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A Fifth Branch of Government: The Private Regulators and Their Constitutionality

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Introduction

The UL,[1] BBB,[2] NASD,[3] and ABA[4] are regulators of the marketplace, but they are not part of the familiar "alphabet soup"[5] agencies of the government. They are private agencies. Like their public counterparts, they make laws and adjudicate disputes.[6] Some of these private agencies operate as formal governmental deputies. Others are autonomous, but have formal connections with government. Still others have no connection whatsoever with government.[7] Private regulation has advantages for both government and the public,[8] prompting calls for more extensive use of private sector regulation.[9] But, as Justice Brennan re-

1. "UL" stands for Underwriters Laboratories, Inc. For a general description of its activities, see *infra* text accompanying notes 33-37.

2. "BBB" stands for Better Business Bureau. For a general description of its activities, see *infra* notes 26-30, 58-61 and accompanying text.

3. "NASD" stands for National Association of Security Dealers. The NASD is a private, not-for-profit organization that was registered with the Securities and Exchange Commission in 1939. The NASD has power, delegated by Congress, to license and discipline security dealers. *See* 15 U.S.C. §§ 78o-3 to 78s (1983).

4. "ABA" stands for American Bar Association. For a general description of its activities, see *infra* note 24 and accompanying text.

5. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 286 n.4 (1979) ("The term 'alphabet soup' gained currency in the early days of the New Deal as a description of the proliferation of new [government] agencies ").

6. *See infra* notes 54-61 and accompanying text.

7. *See infra* notes 21-52 and accompanying text.

8. *See infra* notes 70-79 and accompanying text.

9. *See, e.g.*, 1 C.F.R. § 305.86-3(16) (1987) (The Administrative Conference of the United States recommends that "Agencies should review the areas that they regulate to determine the potential for the establishment and use of dispute resolution mechanisms by private

cently reminded us, "[While] [t]he Government is free . . . to 'privatize' some functions it would otherwise perform . . . such privatization ought not automatically release those who perform government functions from constitutional obligation."[10] This Article examines the constitutional and public policy implications of the activities of the private regulators that comprise a growing and substantial "Fifth Branch" of government.[11]

The debate over privatization of governmental activities[12] tends to focus on the privatization of specific governmental services[13] such as garbage collection[14] and public transportation.[15] In contrast, this Article

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organizations as an alternative to direct agency action."); E. BARDACH & R. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS ch. 8 (1982) (series of recommendations on how to increase the amount of private regulation).

10. San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 107 S. Ct. 2971, 2993 (1987) (Brennan, J., dissenting, Marshall, J., joining). *See also* West v. Atkins, 108 S. Ct. 2250, 2259 (1988) ("Contracting out prison medical care does not relieve the state of its constitutional duty to provide adequate medical treatment to those in its custody. . . .").

11. This Article refers to private regulators as a "Fifth Branch" of government. "Fourth Branch" is commonly used to refer to the administrative agencies created by Congress. *See infra* note 56. The first, second, and third branches are, of course, legislative, executive, and judicial. *See* U.S. CONST. arts. I, II, III.

Fifth Branch has been used elsewhere to refer to other types of actors, including governmental advisory committees, *Advisory Committees, 1971: Hearings on S. 1637, S. 1964, and S. 2064 Before the Subcomm. on Intergovernmental Relations of the Senate Committee on Government Operations*, 92d Cong., 1st Sess. 12 (1971) (statement of Congressman John S. Monagan, Chairman, Government Operations); a changing administrative branch consisting of policymakers in temporary positions with the Fourth Branch referring to a continuing administrative branch, H. MERRY, FIVE BRANCH GOVERNMENT (1980); and interest groups, with Fourth Branch referring to the press, C. PETERS & J. FALLOWS, THE SYSTEM: THE FIVE BRANCHES OF AMERICAN GOVERNMENT (1976). None of these usages are as common as the use of Fourth Branch to refer to administrative agencies.

