



THE NON-DELEGATION DOCTRINE AND PRIVATE PARTIES

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THE NON-DELEGATION DOCTRINE is a bit like Mark Twain's famous cable to the *New York Journal*: "The report of my death is an exaggeration."¹ Despite the constitutional stipulation that Congress holds all legislative powers, it is free to palm off its legislative responsibilities to unelected administrators so long as it provides to those bureaucrats an "intelligible principle"² to guide their discretionary lawmaking. But the question of whether Congress can confer such discretion upon private entities is less commonly encountered, is more unsettled, and raises questions of the source of constitutional limits upon delegation to private parties.³

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¹ *New York Journal*, June 2, 1897. The cable is usually misquoted as "reports of my death are greatly exaggerated." See oupacademic.tumblr.com/post/48310773463/misquoteation-reports-of-my-death-have-been-greatly and www.quotationspage.com/quote/159.html.

² *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

³ Earlier work on this subject includes A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 *Duke L.J.* 17, 143-153 (2000); Harold I. Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 *Hastings Const. L.Q.* 165, 193 (1989); George W. Liebmann, *Delegation to Private Parties in American*

I. DELEGATION OF DISCRETION TO EXECUTIVE OFFICIALS AND AGENCIES

The flaccidity of the intelligible principle standard is exemplified by *Industrial Union v. American Petroleum Institute*.⁴ In the Occupational Safety and Health Act⁵ Congress had given the Secretary of Labor authority to adopt binding regulations that are “reasonably necessary or appropriate to provide safe and healthful employment.”⁶ With respect to toxins in the workplace the Secretary was directed to adopt standards that “most adequately assure[], to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health.”⁷ After a lengthy parsing of the statute, the Court ruled that the Secretary had failed to prove that his proposed rule on benzene emissions addressed a significant risk of harm, but it implicitly concluded that the statutory standards did not constitute an invalid delegation of legislative authority.

Only Justice Rehnquist disagreed. In a concurrence to the judgment, he cited John Locke’s observation that since the “power of the legislative, being derived from the people by a positive voluntary grant . . . , can be . . . only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in other hands.”⁸ To Justice Rehnquist, the statutory directive was “completely precatory, admonishing the Secretary to adopt the most protective standard if he can, but excus-

Constitutional Law, 50 *Ind. L.J.* 650, 709-10 (1975).

⁴ 448 U.S. 607 (1980).

⁵ 29 U.S.C. §§651 *et seq.*

⁶ 29 U.S.C. §652(8).

⁷ 29 U.S.C. §655(b)(5).

⁸ *Industrial Union*, 448 U.S. 607, 672-73 (Rehnquist, J. concurring in the judgment), quoting J. Locke, *Second Treatise of Civil Government*, in the *Tradition of Freedom* 244, ¶141 (M. Mayer ed. 1957). See also *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) (“That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.”).

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ing him from that duty if he cannot.”⁹ In short, it was “a standardless delegation.”¹⁰ The non-delegation doctrine serves several important functions: “it ensures . . . that important choices of social policy are made by Congress”; it requires Congress to provide “the recipient of [delegated] authority with an ‘intelligible principle’ to guide the exercise of the delegated discretion”; and it “ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards.”¹¹ In short, “the very essence of legislative authority under our system [is to make] the hard choices When fundamental policy decisions underlying important legislation about to be enacted are to be made, the buck stops with Congress”¹²

The non-delegation doctrine has mostly been about whether a legislative grant to agencies of rulemaking authority is sufficiently bounded to constitute an intelligible principle. Obscured in this discussion is the distinction “between the delegation of power to make the law, which necessarily involves . . . discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.”¹³ A statute that provides a governmental entity with standards for further legislation, divorced from any responsibility to enforce law, is a delegation of discretion to make law and nothing more.

Considerable wrangling can be expected over the precise line between the invalid delegation of the power to make law, and *only* to make law, and the valid conferral of guided discretion concerning enforcement of law. As interesting and subtle as that topic may be, an antecedent question is whether Congress can confer on private entities discretion to make and enforce law. Perhaps the limit is

⁹ 448 U.S. at 675 (Rehnquist, J.).

¹⁰ *Id.* at 676.

¹¹ *Id.* at 685-86.

¹² *Id.* at 687.

