Private Exercise of Governmental Power

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INTRODUCTION

Privatization—turning formerly governmental responsibilities over to the private sector—has become a popular idea in recent years. Its proponents promise greater efficiency, lower costs, and the avoidance of legal entanglements unique to government. Much of the debate over privatization has been political in nature, rather than legal; and indeed when privatization involves governmental *functions,* the legal issues are largely secondary, involving only details. But if privatization proposals should involve governmental *powers,* the legal problems become considerably more formidable. The transfer of governmental powers raises the issue of to what extent it is constitutionally permissible to delegate those powers to private actors. Given the current interest in privatization and the likelihood that that interest will increase, it is timely to review the law of delegation of governmental power to private actors ("private delegation") and to propose a more structured method for dealing with delegation issues.

Any discussion of the exercise of governmental powers by, or delegation of such powers to, private actors immediately runs against the difficulty of precisely defining the powers that are governmental.[1] Almost any power or function exercised by a government, particularly a state or local government,

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1. Recently the U.S. Supreme Court backed out of this definitional thicket. In National League of Cities v. Usery, 426 U.S. 833 (1976), the Court held that the Fair Labor Standards Act could not be extended to state and local governments in their exercise of "traditional governmental functions," *Id.* at 852. The subsequent efforts of the Department of Labor and the lower courts to classify particular functions as traditionally governmental or not demonstrated the difficulties of the task. 29 C.F.R. § 775.3 (1983) contained the Department's efforts at distinguishing between functions, while the lower federal courts considered the placement of airports, Amersbach v. City of Cleveland, 598 F.2d 1033 (6th Cir. 1979) (traditional and integral); bus systems, *e.g.,* Alewine v. City Council of Augusta, Ga., 699 F.2d 1060 (11th Cir. 1983) (not traditional); and mental health centers, Williams v. Eastside Mental Health Center, Inc., 669 F.2d 671 (11th Cir. 1982) (not traditional). Finally, in Garcia v. San Antonio Metropolitian Transit Auth., 105 S. Ct. 1005 (1985), the Court admitted the difficulty of definition and reversed *Usery.* In another example, in the state action area, one test has been whether the function in question is exclusively reserved to the state. *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978).

can also be exercised, unremarked, by some clearly private actor.[2] Nevertheless, while this initial barrier might not be hurdled, it can be bypassed. Accepting some fuzziness at the edges, we do recognize certain powers as essentially governmental: rulemaking, adjudication of rights, seizure of person or property, licensing and taxation. These powers share the element of coercion, of making someone do something he does not choose to do or preventing him from doing what he wishes to do. Normally, when such powers are privately exercised, the private actor's right to do so is grounded in the consent of those affected—in contract—or in the ownership of property.[3] Public exercise of the powers, on the other hand, depends on neither contract nor property rights. This article's concern is with those situations in which the state has commissioned or allowed the nonconsensual, non-property-based exercise of such powers by private actors.[4]

The subject is further limited to delegations by state and local governments, excluding delegations by the federal government. Since *Carter v. Carter Coal Co.*,[5] decided a half-century ago, the federal courts have consistently allowed delegations of federal power to private actors. They have accepted, often without comment, delegations of federal power identical or very similar to state or local delegations that state courts have found unconstitutional. For example, the Davis-Bacon Act[6] requires that workers on federal public works projects be paid at least the construction wage prevailing in the locality where the project is built. For many years the Department of Labor's implementing regulations in effect defined "prevailing wage" as the locally bargained union wage.[7] State statutes that expressly require payment of union

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2. Robert Ellickson has pointed out the parallels between municipalities and homeowners' associations. Ellickson, *Cities and Homeowners Associations,* 130 U. PA. L. REV. 1519 (1982).

3. This point has been made by a number of authors. *See, e.g.,* Ellickson, *supra* note 2; Hale, *Our Equivocal Constitutional Guaranties,* 39 COLUM. L. REV. 563, 567 (1939); Michelman, *States' Rights and States' Roles: Permutations of 'Sovereignty' in* National League of Cities v. Usery, 86 YALE L.J. 1165, 1167 (1977); Note, *The State Courts and Delegation of Public Authority to Private Groups,* 67 HARV. L. REV. 1398 (1954).

4. Difficulties in distinguishing between public and private actors have rarely arisen in the cases and need not long detain us. Occasionally a court is tempted to define away the problem of private delegations by characterizing any person exercising public powers as therefore a public officer. City of Warwick v. Warwick Regular Firemen's Ass'n, 106 R.I. 109, 256 A.2d 206 (1969). Occasionally the status of a particular delegate is uncertain. See, for example, Cooperative Warehouse, Inc. v. Lumberton Tobacco Bd. of Trade, 242 N.C. 123, 87 S.E.2d 25 (1955), in which the court sometimes treats the tobacco board of trade as a private association and sometimes as an "administrative commission" of the state. But for the most part, the delegate is clearly private, free of the constitutional and statutory constraints that limit government agencies, and the reviewing court does not linger over that aspect of the delegation.

5. 298 U.S. 238 (1936).

6. 40 U.S.C. § 276a(a) (1982).

7. A. THIEBLOT, THE DAVIS-BACON ACT 37-39, 146 (1975). The Reagan Administration recently changed the responsible regulation, 48 Fed. Reg. 19,533 (1983), and the change was upheld in Building & Constr. Trades' Dep't, AFL-CIO v. Donovan, 712 F.2d 611 (D.C. Cir. 1983), *cert. denied,* 464 U.S. 1069 (1984).

wage scales on projects funded by state or local government have come under attack and have sometimes been held unconstitutional as improper delegations of wage-setting power to private actors.[8] No such challenge has ever been made against the federal statute or regulations. Similar comparisons can be made as to federal delegations to farmer groups,[9] medical accrediting agencies,[10] and others. Private exercise of federally delegated power is no longer a federal constitutional issue.

Nor is the private exercise of governmental power delegated by state or local governments a federal constitutional issue, at least not since the 1920's.[11] One issue frequently litigated in state courts, with results both ways, has been whether private organizations may be empowered to appoint public officials. In one such case, the New York Court of Appeals upheld the delegation; the United States Supreme Court dismissed the appeal for want of a substantial federal question.[12] Another subject of frequent state litigation, again with mixed results, has been the participation of private professional organizations in state licensing, particularly in determining which schools' graduates may sit for licensing examinations. A number of challenges to such involvement, particularly to the common delegation of law school accreditation to the American Bar Association (ABA), have been made in federal courts and have uniformly failed.[13]

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8. *E.g.*, Industrial Comm'n v. C & D Pipeline, Inc., 125 Ariz. 64, 607 P.2d 383 (Ariz. App. 1979).

9. For example, the Agricultural Adjustment Act of 1938, 7 U.S.C. §§ 1281-1407 (1982) provides for marketing quotas on a number of crops but conditions the effectiveness of such quotas on referendum approval by the producers of the affected crop. This statute was upheld without special reference to the referendum feature, Mulford v. Smith, 307 U.S. 38 (1939), while a comparable referendum procedure under the Tobacco Inspection Act of 1935, 7 U.S.C. §§ 511-511q (1982), was upheld in Currin v. Wallace, 306 U.S. 1 (1939). Yet state courts have had great difficulty with legislation that conditioned its effectiveness on approval by the voters of the state or a particular subdivision. *See* Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 221-25 (1937); Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650, 668-72 (1975).

10. The Medicaid legislation originally defined "hospital" as an institution accredited by the Joint Commission on the Accreditation of Hospitals (JCAH), thereby delegating the defining function to that private organization. Comparable state delegations to JCAH have troubled some courts. *See, e.g.*, Poe v. Menghini, 339 F. Supp. 986 (D. Kan. 1972); People v. Barksdale, 18 Cal. App. 3d 813, 96 Cal. Rptr. 265 (1971), *vacated*, 8 Cal. 3d 320, 503 P.2d 257 (1972).

11. The last case in which the Supreme Court invalidated a state or local delegation—simply because it was a delegation—seems to be Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928). The federal courts have continued to review delegations to religious groups, but only under the establishment clause. *E.g.*, Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982). In such a case, the constitutional difficulty is not that the delegate is a private group but that it is a religious group. For a similar result in a state court, see State v. Celmer, 80 N.J. 405, 404 A.2d 1 (1979).

12. Lanza v. Wagner, 11 N.Y.2d 317, 183 N.E.2d 670 (1962), *appeal dismissed*, 371 U.S. 74 (1962).

13. *E.g.*, Hackin v. Lockwood, 361 F.2d 499 (9th Cir. 1966) (ABA accreditation of law schools); Ponzio v. Anderson, 499 F. Supp. 407 (N.D. Ill. 1980) (Illinois Dental Examining Board uses examination formulated, administered, and graded by Northeast Regional Board of Dental Examiners, a private organization).

It is only in the state courts that challenges to delegations—on the ground that they violate a state constitutional rule proscribing some or all private delegations—may be made with some hope of success. Unfortunately the state courts have not, by and large, done well with such cases. They have frequently reacted to private delegations with shock, outraged that legislative bodies could so fundamentally undermine democratic values as to allow a private actor to exercise a governmental power. Yet, just as frequently, the same courts have permitted another private actor to exercise some other governmental power. Indeed, the courts themselves have been guilty—if that is the proper word—of conferring government power on private actors, both through common law decisionmaking (by, for example, permitting bail sureties to arrest their principals)[14] and through formal rulemaking (by the widespread delegation to the ABA of the task of deciding which law schools produce graduates qualified to sit for state bar examinations).[15]

This inconsistency of result has been accompanied by generally inadequate opinionwriting. It is striking, for example, how many of the opinions do not identify the risks presented by such delegations and therefore do not discuss whether and how those risks might be avoided in a particular instance.[16] Rather, a court is likely simply to identify the situation as a delegation, state a flat rule against delegations of public power to private actors, and thereby find the delegation unconstitutional. (This approach is used despite the acceptance of some sorts of private delegations in every state.) Even when analysis is attempted, it is frequently unhelpful or wrongheaded. A number of courts have rejected a flat rule against private delegations, permitting delegations that are "reasonable."[17] But the opinions often offer no help in judging why one delegation is reasonable and another not. Other courts have analyzed delegations to private actors under the same principles applied to delegations to public agencies.[18] Such an approach may be useful as far as it goes, but it tends to obscure the differences between private and public delegations.

Although none of these failings is unique to the law of private delegation, the confusion may in part be caused or exacerbated by uncertainty or indefiniteness as to the constitutional source of any rule against private delegations. The most common source cited, when a state constitution is cited

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14. RESTATEMENT OF SECURITY § 204(1) (1941).

15. *E.g.*, Rosenthal v. State Bar Examining Comm'n, 116 Conn. 409, 165 A. 211 (1933).

16. Indeed, the dissenters in one case denied any need to identify the hazards posed by the delegation at issue. Its "illegality consist[ed]. . .in a violation of the constitution that designedly protects us from those unspecified and unidentifiable hazards to self government lurking in a delivery of the powers of government into the hands of private persons or corporations." Insurance Co. of N. Am. v. Kueckelhan, 70 Wash. 2d 822, 843, 425 P.2d 669, 682 (1967).

17. *E.g.*, Male v. Ernest Renda Contracting Co., 64 N.J. 199, 314 A.2d 361 (1974).

18. *E.g.*, Milwaukee v. Milwaukee Dist. Council 48, 109 Wis. 2d 14, 325 N.W.2d 350 (Wis. App. 1982).

at all, is the clause vesting legislative power in the state legislature. Since that is also the usual source of limitations on delegations to public agencies, it is not surprising that some courts apply the same rules to both public and private delegations. But, as is discussed below,[19] it is not a satisfactory source. In other cases the courts cite no constitutional source at all or refer to notions of democracy apparently grounded outside the four corners of the state constitution. When doctrine thus floats free of constitutional language and the traditions associated with specific language, inconsistency and outcome unsupported by analysis is not surprising. At any rate, the state courts have not constructed a consistent body of case law—not as a whole and often not within a single state. Indeed, in the second edition of his treatise, Professor Davis essentially abandons any attempt at such a construction.[20] Nor does this article intend to make that attempt, or even to comprehensively describe the case law.[21] Rather, the article suggests an approach, based on a more specific identification of the constitutional source of the doctrine limiting private delegation, that might ultimately result in intelligible and defensible principles.

I. THE JUSTIFICATIONS FOR PRIVATE DELEGATIONS

Before beginning a legal analysis of private delegations, consideration should be given to several possible justifications, ranging from the philosophic to the practical, for such delegations. My own bias, which I should state at the outset, is that frequently a delegation of public power to a private actor is not harmful and indeed can benefit the public interest. Additionally, this article argues that such a point of view is at least reasonable and therefore deserves the judicial respect given any reasonable legislative policy choice. A private delegation, at the level and to the extent normally made, ought to carry the same presumptions of validity as other legislative or executive decisions and ought to be invalidated only when clearly in violation of some specific constitutional provision.

A. Pluralism

Political scientists, sociologists, and other social scientists commonly describe the United States as a pluralistic society.[22] By this they mean a society

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19. *See infra* text accompanying notes 69-88.

20. "The first edition of the Treatise and the 1970 Supplement elaborately presented the state law concerning delegation to private parties, but retention of that material in the present edition, along with the updating of it, seems undesirable, because identifiable principles do not emerge." K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3.12 (2d ed. 1978).

21. Such a description appears in Liebmann, *supra* note 9.

22. The literature on pluralism is enormous. A classic statement is R. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES (1967). A recent short summary, including criticisms of pluralism as an ideal, is found in M. OLSEN, PARTICIPATORY PLURALISM 29-36 (1982).

with a great many competing power centers, both public and private. While the present existence of numerous private power centers is by itself no justification for granting governmental powers to private groups, or even for continuing the system, it does emphasize that private groups exercising important powers have been and continue to be an integral part of our social system. Many authors have pointed to the significant economic, political, and social powers of corporations,[23] and earlier writers on private delegations have pointed out the practical regulatory powers exercised by a variety of private actors.[24] The important point, at this stage, is that neither legislature nor courts should find the private exercise of important powers so alien to American tradition that a private delegation should be invalidated out of hand.

Morcover, social scientists have not simply described the United States as a pluralist society, they have often celebrated it as such, maintaining that pluralism is one of the strengths of our system. A variety of claims have been made for the benefits accruing to society from the existence and continuation of private power centers that are apart from and sometimes in competition with government. Tocqueville eloquently argued that voluntary associations are essential to individual liberty, as a counterpoise to the potential rigidity and single-mindedness of government.[25] Robert Dahl has made the related point that private associations help create a system of mutual control, in lieu of an alternative hierarchic system of government domination.[26] And other defenders of pluralism have argued that it enhances individual opportunity for growth, self-expression, development of intimate contacts with others, and moral responsibility.[27] To be sure, these claims have not gone unchallenged, and not all defenders of pluralism would accept all such claims. But that is not the point; rather, the point is that it is reasonable, not unassailable but surely reasonable, to believe that pluralism is indeed a strength of the American system and therefore its enhancement and reinforcement a legitimate effect or even goal of government action. While any single private delegation will have only an insignificant effect on the pluralistic nature of our society, it will be in keeping with that nature, and thus the courts should at the least approach it openly and without the automatic negative bias so often found in the cases. One can then look to

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23. *E.g.*, Epstein, *Societal, Managerial, and Legal Perspectives on Corporate Social Responsibility—Product and Process*, 30 HASTINGS L.J. 1287 (1979); Friedmann, *Corporate Power, Government by Private Groups, and the Law*, 57 COLUM. L. REV. 155 (1957).

24. Jaffe, *supra* note 9; Hale, *supra* note 3.

25. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 485-88 (J. P. Mayer & M. Lerner eds. 1966).