12. *See generally* AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES AFL-CIO, PASSING THE BUCKS (1984); S. BUTLER, PRIVATIZING FEDERAL SPENDING: A STRATEGY TO ELIMINATE THE DEFICIT (1985); W. KENNEDY & R. LEE, A TAXPAYER SURVEY OF THE GRACE COMMISSION REPORT (1984) [hereinafter GRACE COMMISSION]; PRESIDENT'S PRIVATE SECTOR SURVEY ON COST CONTROL, A REPORT TO THE PRESIDENT (1984); E. SAVAS, PRIVATIZING THE PUBLIC SECTOR (1982). For a relatively early critique of privatization, see D. GUTTMAN & B. WILLIAMS, THE SHADOW GOVERNMENT: THE GOVERNMENT'S MULTI-BILLION DOLLAR GIVEAWAY OF ITS DECISION-MAKING POWERS TO PRIVATE MANAGEMENT CONSULTANTS, "EXPERTS," AND THINK TANKS (1976).

13. *See, e.g.*, GRACE COMMISSION, *supra* note 12, at ch. VIII, 92-94. The Commission recommended that the following responsibilities be transferred to the private sector: (1) power marketing administrations; (2) national space transportation systems; (3) V.A. hospitals and nursing homes; (4) military commissary stores; (5) Metropolitan Washington Airports; (6) federal vehicle fleet management; and (7) coast guard services.

14. S. BUTLER, *supra* note 12, at 40-41.

15. Perry & Babitsky, *Comparative Performance in Urban Bus Transit: Assessing Privatization Strategies*, 46 PUB. ADMIN. REV. 57 (1986).

focuses on the privatization of core governmental responsibilities—the making of laws and the adjudication of disputes.[16]

Part One of this Article examines the breadth of the activities of the private regulators. Three categories of public-private relationships are identified. These categories are used later in an analysis of constitutional constraints on private regulators.[17] Part Two compares the significant characteristics of the Fifth Branch of government with those of the better known "Fourth Branch," public regulators.[18] Part Three examines four basic constitutional doctrines that form the foundation of the Fifth Branch.[19] A five-step inquiry that should promote a more coherent constitutional evaluation of the activities of the private regulators is proposed in Part Four.[20]

I. Private Regulators as a Fifth Branch of Government

Private regulators make laws and adjudicate disputes in a broad range of subject areas. Others have sorted private regulators into categories according to the subject matter of their work, such as land use or professional standards.[21] But this organization masks the underlying re-

16. "Core" governmental powers include at least those powers that the United States Constitution vests explicitly in government. These powers include not only lawmaking, U.S. CONST. art. I, and the adjudication of disputes, U.S. CONST. art. III, but also other specific powers such as imposing taxes, U.S. CONST. art. I, § 8, cl. 1, declaring war, U.S. CONST. art. I, § 8, cl. 11, and making treaties, U.S. CONST. art. II, § 2, cl. 2.

Even though lawmaking and adjudication are considered core governmental powers, they are not necessarily exclusively reserved for the government. *See, e.g.*, Flagg Brothers v. Brooks, 436 U.S. 149, 161-62 (1978) (settlement of disputes not an exclusive public function); *infra* notes 231-37 and accompanying text.

See generally Hanslowe, *Regulation By Visible Public And Invisible Private Government*, 40 TEX. L. REV. 88, 92 (1961) (an essential element of governmental power is the power to coerce, which is "typically done by government through custom, decrees, rule and law"); Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 648 (1986) ("certain powers [are] essentially governmental, [such as] 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. . . ."); Rudolph & Rudolph, *The Limits of Judicial Review in Constitutional Adjudication*, 63 NEB. L. REV. 84, 89 (1983) ("The first and most basic power that any society grants to its government is the police power: the power to declare law, maintain order, and when necessary, to suppress evils that threaten the public, as opposed to private, interests. A second power that any society grants to its government is the authority to regulate relationships among private individuals.")

17. *See infra* notes 21-52 and accompanying text.

18. *See infra* notes 53-123 and accompanying text.

19. *See infra* notes 123-261 and accompanying text.

20. *See infra* notes 262-326 and accompanying text.

