Supreme Court preferring to exhibit deference to congressional choices.⁵²

(c) Legislative powers

Where the delegated power is legislative, the non-delegation doctrine opts for the first of the two control techniques noted above, and is supposed to limit the power that may be delegated. There are two ways in which this is done. One is

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⁴² Vermont Agency (n 36) 773; also Bucy (n 38) 976.
⁴⁴ US Const Art II s 3. Although challenges to private citizen suits on this ground have not met with much success: see, eg, Atlantic States Legal Foundation Inc v Buffalo Envelope 823 FSupp 1065, 1076 (WDNY 1993).
⁴⁵ Ibid Art II s 2.
⁴⁶ Verkuil (n 43) 450–51.
⁴⁷ Ibid 451.
⁴⁸ Verkuil (n 43) 451. See, eg, AFGE Local 2017 v Brown 680 F2d 722, 726 (11th Cir 1982) (holding that outsourcing decisions are ‘inherently unsuitable’ for judicial review).
⁴⁹ Verkuil (n 43) 450.
⁵⁰ Friends of the Earth Inc (n 3) 197.
⁵¹ See, eg: Atlantic States (n 45) 1076; Delaware Valley Toxics Coalition v Karz-Hastings Inc 813 FSupp 1132, 1138 (ED Pa 1993).
⁵² Friends of the Earth (n 3) 185 (Ginsburg noting for the Court that this ‘congressional determination warrants judicial attention and respect’).
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to require that Congress provide ‘an intelligible principle’ to guide the delegate’s discretion:

a legislative body may not constitutionally delegate to private parties the power to determine the nature of rights to property in which other individuals have a property interest, without supplying standards to guide the private parties’ discretion.

The idea is that if there is an ‘intelligible principle’ then the delegated power can be a power of implementation only, and the constitutional mandate that ‘[a]ll legislative power’ be vested in Congress is preserved. So, for instance, where Congress legislated to regulate tobacco markets, but subjected the application of regulation to a private veto, no legislative delegation was found because Congress had exercised ‘its legislative authority in making the regulation and prescribing the conditions of its application’. The other manifestation of the doctrine is to uphold a delegation where there is governmental oversight of the private delegate. Again, the theory is that if there is oversight, power has not actually been delegated. As the Court reasoned in *Sunshine Anthracite Coal Co v Adkins*, because the Bituminous Coal Commission had ‘authority and surveillance over the activities’ of private delegates, ‘law-making is not entrusted to the industry’. Governmental oversight also alleviates due process concerns by ensuring that a disinterested actor remains in control.

In their operation, the primary effect of the ‘standards’ and governmental oversight tests is procedural, obliging governmental delegators to carefully define, and remain in control of, any delegation. This legal technique also has the effect of ensuring that the delegate does not enjoy unlimited arbitrary and discretionary power. The problem in application has been, however, that a generous interpretation of ‘intelligible principle’ and superficial analysis of governmental oversight have assisted in depriving the non-delegation doctrine of much of its substance. Insofar as ‘intelligible principle’ is concerned, as Justice Scalia has put it:

What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a ‘public interest’ standard?

55 *Carrin* (n 11) 16.
56 *Sunshine Anthracite Coal Co v Adkins* 310 US 381, 399 (1940).
57 Ibid. See also *Friends of the Earth Inc* (n 3) 188 fn 4.
58 *Nassau Securities Service v Securities and Exchange Commission* 348 F2d 133, 136 (2d Cir 1965) (although concerned about the ‘lack of disinterestedness’ of national security exchanges tribunals, the Court was reassured by the fact that their disciplinary actions were ‘subject to full review by the Securities and Exchange Commission, a wholly public organ’).
59 Verkuil (n 43) 424.
60 *Mistretta v US* 488 US 361, 416 (1989) (Justice Scalia dissenting). See also *US v Southwestern Cable Co* 392 US 157, 178 (1968) (‘as public convenience, interest or necessity requires’).
With governmental oversight, quite simply, courts ‘are satisfied by formal provision for government ratification, however perfunctory’.⁶¹ Metzger, for instance, has noted that federal courts have tended to find the governmental oversight requirement satisfied even where provision is made for very limited governmental review,⁶² and without enquiring if the review option is actually ever used.⁶³ Finally, what is noteworthy is that neither the due process nor the separation of powers non-delegation doctrines propose that certain governmental powers are non-delegable under any circumstances. There have been dicta to suggest, for instance, that Congress ‘could not, even if they wished, vote all power to the President and adjourn sine die’.⁶⁴ But beyond this core example, substantive limitations ‘require constitutional arguments that are not easily mustered’.⁶⁵ As such, ‘[n]ondelegation, in both its Article I and due process faces, is still about process.’⁶⁶

4.2.1.3 Judicial attitude

In specific terms, the use of each of the two constitutional bases to control private delegation has been complicated by the judiciary’s doctrinal understandings of the relevant constitutional provisions. With the separation of powers basis, for example, a natural pre-requisite for a constitutional violation is to show that the delegated power is ‘legislative’, ‘executive’ or ‘judicial’—terms to which the courts have traditionally given narrow interpretations.⁶⁷ In more general terms, the ineffectiveness of the non-delegation doctrine has not been completely without judicial disquiet. In the recent American Trucking case, while the majority opinion found an ‘intelligible principle’ in the vague language of ‘requisite to protect the public health’, Justice Thomas in concurrence questioned the usefulness of the intelligible principle test and advocated re-visiting the non-delegation doctrine.⁶⁸ Even more forthrightly, Justice Stevens highlighted the disingenuousness of the Court’s technique:

We could choose to articulate our ultimate disposition of this issue by frankly acknowledging that the power delegated to the EPA is ‘legislative’ but nevertheless conclude that the delegation is constitutional because adequately limited by the terms of the authorizing statute. Alternatively, we could pretend, as the Court does, that the authority delegated to the EPA is somehow not ‘legislative power’.⁶⁹

⁶² Ibid n 250 citing Thomas (n 3) 592.
⁶³ Ibid citing Sunshine Anthracite Coal Co (n 56) 399–400 (upholding a delegation to a private accrediting association to determine eligibility for Medicaid participation because the Secretary of State reserved the power to override the private association, although the Court did not inquire as to whether this actually ever happened).
⁶⁴ Mistretta (n 60) 415 (Scalia J dissenting).
⁶⁵ Verkuil (n 43) 424. ⁶⁶ Ibid.
⁶⁷ See, eg, US v Grimaud 220 US 506, 521 (1911) (authority to make administrative rules is not legislative power).
⁶⁹ Ibid 488.
In the private delegation context, individual judges have also expressed concern about the ‘undemocratic’ nature of private delegation.\textsuperscript{70}

The reason for the judicial reluctance to apply the delegation doctrine meaningfully is unclear, but seems to derive ostensibly from concerns of comity and, less ostensibly and more self-consciously, from the reaction with which the Court’s earlier invalidations were received. Writing for the Court in the \textit{American Trucking} case, Justice Scalia acknowledged that the constitutional mandate of Article I ‘permits no delegation of [Congress’] powers’,\textsuperscript{71} but explained that the Court had ‘almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law’.\textsuperscript{72} Broad delegations to the executive have been justified on grounds of appropriate political responsibility—for example, a delegation to the President to prohibit arms sales if such prohibition would ‘contribute to the reestablishment of peace’ was upheld because of the discretion to be afforded the President in foreign affairs.\textsuperscript{73} Comity concerns may be particularly acute in this context, given that the remedy for an unconstitutional delegation is invalidation.

However, there is also a deep-rooted uneasiness linked to the Court’s history at play.\textsuperscript{74} Exhorting a reinvigoration of the delegation doctrine in a concurring opinion in the 1980 \textit{American Petroleum} case, Justice Rehnquist urged that the judiciary not shy from fulfilling a constitutional duty to invalidate unconstitutional delegations, ‘solely out of concern that [they] should thereby reinvigorate discredited constitutional doctrines of the pre-New Deal era’.\textsuperscript{75} The delegation doctrine, hailing from the same era as the Court’s restrictive interpretation of the Commerce Clause, which impeded the New Deal reforms, and the notorious substantive due process doctrine of the \textit{Lochner} era which was considered in Chapter Two,\textsuperscript{76} has suffered something of a ‘death by association’.\textsuperscript{77} The result of these judicial attitudes is that the Court fulfils its \textit{formal} constitutional duty by invoking the delegation doctrine, but wholly undermines it with a \textit{pragmatic} sympathy for the realities of modern government, which finds an ‘intelligible principle’ even ‘in the most anemic statutory language’.\textsuperscript{78}

\begin{itemize}
\item \textsuperscript{70} \textit{Mistretta} (n 60) 422 (Scalia J dissenting).
\item \textsuperscript{71} \textit{American Trucking} (n 68) 472.
\item \textsuperscript{72} Ibid 474–5. See also \textit{Friends of the Earth} (n 3) 185 and n 52 above.
\item \textsuperscript{73} \textit{US v Curtiss-Wright Export Corporation} 299 US 304, 320 (1936).
\item \textsuperscript{74} Metzger (n 61) 1442–3.
\item \textsuperscript{75} \textit{Industrial Union Department, AFL-CIO v American Petroleum Institute} 448 US 607, 686 (1980).
\item \textsuperscript{76} Above 2.3.1.1. See also DE Bernstein, ‘\textit{Lochner}’s Legacy’s Legacy’ (2003) 82 Texas L Rev 1; DE Bernstein, ‘\textit{Lochner} Era Revisionism, Revised: \textit{Lochner} and the Origins of Fundamental Rights Constitutionalism’ (2003) 92 Georgetown L J 1.
\end{itemize}
4.2.2 State non-delegation doctrines

4.2.2.1 Overview

The Fourteenth Amendment of the US federal Constitution, enshrining due process protections, applies to state actors and, to the limited extent that there exists a due process constraint on private delegation, states will be bound by it.\(^79\) In light of what has just been said about the federal non-delegation doctrine, of course, this restraint is theoretical rather than real. However, in sharp contrast to what has been happening at the federal level, at the state level there is evidence of a much more critical attitude to delegation in general,\(^80\) and to private delegation in particular, with frequent invalidation of delegations, identical to those that federal courts have accepted ‘without comment’.\(^81\) State courts have shown sensitivity to the particular difficulties involved with delegation to private actors. Invalidating a statute granting the Jockey Club the prerogative to deny racing licences, a New York Court of Appeals, noting that the issuance of licences was ‘essentially a sovereign power’, was clearly unhappy with the fact that the officers of the Jockey Club were ‘neither chosen by, nor responsible to the State government.’\(^82\)

(a) Constitutional source

In terms of constitutional source for delegation controls, certain early state constitutions, like Oregon’s, have explicit clauses forbidding any law ‘the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution’.\(^83\) More often, though, it is on state ‘vesting clauses’ that the state delegation doctrine is based. These ‘vesting’ clauses entrust certain branches of government with specified powers, and are typically interpreted to mean that once power is vested in a particular governmental branch it may not be exercised by others.\(^84\) Doctrinally, the use of vesting clauses as the source of authority to invalidate private delegations has been criticized.\(^85\) It has been argued that although state courts usually invalidate private delegations on the basis of vesting clauses, they have, in practice, been less motivated by separation of powers and

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\(^82\) *Fink v Cole* 97 NE2d 873, 876 (NY 1951); *Anderson v New York Racing Association*, January 12, 2004 (SDNY). See also *State Board of Dry Cleaners v Thrift-D-Lux Cleaners Inc* 254 P2d 29, 36 (Cal 1953) (holding unconstitutional the price-fixing provisions of the California Dry Cleaner’s Act); *Kenyon Oil Co v Chief of Fire Department* 448 NE2d 1134, 1135 (Mass App Ct 1983) (holding that statute did not permit a fire marshal to delegate authority to a fire chief to license gas stations).

\(^83\) Or Const Art I s 21, and Art III s 1.