¹³ *Marshall Field & Co. v. Clark*, 143 U.S. 649, 693-94 (1892) (quoting *Cincinnati, Wilmington & Zanesville R.R. Co. v. Commissioners of Clinton County*, 1 Ohio St. 77, 88-89 (1852)).

identical to delegations to agencies: An intelligible principle will suffice. But if there is a constitutional limitation on the putative power to delegate law enforcement to private entities, its source is of some importance. Should the limit be only that imposed by the Constitution's vesting of all legislative powers in Congress there would seem to be no federal constitutional barrier to state delegations of state legislative power to private entities. But if the limit is the Due Process Clause of the Fourteenth Amendment the states would have no more authority than Congress to confer on private entities the power to enforce law.

II. DELEGATIONS OF GOVERNMENTAL POWER TO PRIVATE ENTITIES

The constitutional allocation of “*all* legislative powers” to Congress implies that Congress may not delegate its legislative powers to others, but Congress may confer discretion upon others to find specified facts to implement congressional directives. A delegation of the power to make law, without any limit or guidance from Congress, is an invalid delegation; a delegation of the power to make law (in the form of binding regulations) in accordance with intelligible standards set by Congress is valid delegation. Properly speaking, the latter is not a delegation at all, but a conferral of bounded discretion to make law to accomplish the articulated congressional ends. It is a means to an end. True delegations are always invalid, whether the recipient of the unvarnished power to legislate is a private or public entity. Qualified delegations – delegations of bounded discretion – are valid so long as the recipient is another branch of government and the boundaries on the exercise of discretion constitute an “intelligible principle.” The question is whether Congress may make qualified delegations to private entities.

Carter v. Carter Coal Co.¹⁴ is the starting point.¹⁵ The Bitumi-

¹⁴ 298 U.S. 238 (1936).

¹⁵ See also *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), in which the Court held that the The National Recovery Act was an invalid delegation of legislative power to the President due to the absence of any guiding

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nous Coal Conservation Act created a National Bituminous Coal Commission, which was directed to establish coal districts. Within each district producers of two-thirds or more of the coal and one-half or more of the miners employed were empowered to set minimum wages, which would be binding on all coal producers within the district. Producers of two-thirds or more of the national output of coal and one-half or more of the miners employed were empowered to set maximum hours for miners. These rules were to be incorporated in a Bituminous Coal Code, binding on all coal producers. The Supreme Court invalidated this scheme on two grounds:

The power conferred upon the majority is . . . the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. . . . [O]ne person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question.¹⁶

Carter Coal states two independent reasons for invalidation of a qualified delegation to private parties: The cession of government power, even under the standards of guided discretion that were part of the act, was void because Congress has no power to delegate that power to private entities; or the nature of the discretion conferred was an unjustifiable interference with liberties deemed fundamental under substantive due process. The latter reading is, of course, a

standards, but “a delegation of legislative power [to private groups] is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress.” *Id.* at 537.

¹⁶ 298 U.S. at 311 (citations omitted).

rendition of Justice Sutherland's prose into a more contemporary idiom.¹⁷

Another 1935 law, the Tobacco Inspection Act, authorized the Secretary of Agriculture to designate markets in which tobacco could only be sold after inspection and grading, but only after two-thirds of tobacco growers in the affected markets had approved the rule. In *Curriu v. Wallace*¹⁸ the Court upheld the act:

Congress has merely placed a restriction upon its own regulation by withholding its operation as to a given market 'unless two-thirds of the growers voting favor it.' . . . This is not a case where a group of producers may make the law and force it upon a minority. . . . Here it is Congress that exercises its legislative authority in making the regulation and prescribing the conditions of its application. The required favorable vote . . . is one of these conditions.¹⁹

This is a fine distinction, but it endures. The formal difference is between a mandate concocted by a supermajority of private parties that the government then enforces upon dissenters (invalid), and a mandate drafted by Congress that only becomes effective with the consent of a supermajority of the affected private parties (valid). While the government retains control of the regulations in the latter case, private parties retain a veto over any changes the government may choose to make. Absent private consent, the only options for the government are to abandon the regulations or impose regulations not conditioned upon consent.

Congress was undeterred by *Carter Coal*. It reenacted the Bituminous Coal Act, with the change that the Coal Commission was authorized to set minimum and maximum prices for coal, in accordance with statutory standards. The fixed prices applied to coal producers who had subscribed to the Bituminous Coal Code, but a punitive tax was assessed on coal produced by entities that had not

¹⁷ See also *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 216 (1928) (due process); *Eubank v. Richmond*, 226 U.S. 137, 144 (1912) (due process).