21. For example, Louis Jaffee, in a landmark article, established five general categories: (1) statewide referenda; (2) special districts; (3) restrictions on use of property; (4) professional and industrial standards; and (5) administration of law and representation interests. Jaffe, *Law*

lationship between the public and private sectors, and obscures the full breadth of the Fifth Branch and the significant constitutional issues that arise from its activities.

It may be advantageous to analyze private regulation in terms of the types of relationships that arise between the Fifth Branch and the government. These relationships may be grouped into three categories: (A) formal governmental deputizing of private regulators; (B) formal connection between government and private regulators; and (C) no formal connection between government and private regulators. The use of these categories ensures that the constitutional evaluation of private regulators covers the full range of their activities. These categories also provide a basis for focusing on the most constitutionally troublesome areas of private regulation.

A. Category A: Formal Governmental Deputizing of Private Regulators

This category encompasses the least obvious cases of private regulation: the private actors in this category have been formally deputized by government as public regulators.[22] As deputized governmental officials, private citizens participate in the making of laws and the adjudication of disputes. They are subject to public accountability statutes and constitutional restrictions.[23] Governmental deputizing of private citizens is common in the area of occupational licensing. In many states, professional licensing boards are composed of full-time licensed practitioners who are appointed to serve as part-time regulators. These boards are legally responsible for developing professional misconduct regulations and for applying the regulations in adjudicating disputes involving alleged violations by licensed practitioners.[24]

Making By Private Groups, 51 HARV. L. REV. 201, 221-34 (1937). George Liebman updated and expanded Jaffe's scheme by adding another general category—resale price maintenance—and developing ten sub-categories, including land use and professional standards. Liebman, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650 (1975); *see also* Note, *Delegation of Governmental Power to Private Parties*, 37 COLUM. L. REV. 447, 450-54, 456 (1937).

22. If this category were construed broadly it would cover all public officials, because every public official is in reality a private citizen who has been deputized as a public official for the duration of the assignment. A broad definition would render this category meaningless and would hide a significant and distinctive type of private sector involvement in the regulation of the marketplace. Therefore, Category A is limited to private citizens who have been deputized as public officials for limited purposes and for a limited number of days per year.

23. *See infra* notes 80-123 and accompanying text.

24. *See generally* S. GROSS, OF FOXES AND HEN HOUSES: LICENSING AND THE HEALTH PROFESSIONS 97-105 (1984) (describing the compositions and functions of professional licensing boards).

B. Category C: No Formal Connection Between Government and Private Regulators

In direct opposition to Category A, this category covers the most obvious cases of private regulation: the making of laws and the adjudication of disputes by strictly private agencies that have no formal connection with government. Private agencies in this category can wield great regulatory power in the marketplace.[25] Category C agencies include the Better Business Bureau and Consumers Union, as well as many other private consensual standards-setting organizations.

The Better Business Bureau (BBB) issues business standards and mediates disputes between consumers and member businesses.[26] The BBB sets forth specific guidelines for fair and nondeceptive advertising,[27] an area also regulated by the Federal Trade Commission[28] and many local governmental consumer protection agencies.[29] The BBB, funded by its business members,[30] operates independently of government.

Consumers Union (CU) evaluates a variety of retail products each month and by doing so implicitly develops standards for judging the products. Reports published monthly in *Consumer Reports* magazine describe the features of particular products and the results of CU's evaluations in the form of a five-part, better-to-worse rating system.[31] CU is funded solely by the sale of publications and nonrestrictive, noncommercial grants and fees.[32]

In addition to the BBB and CU, a large number of private *consensual* standards-setting organizations have developed tens of thousands of nongovernmental standards concerning "virtually every aspect of mod-

25. *See, e.g.*, American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 570-71 (1982) ("ASME [a voluntary standards-setting organization] can be said to be 'in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce." (citing Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 465 (1941))); *see also infra* notes 54-61 and accompanying text.

26. *See* COUNCIL OF BETTER BUSINESS BUREAUS, INC., WHAT IS A BETTER BUSINESS BUREAU? (rev. 1985); BETTER BUSINESS BUREAU OF METROPOLITAN NEW YORK; B. WANSLEY, COUNCIL OF BETTER BUSINESS BUREAUS, INC., HISTORY AND TRADITIONS OF THE BETTER BUSINESS BUREAU (rev. 1983).