\(^85\) Lawrence (n 81) 664–8.
more by due process concerns and, in particular, fear of self-interested conduct on the part of private actors. While there is a certain truth in this criticism, it seems unfair. Often courts will be motivated by both due process and separation of powers concerns—two concepts which are, in any event, not unrelated. The underlying purpose of procedural due process is protection of the individual from arbitrary action. Similarly, '[t]he doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power'.

(b) Control technique

It is difficult to categorize the many approaches adopted by different states to the delegation doctrine. In general though, like their federal counterparts, courts have tended to limit the degree of power that may be delegated. On occasion, state courts have simply declared that 'legislative power may not be delegated to non-governmental organizations or groups'. More usually though, state courts scrutinize private delegations using a rigorous test based on the same principles used to scrutinize delegations to public agencies—namely, a search for 'intelligible standards'. Unlike at the federal level, where the 'intelligible standards' test has very little impact, at the state level absence of proper standards will actually result in a delegation being invalidated. To give an example, in New York, it has been held that a town ordinance, requiring unanimous permission from all landowners within 500 feet of a property on which a mobile home was to be placed, was an unconstitutional delegation of zoning authority to private landowners. This was because the delegation lacked adequate standards to ensure that the landowners would not act in an arbitrary or discriminatory manner, by excluding some from placing mobile homes and permitting others. Similarly, in the Californian case of *In re Donnovan*, a delegation of judicial authority to private therapists was found to be an unlawful delegation of judicial power to a private actor. A judge

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86 Ibid.
87 See, eg: *International Service Agencies v O'Shea* 430 NYS2d 224, 228 (NY Sup Ct 1980) ('the reins of government cannot be turned over to private interest groups to be utilized to preserve self-interests'); J Freeman, 'The Private Role in Public Governance' (2000) 75 New York U L Rev 543, 585; see also C Reeder, 'Regulation by Contractors: Delegation of Legislative Power to Private Entities in Texas' (2004) 5 Texas Tech J of Texas Administrative L 191, 201–3 (tracing the history of acceptance of delegation of legislative power to agencies in Texas).
89 *Myers v US* 272 US 52, 293 (1926) (Brandeis J dissenting).
90 *Sedlak v Dick* 887 P2d 1119, 1131, 1135–6 (Kansas 1995); *Gumbhir v Kansas State Board of Pharmacy* 618 P2d 837, 842 (Kan 1980).
92 Ibid 340. See also *International Service Agencies* (n 87) 228–9.
93 68 CalRptr2d 714 (Cal Ct App 1997).
had ordered that a father have no visitation rights of his child without the permission of the therapist. The order was objectionable because it,

neither require[d] that the therapists manage visitation ordered by the court, nor set...criteria (such as satisfactory progress) to inform the therapists when visitation is appropriate. Instead it condition[ed] visitation on the children's therapists' sole discretion.⁹⁶

By contrast, delegations of judicial power in the form of the state ‘lemon laws’, noted in Chapter Two,⁹⁷ have been upheld—although not without significant scrutiny. For example, in the case of *Motor Vehicles Manufacturers’ Association of US, Inc v New York*,⁹⁸ General Business Law § 198-a(k), enabling a consumer to opt for arbitration to settle a claim where the award was binding on the manufacturer, was upheld because it satisfied a number of criteria. First, arbitrators had to be selected pursuant to detailed standards. Second, the procedures the arbitrators were required to follow were specified in detail. Third, the grounds for relief were defined. Fourth, the arbitrators’ determinations were subject to judicial review to ensure compliance with due process, that there was adequate evidence on the record, and that the determination was rational.⁹⁹ The majority also distinguished the scheme of the General Business Law from a delegation of power unaccompanied by appropriate standards.¹⁰⁰

These cases represent typical state practice in considering private delegation, but a more unusually sophisticated and multi-factored delegation analysis has emerged from the Supreme Court of Texas. This analysis merits separate consideration below,¹⁰¹ because it skillfully combines the two techniques suggested at the outset—both limiting the power which can be delegated and attaching conditions to the exercise of any delegated power.

(c) Judicial attitude

In terms of judicial attitude, state courts may have been much less concerned with questions relating to their judicial competence—although this question has been raised by commentators.¹⁰² Quite simply,

⁹⁶ Ibid 716. See also *De Guere v Universal City Studios Inc* 65 CalRptr2d 438, 447–50 (Cal Ct App 1997); *In re Edgar M* 537 P2d 406, 580 (Cal Ct App 1975).
⁹⁷ Above 2.4.1.2.
⁹⁸ 550 NE2d 919 (NY 1990).
⁹⁹ Ibid 924–5. See also *DaimlerChrysler Corporation v Executive Director, Maine Revenue Services* 922 A2d 465 (Me 2007).
¹⁰⁰ Ibid. Contrast the strong dissent by Judge Titone (926–30).
¹⁰¹ Below 4.2.2.2.
[state] courts may have less need to reinvigorate the [delegation] doctrine, since they have historically been more comfortable with striking down state laws on this basis than their federal counterparts.¹⁰³

This attitude has at times led to a direct conflict between the judiciary and the legislature. Thus, where the Californian legislature had delegated taxation power to a metropolitan projects authority, but had conditioned the delegation on approval in a vote by the majority of those within the authority’s geographical jurisdiction,¹⁰⁴ a Californian appellate court was unmoved, holding the delegation—in spite of voter approval—unconstitutional,¹⁰⁵ and noting simply that ‘the Legislature cannot do indirectly what it is prohibited from doing directly’.¹⁰⁶

4.2.2.2 Texas

(a) Texas Boll Weevil Eradication Foundation, Inc v Lewellen

In Texas Boll Weevil Eradication Foundation, Inc v Lewellen¹⁰⁷ the Texas Supreme Court addressed the specific issue of legislative delegation of legislative power to private entities. The Texas Boll Weevil Eradication Foundation is a body of cotton growers given statutory power to implement programmes to eradicate boll weevil, a pest which presents a major economic threat to the Texas cotton industry every year.¹⁰⁸ Noting that the only test previously applied in Texas regarding the constitutionality of private delegation—enquiring whether ‘the legislative purpose is discernible and there is protection against the arbitrary exercise of power’¹⁰⁹—was unhelpful, the Court proceeded to set out a new eight-factor test to apply to private delegations. The test, which the Court based on the constitutional separation of powers clause,¹¹⁰ lists the following factors as relevant in determining the constitutionality of a private delegation:

1. Whether the private delegate’s actions are subject to meaningful review by a state agency or other branch of state government;
2. Whether the persons affected by the private delegate’s actions are adequately represented in the decision-making process;
3. Whether the private delegate’s power is limited to making rules, or whether the delegate also applies law to particular individuals;

¹⁰³ Texas Boll Weevil (n 1) 468. See also Tribe (n 31) 993 noting that the ‘judicial hostility to private lawmaking... represents a persistent theme in American constitutional law’ and 988–92 (describing due process constraints on state delegations to private parties).
¹⁰⁴ Howard Jarvis Taxpayers’ Association v Fresno Metro Projects Authority 48 CalRptr2d 269, 272 (Cal Ct App 1995).
¹⁰⁵ Ibid 280.
¹⁰⁶ Ibid 279. See also County of Riverside v Superior Court 66 P3d 718, 726–7 (Cal 2003).
¹⁰⁷ Above n 1.
¹⁰⁸ Ibid 457.
¹⁰⁹ Ibid 472 (relying on Office of Public Insurance Counsel v Texas Automobile Insurance Plan 860 SW2d 231, 237 (Tex App 1993)).
¹¹⁰ Ibid 465; Tex Const Art II s 1.
4. Whether the private delegate has a pecuniary or other personal interest that may conflict with its public function;
5. Whether the private delegate is empowered to define criminal acts or impose criminal sanctions;
6. Whether the delegation is narrow in duration, extent and subject matter;
7. Whether the private delegate possesses special qualifications or training for the task delegated to it; and
8. Whether the legislature has provided sufficient standards to guide the private delegate in its work.

The Court examined the delegation closely in light of each factor and concluded that, because some of the factors were unfulfilled, the delegation was unconstitutional. While the Act provided for some oversight of the Foundation by the Commissioner of Agriculture, that review was ‘uneven and incomplete’.¹¹¹ Once the Foundation was established as an independent entity, the Commissioner had no authority to dissolve it, except when the eradication purpose had been fulfilled.¹¹² The Foundation’s role went beyond devising guidelines for eradication programmes, to actual application of the programmes to cotton growers.¹¹³ Another problem was that the Foundation’s board members were cotton growers who had a direct pecuniary interest in the eradication programmes implemented.¹¹⁴ There were also very few statutory standards to guide the Foundation.¹¹⁵

A number of the eight factors were, however, satisfied. The persons affected were adequately represented, and the sixth factor was inconclusive since the scope of the statute was narrow, namely, eradication of boll weevil, but the programme’s cost and duration was not limited other than being subject to a Sunshine Act and to being discontinued once boll weevil was eradicated. Moreover, although the Court noted that the Foundation had power to impose monetary penalties, destroy growers’ crops, and create criminal offences, this did not weigh in the Court’s overall decision as to its constitutionality, as these provisions could easily have been severed.¹¹⁶ Interestingly, failure to satisfy the seventh factor was excused by satisfaction of the second factor, the court noting the difficulty of having both adequate representation of affected parties on the board and specialized expertise on the board.¹¹⁷

(b) *FM Properties Operating Co v City of Austin*

In *FM Properties Operating Co v City of Austin*¹¹⁸ the power of the Texas delegation doctrine was again aptly demonstrated. The case concerned the constitutionality...
of section 26.179 of the Texas Water Code, which allowed landowners of contiguous tracts of at least 500 acres within certain municipalities’ extraterritorial jurisdictions to designate their property as ‘water quality protection zones’. Once an area was so designated, the statute exempted landowners from local municipal water quality regulations. The statute divided landowners into two categories, those owning from 500 to 999 acres and those owning 1,000 acres or more. The small landowners had to have their plans approved by the Texas Natural Resource Conservation Commission (‘TNRCC’); large landowners were allowed to make the designation without prior approval. The TNRCC was required to approve the plan unless it determined that implementing the plan would not reasonably attain one of the two water quality objectives for which the plan may be developed, i.e., maintaining background levels of water quality in waterways or capturing and retaining the first 1.5 inches of rainfall from developed areas.

The Court in *FM Properties* began by clarifying when a power would be deemed ‘legislative’, such as to trigger the *Boll Weevil* test. What was required was power to make rules and determine public policy, ‘including the power to provide the details of the law, to promulgate rules and regulations to apply the law, and to ascertain conditions upon which existing laws may operate’. Having determined that the power being delegated was legislative, because it delegated to certain landowners the power to regulate water quality on their property and the power to exempt themselves from the enforcement of municipal regulations, the provision was found to be unconstitutional and was invalidated. The Court accepted that private delegations are ‘frequently necessary and desirable’ and ‘used extensively in Texas government’, but it stressed that such delegations, although tolerated, are subjected to the rigorous *Boll Weevil* review.

There were a number of problems with the delegation. There was very limited scope for governmental review. The TNRCC had no power to review decisions regarding which municipal regulations to enforce on the landowners’ property. Large landowners could record their designations before the TNRCC even reviewed them and the TNRCC’s review was limited to determining whether the plan would reasonably achieve its purpose. If the TNRCC denied a large landowner’s plan the plan remained effective during the appellate process; and, unlike most regulatory schemes, the burden of proof was on the TNRCC to prove its case if a landowner appealed a denial.