26. R. DAHL, DILEMMAS OF PLURALIST DEMOCRACY 32-36 (1982).

27. *See* McBride, *Voluntary Association: The Basis of an Ideal Model, and the "Democratic" Failure*, in NOMOS XI: VOLUNTARY ASSOCIATIONS 202 (J. Pennock & J. Chapman eds. 1969); McConnell, *The Public Values of the Private Association*, *id.* at 147.

the more specific justifications for private delegations (some of which are claimed as benefits of pluralism) to change judicial neutrality to the presumption of reasonableness that traditionally accompanies governmental action.

B. *Interest Representation*

Since the reapportionment revolution of the 1960's, the only fully legitimate basis for political representation has been population. When other interests—economic, social, ethnic—seek access to the political process, they usually must do so in ways other than through direct representation. Although the powers of the "special interests" have been much talked about of late, and rarely with approbation, there are gains to be made from according some sort of special participation to those specially interested in or affected by governmental decisions and programs. The substance of a decision or program frequently may be enhanced—made more efficient—by recognizing in the decisionmaking process or in program design the legitimacy of business, social, or other private values.[28] For example, one argument made for arbitration, rather than adjudication, of industrial disputes is that the arbitrator is more likely than is a judge to be aware of and give weight to labor-management practices, values, and traditions.[29] Moreover, any decision's acceptability is enhanced if those directly affected participate in its making and feel that it reflects and emerges from their own norms of behavior rather than having been imposed on them by some outside agency. Indeed, this notion of enhanced acceptability, with its benefits to social order and stability, is one of the stronger arguments made in support of a pluralistic society.[30]

One way to achieve interest representation is to delegate governmental power to an interested or affected group. Of course, delegation is not the

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28. This point was also made by Jaffe, *supra* note 9, at 212.

29. *See* Cox, *Reflections Upon Labor Arbitration,* 72 HARV. L. REV. 1482 (1959). In a like vein, Loss writes of the Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended in scattered sections of 15 U.S.C.):

> Recognizing that in a highly complex field like the securities business there is a large area for the operation of exchange rules on the level of business ethics rather than law, Congress relied in some measure upon the exchanges themselves to assure high standards of trade and to discipline members who violated these standards.

2 L. LOSS, SECURITIES REGULATION 1175-76 (1961).

30. McConnell, *supra* note 27. Something of this notion is present in Justice Field's famous rhapsody to frontier mining camp regulations in Jennison v. Kirk, 98 U.S. 453 (1878). These regulations, made by the miners themselves, were given the force of law by federal statute. Act of July 26, 1866, ch. 262, §§ 1, 2, 4, 9, 14 Stat. 251, 251-53. *See also* 30 U.S.C. § 28 (1982). Field reported that the author of this legislation argued that private mining law was "a part of the miner's nature. He had made it, and he trusted it and obeyed it." *Jennison,* 98 U.S. at 459.

only way to do so. It is one of a number of methods that range from such informal mechanisms as personal contacts or joint consultation between group and government to representation on administrative boards, making the appointments to (itself a delegation) such boards, and use of advisory commissions.[31] But if a court is to reject delegation as an illegitimate choice from among this group of methods, it should be specific as to the hazards uniquely connected to the delegation and satisfied that those hazards have not been protected against.

C. *Flexibility of Private Agencies*

Different forms of organization seem to have different capacities to innovate or to respond flexibly to new ideas or new situations.[32] It is part of popular folklore that government agencies are not good at these tasks, a thought more seriously urged by Tocqueville, who argued that a government is "incapable of refreshing the circulation of feelings and ideas among a great people. For a government can only dictate precise rules. It imposes the sentiments and ideas which it favors, and it is never easy to tell the difference between its advice and its commands."[33] Certainly government operates under special demands for regularity and predictability and is subject to constitutional requirements of fairness; these factors may impose rigidities on government that do not apply to private actors, and they may thereby cause a government agency to be less open than a private agency to innovation and less flexible in dealing with complex situations.[34] It is not unreasonable, for example, to conclude that the sorts of business-like decisions necessary to protect policyholders when an insurance company fails might better be made by a small private group of insurance experts than by a state department of insurance.[35]

However, most of the rigidity that affects government, so far as it exists at all, probably results not so much from the fact that government is public as from the fact that it typically is bureaucratic. The size of bureaucratic organizations, their complexity, their need for and reliance on rules and procedures, and their centralization of decisionmaking all tend to hamper

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31. The listing is from A. LEISERSON, ADMINISTRATIVE REGULATION, A STUDY OF REPRESENTATION OF INTERESTS (1942).

32. G. ZALTMAN, R. DUNCAN & J. HOLBECK, INNOVATIONS AND ORGANIZATIONS (1973) [hereinafter cited as INNOVATIONS].

33. A. DE TOCQUEVILLE, *supra* note 25 at 487-88.

34. Some private actors clearly can act more flexibly than their government counterparts simply because they are private. For example, private grievance arbitrators are not bound by judicial rules of evidence. T. KHEEL, LABOR LAW § 24.03[3] (1984).

35. *See* Aetna Life Ins. Co. v. Washington Life and Disability Ins. Guaranty Ass'n, 83 Wash. 2d 523, 520 P.2d 162 (1974).

their capacity to respond to innovative ideas and unusual situations.[36] If it is important that an organization be flexible when presented with new ideas or be creative in generating such ideas, then it may be important that the organization be nonbureaucratic in nature—that it be, for example, small and perhaps staffed largely by volunteers.[37] While not all private groups are nonbureaucratic, it is often true that a private group to which a governmental power is being delegated is less bureaucratic than the alternative public group, and for that reason it may be advantageous to make the delegation. For example, private accreditation, conducted by agencies that generally do not fit the bureaucratic model, may well have facilitated greater diversity in higher education than would have occurred under the European model of government accreditation.[38]

D. A Transitional Stage

It has become a commonplace of modern economics that one function of government is to overcome the "free rider" problem of collective goods.[39] A collective (or common or public) good is one which, if consumed by one person in a group, cannot feasibly be withheld from others in the group, whether they pay for it or not. A standard example is local police patrol. If one homeowner on a block hires someone to patrol his home periodically, the patrol will inescapably increase the protection accorded other homes on that block. The homeowner who employs the patrol may try to persuade his neighbors to contribute to the patrol's cost, but it will often be to their self-interest not to pay, hoping that others will. Those who do not pay become free riders. If enough people follow their self-interest and do not pay, the good may not be provided at all—a private market failure—or may be provided at an inefficient level. Because government has the power to coerce contribution through its power to tax, those who wish a collective good often turn to government to finance or provide the good.

Traditionally, this theory of collective goods has been presented as part of a two-sector model of the economy: public and private. The private sector

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36. *See* A. DOWNS, INSIDE BUREAUCRACY, ch. XIII (1967); V. THOMPSON, MODERN ORGANIZATION 18-19 (2d ed. 1977); INNOVATIONS, *supra* note 28, ch. 3. G. BRITAN, BUREAUCRACY AND INNOVATION (1981) reports on a study of a government bureau whose role was to sponsor innovation and on the difficulties it had in attempting—ultimately unsuccessfully—to do so.

37. A. DOWNS, *supra* note 36, ch. III, defines a bureau, in part, as a large organization with a majority of its members being full-time employees who depend upon the bureau for their income.

38. *See* D. PETERSON, ACCREDITING STANDARDS AND GUIDELINES ix (1979). In *Ex parte* Gerino, 143 Cal. 412, 77 P. 166 (1904), the court argued that one reason to leave medical school accreditation to the American Medical Association was the need to keep abreast of progress in natural science and constantly raise requirements to reflect that progress.

39. Good introductions to the free rider problem are found in J. BUCHANAN, THE DEMAND AND SUPPLY OF PUBLIC GOODS ch. 5 (1968), and M. OLSON, THE LOGIC OF COLLECTIVE ACTION, ch. I (1965).

generally concentrated on noncollective goods, while collective goods were mostly provided by government. However, the two-sector model may be inaccurate in that it ignores a third sector: the private nonprofit sector. Frequently this sector provides collective goods alongside the public sector, perhaps responding to the needs of some for different levels or quality of such goods.[40] More importantly, many activities now well established as government-provided collective goods were first undertaken by the nonprofit sector, well before government became involved.[41] It often takes time before a private market failure is sufficiently strong and well recognized for the political process to cause government to fill the gap. In the interim, the nonprofit sector may do so.

Once the political process has advanced and government has begun to think about its involvement in the activity in question, it may be sensible to use the established programs of the nonprofit organizations already at work. They have a developed expertise and have already met start-up costs. They may also be doing a good job, and a delegation of public power may make their operations more efficient. In fact, the political process may not have moved far enough along to support a full government takeover, and the alternative to delegation may be continued governmental abstention from the activity. Thus a delegation may in some instances be seen as an intermediate stage between private market failure and full government responsibility, one that permits an earlier, and often higher-quality, governmental response than would otherwise be possible.

Perhaps New York's delegation of licensing power to The Jockey Club can be understood in this light. The Jockey Club was established at the end of the nineteenth century as a voluntary group to regularize and regulate racing.[42] From the beginning it sought to maintain the integrity of the sport by licensing owners, trainers, and jockeys. By the 1930's, when New York sought to reinvigorate state regulation of racing, the existing state apparatus had deteriorated.[43] Therefore, taking advantage of The Jockey Club's traditions and experience, New York gave it initial licensing power over the sport, with appeals to the racing commission.[44]

E. Expertise

The availability of special expertise may continue as a reason for private delegation beyond a transitional stage. Persons with certain kinds of expertise

40. B. WEISBROD, THE VOLUNTARY NONPROFIT SECTOR, AN ECONOMIC ANALYSIS (1977).

41. *Id.* at 60. *See also* A. MARTS, PHILANTHROPY'S ROLE IN CIVILIZATION (1953).

42. B. LIVINGSTONE, THEIR TURF 26-29 (1973); W. VOSBURGH, RACING IN AMERICA, 1866-1921, at 43-45 (1922).

43. NEW YORK STATE RACING COMM'N, ANNUAL REPORT (1935).

44. Fink v. Cole, 302 N.Y. 216, 221, 97 N.E.2d 873, 874 (1951). The delegation was invalidated some years later. *Id.*

may be too expensive for government to employ or may prefer less structured work environments than government can offer. Private delegation may be a practical method of obtaining that sort of otherwise unavailable expertise. The reliance on the scientific standards of the United States Pharmacopeia for a statutory definition of "drugs" makes clear sense from this standpoint.[45] So too, the governing board of a small town, with no staff particularly expert in electricity, might find it sensible to adopt the National Electrical Code as the town's electric code.[46]

F. Costs

Finally, and perhaps most practically, it may be substantially cheaper for government to delegate power to private actors than to undertake an activity itself. Indeed, cost considerations may make delegation the only realistic method of undertaking an activity. If humane society agents had not initially been delegated the authority to enforce the animal cruelty statutes,[47] those statutes might well have gone unenforced. The political pressure sufficient to enact the statutes was probably inadequate to raise the funds to enforce them. Similarly, allowing private enterprises such as railroads to directly exercise the power of eminent domain, rather than having government officials do so on their behalf, saves the government time and money. And a number of arbitration schemes have been adopted to reduce judicial backlogs, as an alternative to prying loose the money necessary to appoint a number of judges sufficient to reach the same goal.[48]

In summary, a number of legitimate goals may reasonably be thought served by private delegations: involving those most directly affected by a decision or a program in the decisionmaking process or in program design and implementation, thereby improving both the quality of the decision or program and its acceptability; enhancing the capacity to respond flexibly to new conditions or experiment with new approaches; permitting an orderly transition from private to public responsibility for an activity; giving access to levels of expertise not directly available to government; and saving public funds. Private delegation is not the only way to serve these ends, of course, but it is a reasonable one, a reasonable choice.

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45. This delegation has consistently been upheld. *E.g.*, State v. Wakeen, 263 Wis. 401, 57 N.W.2d 364 (1953).

46. Adoption of *future* editions of the National Electric Code has usually been held to be an invalid delegation. *E.g.*, State v. Crawford, 104 Kan. 141, 177 P. 360 (1919). More recently, however, such a delegation was upheld by the Supreme Court of New Jersey. Independent Electricians and Elec. Contractors Ass'n v. New Jersey Bd. of Examiners of Elec. Contractors, 54 N.J. 466, 256 A.2d 33 (1969).

47. *See infra* note 77.

48. *See, e.g.*, INSTITUTE OF JUDICIAL ADMINISTRATION, COMPULSORY ARBITRATION AND COURT CONGESTION: THE PENNSYLVANIA COMPULSORY ARBITRATION STATUTE 3 (1956).

II. THE CONSTITUTIONAL BASIS OF LIMITATIONS ON PRIVATE DELEGATIONS

Any discussion of the state constitutional source for limitations on private delegations must begin with the well-established doctrine that American state constitutions are not grants of power but rather limitations on power. Cooley emphasized this point more than 100 years ago, and it has been repeated, and to a considerable extent respected, by state courts ever since.[49] The doctrine holds that a state exists independently of its constitution and thus its government may constitutionally take any action whatever, unless specifically restrained by some provision of the state constitution (or, of course, the United States Constitution). As a practical matter, the doctrine imposes a burden on state courts to connect their state constitutional decisions to some colorably appropriate state constitutional provision.

No state constitution directly prohibits, in broad terms, delegations of public power to private actors or, for that matter, to public actors. The source of any constitutional limitation is therefore indirect. The discussion below focuses on four possible bases of this indirect limitation: due process, which this article favors; the notion of "constitutional supremacy"; the power-vesting clauses; and fundamental concepts of representative democracy.[50]

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49. T. COOLEY, TREATISE ON CONSTITUTIONAL LIMITATION 173 (1868). The pervasive acceptance of this basic notion is evidenced in the pages of supporting cases cited in the legal encyclopedias. 16 AM. JUR. 2D *Constitutional Law* § 58, nn.18-23 (1979); 16 C.J.S. *Constitutional Law* § 58, nn.81-87 (1984).

50. I should briefly mention three isolated provisions, found in one or a few states only, that colorably interdict at least some private delegations. Eight state constitutions prohibit legislation delegating to special commissions or private organizations the exercise of a variety of municipal powers. The provision originated with Pennsylvania, whose constitutional language is typical: "The General Assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever." PA. CONST. art. III, § 31. The other seven states are California, Colorado, Montana, New Jersey, South Dakota, Utah, and Wyoming. The history and judicial handling of these provisions—for some unexplained reason labeled "Ripper Clauses"—is comprehensively set out in Porter, *The Ripper Clause in State Constitutional Law: An Early Urban Experiment—Part I,* 1969 UTAH L. REV. 287, and Porter, *The Ripper Clause in State Constitutional Law: An Early Urban Experiment—Part II,* 1969 UTAH L. REV. 450. Porter recounts how these provisions were 19th century reactions against excessive state interference with local governments, especially against the transfer of particular functions from local to state control. Only in two states, though—Pennsylvania and Utah—have the courts given much range to such provisions, and so they have had little impact on delegation practice. All that a court need do to avoid the provision is to characterize the power or function being delegated as *not* municipal. For example, the Supreme Court of Pennsylvania held that the provision prohibited a standard municipal revenue bond clause allowing the bond trustee to assume operation of the bond-financed facility upon a default, Lighton v. Abington Township, 336 Pa. 345, 9 A.2d 609 (1939), while the Supreme Court of Colorado reached the opposite conclusion by holding that the trustee, in an instance of default, would not be performing a

A. Due Process

What is it about a delegation of governmental power to a *private* actor that we find so worrisome? What, at bottom, troubles the courts so that they invalidate the legislation or other action making the delegation? The concern is that governmental power—power coercive in nature—will be used to further the private interests of the private actor, as opposed to some different public interest. When a public official is permitted to exercise a public power, he is generally expected to do so in a basically disinterested way. The community expects him to act from some conception of what is good for the community or according to standards that seek to further community interests, as opposed to acting to further his narrow private interests. This expectation of disinterest explains some of the willingness to bestow coercive power on the public official. The serious consequences that attend a failure of the expectation offer evidence of its existence. When an official acts in a privately interested way, courts have been quick to invalidate any action taken,[51] to impose a constructive trust running to the public on

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municipal function, Allardice v. Adams County, 173 Colo. 133, 476 P.2d 982 (1970). The same labeling has gone on in cases concerning whether interest arbitration violates the provision. *Compare* State *ex rel.* Fire Fighters Local No. 946 v. City of Laramie, 437 P.2d 295 (Wyo. 1968) (arbitration not a municipal function) *with* City of Sioux Falls v. Sioux Falls Firefighters, Local 814, 89 S.D. 455, 234 N.W.2d 35 (1975) (wage setting by arbitrator is municipal function).