¹⁸ 306 U.S. 1 (1939).

¹⁹ *Id.* at 15-16.

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joined the Code. The prices set by the Commission were set in consultation with and the consent of Code producers. In *Sunshine Anthracite Coal Co. v. Adkins*²⁰ the Court concluded that Congress had not “delegated its legislative authority to the industry. The members of the code function subordinately to the Commission. It, not the code authorities, determines the prices. And it has authority and surveillance over the activities of these authorities.”²¹ Never mind that the prices were set in concert with the wishes of two-thirds of the coal producers in each district. Once again, formal government control of the regulation was key.²²

The most recent decision on delegation to private parties is *Association of American Railroads v. Department of Transportation*.²³ Under section 207 of the Passenger Rail Investment and Improvement Act of 2008²⁴ a federal agency, the Federal Railroad Administration, and Amtrak, a hybrid entity that the court characterized as private, are required to develop jointly standards relating to on-time performance and service quality. Those standards are made subject to a statutory directive that Amtrak’s passenger trains have “preference over freight transportation in using a rail line, junction, or

²⁰ 310 U.S. 381 (1940).

²¹ *Id.* at 399.

²² The punitive tax levied only on dissenting coal producers was challenged as an *ultra vires* penalty, not a tax. It was upheld: “In purpose and effect [this tax] is primarily a sanction to enforce the regulatory provisions of the Act. But that does not mean that the statute is invalid and the tax unenforceable. Congress may impose penalties in aid of the exercise of any of its enumerated powers. The power of taxation . . . may be utilized as a sanction for the exercise of another power which is granted it. It is so utilized here. The regulatory provisions are clearly within the power of Congress under the commerce clause of the Constitution.” 310 U.S. at 393. Consider *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), in which the Court found the Affordable Care Act’s individual mandate to purchase health insurance to be beyond the commerce power, but still upheld the validity of the tax (which Congress called a penalty) designed to enforce compliance with the invalid individual mandate.

²³ 721 F. 3d 666 (D.C. Cir. 2013).

²⁴ Codified at 49 U.S.C. §24101.

crossing.”²⁵ If on-time performance or service quality is less than the standards for two successive quarters, the Surface Transportation Board, a federal agency, may investigate and Amtrak may require the STB to investigate the failure. If the STB concludes that the poor performance is “attributable to a rail carrier’s failure to provide preference to Amtrak over freight transportation as required,” it may award damages or other relief against the offending host rail carrier.²⁶ If Amtrak and the FRA cannot agree on the substance of these standards, either party may petition the STB to appoint an arbitrator, whose decision is final and binding. The arbitrator may, and likely will be, a private person. Amtrak retains a veto and is permitted to invoke machinery that delegates final authority to a private person. The standards thus generated bind other private parties, railroad freight carriers.

The D.C. Circuit likened this arrangement to “a scenario in which Congress has given to General Motors the power to coauthor, alongside the Department of Transportation, regulations that will govern all automobile manufacturers. And, if the two should happen to disagree on what form those regulations will take, then neither will have the ultimate say. Instead, an unspecified arbitrator will make the call.”²⁷ It then concluded that “[f]ederal lawmakers cannot delegate regulatory authority to a private entity”²⁸ because “the Constitution commits no executive power” to private entities.²⁹ The court acknowledged that “[s]uch entities may . . . help a government agency make its regulatory decisions, [but] precisely how much involvement . . . a private entity [may] have in the administrative process before its advisory role trespasses into an unconstitutional delegation . . . is the task at hand.”³⁰

Neither *Currin* nor *Adkins* controlled. “Like the private parties in

²⁵ 49 U.S.C. §24308(c).

²⁶ 49 U.S.C §24308(f)(2).

²⁷ 721 F. 3d 666, 668 (D.C. Cir. 2013).

²⁸ *Id.* at 670.

²⁹ *Id.*

³⁰ *Id.* at 671.

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Currin, Amtrak has an effective veto over regulations developed by the FRA. And like those in *Adkins*, Amtrak has a role in filling the content of regulations. But the . . . industries in *Currin* did not craft the regulations, while *Adkins* involved no private check on an agency's regulatory authority. [T]he agency in *Adkins* could unilaterally change regulations proposed to it by private parties, whereas Amtrak enjoys authority equal to the FRA. Should the FRA prefer an alternative to Amtrak's proposed metrics and standards, §207 leaves it impotent to choose its version without Amtrak's permission."³¹ The veto enjoyed by Amtrak was much the same as the power invalidly delegated to coal producers and miners in *Carter Coal*.