Other problems with the delegation were inadequate protection and representation of those affected by landowners’ decisions, and the fact that the

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119 *FM Properties* (n 118) 873.
120 Ibid 875.
121 Ibid 870, 888.
122 Ibid 870.
123 Ibid 880–84.
124 Ibid 884–5. There was no method for affected persons to appeal TNRCC’s approval of the plan.
landowners had a pecuniary interest in maximizing profit and minimizing cost that may have conflicted with the public interest. The duration and extent of the delegation (the delegations were covenants running with the land) were problematic. Moreover, a landowner was not required to possess any particular qualification or training to make the designation. Finally, although there were fairly detailed statutory standards to guide landowners in formulating their plans, there was minimal guidance on how the landowner should modify the plan if the plan did not maintain background water quality levels, nor was there any guidance on how a landowner might determine which municipal regulations might be enforced on his or her property. The Court decided that this legislative standards test weighed neither for nor against the delegation.

(c) The Boll Weevil technique
The exacting Boll Weevil analysis, as illustrated in these two cases, addresses the important questions that should be addressed when deciding on the appropriateness of a private delegation of governmental power. Each element of the test must be applied by the reviewing court and no one factor is necessarily determinative; and the test has been applied to state agency rules which delegate rule-making authority and not just statutes. The test exhibits elements of two control techniques.

First, delegable power is limited. Only power subject to ‘sufficient standards’ and narrow in its ‘duration, extent and subject matter,’ can be delegated. By requiring that the delegator provide ‘sufficient standards’ to guide the private delegate in its work, factor eight aims to ensure that the legislature has detailed plans for the outcome of any private delegation. Like the ‘intelligible principle’ test, it seeks to ensure that only implementation power is delegated, and that discretion on the part of the private delegate is to be limited as far as possible. Factor six, which requires that the delegation be narrow in its ‘duration, extent and subject matter’, seeks to prevent governmental actors from evading the responsibility with which they have been charged by the electorate, by making excessive and far-reaching delegations to private entities. Similarly, factors three and five also reduce the likelihood of the private delegate being the recipient of far-reaching

¹²⁵ Ibid 885–6.
¹²⁶ Ibid 886.
¹²⁸ Ibid 887–8. For additional cases applying the Boll Weevil test, see: Fernandez v City of San Antonio 158 SW3d 532 (Tex App 2004) (upholding a rezoning plan proposed by residents due to the fact that the plan was merely advisory, and not binding, in nature); City of Garland v Byrd 97 SW3d 601 (Tex App 2002) (upholding, as constitutional delegation of legislative power, a statute allowing police officers to challenge discipline by appealing to a private hearing examiner).
¹²⁹ Proctor v Andrews 972 SW2d 729, 735 (Tex 1998); City of Garland (n 128) 607 [5], [17].
discretionary power. If the power extends from the devising of rules to the application of laws to particular individuals, or if the delegates are entitled to define criminal acts, or impose criminal sanctions, there is a greater likelihood of the delegation being invalidated. In other words, the greater the degree of discretion attached to the power or the closer the power to what might be called the ‘core’ of governmental power, coercive power,¹³¹ the greater the likelihood that a private delegation of such power will be invalidated.

Oversight is also important in limiting delegable power. Factor one requires that governmental delegators engage in ‘meaningful review’ of their chosen private delegate: this has the dual aim of ensuring that government remains involved in the actions of the delegate and, of course, conversely, that the delegate remains under the control of government and internally accountable to it. If government agents are obliged to review their private delegates, this reduces the opportunity to sidestep responsibility for hard choices by delegating to the private sector, and thereby also seeks to ensure the accountability of governmental delegators.

Second, conditions are attached to the exercise of the power. The Boll Weevil test seeks to ensure that the delegate of governmental power exercises that power in a manner which promotes the public interest. The requirements of factor two for representation by those affected by the private delegate’s actions in the decision-making process, and the requirement of factor four that the delegate should not have any pecuniary or other personal interest to conflict with its public function, offer important protection for individual citizens. While they do not guarantee that the private delegate will not violate any constitutional right of the citizen, they do ensure that, at the very least, due process will be accorded to those affected by the decisions of private delegates. The requirement in factor seven, that the private delegate should possess special qualifications or training for its task, approximates to a novel judicial effort to ensure that private delegations actually result in efficiency and effectiveness gains for the public—and not in waste and corruption. Requiring that the delegate not have a pecuniary or personal interest, and that the delegate be qualified for its task, also places an onerous responsibility on the delegator of governmental power to choose its delegates with care.

Three final points should be made about the operation of the non-delegation doctrine in Texas. First, the doctrine is sometimes used as a technique of statutory interpretation, such that the statutory provisions establishing an independent third-party hearing examiner in disciplinary actions against firefighters and police officers had to be read to permit a full appeal by the city. Otherwise, cities ‘could be hamstrung by an independent hearing examiner’s arbitrary or even fraudulent decision without recourse’, which would not serve the public interest.¹³² Second, the scope of application of the non-delegation doctrine is broad, due to a very generous understanding of the term ‘legislative power’, which

¹³¹ Lawrence (n 81) 648. See also above 1.1.2.
¹³² City of Houston v Clark 197 SW3d 314, 320 (Tex 2006).
seems to include the application of rules and regulations, which might normally be deemed judicial or executive in nature. For example, in *City of Garland v Byrd* the court ruled that where a private hearing examiner conducts a hearing on the suspension of a police officer, this constituted ‘an exercise of the supervisory powers delegated to it by the legislature’ and as such was legislative rather than judicial.¹³³ Third, and perhaps what is most interesting about the *Boll Weevil* case, particularly in light of the federal jurisprudence, is that, to a degree, its exacting analysis actually entailed a relaxation in the Texan judiciary’s attitude to delegation of legislative power to private entities. Although the jurisprudence was not always consistent, in a number of earlier cases, such delegation had simply been prohibited outright by the courts¹³⁴ and the case has actually been criticized by commentators for having digressed from the stricter stance of earlier decisions.¹³⁵

### 4.2.3 The importance of judicial attitude

In terms of appreciating the difference between the non-delegation doctrines of state and federal courts, much seems to hinge on judicial attitude. After all, constitutionally, as was discussed in Chapter Two, both state and federal constitutions contain separation of powers clauses from which private delegation controls could be developed. Explaining the difference of judicial attitude, however, is a complex task, and one that would require a book in itself to answer properly. A brief consideration of three potentially relevant factors—constitutional power, the position of the judiciary, and the calibre of legislation subject to scrutiny—suggests that there is no straightforward explanation.

From a strict doctrinal perspective, state courts should really be more constrained in review than their federal counterparts, since constitutionally, again, as was considered in Chapter Two, the powers of state governments are more secure than those of federal government. A fundamental tenet of state and federal constitutional jurisprudence is that state constitutions, unlike the federal

¹³³ *City of Garland* (n 128).

¹³⁴ See, eg, *City of Galveston v Hill* 519 SW2d 103, 105 (Tex 1975) (noting that the setting of rates and determination of policies, as governmental functions, could not be ‘surrendered, delegated or bartered away’); *Nairn v Bean* 48 SW2d 584, 586 (Tex 1932) (noting that it ‘is well settled that no governmental agency can, by contract or otherwise, suspend or surrender its functions’). But see *Office of Public Insurance Counsel and State Board of Insurance v Texas Automobile Insurance Plan* 860 SW2d 231, 237 (Tex App 1993) (holding that ‘delegation of authority to private entities may be lawful if the legislative purpose is discernible and there is protection against the arbitrary exercise of power’). There were also four dissenting justices in both *Boll Weevil* and *FM Properties* and all dissented on the basis that the *Boll Weevil* test excessively confined the legislature’s ability to delegate legislative power to private entities (*FM Properties* (n 118) 898–915; *Boll Weevil* (n 1) 491–503) although, as Reeder has pointed out, the dissenting judgments were based on policy arguments that privatization is beneficial and desirable, rather than on legal authority (*Reeder* (n 87) 213–15).

¹³⁵ *Reeder* (n 87) 204–5, 224–30 (arguing that delegation of legislative power to private entities requires express authorization through constitutional amendment).
Constitution, are not grants of power, but limitations of power.¹³⁶ A state exists independently of its constitution, and its government may take any action it chooses, unless there is a provision in the state (or federal, of course) constitution restraining the action. Given that there is rarely an explicit state constitutional limitation on private delegations, state courts have developed such limitations indirectly. This is in contrast to federal courts that have interpreted the grants of power in the federal Constitution broadly to allow for far-reaching delegation.

In terms of the judiciary’s position though, from one perspective, it may be easier for state courts to take a more interventionist approach than federal courts. Unlike the federal judiciary, many state judges (including Texas state judges) are elected¹³⁷ and consequently their interference with legislative choices may be less open to attack for being anti-majoritarian, or at least they may be strengthened by being politically accountable.¹³⁸ State constitutions are usually easier to amend, and so state constitutional decisions can be more easily overruled. State courts can also give greater protection to constitutional provisions than federal courts because they are not attempting to set national standards.¹³⁹ Yet this argument seems weak in light of the well-known and more usual willingness of federal courts to intervene in political choices.¹⁴⁰ It would also be wrong to assume that state courts have no comity concerns whatsoever. In the Boll Weevil case itself the Court cautioned ‘that courts should when possible, read delegations narrowly to uphold their validity’, rather than invalidate.¹⁴¹ Furthermore, if anything, the very fact that state judges may be more ‘legitimate’ from a majoritarian perspective, in turn renders them ‘more vulnerable to majoritarian pressure when deciding constitutional cases’.¹⁴² For example, the Texas Supreme Court has frequently been criticized in the media for its political approach.¹⁴³ Empirical studies have also suggested that a claim of violation of a federal constitutional right by a state actor has a greater chance of success in a federal than in a state court,¹⁴⁴ which is attributed to the loyalty and responsibility state judges often exhibit towards other state actors.¹⁴⁵ With life-time tenure and higher compensation, federal courts are

¹³⁹ Lawrence (n 81) 673–5.
¹⁴⁰ For a well-known example, see Bush v Gore 531 US 98 (2000).
¹⁴¹ Above (n 1) 475.
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thought to be immune from such responses, in their reaction to both state and federal activity.¹⁴⁶

Insofar as the legislation reviewed is concerned, here again, the evidence points in both directions. Traditionally, state legislatures consisted of poorly paid part-time legislators who lacked resources to research and draft statutes.¹⁴⁷ However, state legislative capacity, in terms of deliberation time and institutional resources, has increased steadily over the years.¹⁴⁸ Also, during the nineteenth century, to counteract the danger of state legislatures being more open to interest-group influence than Congress, many states introduced a number of restrictions on the legislative process to render it more deliberative.¹⁴⁹ Indeed, some commentators have recommended that aspects of state legislative process be introduced to enhance federal lawmaking.¹⁵⁰ The fact remains that Congress still meets more frequently and still enjoys greater resources than state legislatures.¹⁵¹ but it cannot be said that state lawmaking is so lacking in deliberative input when compared to federal lawmaking, that any legislation produced requires more aggressive judicial review.

Normatively, the challenges posed by federal private delegations are real and it is disappointing that federal courts are not more willing to address this reality. In terms of explanation, in the absence of anything more convincing, perhaps it is—as Justice Rehnquist has suggested—a fear of resurrecting the much-maligned Lochner jurisprudence that causes the federal Supreme Court to resist a robust non-delegation doctrine.

4.2.4 The civil service mandate

Another interesting state constitutional source of control on private delegation is the civil service mandate.¹⁵² Indeed, it has been said that ‘[t]he most litigated privatization issue at the state and local level is whether existing civil service

¹⁵¹ Popkin (n 147) 790.
¹⁵² The mandate is presented here as a constitutional control, even though in some states, it takes, or is implemented through, statutory rather than constitutional form. For a detailed overview of the position in different US states, see RC Miller, 'Privatization of Governmental Services by State or Local Governmental Agency' (1999) 65 American L Reps 5th 1.
The mandate is intended to protect the civil service from deterioration and to remove political considerations from civil service appointments by requiring that appointments be made according to fitness and merit. Generally defined, ‘the merit principle requires the recruitment, selection, and advancement of public employees under conditions of political neutrality, equal opportunity, and competition on the basis of merit and competence’. This has consequences for contracting-out, as contracting-out can be considered to create an employment relationship, which bypasses the fitness and merit requirement, while its extensive use may lead to dissolution of the civil service by replacing civil servants with private contractors. A two-tier approach seems to have developed in the state jurisprudence, with some states adopting what could be described as restrained enforcement, and others opting for more strict enforcement. As with the differences between federal and state non-delegation doctrines, the differences between the states here seem to depend largely on judicial attitudes.