At least three states have constitutional provisions that prohibit the passage of laws, "the taking effect of which shall be made to depend upon any authority except as provided" in the constitution. IND. CONST. art. I, § 25; *see also* OREG. CONST. art. I, § 21; *see also* KY. CONST. § 60. The language suggests a ban on making laws subject to referendum approval, but the provisions have not been so used. *See* McPherson v. State, 174 Ind. 60, 90 N.E. 610 (1909). They have been used sporadically to invalidate other sorts of delegations but without consistency. *See* Commonwealth v. Beaver Dam Coal Co., 194 Ky. 34, 237 S.W. 1086 (1922) (law requiring employer to install washrooms upon request of 30% of employees); Hillman v. Northern Wasco County People's Util. Dist., 213 Or. 264, 323 P.2d 664 (1958) (law adopting present and future editions of National Electrical Code).

A final provision, apparently unique to Colorado (and part of the recall section of its constitution), requires that all persons who exercise any "public or governmental duty, power or function" be either elected or appointed by an elected official. COLO. CONST. art. XXI, § 4, 7. This clause was plausibly used to invalidate a statute that imposed binding interest arbitration on public employment bargaining disputes, on the ground that the arbitrators were neither elected officials nor appointed by elected officials. Greeley Police Union v. City Council of Greeley, 191 Colo. 419, 553 P.2d 790 (1976). The force of that plausibility was seriously weakened when the Supreme Court of Colorado subsequently validated binding grievance arbitration in public employment, implying that the language quoted applied for some reason to legislative but not judicial functions. City and County of Denver v. Denver Firefighters Local No. 858, 663 P.2d 1032 (Colo. 1983).

None of these isolated provisions is a satisfactory basis for limitations on private delegations. At best they support limitations on a narrow band of delegations but offer no general support. Moreover, they have not in fact been seriously applied by the courts in those states that have such provisions. There has been no careful analysis of constitutional language or the background of that language. Rather, the courts have turned to the provisions as a tenuous constitutional foundation for decisions reached on other, usually unarticulated, grounds.

51. Coos County v. Elrod, 125 Or. 409, 267 P. 530 (1928).

private profits made,[52] and to provide a personal remedy in tort against the official in favor of anyone harmed by the action.[53] Moreover, legislatures have made breach of the standard a crime.[54]

Thus far the discussion has centered on self-interest and *public* officials. With such officials an expectation of disinterestedness is normally present and normally sustained. But when the person exercising the governmental power is not a public official at all but a private actor, the expectation is less justified. Perhaps the tort and criminal actions available against public officials who breach the standard of disinterestedness would be also available against private actors, but in practice they are a clumsy means of redress and not often used. It may be that society relies somewhat on the moral force of an official's oath of office, and it could impose a similar oath on private actors exercising public power. But society probably relies most fundamentally on the political process, on its ability to vote the rascals out.[55] And that remedy is not available against private rascals. That is what is most worrisome about private delegations. Yet not *all* private delegations have been prohibited; the courts have distinguished among them. And it is the search for some principled way to make those distinctions that leads to due process.

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52. Jersey City v. Hague, 18 N.J. 584, 115 A.2d 8 (1955).

53. Jaffarian v. Murphy, 280 Mass. 402, 183 N.E. 110 (1932); Kenyon Oil Co. v. Chief of Fire Dep't, 15 Mass. App. 727, 448 N.E.2d 1134 (1983).

54. *E.g.*, N.C. GEN. STAT. § 14-234 (1981), which makes it a misdemeanor for a person holding a position of public trust to, in that position, enter into a contract for his private benefit. The Supreme Court of North Carolina has held that a contract entered into in violation of the statute is unenforceable and has denied the guilty party recovery even in quantum meruit. Lexington Insulation Co. v. Davidson County, 243 N.C. 252, 90 S.E.2d 496 (1955).

An expectation of disinterested action fully makes sense only if we accept a model of government in which the concept of a "public" interest is admitted and the legislative process viewed as a mechanism for identifying that interest and seeking to realize it. Many economists would posit a different, "public choice" model of government, in which all ends are private and legislative decisions a result of bargaining between members who are all pursuing their private goals. The concept of a disinterested pursuit of the public interest is alien to this model. See Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145 (1977-1978), for a description of these two models and an analysis of their application to a number of public law doctrines, including the delegation of public power to private actors.

Existence of this second model does not undercut my analysis of the underlying concern about private delegations. First, it appears that it is a model for *legislative* decisionmaking, not necessarily intended to apply as well to executive and adjudicatory actions. Second, even as to legislative decisionmaking, Michelman's article demonstrates that the public interest model seems to have been the prevailing normative model in the doctrines he examines. The tort and criminal actions noted in the text, as well as the continuing legislative and public concern about conflicts of interest among government officials, also indieate the strength of the public interest model.

55. This point is supported by those decisions that ground anti-delegation holdings in supraconstitutional doctrines of political accountability. *See infra* text accompanying notes 89-92. That we in practice rely on political accountability for enforcement of disinterested behavior by public officials does not constitutionally mean that the absence of such accountability disqualifies an actor if other enforcement mechanisms are available and do a reasonable job.

Why is society concerned about improper motivations of public officers? Most immediately because citizens worry that improper motivations may change the content of the action taken. Some person or group of persons is worse off (and others probably better off) because the official who makes the decision lost sight of the standard of disinterestedness and allowed illegitimate, personal considerations to affect his decision. Perhaps, and on a deeper level, society also worrics about the integrity of the entire political system if the standard of disinterestedness is ignored. If it is correct that some part of the public's willingness to entrust governmental power to others, to subject itself to the coercion of goverument, is traceable to a reliance on those powers being exercised in a disinterested way, then a failure to act disinterestedly will weaken our attachment to the system. Should failure be pervasive and corruption widespread, the reaction may be destabilizing in the extreme.

The first of these dangers—that private interest will affect the content of actions—has obvious due process connections. One settled element of procedural due process is that the decisionmaker must not be personally biased, that he must make his decision according to established standards or a disinterested view of the public interest.[56] If a delegation creates the opportunity for private interest to dominate the use of governmental power, then those against whom the power is used may well have suffered deprivations without due process. But if a delegation does not seem likely to involve conflicts between public and private interest, or does include protections against the domination of private interest, no deprivation without due process will have occurred, nor will have occurred the danger—the enhanced potential for illegitimate considerations to affect the exercise of public power—that causes us to worry about delegations in the first place. In either event, a due process analysis of the delegation will raise and deal with the underlying concern.

So much for the instrumental concern with outcome. What of the more intrinsic concern about the integrity of the system? The instrumental concern is largely personal; someone is worse off or is likely to be worse off because illegitimate considerations have affected the exercise of government power. Thc concern about system integrity, however, is shared collectively; the beneficiary of the biased action is harmed as much as the victim. Can a due process approach, which normally protects individual rights and not the system itself, adequately handle this second concern?

At a direct level it probably cannot. A plaintiff who is concerned only with damage to the political system and who cannot demonstrate any personal harm from the action or actions in question would probably have no interest protected by due process. The content of personal liberty is not that ex-

56. Berryhill v. Gibson, 331 F. Supp. 122 (M.D. Ala. 1971), *vacated,* 411 U.S. 564 (1973).

pansive. However, if a proper due process plaintiff was available, in protecting his rights he would also protect the system's integrity. If the delegation was accompanied by mechanisms sufficient to protect the plaintiff with due process standing, those mechanisms would also protect the system itself. If they did not protect the due process plaintiff, the delegation would fall to his challenge. Thus the system would be vulnerable to this second level of danger only to the extent that no plaintiff is available to raise due process arguments. Although this point will be discussed later,[57] it is sufficient at this stage to state that such a plaintiff can always be found, especially given the generous notions of interest sufficient to give standing to challenge state and local government actions.[58] It may be that some persons who have brought challenges to private delegations would no longer be able to do so, but someone else will.

In summary, a due process basis for reviewing private delegations permits a court to approach and resolve the problem in terms of the essential danger that such delegations present: that governmental power may be used to further private rather than public interests. A court can address the danger directly to determine whether it exists in a particular instance and then test the mechanisms available to protect against the danger. This approach, well within the traditions of due process, not only permits handling the basic dangers raised by private delegations, it has the further advantage of being more likely to force a court to address those concerns directly and to articulate the considerations behind its decision.[59] Before elaborating on this due process approach further, it would be helpful to canvass the alternative constitutional bases for limitation and explain why they are ultimately unsatisfactory.

B. "Constitutional Supremacy"

Sotirios Barber recently reviewed several possible constitutional bases for the doctrine that limits, to some uncertain extent, all delegations of legislative

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57. *See infra* text accompanying notes 114-26.

58. *See infra* text accompanying notes 114-27.

59. The idea that due process may be a source for constitutional limitation on private delegations has been recognized by others. Jaffe, *supra* note 9, at 235-36, suggests that some delegation cases may raise due process issues. Note, *The State Courts and Delegation of Public Authority to Private Groups,* 67 HARV. L. REV. 1398 (1954), argues that due process is the preferable constitutional source, although the author would proceed, particularly with delegation of rulemaking power, somewhat differently than the way I suggest.

The Supreme Court's review of state and local delegations of course proceeded under the due process provisions of the fourteenth amendment, *e.g.,* Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928), and Carter v. Carter Coal Co., 298 U.S. 238 (1936), held that a *federal* delegation violated the due process provision of the fifth amendment. A number of state courts, particularly New Jersey's in recent years, have also decided private delegation cases within a due process framework. *E.g.,* Humane Soc'y of the United States, N.J. Branch v. New Jersey State Fish and Game Council, 70 N.J. 565, 362 A.2d 20 (1976), *appeal dismissed,* 429 U.S. 1032 (1977).

power, to both private and public delegates.[60] He concluded that the most satisfying basis was the idea of "constitutional supremacy."[61] He pointed out that a constitution is not entirely an instrumentalist document; it is not totally devoted to securing the social goals, such as domestic tranquility and a common defense, that led to its drafting and adoption. Were a constitution entirely instrumental, any of its provisions could be ignored if doing so was perceived to move society closer to its goals. But the provisions are not so malleable. Some of them must be respected, in the end, simply because they are *constitutional.*[62] Specifically, if a constitution directly entrusts a particular responsibility to a named agency, that agency must, and only that agency may, exercise that responsibility because the constitution so provides. To delegate the responsibility would be to abdicate constitutional duty and *for that reason* the delegation would be unconstitutional. This is what Barber meant by "constitutional supremacy."[63]

Total and candid abdication is obviously rare, and so Barber also included within his principle delegations that "amount" to abdications of constitutional responsibility. In speaking of legislative delegations, he defined Congress' (and state legislatures') constitutional duty as "deciding between conflicting proposals presented by clashing interests."[64] A virtual abdication of that duty occurs if Congress (or a state legislature) "deliberately transfers to others the responsibility for decision among what public debate shows to be the most salient policy alternatives presented to it."[65] Any delegation that does not go so far as to amount to an abdication is constitutional—as a delegation. Barber stated, without being specific, that some otherwise permissible delegations might violate other constitutional prohibitions.[66]

Although some of his reasoning is troublesome and the practicability of his doctrine at the state level is questionable,[67] Barber's argument is attractive.

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60. S. BARBER, THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER (1975). Barber's thesis and arguments are sympathetically summarized in Freedman, *Delegation of Power and Institutional Competence,* 43 U. CHI. L. REV. 307 (1976). As far as I can tell, Barber's book was otherwise unnoted in the law reviews.

61. S. BARBER, *supra* note 60, at 13.

62. *Id.* at 13-14.

63. *Id.* at 16-17.

64. *Id.* at 38.

65. *Id.* Barber's standard would prohibit some delegations to administrative agencies currently thought permissible. *Id.* at 40-41.

66. *Id.* at 42.

67. Barber simply asserts his crucial definition of constitutional legislative duty. Although I find the definition intuitively satisfying, his argument would be stronger if backed by citation or reasoning of some sort. After all, the whole doctrine rests on the rigidity of constitutional *language.* Furthermore, implementing the doctrine depends on being able to determine what "salient policy alternatives" were in fact before the legislature. In illustrating the applications for the doctrine, Barber relies heavily on printed legislative history for this purpose. Unfortunately state legislatures rarely generate such materials, and without those materials it is not clear how the determination would be made at the state level.

Despite the difficulties, Barber's doctrine can be accepted as a satisfying source of a constitutional limitation on all delegations of governmental power. Unfortunately acceptance is only a very short step in the search for a constitutional basis for limits on *private* delegations, for there are few such delegations that can be characterized as actual abdications of constitutional responsibility. Rather, private delegations are by and large minor in their scope and would be unquestioned if made to a public agency. Rulemaking power is delegated to a private agency rather than to a city council or state department; adjudicatory power is delegated to a private arbitrator rather than to one working for a state agency; arrest power is delegated to a private policeman rather than to a deputy sheriff. It is the private quality rather than the delegation itself that is constitutionally troubling. And as to the private quality the idea of constitutional supremacy offers no help.

For Barber the nature and identity of the delegate was irrelevant to the validity of the delegation. If an abdication, it was invalid; if not, it was constitutional. Freedman criticized Barber's argument at this point, arguing that different considerations attend private delegations.[68] Barber probably would not disagree; he would simply argue that any additional constitutional burden placed on *private* delegations must emerge from some theoretical basis other than "constitutional supremacy." At any rate Barber surely is right on this point on his own terms. If "constitutional supremacy" is to be the basis of limitation on delegations, there is no principled way within its theoretical framework to distinguish between the public or private nature of the delegate, since the constitution says nothing directly about delegations. There is no language to be supreme. Therefore, if delegations are to be further limited because they are private, then there must be some other constitutional basis for doing so.

C. *The Vesting Clauses*

Most state constitutions contain provisions that expressly "vest" legislative power in the state legislature.[69] Without question, this is the provision most likely to be cited in a private-delegation case, if the court bothers to refer to the constitution. For a number of reasons, the vesting clauses are an unsatisfactory basis for judging private delegations.

To begin, such a constitutional base does not satisfactorily deal with delegations by state agencies or local governments. For example, a medical licensing board might adopt the American Medical Association's list of

68. Freedman, *supra* note 60, at 332-35.

69. For example, the Connecticut provision reads: "The legislative power of this state shall be vested in two distinct houses or branches; the one to be styled the senate, the other the house of representatives, and both together the general assembly." CONN. CONST. art. III, § 1.

accredited medical schools, or a city might adopt future editions of the Uniform Building Code. For such a case, the legislature has already granted these subordinate agencies some rulemaking power, and they in turn have delegated some of that power to a private actor. Whatever usefulness the vesting clause may have as a limit on the legislature's delegation of its own power, it is difficult to see how the language might limit delegations by some agency other than the legislature.

It is, in many instances, possible to handle delegations by subordinate agencies as statutory questions, holding a particular private delegation invalid because the agency was not authorized by statute to make it.[70] Should the legislature then respond by specifically and clearly authorizing the delegation, perhaps the vesting clause could legitimately be used to test the legislation authorizing the delegation, if not the delegation itself. But even this escape is unavailable if the delegation occurs in the voter-adopted charter of a home-rule city or county. For example, some of the wage-reference cases challenged home rule charter provisions.[71] Home-rule cuts a piece out of any vesting clause; to some extent legislative power is removed from the legislature and vested in those—usually the voters—who approve the home-rule charter. Thus the vesting clause would be irrelevant to a delegation made in such a charter.