But *Carter Coal* was ambiguous in its rationale. Were the labor provisions of the Bituminous Coal Act an unjustified invasion of a fundamental liberty or a violation of the non-delegation doctrine? Or was it both? The ambiguity was perpetuated by *Association of American Railroads*: Delegation to a private party might be a violation of due process, but "the problem [is] one of unconstitutional delegation. [I]n any event, . . . a change in the label would [not] effect a change in the inquiry."³² Perhaps not, but it might have consequences of some significance. A conclusion that the non-delegation doctrine bars delegations of authority to private parties, even pursuant to intelligible standards set by Congress, affects only federal power. Grounding the principle in due process would also bar state legislatures from delegating state power to private entities.

The states are not virgins with respect to this issue. It is generally acknowledged among the states that delegations to private parties violate state constitutions. Sometimes this is an absolute bar, but it may be conditional or expressed in dicta.³³ Some states have used

³¹ Id.

³² Id. n.3.

³³ See, e.g., *State v. Vaughan*, 30 Ala. App. 201, 203, 4 So.2d 5, 9 (1941); *Emmett McLoughlin Realty, Inc. v. Pima County*, 203 Ariz. 557, 58 P.3d 39 (Ariz. App. 2002); Colo. Const. Art V, §5: "The general assembly shall not delegate to any . . . private corporation or association, any power . . . to levy taxes or perform any municipal function whatever"; *State ex rel. James v. Schorr*, 45 Del. 18, 25, 65 A.2d 810, 813 (1948); *State ex rel. Willard Library v. Evansville-Vanderburgh*

the due process clause of the state's constitution to invalidate delegations of sovereign power to private entities.³⁴ Other states have held that delegations to federal officials are unconstitutional because the state retains no control over the federal official.³⁵ The remaining states are silent on delegation to private parties and apply some form of the "intelligible principle" standard to chart the outer boundary of permissible delegation. Left unaddressed is whether an intelligible principle is sufficient to support private delegation. Only Massachusetts and Kentucky have dictum to the effect that delegations to private entities may be valid.³⁶

Public Library, 848 N.E.2d 1162, 1166-1167 (Ind. App. 2006), *Hollingsworth v. State Barber Examiners*, 217 Ind. 373, 28 N.E.2d 64 (1940); *Maryland Co-op Milk Producers v. Miller*, 170 Md. 81, 182 A. 432 (1935); *Dearborn Fire Fighters Union v. Dearborn*, 394 Mich. 229, 269 (1975); *State v. Allstate Insurance Co.*, 231 Miss. 869, 97 So.2d 372 (1957); *Rowe v. Ray*, 120 Neb. 118, 123, 231 N.W. 689, 691 (1930); *Podiatry Society of New York v. Regents of the State University of New York*, 78 Misc.2d 731, 734, 358 N.Y.S.2d 276, 279 (1974) (dicta); *Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc.*, 285 N.C. 467, 206 S.E.2d 141 (1974); *Van Winkle v. Fred Meyer, Inc.*, 151 Or. 455, 49 P.2d 1140 (1935), *La Forge v. Ellis*, 175 Or. 545, 154 P.2d 844 (1945); *Garris v. Governing Board of the State Reinsurance Facility*, 333 S.C. 432, 511 S.E.2d 48 (1998); *City of Chamberlain v. R.E. Lien, Inc.*, 521 N.W.2d 130, 132 (1994), *Schryver v. Schirmer*, 84 S.D. 352, 358, 171 N.W.2d 634, 637 (1969); *Texas Boll Weevil Eradication Found. v. Lewellen*, 952 S.W.2d 454, 469 (1997) (private delegations subject to "more searching inquiry"); *Revne v. Trade Commission*, 113 Utah 155, 192 P.2d 563 (1948); *Standard Drug Co. v. General Electric Co.*, 202 Va. 367, 117 S.E.2d 289 (1960); *State v. Matson Co.*, 182 Wash. 507, 47 P.2d 1003 (1935); *Gibson Auto Co. v. Finnegan*, 217 Wis. 401, 259 N.W. 420 (1935), *Wagner v. Milwaukee*, 177 Wis. 410, 188 N.W. 487 (1922).