4.2.4.1 Restrained enforcement

Certain courts have indicated that because privatization has an impact on civil service protections it may not be undertaken at the discretion of executive actors, but will be constitutional where it is undertaken pursuant to specific statutory or administrative guidelines. Other courts have accepted that if privatization can be shown to be motivated by the desire to secure efficiency and cost-savings, and not by political cronynism, they will be unwilling to intervene. Thus, provided

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154 Professional Engineers in California Government v Department of Transportation 936 P2d 473, 475 (Cal 1997).

155 Gillette and Stephan (n 136) 497.

156 Alaska Public Employees Association v State 831 P2d 1245, 1249 (Alaska 1992) (internal quotation omitted).


158 See Miller (n 152) § 4; Moore v Department of Transport and Public Facilities 875 P2d 765, 769 (Alaska 1994); Vermont State Employees’ Association Inc v Vermont Criminal Justice Training Council704 A2d 769, 773 (Vt 1997); International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v Michigan Civil Service Commission 566 NW2d 57, 58–9 (Mich Ct App 1997).
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the governmental actor enters into a contract with a private actor, or abolishes civil service positions in 'good faith', the private delegation will be acceptable.¹⁶⁰ In New York the inquiry tends to go slightly further. Article V § 6 of the New York State Constitution provides that appointments and promotions in the civil service should be made according to merit and fitness to be ascertained by competitive examinations. In some older cases, the New York courts limited the scope of delegable functions by holding that the 'conventional and stable duties of the functionaries of civil government' had to be performed by civil servants.¹⁶¹ So it has been held, for instance, that individual projects, such as the building of the Triborough Bridge, may be contracted-out, but the maintenance of the bridge after completion may not.¹⁶²

More generally, New York courts have sought to assess the good faith of the privatization by assessing the relationship between government and the private party. Unlike the delegation doctrine, where oversight may be crucial to the relationship between the delegator and delegate, here the emphasis is on other aspects of the relationship. Employment relationships must not be created under the guise of an independent contract. This would violate the mandate, since it would allow individuals to be indirectly selected for public service without being subject to competitive examination. A contracting-out arrangement will be upheld therefore where it creates a true, independent contract, such as where the public authority: does not select, control or approve the officers or employees of the contractor; does not fix their compensation or their hours of work; does not engage them exclusively; and does not restrict them from engaging in their regular business with anyone they choose.¹⁶³ In contrast, a relationship tantamount to an employee relationship has been found where the services of a physician were retained, for a fixed yearly salary, with compensation being set for any assistants required. Since none of the assistants was selected by means of competitive examination, the delegation was invalidated.¹⁶⁴

4.2.4.2 Strict enforcement

In California, however, the constitutional civil service mandate clause has been interpreted in a very far-reaching manner. Article VII, formerly Article XXIV, is implemented by the state Civil Service Act,¹⁶⁵ and provides for a system of merit,

¹⁶⁰ See Miller (n 152) § 8. See, eg, Connecticutu State Employees Association v Board of Trustees of University 345 A2d 36 (Conn 1974); Ball v Board of Trustees of State Colleges 248 A2d 650 (Md 1968); Michigan State Employees Association (n 153); University of Nevada v State Employees Association 520 P2d 602 (Nev 1974); City of San Antonio v Wallace 338 SW2d 153 (Tex 1960).
¹⁶² Meadows v Moses 44 NYS2d 697, 698 (NY 1935).
¹⁶³ Corwin v Farrell 100 NE2d 135, 139 (NY 1951). See also Coxen v Meyer 518 NYS2d 158 (NY App Div 1987).
¹⁶⁵ Cal Gov Code § 18500 et seq.
based on competitive examination, for civil service appointment or promotion.¹⁶⁶ Again, as with the New York civil service mandate, the technique is to focus on both the power delegated and the relationship between the delegator and the delegate. In contrast to New York though, judicial attitudes to the mandate have been even more robust and the Californian courts have refused to permit an independent contractor exception to civil service protection,¹⁶⁷ although this position has been altered in part with the adoption in 2000 of Proposition 35, which allows for independent contracting for architectural and engineering projects.¹⁶⁸ The constitutional clause has been interpreted to prohibit private contracting, whether for permanent or temporary services, skilled or unskilled, if those services are of such a nature that they could be performed ‘adequately or competently’ by one selected under the provisions of the civil service.¹⁶⁹ Three exceptions to the rule exist: if the state seeks to contract for private assistance to perform new functions not previously undertaken by the state¹⁷⁰; to obtain cost savings as long as other applicable civil service requirements are not ignored¹⁷¹; and if the privatization is being used on an ‘experimental’ basis.¹⁷²

The ‘new’ function exception has been justified as the civil service mandate is designed to protect the ‘existing civil service structure’ and does not compel the state to fulfil every new state function through its own agency.¹⁷³ This exception is satisfied fairly easily, however, and to demonstrate that a function is ‘new’ it will only be necessary to demonstrate that it is not ‘an historic state function’.¹⁷⁴ Thus, even where the civil service had conducted a drug assistance programme for ten years, because provision of drugs was not ‘an historic state function’ it could be performed by private contractors without conflicting with the civil service mandate.¹⁷⁵ The second exception to the civil service mandate, based on cost savings, only applies where savings can be achieved without ignoring other relevant civil service requirements.¹⁷⁶ The exception is tolerated because cost savings are consistent with the two main purposes of Article VII: ‘to promote efficiency and economy’ in state government and ‘to eliminate the “spoils system” of political patronage’.¹⁷⁷ At first glance, this sounds like a significant step towards a

¹⁶⁶ Article VII s 1(b).
¹⁶⁷ State Compensation Insurance Fund v Riley 69 P2d 985, 988–90 (Cal 1937).
¹⁶⁸ Article XXII s 1. See also Professional Engineers in California Government v Kempton 155 P3d 226 (Cal 2007).
¹⁶⁹ Riley (n 167) 989 (enjoining a state agency from retaining a private attorney).
¹⁷⁰ California State Employees’ Association v Williams 86 CalRptr 305, 310–13 (Cal Ct App 1970) (permitting the state to hire private insurance carriers to administer the state Medi-Cal programme).
¹⁷² Professional Engineers (n 154) 476.
¹⁷³ Williams (n 170) 310.
¹⁷⁴ Savient Pharmaceuticals, Inc v Department of Health Services 53 CalRptr3d 689, 696 (Cal Ct App 2007)
¹⁷⁵ Ibid.
¹⁷⁶ State of California (n 171) 234.
¹⁷⁷ Professional Engineers (n 154) 476 (internal quotation omitted).
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The general allowance of contracting out for cost-cutting purposes. In fact, however, the requirement to abide by ‘other applicable civil service requirements’ requires, inter alia, use of publicized competitive bidding,¹⁷⁸ no displacement of state workers,¹⁷⁹ no infringement of affirmative action plans,¹⁸⁰ no significant undercutting of state pay rates,¹⁸¹ and no overriding of the public interest in having the state perform the function.¹⁸² These limitations severely undermine the ability of any state agency to contract out for cost savings—especially the requirement that state pay rates not be undercut, as undercutting state pay rates often provides the most feasible way for private actors to provide cost savings. As for the third exception, experimentation, even if using state funding, is permissible if justified by considerations of economy and efficiency, consistent with applicable civil service requirements.¹⁸³

The Californian courts defend the civil service mandate zealously. Even legislation stating that a particular privatization project fulfills an exemption requirement is not sufficient¹⁸⁴—it is necessary to demonstrate to the court exactly how the exemption is satisfied, with ‘evidentiary or empirical support’.¹⁸⁵ States which have adopted a similar approach to California are Hawaii and Washington, where it has been held that services customarily and historically provided by civil servants may not be contracted out to private parties, at least so long as civil servants are able to provide the services sought to be contracted out.¹⁸⁶ It will also often not suffice to show that cost savings can be made to demonstrate that civil servants are unable to perform the services.¹⁸⁷

4.2.4.3 The civil service mandate considered

Whether strictly or more leniently enforced, the civil service laws constitute a useful device for controlling executive delegators of executive power. At the very least, the laws require that careful consideration be given to the benefits of any proposed privatization. They also require that any delegation of power is conducted in the public interest, rather than for any self-serving motives that may exist on the part of the governmental delegator. Of course, given that the mandate is focused primarily on protecting the civil service its concerns are quite different from those of the non-delegation doctrine, and its impact on private delegation is ancillary, rather than its primary purpose. Indeed, features in favour of upholding a private delegation under the delegation doctrine, such as extensive

¹⁷⁸ Cal Gov Code § 19130(a)(7).
¹⁷⁹ Ibid (a)(3).
¹⁸⁰ Ibid (a)(4).
¹⁸¹ Ibid (a)(2).
¹⁸² Ibid (a)(11).
¹⁸³ Professional Engineers (n 154) 488.
¹⁸⁴ Ibid.
¹⁸⁵ Ibid 492.
¹⁸⁶ Miller (n 152) § 5; Konno v County of Hawai‘i 937 P2d 397, 408 (Haw 1997). Functions can be privatized with statutory authorization: Naito v Miike 81 P3d 1217 (Haw 2004). See also Washington Federation of State Employees, AFL-CIO, Council 28 v Spokane Community College 585 P2d 474, 477 (Wash 1978); Joint Crafts Council (n 153) 1061.
¹⁸⁷ Spokane Community College (n 186) 477; Joint Crafts Council (n 153) 1061.
governmental oversight, may justify invalidating a relationship under the civil service mandate if the oversight means that the relationship looks too similar to an employment relationship. Nonetheless, the mandate does provide a useful reminder of the transition that is made by delegation, from performance by civil servants bound by obligations to act in the public interest, to private actors who are not so bound.¹⁸⁸ It is not surprising that there have been calls for a similar principle to be introduced at the federal level in the ‘Truthfulness, Responsibility and Accountability in Contracting Bill’.¹⁸⁹ The ‘merit’ principle of civil service protection does exist in statutory form at the federal level¹⁹⁰ but, similarly to the federal non-delegation doctrine, it has not been interpreted to curtail privatization.¹⁹¹

4.3 European Union

There are two EU constitutional sources of control of private delegation. The first is based on the principle of institutional balance, inherent in the Treaty¹⁹² while, as yet, the second is only a potential source of control which is unlikely to take effect at this stage, and is found in Title V, Article I-35 of the Draft Treaty establishing a Constitution for Europe (‘Draft Constitutional Treaty’).¹⁹²⁺

4.3.1 Institutional balance

4.3.1.1 Constitutional source

As was discussed in Chapter Two, although given some recognition,¹⁹³ the principle of separation of powers, used so often in the US as a basis for a non-delegation doctrine, is not given great emphasis in the European order. Instead, as Majone has noted, ‘for the Court of Justice, “balance of powers” plays in the Community system a role analogous to that of “separation of powers” in modern constitutional democracies’.¹⁹⁴ Early in the Community’s history, it was argued by some that Article 7(1), from which the institutional balance or balance of powers

¹⁸⁸ Becker (n 157) 88–97.
¹⁹⁰ Civil Service Reform Act 1978 (n 5) 5 USC §§ 2301–2.
¹⁹²⁺ An equivalent or similar provision may be introduced through the Reform Treaty: see above 2.2.3, n 59.
¹⁹³ EC Treaty Art 202 (distributing implementation and rule-making powers between the Council and the Commission).
principle derives, mean there was no authority on the part of Community institutions to delegate their powers. The principle of enumerated powers was to be given inclusive and exclusive effect. This reasoning is reminiscent of that seen at the state level in the US, around the state vesting clauses: simply, by virtue of the fact that power is vested in one institution that power cannot be exercised by any other institution. It was also argued, by those who doubted the ability of Community institutions to delegate, that delegation would upset the very delicate institutional balance of the Community. While the ECJ rejected the first argument, and absence of a specific power to delegate has not been construed as an absolute prohibition on delegation, as will be seen, the ECJ has been influenced by the importance of the second argument regarding institutional balance.