In addition, reliance on a vesting clause to limit private delegations distorts the constitutional purpose of such a clause. State constitutions routinely mandate a separation of powers, declaring the government power is to be divided among three departments and that each department is to remain separate and is not to exercise the powers of another.[72] But these provisions do not specify the department in which each category of power is to be located; the vesting clauses (there are also clauses vesting executive and judicial power) carry that responsibility. Thus they are merely part of the contitutional separation of powers.

Separation of powers may have some relevance to delegations of legislative power to executive agencies, in that one department might then in fact be exercising the power of another, but a private delegation does not cross the lines between departments. It has been argued that the purpose of the separation-of-powers requirement is to protect individual liberty, in that dispersing power among several agents prevents a liberty-endangering con-

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70. *E.g.*, Cawley v. Northern Waste Co., 239 Mass. 540, 132 N.E. 365 (1921) (city ordinance); State *ex rel.* Westercamp v. State Bd. of Chiropractic Examiners, 137 Mont. 451, 352 P.2d 995 (1960) (state agency).

71. *E.g.*, Fuldauer v. City of Cleveland, 32 Ohio St. 2d 114, 290 N.E.2d 546 (1972). These cases are discussed at length, *infra* text accompanying notes 138-39.

72. To continue with the Connecticut example: "The powers of government shall be divided into three distinct departments, and each of them confined to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another." CONN. CONST. art. II.

centration of power in one or a few hands.[73] If that view is correct, then private delegations serve the same goal because power is spread still further. One need not carry the argument that far, however, to see that the separation-of-powers principle is a weak foundation for limiting private delegations.

The most important reason against using the vesting clauses as our constitutional basis is that their language (and their traditions) offers no help at all to the decision of cases. If the language means anything in this context, it is an implied negative; since the power is vested in the legislature, it may not be exercised by others and so no delegations at all are permissible. But obviously it does not mean that. Some private delegations of legislative power have been upheld with little difficulty: delegation of medical school accreditation to the American Medical Association;[74] delegation of the authority to make mining field regulations to the miners themselves;[75] and, perhaps most strikingly, delegation of the power of eminent domain to railroads, public utilities, and other private condemnors.[76] What in the language, or even the tradition, of the vesting clause supports these delegations while condemning others?

Furthermore, as noted above, clauses that vest legislative power are paralleled by clauses vesting judicial and executive power. Important judicial and executive powers have been delegated, in some cases for decades or even centuries, without the validity of the delegation being questioned. The power of arrest has been delegated to railway police, to humane society agents, and to bail bondsmen.[77] The power to seize and sell property has

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73. *See generally* W. GWYN, THE MEANING OF THE SEPARATION OF POWERS: AN ANALYSIS OF THE DOCTRINE FROM ITS ORIGIN TO THE ADOPTION OF THE UNITED STATES CONSTITUTION (Tulane Studies in Political Science Vol. 9, 1965).

74. *E.g., Ex parte* Gerino, 143 Cal. 412, 77 P. 166 (1904).

75. *See, e.g.,* Morton v. Solambo Copper Mining Co., 26 Cal. 528 (1864).

76. 1A J. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 3.23 (3d ed. 1981).

77. A majority of the states by statute permit the commissioning of special railroad police. In 1975, 41 states were reported to have such statutes. *See* Dralla, Honig, Port, Power & Simmons, *Who's Watching the Watchman? The Regulation, or Non-Regulation, of America's Largest Law Enforcement Institution, the Private Police,* 5 GOLDEN GATE L. REV. 433, 474 (1975). Railroad police are typically given the same arrest powers as public police and permitted to carry concealed weapons. Although nominally they are formally appointed by a public official, such as a governor, and take an oath of office, they are in fact named by the railroad, paid by the railroad, and supervised by the railroad. J. SHALLOO, PRIVATE POLICE (1933). Some states have extended the delegation to other industries and activities. Pennsylvania, apparently an extreme example, permitted private police for coal and iron mines, cemeteries, camp meetings, fishing clubs, county fairs, charities, humane societies (children), and street railways. *Id.*

While there was an appearance, albeit fictional, of public control of railroad police, there was none for the "agents" of animal cruelty societies. A number of states authorized such societies to appoint agents, who were permitted to summarily seize and destroy animals and otherwise enforce the animal cruelty statutes; the societies had complete control over appointment and supervision of their agents. HUBBARD, PREVENTION OF CRUELTY TO ANIMALS IN THE STATES OF ILLINOIS, COLORADO AND CALIFORNIA (Proc. Acad. Pol. Sci. Monograph Vol. 6, No. 2, 1916). Furthermore, under the common law, sureties on bail bonds were permitted to arrest and surrender their principals. RESTATEMENT OF SECURITY § 204(1) (1941). That the delegation was effected by judges rather than legislators does not make it any less a delegation.

been delegated to certain lienholders.[78] The power to destroy buildings, without personal liability, in order to stop the spread of fire has been delegated to anyone at the scene of a fire.[79] The power to adjudicate grievances between employees and employers has been delegated to private arbitrators.[80] And the authority to determine which law schools' graduates may sit for the bar examination has been delegated to the American Bar Association.[81] Only the last of these has been challenged on delegation grounds, and the challenges consistently have been refuted.[82] Yet there is nothing in the executive and judicial vesting clauses to indicate why delegations of those sorts of powers are accepted and delegations of legislative powers invalidated.[83]

Finally, in this vein, the vesting clause offers no help in understanding why it is permissible to delegate a particular power to a state agency or

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78. The common law gave a warehouseman a possessory lien on goods stored in his warehouse. Nineteenth century statutes, now codified at U.C.C. § 7-210(2) (1983), permitted the lienor to sell the goods to satisfy his claim. R. BROWN, THE LAW OF PERSONAL PROPERTY § 14.1 (W. Raushenbush 3d. ed. 1975). Although a divided Supreme Court held that a sale pursuant to such a statute was not "state action", Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978), the legislation does permit a private actor to exercise a power normally thought governmental: summary sale of seized goods. Therefore I would call it a delegation. *See* Yudof, *Reflections on Private Repossession, Public Policy and the Constitution,* 122 U. PA. L. REV. 954 (1974). Although *Flagg Bros.* was decided on the assumption that there was no contract between the parties incorporating the statutory right of sale, such a contract really does not change the nature of the delegation. When it has been important, courts have treated statutorily required provisions of contracts as statutes rather than as contracts. Seese v. Bethlehem Steel Co., 74 F. Supp. 412 (D. Md. 1947), *aff'd,* 168 F.2d 59 (4th Cir. 1948); Lloyd v. Cincinnati Checker Cab Co., 67 Ohio App. 89, 36 N.E.2d 67 (1941), *appeal dismissed,* 138 Ohio St. 438, 35 N.E.2d 446 (1941). *Cf.* Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co., 284 U.S. 151 (1931).

79. Hall & Wigmore, *Compensation for Property Destroyed to Stop the Spread of a Conflagration,* 1 ILL. L. REV. 501 (1907). As with the surety's right of arrest, this delegation was made by the courts.

80. Arbitration of employee grievances, arising out of a collective bargaining agreement between the employee's union and his employer, is widespread, in both private and public employment. In a few states, grievance arbitration is a required feature of governmental collective bargaining agreements. *E.g.,* MINN. STAT. ANN. § 179A.20(4) (West Supp. 1986); and PA. STAT. ANN. tit. 43, § 1101.903 (Purdon Supp. 1985). Grievance arbitration supplants ligitation as the means of resolving the dispute; and by and large, once the arbitration process has been completed, the employee may not then seek to retry the questions in court. Vaca v. Sipes, 386 U.S. 171 (1967); Guille v. Mushroom Trausp. Co., 425 Pa. 607, 229 A.2d 903 (1967). For the employee, the judicial function has been effectively delegated to the arbitrator. Yet, although arbitration may be consensual as to the employer and the *union,* the employee may not have agreed to anything. He is bound even if he has a separate contract of employment and is not a member of the union. Cohen v. Temple Univ., 299 Pa. Super. 124, 445 A.2d 179 (1982).

81. *E.g.,* Rosenthal v. State Bar Examining Comm'n, 116 Conn. 409, 165 A. 211 (1933).

82. *In re* Hansen, 275 N.W.2d 790, 793-94 (Minn. 1978), lists a number of cases in which such challenges were denied.

83. The due process approach does not distinguish between delegations based on the type of power delegated. Rather, it applies the same basic method to any delegation. This applicability to all delegations, of whatever governmental power, is one of its strengths.

local government but impermissible to make precisely the same delegation to a private delegate. A state board may license jockeys, but The Jockey Club may not.[84] A state-employed arbitrator may establish the terms of a collective-bargaining agreement for public employees, but a private arbitrator may not.[85] A public hospital's medical staff may, in essence, decide which physicians will be allowed to practice in the hospital, but the county medical society may not.[86] Obviously there is a difference between public and private delegations. But nothing, not a word, in the vesting clauses suggests how a distinction might be drawn.

The obvious response to all this criticism is that the courts could implant a "reasonableness" element in the vesting clause, holding that it allows delegations that are reasonable and invalidates those that are not. And that course has been taken by some courts.[87] It might be that courts that use this approach would develop, over time, a set of principles giving some guidance to when a delegation is reasonable and when it is not. A court might even, in this way, come to review the cases in a manner similar to the due process approach. But courts have not. No consistent set of principles has developed, nor have the courts paralleled the due process analysis. A "reasonableness" standard too easily permits what in fact has happened: the court reaches a decision, labels the action reasonable or unreasonable accordingly, and does not explain its process of reasoning. Perhaps the process defies explanation. After all, in acting on a "reasonableness" standard the court may simply be relegislating or second-guessing the primary policymakers. In any event, the ultimate criticism of the vesting clause as a constitutional basis is that it has failed to inspire a body of principled case law.[88]

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84. Fink v. Cole, 302 N.Y. 216, 97 N.E.2d 873 (1951).

85. Dearborn Fire Fighters Union Local No. 412 v. City of Dearborn, 394 Mich. 229, 231 N.W.2d 226 (1975). See especially the opinions of Justice Levin and Justice Williams. *Id.* at 228-43, 252-68.

86. Ware v. Benedikt, 255 Ark. 185, 280 S.W.2d 234 (1955). Although the matter is not free from doubt, the medical staff is probably part of the hospital's organizational structure. *See* Horty & Mulholland, *The Legal Status of the Hospital Medical Staff,* 22 ST. LOUIS U.L.J. 485 (1978).

87. *E.g.,* Male v. Ernest Renda Contracting Co., 64 N.J. 199, 314 A.2d 361 (1974).

88. Reliance on the vesting clauses also seems to spawn a sterile preoccupation with labels, in which realities are forgotten and the real issues are ignored. Maryland's 1976 medical malpractice reform legislation required claims of more than $5,000 to go to arbitration before they could be tried in court. When this requirement was challenged as an unconstitutional delegation of judicial power, the Maryland court held that the arbitrator was not exercising a judicial function because he could not enforce his own decisions. Attoruey General v. Johnson, 282 Md. 168, 385 A.2d 57 (1978). So too, a number of arrangements under which insurance companies have been required to join organizations that then levied assessments against the members were upheld against the argument that the taxing power had been delegated by labeling the charge in question as an "assessment," not a tax. *E.g.,* New York Bd. of Fire Underwriters v. Whipple, 2 A.D. 361, 37 N.Y.S. 712 (1896); *cf.* Aetna Life Ins. Co. v. Washington Life and Disability Ins. Guarantee Ass'n, 83 Wash. 2d 523, 520 P.2d 162 (1974).

D. Concepts of Representative Democracy

Rather than rely on specific constitutional language, courts sometimes seek support in fundamental concepts that they find underlying the document and the governmental system as a whole. In a Michigan case that challenged interest arbitration—the establishment of contract terms, by arbitration—of a local government labor dispute, Justice Levin, writing for himself and one other of the four sitting justices, argued that interest arbitration was inconsistent with a "core concept of a representative democracy: the political power which the people possess and confer on their elected representatives is to be exercised by persons responsible (*not independent*) and accountable to the people through the normal processes of the representative democracy."[89] He went on to describe the resolution of heated political issues by arbitrators as "an enormous departure from present concepts of responsible exercise of governmental power"[90] and interest arbitration in particular as "not consonant with proper governance and. . . not an appropriate method for resolving legislative-political issues in a representative democracy."[91] Another court, invalidating a private delegation of the power to make appointments to a public board, relied on the "fundamental precept of the democratic form of government imbedded in our Constitution. . . that the people are to be governed only by their elected representatives."[92]

The rhetoric of the Michigan interest arbitration case illustrates both the attractions and the ultimate weaknesses of this sort of supraconstitutional approach. Interest arbitration has been a controversial instrument in public sector labor relations, in significant part because it permits a person isolated from the political process to make highly political decisions allocating limited public resources without having to balance the needs of all claimants to those resources.[93]

At first blush, Justice Levin's rhetoric seems to echo the analysis of Barber, who argued that it was improper to delegate away the legislative responsibility for deciding heated political issues.[94] Justice Levin finds it unacceptable that

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89. *Dearborn Fire Fighters,* 394 Mich. at 257, 231 N.W.2d at 235.

90. *Id.* at 267, 231 N.W.2d at 240.

91. *Id.* at 258, 231 N.W.2d at 236. Levin's opinion was generally the basis for the court's opinion in Salt Lake City v. International Ass'n of Fire Fighters, Local 1645, 563 P.2d 786 (Utah 1977), which held interest arbitration to be an unconstitutional delegation.

92. Hetherington v. McHale, 458 Pa. 479, 484, 329 A.2d 250, 253 (1974). It is difficult to take this soaring rhetoric seriously in a case that questioned allowing private agriculture groups to make a minority of appointments to a board that distributed around $400,000 annually to agricultural research projects, especially when the author of the opinion more recently has characterized as "frivolous" a delegation challenge to allowing the American Bar Association to decide which law schools are accredited for Pennsylvania bar admission purposes. *In re* Kärtorie, 486 Pa. 500, 501, 406 A.2d 746, 747 (1979) (statement of Roberts, J.).

93. The opinion of Justice Levin in *Dearborn Fire Fighters,* 394 Mich. at 229, 231 N.W.2d at 226, refers to much of the literature.

94. *See supra* text accompanying notes 64-65.

"legislative-political issues" be resolved by delegates rather than by the elected legislative body. But the echo is a false one. Barber's limit on delegation derived from the constitutional status of the legislature's responsibility. A city council's responsibility for allocating resources is a statutory one and thus would not be superior to another statute that transferred the responsibility elsewhere. Moreover, a complete analogy to Barber would prohibit delegating the responsibility to public arbitrators as well as private ones, and none of the judges in the Michigan case was willing to go that far.

The underlying notion here is different from Barber's and recognizes a difference between public and private delegates. Justice Levin argues that those who make public decisions must be accountable to the public, either by being directly elected or by being appointed by and thus accountable to persons who themselves are elected. In a governmental system that traces all power back to the people, there is an intuitive appeal to a principle that all public decisionmakers must be accountable to those same people. Nevertheless, the principle is not a satisfactory basis for deciding constitutional questions.

First, such a principle assumes either that there is general agreement about those decisions that must be reached through a political process or that the question of what those decisions are is answerable through judicially manageable standards. Yet neither condition exists. One example Justice Levin gives of a category of decision too politically important to be removed from political decisionmaking is local zoning. Yet a number of courts have recently characterized rezonings—amendments to the zoning map that affect one or a few parcels of property—as quasi-judicial rather than legislative in nature and so best decided through nonpolitical procedures.[95] No general agreement exists about that particular category. In fact, the decision as to which decisions must be made politically must itself be political rather than judicial. To attempt to subject this decision about decisions to judicial control risks pointless judicial confrontation with the continuous evolution of government structures. Several categories of decision that formerly were legislative and often intensely political—utility ratemaking, incorporation of private companies, divorce, to name a few—have been removed to administrative or judicial forums. Courts must be very cautious promoting a supraconstitutional principle that might interfere with that kind of structural dynamism.