³⁴ See, e.g., *Opinion of Justices*, 337 Mass. 796, 798-799 (1958). But see *Corning Glass Works v. Ann & Hope, Inc.*, 363 Mass 409, 422, 294 N.E.2d 3 (1973) (delegation to private parties "can be no broader than that to public boards or officers"); *Newport Int'l University, Inc. v. State*, 186 P.2d 382 (Wyo. 2008) (upholding delegation of accreditation to private entity because due process satisfied).

³⁵ See, e.g., *Crowly v. Thornbrough*, 226 Ark. 768, 294 S.W.2d 62 (1956); *Hutchins v. Mayo*, 143 Fla. 707, 197 So. 495 (1940); *Smithberger v. Banning*, 129 Neb. 651, 262 N.W. 492 (1935); *State v. Gauthier*, 121 Me. 522, 118 A. 380 (1922); *Holgate Bros. Co. v. Bashore*, 331 Pa. 255, 200 A. 672 (1938).

³⁶ *Corning Glass Works v. Ann & Hope, Inc.*, 363 Mass 409, 422, 294 N.E.2d 354,

III. DUE PROCESS OR NON-DELEGATION

The non-delegation doctrine is rooted in the principle of separation of powers, a limit on the ability of any one branch of the federal government to encroach upon the powers constitutionally allocated to another branch, or to aggrandize itself beyond its enumerated powers. Superficially, the non-delegation doctrine appears to be inapplicable to delegations to private entities, but that conclusion is unduly formal. The point of separated powers is to enhance individual liberty by minimizing the possibility of concentrated government power. As Madison famously put it: “If men were angels, no government would be necessary. . . . In framing a government . . . you must . . . oblige it to control itself.”³⁷ When Congress encroaches unduly upon judicial or executive power the President and the judiciary have incentives (and some power) to fight back, but when Congress hands its power to private entities there is little incentive for anyone but affected private persons to resist. Short of a statutory prohibition on private delegation (which is highly unlikely to emanate from a Congress bent on private delegation), the only recourse is resort to litigation, which means that courts are required to decide the issue.

Delegation to private entities is a mirror image of the usual non-delegation concern. Rather than worrying about the “gradual concentration of the several powers in the same department,”³⁸ delegation to private entities raises the specter of a cession of power to unelected and politically unaccountable persons who have every incentive to exercise the delegated power for their own ends. Of course, our elected representatives and their agency proxies can exercise power for narrow (and sometimes corrupt) ends, but there is at least a modicum of political control in such cases. While it is

362 (1973) (delegation to private parties “can be no broader than that to public boards or officers”); *Yeoman v. Commonwealth Health Policy Board*, 983 S.W.2d 459, 471-472 (Ken. 1998) (dicta that delegations to non-government entities are valid but finding no delegation had occurred).

³⁷ Federalist No. 51 (J. Madison).

³⁸ *Id.*

possible that citizens might hold Congress responsible for delegations of public authority to private persons, it is far more likely that such delegations are sufficiently obscure that only those immediately affected are aroused to protest. A blanket rule forbidding delegations to private entities cuts off litigation concerning whether the particular delegation unjustifiably interferes with a fundamental liberty interest. It ends the debate. A blanket rule that any delegation to a private person unjustifiably infringes the fundamental liberty of being governed solely by our elected representatives does not accomplish the same end because the current architecture of substantive due process leaves open the possibility of advancing sufficiently compelling interests to justify the intrusion on liberty. The only advantage of due process is that it binds the states as well as the federal government, but given the tendency of the states to bar private delegations this may not be necessary.

The theoretical argument for relying on due process is based on at least two concerns. First, permitting private parties to control other private parties is likely to “entrench a kind of officially sanctioned self-interested regulation.”³⁹ Private parties are apt to use delegated sovereign power for personal profit, despite the public costs that may be imposed. Bureaucrats can also be captured by private interests but they are subject to a degree of public control that does not apply to private entities. Second, it is inconsistent with the entire theory of democratic self-governance to permit public powers to be exercised by “those who are neither elected by the people, appointed by a public official or entity, nor employed by the government.”⁴⁰

All delegations to private entities are not alike. Consider the common practice of authorizing ministers, priests, rabbis or non-ecclesiastical private citizens to marry people.⁴¹ The principles that would deny validity to delegations of sovereign power to private citizens do not readily apply in these circumstances. Moreover, because

³⁹ Froomkin, *supra* note 3, at 154.