The seminal case on delegation in Community jurisprudence is *Meroni v High Authority*. Using what Lenaerts has described as a ‘kind of “effet utile” reasoning’, the ECJ accepted that a power to delegate could be implied from Treaty provisions conferring powers on the institutions, where the delegation was ‘necessary’ for the exercise of the power conferred. Although the decision was given in the context of the ECSC Treaty, Lenaerts notes that it appears to be equally applicable in the context of the EC Treaty, and it has certainly been cited in many EC contexts. Moreover, unlike the US non-delegation doctrine, the principles of the *Meroni* case apply to the delegation power of all EU institutions, and not just primarily to legislative delegation power. At issue in the *Meroni* case was Decision 14/55 of the High Authority, which delegated powers of the High Authority to the Joint Bureau of Ferrous Scrap Consumers and the Imported Ferrous Scrap Equalization Fund—Brussels agencies charged with establishing a financial arrangement for ensuring a regular supply of ferrous scrap for the Common Market. Accepting the existence, in the absence of a specific prohibition on delegation, of a power to delegate, the ECJ noted that this power included the possibility of entrusting powers to ‘bodies established under private law, having a distinct legal personality and possessing powers of their own’.


195 Above 2.3.3.1.
197 Above 4.2.2.1(a).
198 Lenaerts (n 196) 24.
200 Ibid.
201 Lenaerts (n 196) 40; *Meroni* (n 199) 151.
202 Lenaerts (n 196) 41.
203 See, eg, Case T-333/99 *X v European Central Bank* [2001] ECR II-3021 [100]–[106] (applying the *Meroni* doctrine to a delegation by the Governing Council of the European Central Bank); C-301/02 *Tralli v European Central Bank* [2005] ECR I-4071 [41] (noting that the *Meroni* case established that, ‘the powers conferred on an institution include the right to delegate, in compliance with the requirements of the Treaty, a certain number of powers which fall under those powers, subject to conditions to be determined by the institution’).
204 *Meroni* (n 199) 147.
205 Lenaerts (n196) 40.
206 *Meroni* (n 199) 151.
4.3.1.2 Control technique

Accepting a power of delegation did not mean, of course, that the power was unlimited. The limits applied by the Court to the High Authority’s delegation power are probably best understood in a threefold sense,²⁰⁷ and in terms of control technique, the Meroni doctrine, like the Texas Boll Weevil doctrine, combines attaching conditions to the exercise of any power delegated, and limiting the power that can be delegated.

First, and very crucially, a delegation of power can be of no more power than that which the delegating authority enjoys itself. In Meroni the Court reasoned that had the delegated power been exercised by the High Authority directly it would have been required to comply with certain procedures mandated by the Treaty, such as stating reasons for its decisions,²⁰⁸ and having its decisions subject to review by the ECJ.²⁰⁹ Since these conditions had not been attached to the power delegated to the Brussels agencies, the delegation ‘in reality [gave] the Brussels agencies more extensive powers than those which the High Authority holds from the Treaty’.²¹⁰ Consequently, the delegation infringed the Treaty.²¹¹ This first principle of Meroni limits the range of delegable power—to no more than the delegator enjoys—and also requires that conditions be attached to the exercise of the power, in this case reason-giving and procedure, for the delegation to be valid.

Second, a delegation could only be legitimate, if it entailed ‘clearly defined executive powers the exercise of which can, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority’.²¹² Such delegation was distinguished from delegation of discretionary power, which is problematic because it involves ‘an actual transfer of responsibility’,²¹³ whereby the choices of the delegator are replaced by the choices of the delegate. Only the delegation of defined powers would not ‘appreciably alter the consequences involved in the exercise of the powers concerned’²¹⁴ and be compatible with the Treaty.²¹⁵ This second principle seems to focus on controlling the extent of power that can be delegated. On this ground, the particular delegation was also found wanting. Granting powers to determine the fixing of the ‘maximum import price’, the ‘equalization price’, and the ‘criteria for the calculation of economy in scrap’ were considered to imply ‘a wide margin of discretion’ and to require the reconciliation of the many requirements of a varied and complex economic policy.²¹⁶ Objective criteria guiding the agencies’ decision were lacking, and although the High Authority had reserved to itself the power to refuse approval of any

²⁰⁷ Tralli (n 203) [43].
²⁰⁸ Treaty establishing the European Coal and Steel Community (‘ECSC’) Art 15.
²⁰⁹ Art 33 ECSC. ²¹⁰ Meroni (n 199) 150.
²¹¹ Ibid. ²¹² Ibid 152.
²¹³ Ibid. ²¹⁴ Ibid.
²¹⁵ Ibid. ²¹⁶ Ibid 153.
The first Meroni principle, that an institution can delegate no more power than it enjoys itself, sounds self-evident and trite and, on one level, does not seem to say much. In fact, though, this principle goes to the very heart of the challenge of private delegation—namely, that private actors are able to exercise governmental power without being subject to the procedural and substantive safeguards on which we insist for the exercise of that power by government itself. The Treaty required the High Authority: to provide reasons for its decisions;²¹⁹ to publish reports on its activities and expenses;²²⁰ to publish data;²²¹ and to have its decisions subject to review by the ECJ.²²² Any delegation of power should also be subjected to these same requirements and private actors too should be required to provide reasons, publish reports and data, and be subject to judicial review. The logic of this position is forceful and attractive. To delegate power without the constraints to which one is subject is, of course, to delegate more power than one enjoys oneself. However, every day, in all three jurisdictions, delegators delegate more power than they themselves enjoy, and often justify delegating that excess of power by reference to an efficiency rationale. In other words, the very reason for delegation to private entities is to ensure that delegates do not have to comply with the same restraints as the delegators, such as judicial review or duties to provide reports, as bypassing such safeguards can save money. It is forgotten that, if power is delegated to private actors without attaching the same conditions to the exercise of that power as would apply if the actor was public, any comparative efficiency calculus between public and private is completely distorted: a private contractor's bid will be calculated on a basis which excludes a liability to which the public actor is subject.

The second Meroni principle, which considers the type of power which can be delegated and seeks to limit it to non-discretionary power, is also important, as the first principle, although far-reaching, would not answer every concern we have regarding delegation. Even if private actors were to be subject to all of the restraints to which governmental actors are subject, we would still probably feel uneasy at the thought of a private company enjoying a delegated power to declare war on behalf of the nation. This aspect of the Meroni test rests on the notion—which, as will also be seen from the discussion in Chapter Five, permeates EU

²¹⁷ Ibid 154.  
²¹⁸ Ibid 151.  
²¹⁹ ECSC Art 15.  
²²⁰ ECSC Art 17.  
²²¹ ECSC Art 47.  
²²² ECSC Art 33.
Delegation of Governmental Power to Private Parties

thinking in this area\(^{223}\)—that a clear distinction can be drawn between policy-making and policy-implementation. The usefulness of this type of test is debatable\(^{224}\)—but it nonetheless has the advantage of forcing delegators to put thought into their delegation.

Meanwhile, the third Meroni principle, which does not impose a substantive limitation on delegation, is nonetheless a reminder of the international context of the Meroni decision, which was given at a time when the EU was much less integrated and evolved than it currently is.\(^{225}\) Sarooshi notes, for instance, that the requirement for an intention to delegate to be stated expressly is a fundamental aspect of the law of international institutions.\(^{226}\)

4.3.1.3 Judicial attitude

The Meroni doctrine has provided very valuable principles to govern delegation yet, since the Meroni case itself, appears never to have been used to invalidate a delegation. On occasion this has been because the delegation satisfied the Meroni requirements.\(^{227}\) Often, however, similarly to the demise of the non-delegation doctrine at the federal level, judicial attitudes have not resulted in a vigorous application of the Meroni doctrine. A number of factors may have contributed to this situation. First, on occasion, the doctrine simply has not been applied, even though it would seem to have been obviously relevant to the situation at issue. Where private auditing companies had been given powers of investigation by the High Authority,\(^{228}\) rather than even apply Meroni, the Court concluded that there had been no delegation of power but simply ‘the exercise [by the Authority] of its own powers by making use of the information which it has obtained on its own responsibility’.\(^{229}\) Given that the investigative powers resulted in significant financial consequences for the applicant, surely further consideration of the scope of the powers enjoyed by the private auditors should have been undertaken. Second, the doctrine has been applied in a very context-dependent manner. For instance, where there is a delegation to Member States, it tends to be tempered by more important concerns of cooperation between Community institutions and Member States.\(^{230}\)

\(^{223}\) Below 5.2.1.1.
\(^{224}\) Above 3.3.1.2 and 3.4; and below 5.5.2.
\(^{225}\) See generally above 2.2.3 and below 9.1.2 on the evolution of the EU.
\(^{227}\) See, eg, Case C-154/04 R (Alliance for Natural Health and Another) v Secretary of State for Health [2005] ECR I-6451 [90]–[92] (upholding a delegation to the Commission to amend legislation, since the Directive, through its recitals although not the provisions of the Directive itself, limited the Commission’s power to modify the legislation through reference to objective criteria).
\(^{228}\) Case 30/65 Macchiorlati Dalmas & Figli SAS v High Authority of the ECSC [1966] ECR 49, 54.
\(^{229}\) Ibid.
Constitutional Controls on Delegation

Third, it also seems that the Meroni doctrine has been malleable, and it has rarely been considered necessary to satisfy all of its principles in order to uphold a delegation. In X v European Central Bank,²³¹ at issue was Article 21.3 of the European Central Bank’s Rules of Procedure, which delegated power from the Governing Council of the European Central Bank to its Executive Board, to devise staff rules, including the terms on which the conditions of employment of the Bank were to be implemented—even though, according to Article 36.1 of the Protocol on the Statute of the European System of Central Banks, it was for the Governing Council, on a proposal of the Executive Board, to determine such conditions of employment.²³² In assessing whether the rules had a legal basis for the purpose of disciplining an employee, the Court of First Instance seemed satisfied, without rigorous examination, that the only power being delegated was a power of implementation, and that therefore Meroni was satisfied.²³³ Arguably, though, this analysis was superficial. The rules adopted by the Executive Board were being used in a disciplinary context, with enormous consequences for the individual involved. Moreover, on its face, a power to determine the terms on which the conditions of employment were to be implemented seems to involve an element of discretionary power, thereby violating a central principle of Meroni. To assert, without further examination, that the power was one of ‘implementation’ seems to fail to give full effect to Meroni. When a similar challenge in a different case concerning probationary periods reached the ECJ, although the ECJ listed the requirements of Meroni,²³⁴ it reasoned that if an institution is capable of delegating power to a body established under private law, ‘a Community institution or body must be entitled to lay down a body of measures of an organizational nature, delegating powers to its own internal decision-making bodies, in particular as regards the management of its own staff’.²³⁵ The ECJ also characterized the powers as ‘general implementing measures concerning staff’²³⁶ and seemed particularly persuaded by the fact that what was at issue was an internal delegation.²³⁷ As such, the principle of institutional balance was not relevant since that principle ‘is intended to apply only to relations between Community institutions and bodies’²³⁸

A fourth limitation on the effect of the doctrine is that, at times, it has been used more as an interpretive presumption than a free-standing test to be satisfied. To assist the Commission with the financial implementation of a programme to promote the development of the European audiovisual industry (MEDIA), governed by Council Decision 90/685, a body was established, the European Film Distribution Office (EFDO). In the Nostradamus case it was decided by the Court of First Instance, and not overturned by the ECJ, that the decisions of EFDO should be imputed to the Commission, as the cooperation rules of

²³¹ Above n 203.
²³² Ibid [99].
²³³ Ibid [102]–[106].
²³⁴ Tralli (n 203) [43].
²³⁵ Ibid [42].
²³⁶ Ibid [46].
²³⁷ Ibid [42] and [46].
²³⁸ Ibid [46].
the agreement between EFDO and the Commission required that prior approval of the Commission’s representatives was to be obtained in relation to all matters having an impact on the implementation of the MEDIA programme.²³⁹ Although, on the facts, it seems that this delegation of power, if thoroughly examined, would have complied with the Meroni conditions, interestingly, the Court of First Instance reasoned that, because Decision 90/685 rendered the Commission responsible for implementing the programme, because all of EFDO’s decisions were subject to the prior agreement of the Commission, and because Meroni ‘shows that delegation of powers coupled with a freedom to make assessments implying a wide discretionary power was not permissible’,²⁴⁰ the decisions must be imputed to the Commission. In other words, the role of Meroni was to raise a presumption that delegations must be interpreted to be compatible with the Treaty, rather than to require an investigation into whether the decision was, in fact, compliant with Meroni.