Furthermore, if the underlying principle of decision is a demand for public accountability for political decisions, the stage is opened to arguments that a particular delegation serves accountability as well as or better than its

95. *E.g.*, City of Louisville v. McDonald, 470 S.W.2d 173 (Ky. 1971); Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973), *distinguished on other grounds*, Neuberger v. City of Portland, 288 Or. 585, 607 P.2d 722 (1980). *See* Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130 (1972).

public decisionmaking counterpart. For example, all the Michigan judges apparently would accept a system under which interest arbitration was conducted by full-time, state-employed arbitrators.[96] Probably these arbitrators would not be elected; thus their accountability would depend on direct or indirect appointment by an elected official, most likely the governor. For example, the governor might appoint a department head, who might in turn appoint a division chief, who would in turn appoint the arbitrators. The first point to note is that if the arbitrators held civil service protection, they might not be particularly accountable to the governor, let alone the public. But even if they were practically accountable to the governor, it is not clear that such an arbitrator is more accountable to the people of the city affected by his decision than would be a private arbitrator directly appointed by the city council, or another arbitrator appointed by the first. A single city's electorate might well be more effective in changing the city council's arbitrator-seleetion patterns than in changing the governor's. Nor is it clear why satisfying the public's need for accountability requires that all decisionmaking be traced to elected officials; why is it not enough to have electoral control over those who establish the *system* of decisionmaking? If a system of interest arbitration becomes politically unpopular, it may be as easy or easier to cause the legislature to change the system as to cause the governor to change the arbitrators.[97] To be sure, a court might concern itself with comparing accountability, forcing the legislature to choose a system that the court finds most enhances accountability. But that is the kind of policy judgment that legislatures are better equipped to make. After all, legislatures are generally more accountable to the voters than are courts.

These difficulties are not simply difficulties with this supraconstitutional principle but inhere in all such principles. The difficulties arise precisely because the principles are supraconstitutional and thus not traceable to any specific language of the document. The concepts are too much the stuff of political debate to be given constitutional status without a foundation in constitutional language. All constitutional litigation risks imposition of the judges' value systems, but when the basis of decision is some doctrine discovered by the judges beyond the constitution itself, that risk increases manyfold. Thomas Cooley made the point more than a century ago, and it remains valid today:

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96. In *Dearborn Fire Fighters,* Justice Coleman thought interest arbitration was constitutional in any event. 394 Mich. at 273-91, 231 N.W.2d at 243-52. Justice Williams held that this arbitration was valid because state-appointed arbitrators were involved. *Id.* at 325, 231 N.W.2d at 268. Chief Justice Kavanaugh made clear he wonld accept such a system, *id.* at 273, 231 N.W.2d at 243, and Justice Levin implies that he would. *Id.* at 240-72, 231 N.W.2d at 228-43.

97. Justice Levin recognized that legislative accountability for establishing the system would insulate any legislatively established delegation from attack on accountability grounds. *Id.* at 259-70, 231 N.W.2d at 236-42. Therefore, he rejects it as insufficient but does not say why.

> [Statutes ought not to be found unconstitutional] because they appear to the minds of the judges to violate fundamental principles of republican government, unless it shall be found that those principles are placed beyond legislative encroachment by the constitution. The principles of republican government are not a set of inflexible rules, vital and active in the constitution, though unexpressed, but they are subject to variation and modification from motives of policy and public necessity; and it is only in those particulars in which experience has demonstrated any departure from the settled practice to work injustice or confusion, that we shall discover an incorporation of them in the constitution in such form as to make them definite rules of action under all circumstances.[98]

III. THE DUE PROCESS APPROACH ELABORATED

Having reviewed the competing constitutional bases and demonstrated that each suffers from serious weaknesses, this article returns to the due process approach for handling private delegations. First the article considers some apparent difficulties with this approach and then elaborates upon the approach itself.

A. Differences Between State and Federal Due Process

An initial impediment to the due process approach is the (non)development of federal delegation law over the last half century. As noted earlier, the Supreme Court has used due process, under both the fifth and fourteenth amendments, as a basis for reviewing private delegations but has not found such a delegation unconstitutional since 1936.[99] If private delegations no longer violate due process under the United States Constitution, how can they violate due process under state constitutions? Or is a reliance on due process simply a way to insulate all private delegations from successful challenge?

In a sense the question is irrelevant. Whatever the federal practice, the state courts continue to actively review private delegations. If due process

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98. T. COOLEY, TREATISE ON CONSTITUTIONAL LIMITATIONS 169 (1868). State and local governments have often been subjected to decisions based on supraconstitutional doctrines. The doctrine of an inherent right of local self-government had a brief vogue in the late 19th and early 20th centuries. *Compare* Eaton, *The Right to Local Self-Government* (pts. 1-3), 13 HARV. L. REV. 441, 570, 638 (1900); Eaton, *The Right to Local Self-Government* (pts. 4 & 5), 14 HARV. L. REV. 20, 116 (1900) *with* McBain, *The Doctrine of an Inherent Right to Local Self-Government* (pts. 1 & 2), 16 COLUM. L. REV. 190, 299 (1916). Courts have also held that levy of local taxes by appointed, rather than elected, officials violates a principle against taxation without representation. *E.g.*, State *ex rel.* Bulkeley v. Williams, 68 Conn. 131, 35 A. 24 (1896); Fox v. Board for Louisville & Jefferson County Children's Home, 244 Ky. 1, 50 S.W.2d 67 (1932).

99. *See supra* text accompanying notes 5-13.

is the best constitutional basis for doing so, then it should be used regardless of the federal withdrawal. However, grounds stronger than irrelevancy justify dismissing the federal practice as determinative.

First, there are considerations of judicial economy. The federal courts face a potential agenda much greater than their capacity to meet it. Frequently, choices will be made that certain areas of the law are more demanding and more in need of federal judicial attention than others, and those choices may well be reflected in doctrine.[100] A generation ago Robert McCloskey persuasively demonstrated that the justifications given for preferential protection of civil over economic rights do not withstand analysis.[101] Yet having thus pulled down the fences around meaningful, due process-based review of governmental intrusions on economic rights, he concluded by arguing for "leaving economic due process in repose."[102] A principal reason was that the Court simply did not have the capacity to recommence meaningful review given the other demands on its time.

Many private-delegation cases concern economic regulations. Federal noninterest in them is probably simply part of the general federal withdrawal from economic due process. The remaining private-delegation cases deal largely with challenges to how a state (or local government) distributes power among its own institutions, generally a matter of greater state than federal concern.[103] Thus, if the federal courts do manage their case load through doctrine, the private-delegation cases would be a sensible category for them to excise.

Second, considerations of federalism may cause the federal courts to take a less expansive view of due process—economic and noneconomic—than

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100. These kinds of considerations clearly can affect doctrines. For example, some Justices have been quite explicit about the effect of court congestion on their own notions of doctrine under 42 U.S.C. § 1983 (1982). *E.g.*, Maine v. Thiboutot, 448 U.S. 1, 23 (Powell, J., dissenting) (overburdened courts justify narrow reading of § 1983 as remedy for federal statutory violations).

101. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34.

102. *Id.* at 60.

103. Apart from the important exceptions of the reapportionment cases and of structural decisions based on race, *e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960), a variety of cases demonstrate that state and local structural matters are the primary responsibility of the states. *E.g.*, National League of Cities v. Usery, 426 U.S. 833 (1976) (Fair Labor Standards Act eannot be extended to regulate traditional state services), *overruled in* Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985); Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co., 284 U.S. 151 (1931) (due process does not prohibit a state from substituting adjudieation by arbitrator for adjudieation by court); Ohio *ex rel.* Bryant v. Akron Metropolitan Park Dist., 281 U.S. 74 (1930) (levy of taxes by appointed board does not raise substantial federal questions); City of Trenton v. New Jersey, 262 U.S. 182 (1923) (city not protected by contract clause against actions of state); Hunter v. City of Pittsburgh, 207 U.S. 161 (1907) (state may merge cities without consent of citizens affected); Glisson v. Mayor of Savannah Beach, 346 F.2d 135 (5th Cir. 1965) (allowing nonresidents, as well as residents, to vote in town elections does not violate fourteenth amendment).

would a state court interpreting the state's own constitution.[104] Supreme Court decisions establish national standards. Just as some jurisdictions would wish a lower standard, so others seek a higher one; independent interpretation of state constitutional provisions gives room for imposing the higher standard.[105] Moreover, if the states are to be laboratories for testing new approaches to government, they must have room to experiment, and a self-effacing role for federal due process helps give that room. Should experimentation turn to excess, the state courts have shown themselves, in the economic due process cases, able to intervene.[106]

Third, a recent discussion of state constitutional law suggested a number of institutional differences between the United States Constitution and federal courts on the one hand, and the state constitutions and state courts on the other, that justified a more expansive state judicial role even when the state and federal constitutional language was identical.[107] The Supreme Court heads a national system of federal and state courts. Its inability actively to supervise this enormous system leads it toward decisions that draw bright lines visible to the lower courts, rather than toward a more accretive, fact-specific approach. In addition, as the court of last resort, it may seek to husband its political capital, avoiding too many controversial decisions in too brief a time. Neither of these points applies as strongly to a state supreme court, which therefore may be able to take more chances, to parry and thrust with doctrine, as it takes account of the political reactions to and practical effects of its advances. Furthermore, almost all state court judges are elected in some fashion, and so their use of judicial review is somewhat less open to attack as anti-majoritarian. Finally, state constitutions themselves are considerably easier to amend than is the federal constitution, so that state constitutional decisions can more easily be overruled.[108] On the basis of these

104. All states have some form of due process provision in their constitutions. A.E. Dick Howard reported in 1968 that such a provision was present in every constitution but New Jersey's, A.E.D. HOWARD, THE ROAD FROM RUNNYMEDE 212 (1968), and New Jersey's highest court has since located due process protections in a natural rights provision of the state's constitution. State v. Baker, 81 N.J. 99, 114 n.10, 405 A.2d 368, 375 n.10 (1979).

105. Perhaps the best-known examples involve the first amendment. In Hudgens v. NLRB, 424 U.S. 507 (1976), the Court refused to find a first amendment right for individuals to enter a privately owned shopping center, against the owner's wishes, to engage in peaceful protest. A number of state courts responded by locating such a right in state constitutional protections of free expression. *E.g.*, Robins v. PruneYard Shopping Center, 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979), *aff'd*, 447 U.S. 74 (1980).

106. *See* Hetherington, *State Economic Regulation and Substantive Due Process of Law* (pts. 1 & 2), 53 NW. U.L. REV. 13, 226 (1958).

107. *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1347-56 (1982).

108. In my own state of North Carolina, at least four amendments have been approved in the past 15 years with a clear intention of overruling decisions of the state supreme court. *See* N.C. CONST. art. V, § 2(4) (permits special tax districts, partially overruling Anderson v. City of Asheville, 194 N.C. 117, 138 S.E. 715 (1927)); N.C. CONST. art. V, § 4(5) (defines "debt,"

institutional differences, the authors concluded that "both the [state] constitution and the judiciary applying it are more responsive to political pressures and more integrated into the policymaking process than are their federal counterparts," and thus some of the concerns that restrain federal elaboration and enforcement of constitutional rights are less telling with state courts.[109]

A final justification for an assertive state due process review arises from the nature of the state legislative process. Most state legislatures remain part-time, condensing most of their work into a few months each biennium.[110] Because there is so much to do, many rely considerably on committees, which frequently are dominated by legislators with a special interest in the committee's area of responsibility.[111] As a result, a well-organized lobby, pursuing a goal that enjoys only minority support, may prevail over an unorganized or unaware public interest.[112] State court judges usually are familiar with this system and can be comfortable giving less weight to the normal presumptions of legislative validity.[113]

In summary, the doctrinal development of federal due process may be affected by considerations of judicial economy, federalism, and institutional constraints that do not so strongly affect the state courts. In addition, the election of state courts, the nature of state constitutions, and the methods of state legislatures combine to make it more tenable for a state court to overturn legislative decisions. While these differences do not demand differences in doctrine, their existence suggests that differences in doctrine should not be surprising.

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overruling definition of Yokley v. Clark, 262 N.C. 218, 136 S.E.2d 564 (1964) and Vance County v. Royster, 271 N.C. 53, 155 S.E.2d 790 (1967)); N.C. CONST. art. V, § 8 (permits public revenue bonds for private hospitals, overruling Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973)); N.C. CONST. art. V, § 9 (permits industrial revenue bonds, overruling Mitchell v. North Carolina Indus. Dev. Fin. Auth., 273 N.C. 137, 159 S.E.2d 745 (1968) and Stanley v. Department of Conservation and Dev., 284 N.C. 15, 199 S.E.2d 641 (1973)).

109. *Developments in the Law—The Interpretation of State Constitutional Rights,* 95 HARV. L. REV. 1324, 1347-48 (1982).

110. M. JEWELL & S. PATTERSON, THE LEGISLATIVE PROCESS IN THE UNITED STATES 117 (3d ed. 1977).

111. *Id.* at 203.

112. Hetherington speaks of "competing commercial groups [that] attempt to protect their interests from competition by legislation. The resulting race to the legislature . . . produces legislation which cannot in any real sense be ealled an expression of the will of the people speaking through their elected representatives." Hetherington, *supra* note 106, at 249.

113. The presumption of constitutionality accorded legislation is based on the coequal status of the legislature and on its independent authority and responsibility to consider the constitutionality of what it does. Yet I have frequently heard state legislators—in floor debate and in committee—disclaim any responsibility for the constitutionality of legislation, asserting that the courts will decide that question.

B. Interests Protected by Due Process

State and federal due process clauses, of course, do not protect against all arbitrary government (or private delegate) action. Only if that action infringes a person's life, liberty, or property may he seek the shelter of due process. If a challenged action affects no protected interest, a due process claim against the action will be dismissed or fall to summary judgment. A second potential difficulty with basing private-delegation review on due process is the chance that some delegations might be insulated from review because no appropriate challenger can be found.[114]

With most delegations, no difficulty exists. Many clearly affect property interests: neighbor consent requirements affect the use of real property; fair trade laws affect the sale price of merchandise; condemnation by a private condemnor affects the property interest being acquired. Other delegations attack liberty in its sense of freedom from restraints: any arrest by a private policeman does so, as does any privately promulgated rule that carries a criminal penalty for violation. Moreover, the state courts have continued to recognize an economic component of personal liberty; an interest in being able to pursue one's own occupation or profession.[115] Protecting this interest permits due process challenges to such private delegations as The Jockey Club's licensing of trainers,[116] existing banks' determining whether new banks may open in a community,[117] the local medical society's selecting hospital medical staff,[118] and private associations' accrediting schools and colleges.[119]

As a practical matter, the necessity that a protected interest be affected would deflect two groups of potential challengers: local governments and state officials. Local governments—or more specifically their governing boards—have challenged delegation-based administrative arrangements imposed by state statute or by voter-approved charter provision—for example, interest arbitration and municipal wage requirements. Local governments, however, are not protected by the fourteenth amendment,[120] or by state due

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114. As I understand him, Barber rejected due process as a basis for limiting all delegations on grounds something like these: if there is no injury to the substantive interests of some person, the delegation is beyond attack. Barber, *supra* note 60, at 33. I do not, however, believe that our views are inconsistent, in that I am discussing delegations that do not amount to abdications of constitutional responsibility in his sense and that therefore would be permissible under that standard.

115. Hetherington, *supra* note 106.

116. Fink v. Cole, 302 N.Y. 216, 97 N.E.2d 873 (1951).

117. Union Trust Co. v. Simmons, 116 Utah 422, 211 P.2d 190 (1949).

118. Ware v. Benedikt, 225 Ark. 185, 280 S.W.2d 234 (1955).

119. *E.g.*, Colorado Polytechnic College v. State Bd. for Community Colleges and Occupational Educ., 173 Colo. 39, 476 P.2d 38 (1970) (suit by unaccredited college); Gumbhir v. Kansas State Bd. of Pharmacy, 228 Kan. 579, 618 P.2d 837 (1980) (suit by applicant for pharmacist's license).