⁴⁰ *Texas Boll Weevil Eradication Foundation v. Lewellen*, 952 S.W.2d 454, 469 (Tex. 1997).

⁴¹ See, e.g., Ala. Code §30-1-7 (2013); Va. Code Ann. §§20-23 and 20-25.

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states predicate the marriage ceremony upon obtaining a marriage license from the government, the act of solemnization is ministerial, and may not even constitute a delegation of governmental authority. The federal government, by contrast, has fewer opportunities to devolve ministerial government functions upon private citizens because its powers, while extremely broad, are enumerated. The states' police power provides many more possibilities for inoffensive ministerial delegations; it is thus wise to eschew due process as the rationale for a general prohibition of private delegation. The states may make their own decisions concerning ministerial delegations. Reliance on the structural principle that Congress may not delegate its legislative authority is sufficient to support a rule that Congress may not give private parties the power to bind other private citizens.

IV. PRIVATE OR PUBLIC

Any ban of private delegation immediately requires defining the line between public and private entities. *Association of American Railroads* grappled with this problem. Eight of Amtrak's nine directors are presidential appointees, including the Secretary of Transportation, who is a director *ex officio*.⁴² The final director is the President of Amtrak, who is selected by the other eight board members.⁴³ While its common stock is owned by four private railroads, its preferred stock is entirely owned by the federal government.⁴⁴ Amtrak receives substantial government subsidies. Yet, the statute creating Amtrak specifies that it "is not a department, agency, or instrumentality of the United States Government" and must be "operated and managed as a for-profit corporation."⁴⁵

The D.C. Circuit examined the functional purposes of the private-public distinction: preservation of public accountability for the exercise of sovereign authority and ensuring that sovereign power is

⁴² See 49 U.S.C. §24302(a).

⁴³ See 49 U.S.C. §24303(a).

⁴⁴ *Association of American Railroads v. Department of Transportation*, 721 F.3d 666, 674 (D.C. Cir. 2013).

⁴⁵ 49 U.S.C. §24301(a).

used for public ends rather than private purposes.⁴⁶ Both of those functional concerns pointed toward a conclusion that Amtrak was a private entity, at least for purposes of the non-delegation doctrine.

But what about *Lebron v. National Railroad Passenger Corporation*, in which the Supreme Court concluded that, for purposes of the free speech guarantee, Amtrak was “part of the Government.”⁴⁷ The D.C. Circuit’s answer was that it was equally “impermissible for Congress to employ the corporate form to sidestep the First Amendment [or to] reap the benefits of delegating regulatory authority while absolving the federal government of all responsibility for its exercise. The federal government cannot have its cake and eat it too.”⁴⁸ Because the purpose of characterizing hybrid entities as either private or public is to maximize individual liberty, each decision makes sense. Free speech is compromised and liberty is diminished if Amtrak is treated as a private enterprise, but the principle of confined and enumerated governmental power is compromised, and the individual liberty of freedom from government compulsion (albeit through private proxies) is diminished if Amtrak is treated as a government arm.

V. CONCLUSION

Delegation of the federal government’s legislative authority to private entities is a dangerous expedient that undermines public accountability, incites private rent-seeking at the expense of less favored private citizens, and expands government power through the use of shadow proxies. It is properly regarded as an impermissible delegation of legislative power. The states occupy a slightly different position. Because they possess a broad police power there are more occasions where delegation of ministerial power to complete a state-regulated action is appropriate. States should decide the scope of private delegation under their own constitutional law rather than

⁴⁶ 721 F.3d at 675.

⁴⁷ 513 U.S. 374, 400 (1995).

⁴⁸ 721 F.3d at 676.

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be denied that authority by a conclusion that private delegations violate the due process clause of the Fourteenth Amendment. In any case, the states are generally in agreement that private delegations are unconstitutional under the relevant state constitutions.

The question of whether any given recipient of legislative power is public or private should be resolved by applying the principle of maximizing individual liberty. Embedded in that principle are concerns about erosion of public accountability and fostering private gain at the expense of citizens who are subject to rules made by private recipients of governmental power. These principles are equally applicable to putative private delegations by either Congress or state legislatures.

Courts should be deeply skeptical of attempts to confer public power on private entities.