If anything, it has been in the non-judicial setting that Meroni has been accorded the greatest significance. Special reports of the Court of Auditors have relied heavily on it in pronouncing on delegations by the Commission. A 1996 report criticized the Commission for delegating power without subjecting it to the same rules to which the Commission itself would have been subject, and it was noted that as ‘the Commission is required to exercise its powers in complete independence, the ARTM should have done the same’.²⁴¹ Similarly, in Special Report No 2/2002, on the Socrates and Youth for Europe Community action programmes, the Court of Auditors found a violation of the Meroni requirement for ‘a precise definition of the extent and scope of the competence delegated to a third party’.²⁴² Elements of the Meroni doctrine are also found in the EU’s Financial Regulation,²⁴³ which will be examined in Chapter Five.

4.3.2 Article I-35

The second (only potential) EU constitutional basis for control of private delegation, found in Title V, Article I-35 of the Draft Constitutional Treaty, seeks, in its technique, to limit the range of delegable power. It provides for European laws and framework laws, enacted by the Parliament, Council, and Commission together,²⁴⁴ to delegate to the Commission, acting alone, the power to enact

²⁴⁴ Draft Constitutional Treaty Title V Art I-33.
Constitutional Controls on Delegation

regulations to supplement or amend non-essential elements of the law or framework law.\textsuperscript{245} The Article seems to have been intended to make it easier for the Council and/or Parliament to agree on any given regulatory scheme and to facilitate adapting the scheme quickly and effectively to changes in market behaviour or scientific technology.\textsuperscript{246}

In the first part of the Article, it is stressed that ‘essential elements’ must be determined by the law or framework law, and that the ‘objectives, content, scope and duration’ of the delegation must be ‘explicitly defined’. Determining what are the ‘essential elements’ of a law or framework law is a highly subjective exercise, but its purpose is clear—to exhort that the important decisions be taken by the three institutions acting in concert, and not by the Commission alone. Similarly, requiring that the details of the delegation be ‘explicitly defined’ seeks to ensure that as little discretionary power as possible is delegated to the Commission. The second part of Article I-35 then shifts the emphasis to oversight mechanisms. It is possible for the law or framework law to grant a power of revocation to the European Parliament or Council; or to insist that the delegated regulation only enter into force if no objection is expressed by the European Parliament or Council within a set period.\textsuperscript{247} In this way, the other two institutions can retain control over delegation to the Commission.

Although the principle is expressed in terms of the relationship between Union institutions—Council, Commission, and Parliament—it is likely that it could be considered relevant in a private delegation context, particularly given that the Meroni doctrine has itself been applied in a great variety of delegation contexts. The Article I-35 principle is similar to that of Meroni, insofar as it seeks to limit delegable power. In one respect the principle goes further than Meroni, by attaching more attention than does Meroni to the importance of delegator oversight of the delegate. However, it also does not go as far as Meroni, and does not require that power delegated be subject to the same conditions to which it would have been subject if exercised by the initial decision-maker. Although it was suggested above\textsuperscript{248} that this was the most important aspect of the Meroni doctrine, it is not actually surprising that it was omitted in the context of Article I-35. Primarily, the delegation power at issue, allowing the Commission to amend or supplement a legislative act by a non-legislative regulation, would have been rendered pointless had the Commission’s power been subjected to the requirements of the legislative process. This is because the legislative process demands that all three institutions act in concert, which is precisely what Article I-35 seeks to avoid for the limited circumstances to which it applies. This point, though, also highlights the difference between public and private delegation. The Commission is subject to

\textsuperscript{245} Ibid Art I-35(1).
\textsuperscript{247} Draft Constitutional Treaty Title V Art I-35(2).
\textsuperscript{248} Above 4.3.1.2.
accountability devices such as reason-giving and proportionality in any event,²⁴⁹ and Article I-35 did not have to reiterate this point. It would, however, be necessary to remember this difference if Article I-35 or an equivalent is ever used to inform a private delegation decision by the ECJ. Of course, even with such a provision,²⁵⁰ the intensity with which the ECJ would enforce it is unknown and, given its record on Meroni, its enforcement may not be that rigorous—‘explicitly defined’ details could well suffer the same fate as ‘intelligible standards’ in US federal courts.

4.4 England

In England there are virtually no constitutional restraints on the delegation capacity of governmental actors.²⁵¹ Rather than the problem being a lack of judicial willingness to use the powers of control which they enjoy though,²⁵² in England lack of restraint arises more from the absence of any underlying constitutional source of control that would enable the judiciary to actually impose limits on the delegation. Indeed, in the English context, the analysis of delegation controls cannot even be developed beyond the initial ‘constitutional source’ factor: issues of control technique and judicial attitude do not really arise. Three factors—all of which were highlighted in Chapter Two—seem to explain the inability of the judiciary to control delegation of power to private parties by the legislature and the executive. The first is the impact of a constitution that is ‘indeterminate, indistinct, and unentrenched’.²⁵³ The second, linked to the first, is the uncertain scope of executive power. And the third is one of the few principles to have actually emerged clearly in English constitutionalism—the principle of parliamentary sovereignty.

4.4.1 ‘Indistinct, indeterminate, unentrenched’

As was discussed in Chapter Two, in England constitutional law refers to laws, customs, and conventions,²⁵⁴ and while the experience at the US federal level in particular demonstrates that strong constitutionalism will not result in strong

²⁵⁰ Above 2.2.3 (and especially n 59).
²⁵² Although, as will be discussed in Chs Six and Seven, judicial reluctance to exercise the powers at their disposal has undermined legal control of private delegates in England.
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legal control of private delegation, nonetheless, the absence of strong constitutionalism has had a marked effect on the control of private delegation in England. Even where underlying values such as enumeration of powers or procedural fairness are found in English law—values that are enshrined constitutionally and have been useful for control of delegation in the US states and the EU—because these values are ‘indistinct, indeterminate and unentrenched’ they have been incapable of giving rise to a non-delegation doctrine. As Graham and Prosser have noted of privatization of utilities, ‘the role of the law has been almost wholly instrumental’ and the ‘role of the courts has been purely technical in the few cases where they have been called upon; they have had no clearly constitutional role in assessing the compatibility of public actions with constitutional principle’.

4.4.1.1 Procedural fairness

Although obviously not formally articulated in the English constitution, a procedural fairness principle, correlating with the US due process principle, has long been protected in English administrative law, and is now also protected by the Human Rights Act 1998 (‘HRA’) and Article 6 of the ECHR. The common law principle is arguably broader in application than its Article 6 equivalent, since it is not dependent on the presence of ‘civil rights or obligations’ for its application. The response of administrative law principles to private delegation will be discussed in greater depth in Chapters Six, Seven, and Eight, but for present purposes three points suffice. First, an administrative law principle, such as procedural fairness, cannot be used to review primary delegating legislation. Second, the focus of administrative review tends to be on specific decisions and, as Freedland has shown, it is incapable of reaching the pre-contractual stage, at which delegation policies are formulated. Third, where executive delegation takes place through contract, there is a general reluctance on the part of the judiciary, as will be discussed in greater depth in Chapters Five and Seven, to apply administrative law principles to contractual arrangements.

An attempt to construct a strong non-delegation doctrine using the HRA has recently been rejected by the Court of Appeal in the case of

YL v Birmingham City Council


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255 C Graham and T Prosser, Privatizing Public Enterprises: Constitutions, the State and Regulation in Comparative Perspective (Clarendon Press, Oxford 1991) 243.


257 Common law natural justice protections apply generally to any ‘right, interest or legitimate expectation’: Schmidt v Secretary of State for Home Affairs [1969] 2 Ch 149 (CA) 170. On the other hand, Art 6 reads: ‘in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’

258 Freedland (n 251) 97–8.

259 Below 5.4.4 and 7.4.3.1.

home operated by a local authority in fulfilment of its duties under section 21 of the National Assistance Act 1948 (‘the 1948 Act’), sought to prevent the transfer of the care home (and other care homes) to private sector control. The local authority was entitled to make the transfer under section 26 of the 1948 Act. The claimant argued that the transfer itself would result in a breach of her Article 3 right (to be free from inhuman and degrading treatment) and Article 8 right (to respect for her home), because she would not be able to enforce these rights against the private carers, which would constitute a ‘fundamental and material diminution (and indeed in certain cases, negation)’ of her existing rights.

In respect of Article 3, the Court concluded that there was no lacuna in protection because, if a private care home subjected a resident to inhuman and degrading treatment, breaches of the criminal law would be involved with the result that legal protection of the resident would not be diminished by the transfer. The claimant’s case on Article 8 was also rejected. Buxton LJ, giving judgment for the Court, noted that loss of a direct remedy against the care home operator would only entail a diminution in Article 8 protection if it could be assumed that Article 8 placed the state under an obligation to make welfare provision of the type provided by the 1948 Act. Whether a breach of duty under section 21 of the 1948 Act constituted a breach of Article 8 was a fact-specific inquiry, and since the article 8 requirements are less stringent, and manifestly less well-defined, than the requirements of domestic law, it would seem impossible to say that there is an article 8 obligation to maintain a particular type or level of provision when discharging duties under section 21.

Buxton LJ also rejected the proposition that a change in the content of Article 8 protection would necessarily entail a breach of Article 8. His Lordship was persuaded by the fact that the local authority would still have responsibility for the resident who moved to a private home and would continue to have Article 8 obligations in respect of that resident.

Significantly, Buxton LJ also noted that accepting the claimant’s argument would ‘place very far-reaching and surprising inhibitions on national policy’, which the Court indicated was a relevant consideration where the reach of an article, as in this context with Article 8, was unclear. Finally, Buxton LJ noted that the implications of accepting the claimant’s argument would be that every example of privatization would result in a breach of Convention responsibilities, as in every case there would be a loss of direct action. His Lordship concluded that views on privatization were ‘more appropriately adjudicated upon by the national democratic process’ and that this was an area where the ECHR should only enter with ‘considerable diffidence’.

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261 Ibid [1].
262 Ibid [8].
264 Ibid [15]–[16].
265 Ibid [16].
266 Ibid.
267 Ibid [17].
268 Ibid [20].
269 Ibid.
270 Ibid [21].
271 Ibid.
Given the potentially very far-reaching consequences of the argument made by the claimant in YL, the position adopted by the Court of Appeal is hardly surprising. However, a court might be persuaded by a much weaker and more restricted use of the HRA and, for example, it is certainly possible to envisage a situation where delegation of power to a private party to decide on the ‘civil rights’ of a citizen could violate the Article 6 requirement for provision of an impartial tribunal. Most legislation facilitating delegation, as will be seen,²⁷² is worded too broadly to render operable the HRA section 3 obligation to read legislation in accordance with the Act and, if unable to do so, to issue a section 4 declaration of incompatibility. However, more specific secondary legislation, such as a statutory instrument, may run afoul of Article 6, and not be capable of harmonious interpretation with the section 3 obligation.