120. Williams v. Mayor of Baltimore, 289 U.S. 36 (1933).

process clauses.[121] Thus a due process basis for private delegation review would preclude challenges brought by local governments or by their governing boards, who normally have no protected personal interest at stake. However, this would not thereby insulate these administrative arrangements from judicial review. The state courts generally take a broad view of taxpayer standing, perhaps in part because of a perceived need to permit a remedy against unconstitutional action that would otherwise go unreviewed.[122] The taxpayer's tax liability constitutes an interest in property, and taxpayers have been held to have standing to make due process claims.[123] Since the local government's challenge would typically be founded in a fear of higher costs—added taxes—because of the delegation, a taxpayer would clearly have standing to bring the challenge instead of the local government.

The second group of affected challengers are state officials, who have, for example, frequently attacked delegations of appointment power.[124] Since they normally have no personal stake in the appointment or in the actions of the board to which the appointment is made, the due process basis would foreclose such an attack. Again, however, taxpayers could bring the action, as could other persons affected by the board's operations[125] or a group attacking the delegation, because they are not allowed to make appointments as well.[126] Thus, although state officials would be foreclosed from challenging the delegation, others would not, and the delegation would certainly remain open to review.

In summary, although adopting a due process approach would foreclose challenges by a few who have successfully challenged private delegations in the past, a potential party with the requisite interest to do so will remain available. That being so, the next step is a fuller explanation of how a due process approach would work.[127]

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121. *E.g.*, Supervisors of Boone v. Village of Rainbow Gardens, 14 Ill. 2d 504, 153 N.E.2d 16 (1958); Minnesota State Bd. of Health v. City of Brainerd, 308 Minn. 24, 241 N.W.2d 624, *appeal dismissed*, 429 U.S. 803 (1976).

122. Comment, *Taxpayers' Suits: A Survey and Summary*, 69 YALE L.J. 895 (1960).

123. *E.g.*, City of Marshall v. Public Employees Retirement Ass'n, 310 Minn. 489, 246 N.W.2d 572 (1976).

124. *E.g.*, Hetherington v. McHale, 458 Pa. 479, 329 A.2d 250 (1974).

125. *E.g.*, Bradley v. Board of Zoning Adjustment, 255 Mass. 160, 150 N.E. 892 (1926) (persons whose property rezoned by defendant board); Ashmore v. Greater Greenville Sewer Dist., 211 S.C. 77, 44 S.E.2d 88 (1947) (taxpayer).

126. *E.g.*, Humane Soc'y of United States, N.J. Branch v. New Jersey State Fish and Game Council, 70 N.J. 565, 362 A.2d 20 (1976), *appeal dismissed*, 429 U.S. 1032 (1977); United Chiropractors of Wash. v. State, 90 Wash. 2d 1, 578 P.2d 38 (1978).

127. I should briefly mention one other possible difficulty with a due process approach: the need for state action. I have suggested that the power a warehouseman enjoys to summarily foreclose his lien amounts to a private delegation. *See supra* note 78. The Supreme Court, in Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978), held that there was no state action when the warehouseman exercised the power. If the state courts agreed, the delegation could not be challenged on due process grounds. Although one could argue that the state action threshold

C. *The Due Process Approach: Substantive*

The due process approach to reviewing private delegations is primarily procedural, but a small role remains for substantive due process. Although substantive due process still bears a tainted reputation, it has enjoyed an academic renaissance in recent years.[128] Observers have commented on the Supreme Court's use of other doctrines to give substantive protection to noneconomic rights, employing the methods, if not the letter, of substantive due process.[129] They have also pointed out that the Court has not been willing to renounce totally economic due process but rather has applied the tests of *Nebbia v. New York*[130] with a tolerance—or perhaps inventiveness—that robs them of all bite.[131] Of course, many state courts have never stopped using substantive due process, and so it may be that any delegation doctrine based on due process would perforce have a substantive component in the state courts regardless of its originator's own wishes.

Substantive due process is normally thought to involve two questions: is the end sought by the measure legitimate, and are the means rationally related to achieving that end? As noted earlier,[132] most private delegations are economic regulations. The chief exceptions are delegations of an internal management function, as with interest arbitration or wage-setting, and delegations of the power of arrest. In any case, the end will rarely be in question. A redistribution of management power is surely legitimate, as is

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is lower under state constitutions, *e.g.*, Sharrock v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152, 379 N.E.2d 1169, 408 N.Y.S.2d 39 (1978) (warehouseman lien statute constitutes state action under New York Constitution), I prefer to argue that *Flagg Bros.* was wrongly decided. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW ch. 18 (Supp. 1979). A due process approach to private delegations should focus on the system of rules that establishes the delegation, the rules that give to certain private actors coercive powers not generally available to all. When the challenge is to the system of rules, state action clearly exists in the establishment of the system.

Moreover, as a practical matter, state action would probably be a problem only in challenges to lien statutes, as in *Flagg Bros.*, or in challenges to the arrest powers of bail sureties. Yet if a court were to find no state action in these cases, it would probably find no delegation as well. The Court in *Flagg Bros.* seemed to deny that any delegation had occurred, as have courts that have denied due process challenges to the arrest powers of bail sureties. *See* Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547 (9th Cir. 1974); Citizens for Pre-Trial Justice v. Goldfarb, 88 Mich. App. 519, 278 N.W.2d 653 (1979), *vacated*, 415 Mich. 255, 327 N.W.2d 910 (1982). Thus those particular uses of coercive power would escape delegation challenge regardless of the constitutional basis employed.

128. *E.g.*, Perry, *Abortion, The Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689 (1976); Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967).

129. *E.g.*, Perry, *supra* note 128; Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048 (1968).

130. 291 U.S. 502 (1934). "[T]he guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." *Id.* at 525.

131. McCloskey, *supra* note 101.

132. *See supra* note 103 and accompanying text.

the apprehension of alleged lawbreakers. Furthermore, there is no principled way to distinguish between businesses legitimately subject to regulation and those not; the notion of businesses "affected with a public interest" is ultimately meaningless.[133] Therefore, only the second question—the rationality of means—is likely to be raised in any substantive review of a private delegation.

The rationality test, of course, both in due process and in equal protection, has tended to lose all meaning when an inventive court wants to uphold legislation. Nor is there much reassurance in the tendency to swing to the other extreme when an alternative mode of analysis is wanted. Strict scrutiny in equal protection replaced the open door with an impassable barrier. Nevertheless, a court could still find a middle way, respectful of legislative prerogative yet conscientious in its review and open to the possibility of invalidity. Perhaps some of the techniques developed for "intermediate review" of equal protection claims are adaptable to substantive due process, techniques like forswearing judicially manufactured rationales and relying only on those articulated by the defender of the delegation and looking at how well the means serve the articulated end.[134]

Given the danger of abuse, though, plus the legitimate question of whether legislative ends can sensibly be determined,[135] is giving an explicit role to substantive review worth the risk? Will it decide very many cases?

Only rarely should substantive review invalidate a private delegation. Rather, almost any delegation will be found to be a sensible means of reaching legitimate goals. Perhaps substantive review will be most helpful with delegations that have outlived their rationales. What once had been a rational relation between delegation and goal may have decayed or disappeared with the passage of time. Perhaps the basic problem has disappeared. A court might suggest that this has occurred and in effect "remand" the matter to the legislature.[136] It would be open to the legislature to reassert the rela-

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133. The Supreme Court severely questioned the usefulness of the quoted phrase in *Nebbia* and rejected it altogether in Olsen v. Nebraska *ex rel.* W. Reference & Bond Ass'n, 313 U.S. 236 (1941). Despite that rejection, the phrase is still quoted by some state courts. *See, e.g.*, Note, *Substantive Due Process in Florida,* 21 U. MIAMI L. REV. 99 (1966).

134. These techniques are summarized in L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-30 (1978). In Tribe, *Structural Due Process,* 10 HARV. C.R.-C.L. L. REV. 269, 299-300 (1975), the author points out the use of the "articulated rationale" technique in due process cases.

135. *See* Linde, *Due Process of Lawmaking,* 55 NEB. L. REV. 197 (1976).

136. An example may be helpful at this point. In 1875, the State of Alabama delegated the full power of its state board of health to the Board of Censors of the State Medical Society. The delegation was upheld in Parke v. Bradley, 204 Ala. 455, 86 So. 28 (1920). In 1875, the field of public health was in its infancy, and the state legislature might have thought, reasonably to my mind, that physicians would have a special expertise in the field; the Board of Censors could, also reasonably, be thought to represent the best physicians. Therefore, the delegation was rationally related to a legitimate purpose in 1875; it made sense. I am not sure about 1920, but it certainly has lost its historical validity today, when public health is a well-established

tionship and reenact the legislation; if it did so, the court should accede. But it does no harm to cause such legislation to be reviewed, and most of it probably would not be reenacted.[137]

Substantive review, however, serves purposes beyond the occasional invalidation. (If it did not, it might not be worth the risk.) In fact, substantive review might rescue more delegations than it kills. If a court conscientiously reviews the reasonableness of a delegation—thinking about why it was made, and whether it makes sense—the result might affect the court's attitude as it begins the more important procedural review. As suggested just above, most delegations should survive substantive review, because most of them make sense. By putting itself in the delegator's place and understanding what he was attempting, a court should see that. Although the judges might not have made the same choices, they ought at least to appreciate that the choices made were reasonable. This should stop the sort of mindless judicial reaction that, on seeing a delegation, immediately says: You can't delegate governmental power to a private actor; why that's unconstitutional. Instead, by understanding the basic reasonableness of a delegation, a court should be more inclined to think carefully about the risks, if any, that the delegation poses and how, if at all, those risks have been minimized. That exercise is the task of the procedural component of the due process approach. By establishing an open-minded attitude, substantive review, troublesome as it is, may be essential, at least in the short run, to the successful use of the due process approach.

Moreover, removal of the substantive concern, through a recognition that the delegation was a legitimate legislative choice, may sometimes virtually decide the case. For once the court isolates and focuses on the procedural issues, it may find them virtually nonexistent. Invalidation of the delegation at that point becomes simply a disagreement with legislative policy. Both the various wage-reference statutes and interest arbitration illustrate this possibility.

Wage-reference statutes divide into two fundamental types. The first requires that contractors on government construction projects pay their employees the prevailing construction wage in the locality; sometimes this prevailing wage is defined as the union wage. The second sets public-sector wages by reference to wages either in the private sector or in some other

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field separate from and only partially overlapping medicine. Were the 1875 delegation still in force, a court could justifiably decide that its historical supports had collapsed and the legislature should look at it again.

137. Occasionally a delegation will be invalidated on rationality grounds. For example, Illinois legislation exempted from noise pollution standards all motor races sanctioned by the National Association for Stock Car Auto Racing, the United States Auto Club, or the Association for Motor Sports. Because there is no link at all between whether a race is sanctioned and how much noise it makes, the Illinois court quite properly held the exemption invalid. *See* People v. Pollution Control Bd., 83 Ill. App. 3d 802, 404 N.E.2d 352 (1980).

public jurisdiction. Both types have been attacked as private delegations, and courts have both upheld and invalidated each type. The basic purpose of the prevailing-wage statutes is to protect and perhaps increase the wages of construction workers, especially against importation of cheap labor from other localities.[138] Tying the prevailing wage to the union wage probably serves the additional purpose of reinforcing unionization in the construction industry. The wage-setting statutes probably seek to increase the wages of the affected public employees, usually police or firefighters. Each of these is a legitimate governmental policy, and the delegations are clearly related to its furthering. There is, after all, no constitutional requirement that government buy goods or services at the least expensive price available. Recognizing this, a court would then have to focus and decide the case on the procedural concerns. These concerns, as suggested below, tend to evaporate upon investigation.[139]

With interest arbitration, substantive review may be even more compelling. The reason that legislatures turn to interest arbitration is fairly obvious and results from the basic political decision to allow public employees to organize and bargain collectively. In the private sector the union's ultimate weapon in an impasse is the strike. Almost all states, however, formally deny this weapon to public employee unions.[140] Yet, if bargaining is to work, there must be some way to resolve impasses. Binding interest arbitration has been looked to for that task.[141] Thus a well-crafted system of binding interest arbitration often becomes an essential part of the compromises that result in legislative approval of public employee unions. The independence of the arbitrator—along with his private character—may well strengthen the acceptability of the device to the unions, perhaps increasing their willingness to forego the traditional strike weapon. A court's recognition of the importance of arbitration to the entire unionization policy would not only isolate the procedural concerns but also encourage the court to resolve them in favor of the delegation. Professor Jaffe commented that courts came to uphold local-option referenda against delegation attacks because the alternatives were simply inadequate to the needs of public policy: "[t]he constant irresistible stream of legislation soon washed away the constitutional theories

138. *See* Universities Research Ass'n v. Coutur, 450 U.S. 754 (1981).

139. *See infra* text accompanying note 160.

140. Craver, *The Judicial Enforcement of Public Sector Interest Arbitration,* 21 B.C.L. REV. 557 (1980).

141. Although he would much prefer the use of standard collective bargaining in the public sector, including the risk of strikes, and has serious policy doubts about arbitration, Theodore Kheel wrote that "compulsory arbitration in one form or another is the only logical, if not practical, alternative" to allowing strikes. Kheel, *Strikes and Public Employment,* 67 MICH. L. REV. 931, 937 (1969). A more positive statement of the same thought is found in R. DOHERTY & W. OBERER, TEACHERS, SCHOOL BOARDS, AND COLLECTIVE BARGAINING: A CHANGING OF THE GUARD 104 (1967).

of the early courts . . . ."[142] Helped by the procedural mechanisms noted below, the same thing seems to be happening with interest arbitration.[143]

D. *The Due Process Approach: Procedural*

As argued above,[144] the principal concern that the procedural element of the due process approach seeks to meet is a traditional one in due process doctrine, at least as regards determinations affecting identifiable individuals. Furthermore, it is a fairly narrow stream of due process doctrine. The concern reflects the fundamental proposition that those who make coercive, governmental-style decisions—whether adjudicating, licensing, making an arrest, or whatever—should be more or less disinterested. They should be neither personally biased against the identifiable individual on whom the decision operates nor biased because of the decision's effect on their own private interests.

The relevancy of due process to these concerns is unquestionable when decisions affect identifiable individuals. It is unusual, however, to extend the analysis to lawmaking, where decisions operate generally, without reference to specific individuals. It is not that it is unusual to expect disinterestedness, at least in the second sense, in lawmaking; lawmakers are frequently expected to excuse themselves when a proposed statute, ordinance, or rule peculiarly affects their private interests. But these expectations are normally based on statute or customary ethics; they are not usually considered constitutional or part of due process.[145]

Nevertheless, applying due process principles to lawmaking is not entirely novel. In a suggestive article, Professor Hans Linde argued that the due process clauses did, by their language, apply to lawmaking and went on to point out existing applications of due process-like doctrines to the legislative

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142. Jaffe, *supra* note 9, at 225.

143. Since 1976, seven courts have upheld interest arbitration and two have invalidated it. Those decisions that uphold it are Superintending School Comm. v. Bangor Educ. Ass'n, 433 A.2d 383 (Me. 1981); Town of Arlington v. Board of Conciliation and Arbitration, 370 Mass. 769, 352 N.E.2d 914 (1976); City of Richfield v. Local No. 1215, Int'l Ass'n of Fire Fighters, 276 N.W.2d 42 (Minn. 1979); Division 540, Amalgamated Transit Union v. Mercer County Improvement Auth., 76 N.J. 245, 386 A.2d 1290 (1978); Medford Firefighters Ass'n, Local No. 1431 v. City of Medford, 40 Or. App. 519, 595 P.2d 1268 (1979); City of Spokane v. Spokane Police Guild, 87 Wash. 2d 457, 553 P.2d 1316 (1976); Milwaukee County v. Milwaukee Dist. Council 48—Am. Fed'n of State Employees, 109 Wis. 2d 14, 325 N.W.2d 350 (Wis. App. 1982). The two cases that invalidate interest arbitration are Greeley Police Union v. City Council of Greeley, 191 Colo. 419, 553 P.2d 790 (1976); Salt Lake City v. International Ass'n of Fire Fighters, Local 1645, 563 P.2d 786 (Utah 1977).