The situation might evolve as follows: the Deregulation and Contracting Out Act 1994²⁷³ grants sweeping power to the executive to contract out, and delegation could involve transfer of decisions in respect of citizens’ civil rights to a private company, without violating the Act. One example is the Contracting Out (Functions relating to Social Security) Order 2000,²⁷⁴ under which it is possible to contract out functions relating to ‘work-focused interviews’, as conferred by regulations under Section 2A of the Social Security Administration Act 1992.²⁷⁵ Certain benefits, such as incapacity benefits,²⁷⁶ are conditional upon the applicant attending a ‘work-focused interview’ and functions relating to the holding of such interviews, including applying regulations concerning the determination of whether applicants have ‘good cause’ for failure to attend, are considered suitable for private delegation.²⁷⁷ Failure to attend an interview without good cause will result in the applicant being deemed not to have applied for a benefit or, if the applicant is in receipt of a benefit, having the benefit terminated.²⁷⁸ Given that non-attendance at interviews may result in termination of, or a rejected application for, benefits, and given that it seems that private actors may decide on whether or not the applicant has ‘good cause’ for non-attendance, albeit that the exercise of discretion is confined by the criteria set out in the relevant regulations,²⁷⁹ it seems possible for private actors to effectively decide whether or not applicants are entitled to benefits.

²⁷² Below 4.4.3.1 and 5.4.
²⁷³ The order-making provisions of Pt I of the 1994 Act were amended by the Regulatory Reform Act 2001. However, the contracting out provisions of Pt II of the Act continue in force as originally enacted, apart from minor amendments which are not relevant for present purposes: see, eg, Charities Act 2006 Sch 8 para 179.
²⁷⁴ SI 2000/898.
²⁷⁵ This was inserted by the Welfare Reform and Pensions Act 1999 s 57.
²⁷⁹ Social Security (Incapacity Benefit Work-focused Interviews) Regulations (n 277) Reg 11.
Although not without some jurisprudential wrangling, the European Court of Human Rights has held that such benefits may give rise to ‘civil rights’.²⁸⁰ Thus, a statutory instrument which allows decisions regarding such interests to be made by economically-motivated private companies may conflict with Article 6 impartiality requirements, thereby requiring a reading under HRA section 3 which excludes this clash or grants a declaration of incompatibility. Of course, whether or not there is impartiality, in practice, would depend on the payment structure for the private delegate. For instance, if there is a general payment incentive to try to reduce welfare payments, this may create an incentive to disqualify applicants from welfare benefits.

If wishing to exclude a breach of Article 6, the court could imply a judicial review safeguard, attaching to the exercise of discretion by the private contractor. This is how administrative decisions made by public actors, in pursuance of policy preferences, have been rendered compatible with Article 6—although in the past the Courts have been reluctant to distort statutory wording to achieve Article 6 compliance.²⁸² However, it is not entirely clear that judicial review could always save the private delegation, since a determination of ‘just cause’ has been deemed to be a question of fact, for which there is inadequate judicial review available in England to satisfy the requirements of Article 6.²⁸³ Alternatively, the instrument could be declared incompatible with the Convention, the executive would be prevented from contracting out a function which implicates Article 6, and a weak non-delegation doctrine would emerge.

Although the English courts have certainly not gone this far, the fact that private decision-makers are not institutionally impartial has been acknowledged by the House of Lords. Their Lordships’ comment on the subject arose as follows. In the case of _Runa Begum v Tower Hamlets London Borough Council_,²⁸⁴ at issue was whether the review procedure of a local authority, in determining whether or not a reasonable offer of accommodation had been made to a homeless person, satisfied the impartiality requirement of Article 6.²⁸⁵ The problem was that the reviewing officer worked for the same local authority that made the initial decision that the accommodation offer was reasonable.²⁸⁶ One of Begum’s arguments was that the local authority should have used its power under Article 3 of the Local Authorities (Contracting Out of Allocation of Housing and Homelessness


²⁸² _Adan v Newham LBC_ [2001] EWCA Civ 1916, [2002] 1 WLR 2120 [19], [49], [94]–[95] (refusing to read review for error of law to include review for error of fact).

²⁸³ _Tsfayo_ (n 280) [45]–[48].


²⁸⁵ Ibid [2].

²⁸⁶ Ibid [16].
Functions) Order 1996\textsuperscript{287} to contract out the review decision and achieve impartiality\textsuperscript{288}—an argument which had been regarded favourably in an earlier Court of Appeal judgment.\textsuperscript{289} The House of Lords rejected this option however, with Lord Hoffmann citing four reasons.\textsuperscript{290} Most of his Lordship’s reasons were pragmatic: regarding deciding which factual questions to contract out, cost and delay, and a fear of binding the discretion of housing officers by independent fact-finders. Lord Hoffmann’s final objection to contracting out was, however, guided by fairness concerns. He noted that he was, by no means confident that Strasbourg would regard a contracted fact finder, whose services could be dispensed with, as more independent than an established local government employee.\textsuperscript{291}

Although his Lordship did not elaborate on this, it seems that English courts may be slowly awakening to the potential risk of private delegation to values of fairness. Of course, there is still a huge gap between stating that contracting out may not assist a local authority in meeting its Article 6 obligations, and holding that contracting out in such a context is actually incompatible with Article 6, and then going on to hold that a statutory instrument granting the power to contract out functions implicating Article 6 is incompatible with the Convention. Indeed, the statutory instrument at issue in \textit{Begum} granted local authorities significant leverage in contracting out, with almost the only functions exempt being those entailing awarding of loans and grants.\textsuperscript{292} Yet the House of Lords expressed no concern at its wide scope.

\textbf{4.4.1.2 Separation of powers}

The principle of separation of powers has not fared much better in English constitutionalism. As was discussed in Chapter Two, it does exist, and has also experienced something of a revival recently, partly due to the HRA, since it has been recognized that one of the purposes of Article 6 of the ECHR, in requiring that disputes over civil rights should be decided by or subject to the control of a judicial body, is to uphold the rule of law and the separation of powers.\textsuperscript{293} However, the recent jurisprudence has been focused mainly on ensuring that executive bodies do not exercise judicial powers or, in particular, judicial sentencing powers,\textsuperscript{294} rather than on a wider notion of control of delegation. Moreover,

\begin{itemize}
\item \textsuperscript{287} SI 1996/3205.
\item \textsuperscript{288} \textit{Begum} (n 284) [23].
\item \textsuperscript{289} \textit{Adan} (n 282) [9], [43]–[45], [76], [94].
\item \textsuperscript{290} \textit{Begum} (n 284) [46].
\item \textsuperscript{291} Ibid.
\item \textsuperscript{292} Schedule 2 excluding from contracting out functions under Housing Act 1996 ss 179(2)–(3), 180, 213.
\item \textsuperscript{293} \textit{Begum} (n 284) [27]. Above 2.3.2.1.
\item \textsuperscript{294} \textit{R (Anderson) v Secretary of State for the Home Department} [2002] UKHL 46, [2003] 1 AC 837 [39].
\end{itemize}
the practical reality of executive control of the legislature undermines the principle of the separation of powers. While Bagehot’s idea of ‘fusion’ government may be somewhat strong,²⁹⁵ the relationship between the executive and the legislature renders the separation of powers doctrine a weak one upon which to rest a non-delegation doctrine.

Of course, the EU experience has shown that a less ‘pure’ principle of power distribution, in the form of enumerated powers, can suffice as a constitutional basis for a non-delegation doctrine. Moreover, the separation of powers doctrine itself need not necessarily be understood only as a strict distribution of functions between branches of government, but also as ‘a network of rules and principles which ensure that power is not concentrated in the hands of one branch’.²⁹⁶ There are commentators who point to the fact that although the executive and legislative powers might be fused, the two functions remain nonetheless distinct, while the judiciary jealously guards its power from executive and legislative encroachment.²⁹⁷ It has also been argued that a separation of powers does exist in England, but rather than the Montesquieu model found in the US Constitution, there is a separation of powers between Crown and Parliament.²⁹⁸ However, even accepting that there is a distribution of powers in England, another problem remains. In the absence of strong constitutionalism, how are these distributed powers defined?

4.4.2 Uncertain executive power

If seeking to control a delegator’s ability to delegate, it is helpful to know what power is at the delegator’s disposal to delegate. But when considering the power of the English executive, it becomes very difficult to ascertain precisely how much power is at its disposal.²⁹⁹ It will be recalled from Chapter Two that 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.³⁰⁰ The power of contracting, by which much private delegation is effected, has mostly been treated by the government as a residual common law power which it can exercise without parliamentary approval, assuming there is no interference with human rights.³⁰¹ Although the general proposition that a minister of government or government department can do anything that a natural person can do, provided it is not forbidden from

²⁹⁷ Barendt (n 296) 615–17.
²⁹⁸ Tomkins (n 253) 33–60.
³⁰⁰ Above 2.3.2.1.
³⁰¹ Ibid.
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doing so, has fallen into doubt,³⁰² it does seem to be accepted that the Crown has ‘the same common law capacity to make a contract as a private individual’³⁰³ and the Courts have referred to the ‘common law right to contract’ of the government without seeming to envision any qualifications.³⁰⁴ As Arrowsmith, who adopts the ‘third source of power’ position, explains, historically, in legal theory, the Crown, in the sense of the government, was indistinguishable from the person of the Monarch.³⁰⁵ Because the Crown is a natural person, the courts have reasoned that it must possess the same legal powers as any other natural person, including power to enter into contracts.³⁰⁶ Being one of the ‘ordinary’ powers of government, the contractual power is not subject to parliamentary scrutiny in the same way as other powers of government.³⁰⁷ At one time, it was suggested that a limitation of parliamentary consent for expenditure of public funds affected the Crown’s contractual capacity,³⁰⁸ but now parliamentary failure to appropriate funds is considered to only go to contractual enforceability and not validity.³⁰⁹ At best, the former capacity rule represents, as Freedland has observed, yet another ‘decidedly weak convention’.³¹⁰

4.4.3 Parliamentary sovereignty

Of course, the difficulties for constitutional control of private delegation are exacerbated by the principle of parliamentary sovereignty. Even if it could be said that the English constitution prescribed a system of distributed powers, and defined those powers, the overriding importance of parliamentary sovereignty means that such principles could be overridden. Summing it up neatly, Lord Denning once noted that no government department has the right to legislate, ‘except in so far as Parliament has said that it may’.³¹¹ Notwithstanding the many attacks on the doctrine, the importance of the underlying principle of parliamentary

³⁰⁴ R v Lord Chancellor, ex p Hibbit and Saunders [1993] COD 326 (DC) 328 (Rose LJ referred to the Lord Chancellor’s Department, when putting court reporting services out to tender, as exercising a, ‘common law right to contract’).
³⁰⁶ Bankers Case (1700) 90 ER 270, 271.
³⁰⁷ Arrowsmith (n 305) 235.
³¹⁰ Freedland (n 251) 93.
³¹¹ Earl of Fitzwilliam’s Wentworth Estates Co Ltd v Minister of Town and Country Planning [1951] 2 KB 284 (CA) 311 (dissenting).
sovereignty in English judicial thinking should not be underestimated. Its importance in the private delegation context is twofold. First, the notion that the judiciary could invalidate parliamentary legislation is controversial, the only qualification to this relevant for present purposes being found in the already discussed HRA section 4 declaration of incompatibility. This means that the English courts could never develop a non-delegation doctrine addressing legislative delegation of power equivalent to that found in the US or the EU. Second, as a further consequence of this judicial inability to invalidate the primary legislation, the judiciary’s power to review the executive’s exercise of any legislatively granted delegating powers is limited.