144. *See supra* note 56 and accompanying text.

145. A few state constitutions, no doubt because of particularly exciting periods in the states' pasts, specifically proscribe bribery of state legislators. *E.g.*, ALA. CONST. art. IV, § 79; ARK. CONST. art. 5, § 35; COLO. CONST. art. V, § 40.

process.[146] The principle difference between legislative due process and more traditional due process is that instead of building on a basic requirement of notice and a hearing—for there is no such individualized right in lawmaking—the focus in legislative due process is on determining minimal requirements of legislative decisionmaking: quorums, majority rule, notice to other legislators, and the like. State constitutions normally establish procedural rules for the state legislature, while statutes and charters establish such rules for state agencies and local governments. Courts have had to decide whether compliance with these procedural rules is necessary to the validity of legislation. No consensus has developed, except perhaps around the point that some such rules are binding and that nonobservance risks invalidation of the legislation.

Linde's arguments are helpful, but more is needed. Even if it is accepted that meeting certain procedural requirements is necessary to the validity of legislation, those basic requirements have not included prohibitions on self-interested action. That is, in general, violation of rules that seek disinterested lawmaking by state legislators has not invalidated the affected state legislation. Even when bribery—the most blatant attack on legislative integrity—has occurred, the remedy has worked against the person taking the bribe and not against the legislation.[147] But that remedial distinction need not be fatal to including a concern for disinterested behavior in a due process analysis of private delegations of lawmaking power.

First, the remedial distinction is founded to some extent on the special relation of a state legislature to a state court as coequal departments of government. If this foundation is fully or partially absent, one might expect to see a greater degree of supervision by the courts. And in fact there are distinctions—small to be sure—being made when it is municipal rather than state legislation that is at issue. The question of whether a legislator's strong personal interest should permit invalidation of legislation has frequently been tied to the courts' unwillingness to examine the personal motives of legislators in enacting legislation. However, following one commentator,[148] a number

146. Linde, *supra* note 135. This paragraph relies on Linde's article. A major portion of Linde's article argued against substantive due process. Just as he suggests that courts will have to pick and choose among procedural requirements to determine which are of constitutional importance, so I pick and choose among his arguments.

147. *Id.* at 247-48. *See also* Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

148. II J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 580 (5th ed. 1911) (emphasis added):

> It is well settled that *the judicial branch of the government cannot institute an inquiry into the motives of the legislative department in the enactment of laws* . . . . In analogy to this rule it is doubtless true that the courts will not, in general, inquire into the motives of the council in passing ordinances. But it would be disastrous, as we think, to apply the analogy to its full extent. Municipal bodies, like the directories of private corporations, have too often shown themselves capable of using their powers fraudulently, for their own advantage or to the injury of others.

of courts have indicated a willingness to go behind an apparently valid *municipal* ordinance if fraud is alleged.[149] One should not make too much of this; the point is usually made as an abstract proposition with no fraud having been alleged, and other courts refuse to even admit evidence of fraud.[150] But the statements do suggest a slightly greater willingness to intervene in lawmaking below the legislative level. A further bit of evidence comes from cases involving legislator compensation. No common law ban prohibits legislators from setting their own salaries, but the courts have generally not permitted local governing boards to do so without specific statutory authority.[151] Private lawmaking, of course, much more resembles local government lawmaking than it does legislating, and there is no ground at all for according the private lawmaker the dignity of a coequal branch of government.

Furthermore, constitutional duty should not be confused with the remedies available to deal with a violation of that duty. Disinterested lawmaking may be constitutionally expected. In *Tool Co. v. Norris,* the Supreme Court argued:

> Legislation should be prompted solely from considerations of the public good, and the best means of advancing it. Whatever tends to divert the attention of legislators from their high duties, to mislead their judgments, or to substitute other motives for their conduct than the advancement of the public interests, must necessarily and directly tend to impair the integrity of our political institution.[152]

At the least this language suggests a constitutional expectation that legislators are disinterested. Perhaps the failure of that expectation in one legislator should not threaten the validity of legislation, but what if *every* legislator were self-interested? That condition, which may describe a private lawmaker, might permit a remedy that attacks the lawmaker itself, as the attack is on the legitimacy of *all* that the lawmaker does.

Finally, the sorts of institutional safeguards that guard against self-interested action by public decisionmakers are absent with respect to private lawmakers. Legislators are politically aecountable for what they do, and the desire to be reelected (and in some places avoid the possibility of recall) probably prompts legislators to avoid apparently self-interested action. (Electoral accountability certainly is argued as a justification for not investigating the motives of legislators.) Nor should one discount the force on public lawmakers of the customs of their institution against interested action and

149. *E.g.,* Pyatt v. Mayor of Dunellen, 9 N.J. 548, 553-58, 89 A.2d 1, 3-6 (1952).

150. People v. Gardner, 143 Mich. 104, 107-09, 106 N.W. 541, 543 (1906).

151. Kirk v. Brantley, 228 So. 2d 278, 280 (Fla. 1969) (legislature may set its own salary); Davis v. City of Jenkins, 314 Ky. 870, 872, 238 S.W.2d 475, 476 (Ct. App. 1951) (mayor's salary ordinance, which depended for passage on mayor's vote, held invalid).

152. 69 U.S. (2 Wall.) 45, 54-55 (1864).

the pressure from their peers within the institution to maintain those customs. None of these considerations influence private lawmakers. Indeed, the possibility of private interest is often inherent in the private delegation; recognition of that interest may even have been the reason for the delegation. For all these reasons, the due process framework for analyzing private lawmaking should include a concern for disinterested action, just as it does in analyzing other sorts of private delegations.

Thus a court that is reviewing a private delegation should center its analysis on this concern about interest. At this stage, as with any due process inquiry, the court will have to weigh risks and benefits in deciding how much process is due. First, the court must analyze how much the delegation risks a conflict between public and private interest. In some delegations the two interests will coincide, in others they will be absolutely opposed, and in most they will fall somewhere in between. The extent of conflict will be central to the second task, determining whether safeguards must accompany the delegation and, if so, safeguards of what sort. Not all delegations will require the same safeguards. Some may need none at all; others may be irretrievable no matter how many are added. The court will have to weigh the risks of and consider the mechanisms attached to *this* delegation. It will take a number of cases for this approach to sort itself out, and obviously judgments will differ in particular instances, but at least the focus will be where it belongs. One incidental advantage to this approach is the possibility of a second try if a delegation with desirable features is invalidated because of inadequate safeguards. If the difficulty is in the safeguard, the delegation need not be blocked altogether; another attempt could add further safeguarding mechanisms.

This kind of approach, although it has not carried the label of due process, has in fact been used with two delegations so well established that they are not normally thought of as delegations at all. The first is what might be called the delegation of governmental spending power, which is controlled by the public purpose doctrine. A reaction to unsuccessful public aid to private enterprise, especially to railroads in the nineteenth century, the doctrine is an early example of substantive due process, but one that has achieved an independent existence.[153] What is important here is a continuing thread in the public purpose cases that requires public controls on the private expenditure of public money or private operation of public facilities sufficient to assure that the public's economic objectives are furthered and not just the private interests of the aid recipient or facility operator.[154] For example, courts have generally expected governments that turn public facilities over

153. Pinsky, *State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach,* 111 U. PA. L. REV. 265, 281-82 (1963).

154. *Id.* at 284-89.

to private operators to retain control over such matters as rates and basic operating policies.[155] The possibility of conflict is recognized and safeguards are required in order to protect against the dominance of the private interest.

So too with the private exercise of the power of eminent domain. Both public and private condemnors are subject to the requirement that the condemnation be for a "public use," but many states have imposed additional procedural requirements on private condemnors alone. Frequently statutes require private condemnors to secure the approval of a state agency before initiating the condemnation action, and the agency may investigate the particular project quite closely to assure that it furthers the public interest.[156] Some state courts also scrutinize private condemnations more closely than public ones.[157] Again, the possibility of public-private conflict has been recognized and steps have been taken to minimize it.

This article concludes by reviewing a number of mechanisms that might be used to minimize the possibility that a private delegate's private interest will overwhelm decisionmaking.

1. No Private Interest

Although not strictly involving a mechanism, it is worth beginning with the reminder that some delegations seem not to present any conflict at all between private and public interest. The delegate has no private interest at stake. Arbitrators typify this absence of interest and in this respect mirror the ideal of the judges they partially supplant. So too do certain sorts of experts, usually scientific, who probably consider themselves motivated entirely by a sense of furthering the public welfare. By delegating specialized tasks to such experts, the delegator agrees with that self-characterization. Examples of such experts include those who maintain drug definitions in the *U.S. Pharmacopeia*[158] and the physicians who sought to improve, for

155. *E.g.*, Hiller v. City of Los Angeles, 197 Cal. App. 2d 685, 17 Cal. Rptr. 579 (1961) (zoo); Gilbert v. Bath, 267 S.C. 171, 227 S.E.2d 177 (1976) (hospital).

156. *E.g.*, ILL. ANN. STAT. ch. 111 2/3, § 56 (Smith-Hurd 1966); N.D. CENT. CODE § 49-03-01 (1978).

157. *E.g.*, *In re* Puget Sound Power & Light Co., 28 Wash. App. 615, 617-20, 625 P.2d 723, 724-25 (1981). *Contra* Schara v. Anaconda Co., 610 P.2d 132 (Mont.), *cert. denied*, 449 U.S. 920 (1980).

158. The U.S. PHARMACOPEIA (U.S.P.) is compiled and published by the U.S.P. Convention, Inc., a corporation composed of medical schools and medical societies, pharmacy schools and societies, various medical and scientific professional organizations, and a number of federal agencies. The U.S.P. sets out drug standards and is published each five years. U.S. PHARMACOPEIA xxi-xxiii (20th rev. 1979). Statutory delegations to the U.S.P. to define drugs have been uniformly upheld. *E.g.*, State v. Wakeen, 263 Wis. 401, 57 N.W.2d 364 (1953).

health reasons, sanitary milk standards through the old medical milk commissions.[159]

2. Parallel Public and Private Interests

The risk of a conflict between public and private interest would also be minimal when the delegate's motivations parallel those of the alternative public actor. The wage-reference statutes illustrate this category. When we focus on the potential for conflict inherent in this delegation, we find very little. The prevailing wage—whether the union wage or an average—has been set through a process in which the employers, who have the same interests in holding down costs as does the government that will be paying the prevailing wage, are fully involved and assert their interest. And if the wages of public employees are to be set by reference to wages paid in local private trades or by other governments, the same point holds true. The employers in those private trades or other governments share the governmental employer's interest in reducing personnel costs.[160]

Interests can shift over time, however, so that a one-time identity of interests that would support a delegation comes asunder, leaving the delegation open to abuse. In that circumstance, an earlier judicial validation of the delegation should not necessarily control. When public hospitals first began limiting staff privileges to those who were members of or approved by the local medical society, the general level of medicine was such that both hospital and society were primarily concerned to exclude incompetents and charlatans. Eventually, however, the societies became exclusionary, particularly as to physicians who practiced alteruative schools of medicine, such

159. Before the pastuerization process was developed, a number of county medical societies appointed medical milk commissions to establish rigorous standards for raw milk; milk that met those standards was labeled "certified." The movement began in New Jersey in the late 19th century, and in 1907 the American Association of Medical Milk Commissions was formed. That national association adopted uniform standards in 1912, to be enforced by the local commissions. *See* H. ADAMS, MILK AND FOOD SANITATION PRACTICE 1 (1947); E. KELLY & C. CLEMENT, MARKET MILK 32-33 (1923). The national rules were influential both within the milk industry and in shaping modern milk legislation. *Id.* A San Francisco ordinance that permitted sale of raw milk only if it conformed to the rules of the national association was upheld, at least in part because of the neutral expertise of the physicians, in Natural Milk Producers Ass'n v. City of San Francisco, 20 Cal. 2d 101, 115-16, 124 P.2d 25, 33 (1942).

160. Delegation of appointment power is another example of parallel interests. The purpose of such legislation is to represent the appointing group on the board to which appointment is made. With respect to the *appointment,* the public's interest is to have the group as well represented as possible, which is also the group's interest. While it is possible to quarrel—on a policy basis—with the purpose of group representation, *e.g.,* Rose, *Occupational Licensing: A Framework for Analysis,* 1979 ARIZ. ST. L.J. 189, once that policy is established, there really is no conflict of interest. Some courts are disturbed by the possible effect of such a method of appointment on the appointee's actions, but at the time of action the appointee is a fully authorized public official. *See* State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc., 40 Cal. 2d 436, 456, 254 P.2d 29, 37 (1953) (Traynor, J., dissenting).

as osteopathy and podiatry; public interest and private interest diverged. At that point, the courts were justified in invalidating the delegations.[161] The same shift may now be occurring with educational accreditation, especially of professional schools. Originally both the accreditors and the public agencies were seeking to rid the professions of the incompetent, the quack, and the diploma mill. But when the private agencies began to show a further interest in protecting their constituents from competition, the courts were right to invalidate the delegation or require further safeguards.[162]

3. A Representative Private Process

Some delegations of lawmaking power have been made to groups that seek to include representatives of all the interests significantly affected by their work. Through the delegation, the group becomes a private legislature. However, being private, its members might not be expected to act in the disinterested way demanded of public officials. Indeed, the intention might be that they speak and act for those private interests they represent. Therefore, the fact of representativeness alone would not overcome concerns about self-interested action.

However, this sort of group frequently acts more by consensus than by a majority principle. As a result, through compromise its products are acceptable to all, even if not preferred by any. In economists' terminology, it is operating in a positive-sum rather than a zero-sum game;[163] rather than seeing the group's efforts as redistributional, all interests perceive themselves as better off as a result of its work. The rules that emerge from such a group may not be the same rules that would emerge from a public lawmaker, but their broad acceptability offers advantages that publicly made rules might not. It seems legitimate for a legislature to decide that a broadly acceptable rule, devised by a group representing all affected interests, serves the public interest; because of the consensus decisionmaking, the group's product is unlikely to favor any private interest at the expense of either some theoretical public interest or other private interests. Indeed, it may be strained to expect a "best" version, which alone serves the public interest, of the sort of detailed regulations such groups promulgate.[164] Therefore, if a group does

161. *Ware,* 225 Ark. 185, 280 S.W.2d 234 (1955) (society would not admit foreign-trained physician).

162. *E.g., In re* Hansen, 275 N.W.2d 790 (Minn. 1978) (court will hear appeals from law schools refused accreditation by the ABA); State *ex rel.* Kirschner v. Urquhart, 50 Wash. 2d 131, 310 P.2d 261 (1957) (statute requiring applicant for medical license to have diploma from AMA-approved medical school held invalid in suit brought by a physician educated abroad before AMA would approve foreign medical schools).

163. *See* the summary in D. MUELLER, PUBLIC CHOICE ch. 11 (1979).

164. Not all courts would agree. In Hillman v. Northern Wasco County People's Util. Dist., 213 Or. 264, 285, 323 P.2d 664, 674 (1958), the court complained that the National Electrical Safety Code contained not the best judgment of the Bureau of Standards but rather compromises among all the parties involved in its drafting.

represent all affected interests and does act largely by consensus, the concern about self-interested action has been met.