4.4.3.1 Review of legislative delegation

Judicial inability to challenge primary legislation comes into focus when one considers the far-reaching Deregulation and Contracting Out Act 1994 (the ‘1994 Act’), which grants a general licence to Ministers to transfer statutory ministerial functions to private contractors at the Minister’s discretion. The Act has been discussed in depth elsewhere, and will be considered in detail in Chapter Five. It suffices to note, for present purposes, that the Act provides the executive with an unusually broad delegating power, and creates the opportunity for a wide range of governmental activities to be delegated to private parties. The Act itself is not open to challenge in the courts, except perhaps as being in violation of the HRA, but it is framed so broadly that it would be difficult to imagine any conflicts arising on its face with the HRA. Ironically, despite the well-accepted reality of executive control of the legislative procedure, and despite the broad delegating power the executive derives from this legislation, the myth of parliamentary sovereignty protects the legislation from judicial challenge.

4.4.3.2 Review of legislatively granted executive delegation power

In contrast, executive delegations, made under a legislatively granted delegation power, such as the 1994 Act, can be subjected to judicial review. Generally, the courts review to ensure that the executive act is intra vires—the sense that there is no illegality, irrationality, procedural impropriety, and, increasingly, lack of proportionality. Judicial review has resulted in executive

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313 English courts do not apply statutes which are incompatible with EU law: R v Secretary of State for Transport, ex p Factormate (No 1) [1990] 2 AC 85 (HL); R v Secretary of State for Transport, ex p Factormate (No 2) [1991] AC 603 (HL).
314 Section 69.
316 Below generally 5.4.
317 Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 (HL) 410.
318 See, eg, Nadarajah v Secretary of State for the Home Department [2005] EWCA Civ 1363, [2005] 2 All ER (D) 283.
acts being invalidated, as where the act of a local authority in entering speculative interest rate swap transactions was considered to be ultra vires its power-granting statute. More typically, though, statutory provisions empower rather than limit public authorities, and usually enable the authority, in addition to a list of specific powers, to ‘do anything which it considers is calculated to facilitate, or is conducive or incidental to, the performance of any of its functions’. As noted in the discussion of the 1994 Act, delegating acts tend to be drafted broadly rather than narrowly, which, in turn, renders ultra vires actions more unlikely. For instance, in *R v Secretary of State for Transport, ex p Port of London Authority Police Federation*, at issue was whether the Ports Act 1991, which provided for the ‘transfer of certain property, rights, liabilities and functions of the Port of London Authority’ to a private company, included a power to transfer the Port’s police federation. Pill J completely rejected the argument that transfer of police functions was ultra vires the statute or that a ‘specific provision was required on constitutional or any other grounds’ for such a transfer.

Another principle of judicial review that has evolved is the rule that where a power has been confided to a person in circumstances indicating that trust is being placed in his or her individual judgment and discretion, he or she must exercise that power personally unless expressly empowered to delegate it to another. This principle is expressed in the maxim delegatus non potest delegare, and on one level reflects a desire on the part of the courts to ensure that there has been no failure to exercise discretionary power. On another level, the maxim is motivated by a concern to ensure that a decision is made within the ‘institutional framework’ anticipated by the legislature when it delegated the decision-making to the executive. The rule has been applied strictly in the context of delegation of judicial and legislative powers. Courts, tribunals, and public authorities exercising functions analogous to judicial functions are precluded from delegating their powers—including possibly investigative and evidentiary duties—without express statutory authorization, and legislative powers should only really be delegated in times of ‘grave emergency’. In the adjudicative context, the principle has even meant that the General Medical Council has had to exercise disciplinary powers over dentists itself, even though it had express

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319 *Hazell v Hammersmith and Fulham LBC* [1992] 2 AC 1 (HL) 29–30. Discussed below 8.3.2.3.
320 This formulation is used in the Private Security Industry Act 2001 s 1(3) (functions of the Security Industry Authority). See also Daintith (n 309) 61 fn 27.
321 *Ports Act 1991 Preamble*.
322 Unreported judgment (QB) 17 January 1992 (rejection of leave for judicial review).
324 Craig (n 256) 522.
326 *De Smith, Woolf and Jowell* (n 323) 225–6 [5–104]–[5–105].
327 Ibid 227.
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statutory authority to act through a committee for the purpose of its functions under the Dentists Acts.³²⁸ At other times, though, the maxim has operated only as a presumption, which may be rebutted by any contrary indications found in the language, scope or object of the statute³²⁹: courts are, for instance, generally willing to tolerate delegation of discretionary administrative power. The principle is also qualified in the operation of central government, and a civil servant can be deemed to act as the alter ego of a Minister without a delegation even having taken place.³³⁰ Generally, factors that will militate against finding a valid delegation are: lack of supervisory control of the delegate³³¹; an inability to identify the decision as that of the delegating authority due to lack of control³³²; and the type of power delegated—namely, the greater the ability of the power to affect individual interests, the less likely the court will be to find a valid delegation.³³³

This principle echoes the type of reasoning used by the US state courts in their interpretation of their state vesting clauses—if power is placed in one body, then that body must exercise the power. Moreover, the types of factor considered in deciding whether there has been an invalid delegation—supervisory control, the nature of the power being delegated—are similar to those considered by the Texas courts in the Boll Weevil case, and by the ECJ in Meroni. This principle could be useful in control of private delegation, but for the fact, that, once again, parliamentary sovereignty exerts its influence. The non-delegation principle is merely a principle of common law, and has no force where statutory delegation powers have been granted.³³⁴ So, for instance, there are many statutory sub-delegation powers. The Local Government Act 1972 empowers local authorities to arrange for the discharge of any of their functions by committees, sub-committees or officers, and so on.³³⁵ Similarly, if the executive is relying on the Deregulation and Contracting Out Act 1994, the statute will override the judicial common law rules. Once again, the doctrine of parliamentary sovereignty renders it difficult to impose limits on the delegator.

4.5 Constitutional Controls on the Delegator: An Overview

Overall, it seems that the extent to which constitutional principles are used to impose controls on the ability of a governmental actor to delegate power to a private actor is limited. It is only at state level in the US that such controls exist in an effective manner—in the delegation doctrine, to control legislative delegates,

³²⁸ General Medical Council v UK Dental Board [1936] Ch 41 (Ch).
³³⁰ See Freedland (n 325) 19–20.
³³¹ Allingham v Minister of Agriculture and Fisheries [1948] 1 All ER 780 (DC) 781.
³³² De Smith, Woolf and Jowell (n 323) 232–3 [5–111].
³³³ Ibid 232.
³³⁴ See also Wade and Forsyth (n 312) 314.
³³⁵ Sections 101, 102. Certain functions are excluded such as the levying of rates: s 101(6).
and in the civil service mandate, to require executive delegators to contract out to further the public interest. Whilst the EU Meroni doctrine in theory offers a very far-reaching limitation on the power of the delegator, in practice it seems that, apart from in the Meroni case itself, the ECJ has applied the doctrine with a lack of enthusiasm and rigour similar to the application of the non-delegation doctrine by federal courts in the US. Interestingly though, in the EU context, the doctrine seems to have exerted some influence beyond the non-judicial setting and, as has been seen, the Court of Auditors has on occasion had cause to criticize delegation by the Commission for violation of the Meroni principles.³³⁶ Finally, in England, the constitutional structure seems generally unsupportive of constitutional controls on governmental delegators and, as such, it seems that there are few constitutional limits on the ability of either the legislative or executive delegator to delegate power to private parties.

All three factors of constitutional source, control technique, and judicial attitude are important in determining the efficacy of constitutional limitation on delegation power, with the latter two being particularly interlinked. In the US, although both state and federal constitutions have equivalent potential sources of control, due to differences in judicial attitude, at the state level the source has been used to develop an effective control technique in a way not found at the federal level. In the EU, source and effective technique exist, but judicial application has been weak. In England, in the absence of source, it is difficult to progress to questions of technique and judicial attitude.

In terms of technique, controls which combine imposing limits on the power which can be delegated and attaching conditions to the exercise of delegated power, such as the Boll Weevil or Meroni tests, seem the most effective. Such tests effectively address the democratic and accountability concerns raised in Chapter Three,³³⁷ by requiring governmental delegators to exercise the power they have been constitutionally granted and by controlling private delegates in their exercise of delegated power. From the perspective of strict logic, it is the Meroni test that is the most persuasive, however simple its statement. To delegate power, without the limits to which it would be subject if exercised by oneself, is to delegate more power than one possesses. The problem with a technique that focuses just on the nature of the power being delegated, such as the US federal non-delegation doctrine, is that, as has been observed, it ‘makes no attempt to link the constitutionality of a private delegation to the risk that it will place government power outside of constitutional controls’.³³⁸ The Meroni test is also capable of accommodating the reality of the intertwining of the public and private in modern governance, and ensures that controls follow power rather than the identity of the exerciser of the power.

³³⁶ Above 4.3.1.3.
³³⁷ Above 3.3 and 3.4.
³³⁸ Metzger (n 61) 1370.
Insofar as judicial attitude is concerned, in the US and the EU, it seems that future developments depend entirely on this factor. The only call can be to the judiciary to vigorously apply the non-delegation doctrines that exist. There are some inklings of discontent at the US federal level with the current state of the non-delegation doctrine, but whether that will ever manifest itself in a more restrictive doctrine depends entirely on the judiciary. Whether, of course, it is suitable for the judiciary to intervene in this context has been questioned, it is submitted, unjustifiably. Judicial intervention in this context should not be discouraged. The only jurisdiction, of those studied, in which the courts have been interventionist is Texas, and unfortunately this judicial activism has been subject to significant criticism, with the Boll Weevil reasoning being condemned on a number of grounds. It has been criticized for distinguishing, for the first time in Texas jurisprudence, between public and private delegation—to which the simple response is that there is a major difference between public and private delegates, which should be acknowledged and accommodated within a delegation analysis. The test has also been described as ‘unworkable and unpredictable’. Admittedly, one problem can be that the weight to be given to each individual factor is not always clear. In the Proctor v Andrews case, while the Court of Appeal was particularly persuaded by the fact that there was no meaningful review of the private actor’s authority, by contrast the Supreme Court considered all eight factors to uphold the delegation. However, it has been shown here that each element of the Boll Weevil analysis is important and can be justified in the review of private delegation.

The test has also been criticized as being overly formalistic and for failing to understand ‘modern administrative realities’ and the importance of allowing delegators to respond flexibly to the problems of modern administration. Yet, if anything, the Boll Weevil test surely constitutes a very pragmatic and realistic approach to the problem of private delegation. It does not prevent the legislature from delegating its power absolutely; it does not require the legislature to struggle with ‘modern administrative realities’; it just requires that delegating institutions carefully consider and control their delegations. Judicial intervention in this context can also be legitimized as a proper exercise of judicial power. Apart from anything else, as shown in Chapter Two, private delegation may have significant consequences for human rights protections and for legal accountability of
public actors—issues that most would agree are within the provenance of judicial expertise.

Finally, in contrast to the EU and the US, in England, the call for better control of private delegation cannot really be to the judiciary. In fact, it is actually difficult to expect the judiciary to do much. As Barendt notes in the separation of powers context: ‘[t]he courts could . . . take the separation of powers more seriously, though in the absence of a codified constitution it is hard for them to articulate or develop appropriate principles’.³⁴³ Ultimately, perhaps the only constraint is a political or social one: as Freedland puts it, ‘even today one shrinks from accepting that a total freedom of contracting out could validly be asserted’.³⁴⁴ One might hope that political or social outrage would help to control the most far-reaching delegations. Overall, though, the English governmental delegator has a relatively free hand and, in constitutional terms, it is difficult to envisage how enforceable restraints might be imposed.

³⁴³ Barendt (n 296) 618.
³⁴⁴ Freedland (n 251) 93.