A leading example of this sort of group is the National Fire Protection Association, which promulgates the National Electrical Code. A number of states or local governments have adopted existing and future versions of the Code, turning a technical and complex task often quite beyond the competence of many city councils or even state legislatures over to a specialized private group. The adoption of future changes has been attacked as an unconstitutional delegation. The early case law consistently invalidated the delegation, but there has been some reversal in recent years.[165] Under the analysis of this section, the delegation should be upheld. The Association's code-development apparatus represents electrical contractors, inspectors, manufacturers, utilities, testing laboratories, regulatory agencies, insurance organizations, organized labor, and consumer groups. These interests are spread across some twenty technical committees that develop the details of the Code; no single interest is permitted to dominate any committee. The final result is "built on participation and substantial agreement by all the interests affected by the Code."[166] Through compromise and consensus, the result is acceptable to all.

4. All Affected Persons Involved

Some delegations of lawmaking power have been to groups that arguably contain all those importantly affected by the set of rules made by the group. In effect, powers of self-government, on limited subjects, have been delegated to a nonpublic organization. Since the group contains all those interested in the matters at issue, there is no obvious distinction between the public interest and the group members' private interests if its decisions are reached through an acceptable process. Although particular rules made by the group might still be challenged, as may particular rules made by a public body, the basic delegation should be secure. With such a group, any judicial inquiry into the delegation should be limited to the accuracy of the claim that all affected are included in the lawmaking group and to the fairness of the group's decisionmaking apparatus.

The salvage corps that operated in a number of large American cities earlier in this century illustrate these points. The corps were operated by private boards of fire underwriters. They followed the public fire department to fires and, while the department put out the fire, saved as much property

165. The leading early case is State v. Crawford, 104 Kan. 141, 177 P. 360 (1919). The principal case upholding the delegation is Independent Electricians and Elec. Contractors Ass'n v. New Jersey Bd. of Examiners of Elec. Contractors, 54 N.J. 466, 256 A.2d 33 (1969).

166. NATIONAL FIRE PROTECTION ASSOCIATION, THE NATIONAL ELECTRICAL CODE 10 (1984).

as possible from smoke and water damage, thus reducing insurance claims.[167] The corps began as voluntary organizations, but a number of states enacted legislation permitting participation by and requiring support of all companies that wrote fire insurance in the community. Contributions by all were required, no doubt, to avoid free riders, because at the scene of the fire the corps could not distinguish between insured and uminsured property or between property insured by different companies. The delegation was primarily of the taxing power; the board of underwriters was permitted to assess each company for corps expenses, pro rata according to premiums earned in the community. To the extent that the group was in fact open to all companies, so that all could participate in its decisions, the delegation was upheld.[168]

In a somewhat different way, the frontier mining camps also illuminate this point. Their regulations respecting claim procedures were given the force of law by the federal government and by most of the western mining states.[169] In the traditional story, the camps were frontier democracies, their meetings open to all able-bodied miners in the district and their decisions taken by majority rule.[170] Yet there may have been some unease about early arrivals establishing rnles—such as about claim size—that favored them against latecomers and about the latecomers' countervailing efforts to establish control of the camp machinery and change the rules to their benefit. At any rate, to some extent the courts did not fully respect the delegation but treated

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167. H. JENNESS, BUCKET BRIGADE TO FLYING SQUADRON 9, 95-98 (1909). The New York Board of Fire Underwriters still operates a salvage corps.

168. New York Bd. of Fire Underwriters v. Whipple & Co., 2 A.D. 361, 37 N.Y.S. 712 (1896) (assessment upheld; all companies entitled to membership); Milwaukee Bd. of Fire Underwriters v. Badger Mut. Fire Ins. Co., 230 Wis. 60, 283 N.W. 342 (1939) (assessment invalid against company not entitled to membership in board).

A modern example of such a group would be a high school athletic association, insofar as its regulations affect its member schools. Such an association normally includes public and private high schools throughout a state and is considered a private organization, *e.g.*, Sanders v. Louisiana High School Athletic Ass'n, 242 So. 2d 19, 28-29 (La. App. 1970), although not for state action purposes, *e.g.*, Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126, 1128 (9th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983). Because all schools are members and participate in making its rules, a school penalized for violating such a rule ought not to be able to successfully challenge delegation to the association of rulemaking power. This analysis, however, would not apply to a pupil injured by an association rule. *See* Chabert v. Louisiana High School Athletic Ass'n, 323 So. 2d 774 (La. 1975) (student alleged rule violated his equal protection rights).

169. The first such law was California's in 1851, which provided:

> In actions respecting "Mining Claims," proof shall be admitted of the customs, usages, or regulations established and in force at the bar, or diggings, embracing such claim; and such customs, usages, or regulations, when not in conflict with the Constitution and Laws of this State, shall govern the decision of the action.

Act of April 29, 1851, 1851 Cal. Stats. ch. 5, § 621. The federal legislation followed in 1866, Act of July 26, 1866, ch. 262, §§ 1, 2, 4, 9, 14 Stat. 251, 251-53, and several other western states adopted the California model. *E.g.*, IDAHO CODE § 6-410 (1979).

170. The classic expression of this viewpoint is C. SHINN, MINING CAMPS (1884 & reprint 1970).

the camp regulations not so much as positive law but more as trade customs that importantly informed but did not control the common law in fact being developed by the courts.[171] That is, when there was uneasiness about whether the lawmaking group in fact included all of those affected, the delegation was partially ignored. Once the courts established common law rules, however, and camp regulations began to conform to them, the courts could begin to treat the regulations themselves as law.[172]

5. Appeal to or Review by a State Agency

This article has already mentioned the role that the requirement of state agency approval plays in assuring disinterest in the private use of eminent domain.[173] In upholding interest arbitration, the Supreme Court of Minnesota emphasized that the private arbitrators must come from a list maintained by a state agency.[174] Those listed were to be "qualified by experience and training in the field of labor management negotiations and arbitration," and the agency could remove a name if the arbitrator made eccentric awards.[175] So too the Supreme Court of Washington emphasized the close supervision that the state's insurance commissioner exercised over the private insurance examination bureau to which had been delegated the authority to audit all insurance contracts for rate correctness; in addition, any determination by the bureau might be appealed to the commisioner, and only he could order a correction.[176]

6. Rights to Damages

Occasionally, a damages remedy might be a safeguard. For example, persons harmed by the improper actions of a private policeman (one such

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171. In Brown v. '49 and '56 Quartz Mining Co., 15 Cal. 153, 162 (1860) (emphasis added), the court said: "The custom of miners is entitled in these anomalous cases to *great, if not controlling weight.*" See also Lincoln v. Rodgers, 1 Mont. 217, 222 (1870), in which a miners' custom was ignored because "inconsistent with the full and rapid development of all the mining resources of the country." This analysis of how miners' regulations were actually treated by the courts is made most fully in McCurdy, *Stephen J. Field and Public Land Law Development in California, 1850-1866: A Case Study of Judicial Resource Allocation in Nineteenth Century America,* 10 LAW AND SOC'Y REV. 235 (1976).

172. *E.g.*, St. John v. Kidd, 26 Cal. 263, 271-72 (1864); Morton v. Solambo Copper Mining Co., 26 Cal. 528, 533 (1864).

173. *See supra* text accompanying notes 156-57.

174. *City of Richfield,* 276 N.W.2d at 42, 47 (Minn. 1979).

175. *See* MINN. STAT. § 179.72(5) (1976), *cited in City of Richfield,* 276 N.W.2d at 47 (current version at MINN. STAT. ANN. § 179A.05(6) (West Supp. 1986)).

176. Insurance Co. of N. Am. v. Kueckelhan, 70 Wash. 2d 822, 837-38, 425 P.2d 669, 679 (1967). Such state supervision or review must be real rather than nominal. Railroad police statutes frequently allow the appointing official to cancel the appointment. However, since that authority was commonly not independently exercised, J. SHALLOO, *supra* note 77, it ought not to offer any support to the delegation.

situation would be those arrested without probable cause) may bring an action for damages against the policeman.[177] However, since many such policemen are judgment-proof, that remedy alone would be insufficient. Moreover, the general rule first emerged that if the policeman was acting in his "public" capacity, as a sworn peace officer, his employer could not be held liable.[178] Since the formal appointing agency would also be immune from suit, the injured plaintiff was effectively without remedy. However, a number of legislatures amended their statutes to provide for employer liability;[179] other courts narrowed the concept of "public" capacity, thereby giving in most cases a remedy against the employer.[180] When employer liability—which, after all, reflects actual supervision and control—is possible, the right of damages becomes a safeguarding mechanism.

7. Standards

Occasionally it may be appropriate to establish standards to guide the delegate in his work and perhaps permit judicial review of his actions. Whether the standards will be of use mainly to the delegate or also to a court that reviews his work will depend on the nature of the power delegated. Some sort of standards to guide an interest arbitrator would be helpful in channeling his broad discretion and has reassured those courts that uphold this form of delegation.[181] However, given the extent of his discretion, the standards would be only minimally useful to a court reviewing an award (although they may be helpful to a state agency that is required to keep a list of qualified arbitrators). On the other hand, general standards of relevancy do guide a court in reviewing exercise of the standard authority given voluntary arbitrators to subpoena nonparties and documents held by nonparties; the review offers the necessary procedural safeguard.[182]

8. The Fairness of Group Procedures

Although the peculiar threat of a private delegation is the enhanced possibility of decisionmaking unduly influenced by private interest, there can

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177. *E.g.*, Commonwealth v. Jayne, 11 Pa. Super. 459 (1899).

178. *E.g.*, Tucker v. Erie Ry. Co., 69 N.J.L. 19, 21-22, 54 A. 557, 558 (1903).

179. *See, e.g.*, Armstrong v. Stair, 217 Mass. 534, 105 N.E. 442 (1914).

180. *E.g.*, Southwestern Portland Cement Co. v. Reitzer, 135 S.W. 237, 241 (Tex. Civ. App. 1911).

181. *E.g., Town of Arlington*, 370 Mass. at 779, 352 N.E.2d at 920 (1976).

182. *See In re* Minerals and Chemicals Phillipp Corp., 15 A.D.2d 432, 224 N.Y.S.2d 763 (1962), *cert. denied*, 372 U.S. 910 (1963); *In re* Sun-Ray Cloak Co., 256 A.D. 620, 11 N.Y.S.2d 202 (1939).

When a government leases a facility to a private operator, operating standards are frequently part of the lease. *E.g., Hiller*, 197 Cal. App. 2d at 688-89, 17 Cal. Rptr. at 580-81 (1961).

be other more conventional due process concerns as well. If a group uses its delegated power to make decisions affecting specific individuals, one can generally expect that it accord those individuals the same basic standards of due process that a public body must. Obviously not every action that is subject to due process constraints if done by government should therefore become subject to the same constraints if privately done. But if the function involves decisions that affect specific, identifiable individuals and if those decisions result in exercise of typical government-like powers against the individual (arrest, seizure of property, exclusion from an occupation, etc.), we begin to expect that the delegate give the individual the same process as would government. Now is not the time to get bogged down in the marshes of state action on this point. But as a practical matter, when a delegation involves this kind of decisionmaking, it will be considerably more acceptable to a reviewing court if the delegate operates under regular procedures, with hearings as appropriate, and according to standards that are defined and observed.

In upholding a statute that limited racing to horses registered with The Jockey Club, a New York appellate court took note of the club's own procedures, which operated under clear standards and accorded a hearing to the owner of an unlisted horse.[183] In constrast, the South Carolina Supreme Court's refusal to countenance an exclusion from the state's obscenity laws of any movie approved by the Motion Picture Association of America is supportable on the ground that the movie-rating body is inconsistent in its actions and does not operate under settled standards.[184] Certainly the possibility of unprincipled private action has expressly disturbed courts that have reviewed such delegations as requiring medical society membership as a condition of hospital staff privileges or medical society approval before a medical service corporation may begin operations.[185]

9. Specially Qualified Delegate

Just as a delegation of limited lawmaking power in a technical, complex area is strengthened if the delegate possesses special expertise, so in other sorts of delegations the special training and qualifications of the delegate

183. Morgan v. New York Racing Ass'n, 72 A.D.2d 740, 421 N.Y.S.2d 249 (1979).

184. State v. Watkins, 259 S.C. 185, 191 S.E.2d 135 (1972). S. FARBER, THE MOVIE-RATING GAME (1972), argues that the rating process is standardless and inconsistent.

185. *Ware,* 225 Ark. 185, 280 S.W.2d 234 (1955) (medical society, membership in which was required for hospital staff privileges, could deny membership for no reason at all). Group Health Ins. of N.J. v. Howell, 40 N.J. 436, 193 A.2d 103 (1963) (state medical society, which had to approve trustees of any proposed medical service corporation, could act arbitrarily). In approving delegation of law school accreditation to the ABA, the Alaska court noted the lengthy and sophisticated procedure followed by the ABA in its accreditation process. *In re* Urie, 617 P.2d 505, 507-08 (Alaska 1980).

may be important—not so much to sustain the delegation but as a minimum safeguard without which it will be invalid. When adjudicatory power is delegated to an arbitrator, it may be that part of the due process rights of anyone who is required to submit to arbitration is that the arbitrator be minimally qualified, that he be more than someone off the street. (This same notion is at work in the common limitations on the jurisdiction of and the developing programs of training for nonlawyer judges.[186]) It would not be necessary that an arbitrator be approved as qualified each time he undertakes an arbitration. The legislation could contain a mechanism that gives a reasonable assurance of qualification. For example, arbitrators might be required to come from a list maintained by a state agency or by the American Arbitration Association.

Qualification requirements might also be necessary safeguards with private police. Increasingly, states require that all state and local government law enforcement personnel undertake a minimum level of training.[187] Officers whose work so inherently involves statutory and constitutional rules need to comprehend those rules. If a state imposes such a requirement on its public law enforcement officers, a comparable degree of training might become a *constitutional* necessity for private law enforcement officers in that state to assure that they have at least the same basic knowledge as the public officers whose special powers they share. Imposing such a requirement supports the validity of the delegation of arrest powers; lack of the requirement raises serious doubts.

It cannot be stressed too often that the mechanisms required in a particular delegation will depend on the nature of the power delegated and the risks of interested action it creates. No doubt other sorts of mechanisms are available. A court, and a legislature, should be flexible on this point and work for a fit in each case rather than develop rigid rules for all delegations.

CONCLUSION

Legal doctrine respecting delegation of governmental powers to private actors is inconsistent and nonprincipled. Some part of the fault lies in the mistiness of the constitutional basis for the doctrine. Of the possible bases, due process is most satisfactory because due process traditionally includes a concern about the underlying problem with private delegation: the self-interested decisionmaker. The more common basis—the legislative vesting clause—is unsatisfactory because it offers no means of explaining distinctions

186. *See* L. SILBERMAN, NON-ATTORNEY JUSTICE IN THE UNITED STATES: AN EMPIRICAL STUDY (1979).

187. NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, POLICE ch. 16 (1973) notes the increased requirements of training between 1959 and 1973 and urges acceleration of the trend.

commonly made and too often leads courts away from the proper questions in a delegation case. "Constitutional supremacy," while it might guard against a total surrender of power to a private entity, ultimately fails as a basis because it does not focus on the peculiar problems of a *private* delegation. And supraconstitutional notions of political accountability are founded too much in the political beliefs of individual judges to offer principled bases for decision.

The due process approach to reviewing private delegations would begin with a substantive review of the rationality of the delegation. Although this stage might result in an occasional invalidation, it is more likely to strengthen the case of most delegations, laying bare the sensibleness and reasonableness of the delegations. Procedural review would consist of two stages. First, a court would assess the risks of conflict between public and private interest inherent in the delegation. Second, it would analyze whether the delegation is accompanied by sufficient safeguarding mechanisms to guard against the risk. The most common safeguards for delegations of lawmaking powers would be a lack of any private interest in the delegate, a parallel interest between the delegate and the public, and for the delegate to include, by representation or directly, all those affected by the decision. Delegations of other governmental power could be safeguarded by these mechanisms or by others, such as state agency review, liability in damages to those harmed by a misuse of the delegated power, standards, or requirements that the delegate be specially qualified to act pursuant to basically fair procedures. With the focus of judicial inquiry placed directly on the special problems posed by private delegations, one may expect the law to become more consistent and sustaining principles of decision to emerge.