27. COUNCIL OF BETTER BUSINESS BUREAUS, INC., CODE OF ADVERTISING (1985).

28. 15 U.S.C. § 45(a) (1983).

29. *See generally* CONSUMERS UNION REPORT ON NEW CITY AND COUNTY CONSUMER PROTECTION AGENCIES 30, 31, 34, 37, 45, 62, 66, 83, 87, 98 (1972).

30. *See* COUNCIL OF BETTER BUSINESS BUREAUS, INC., WHAT IS A BETTER BUSINESS BUREAU? (rev. 1985). *But see infra* note 284 and accompanying text.

31. For example, in its March 1987 issue of *Consumer Reports*, Consumers Union rated 17 features of 39 color television sets based on a five-part scale. *A Guide to TVs: The Current Choices in Screen Size, Features, and Sound, Plus Ratings of 39 Sets*, 52 CONSUMER REPORTS 142, 146-49 (March 1987).

32. *See No-Commercialization Policy*, 52 CONSUMER REPORTS 131 (March 1987).

ern society."[33] These private organizations adopt consensual standards pursuant to procedures that only recently began to resemble procedural due process.[34] Voluntary health and safety standards are common, even though such major governmental agencies as the Occupational Safety and Health Administration and the Consumer Product Safety Commission also regulate the area.[35] Funded primarily through dues and sales of publications,[36] Category C agencies are autonomous. But, as is discussed in the next section, many large private consensual standards-setting organizations have developed formal connections with government.[37]

C. Category B: Formal Connection Between Government and Private Regulators

This category includes organizations that have a formal relationship with government, although the relationship is less definite than formal deputization. Category B is a catchall category, encompassing relationships that fall between Category A (deputization) and Category C (no connection). Examples of Category B organizations include advisory committees, rules-negotiation groups, arbitrators, and the issuers of private voluntary standards. In each of these examples, the private sector makes laws or adjudicates disputes, but the degree of governmental power conferred on the private sector varies from case to case, resulting in many diverse public-private relationships.

Of the examples above, governmental use of advisory committees involves the least delegation. Advisory committees provide governmental decision makers with input from private citizens and experts.[38] Unless otherwise authorized by statute or presidential directive, their power is limited to giving advice: they do not have authority to dictate governmental action.[39] In reality, however, many advisory committees are in-

33. Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEX. L. REV. 1329, 1331 (1978). *See also id.* at 1331-32, 1336-38.

34. *Id.* at 1345-68.

35. *Id.* at 1333.

36. *Id.* at 1338-41. Large Category C standards-setting organizations include the American Society for Testing and Materials, the National Fire Protection Association, the American Society of Mechanical Engineers, and Underwriters Laboratories, Inc.

37. *See infra* notes 46-48 and accompanying text.

38. *See* Cardozo, *The Federal Advisory Committee Act In Operation*, 33 ADMIN. L. REV. 1, 1-2, 31-46 (1981); Perritt & Wilkinson, *Open Advisory Committees And The Political Process: The Federal Advisory Committee After Two Years*, 63 GEO. L.J. 725, 726-29 (1975).

39. 5 U.S.C. app. §§ 2(a), 2(b)(6), 9(b) (1982).

fluential in shaping governmental policies.[40]

The development of rules through negotiation involves a greater degree of private delegation than does governmental use of advisory committees. Rather than restricting their input to filing written comments,[41] a group of interested public and private parties actually participates in negotiations on a proposed regulation. The participants' role in lawmaking is limited because any consensus the group reaches is technically only a recommendation to the agency head.[42] In practice, however, the agency head is likely to give substantial deference to a recommendation[43] for at least two reasons. First, if the agency head is faithful to the process, she appoints a senior official to the negotiating team to represent the interests of the agency and the public in the negotiations.[44] Second, if the agency head does not give substantial deference to the consensus developed by the negotiating group, the parties are unlikely to commit their time and resources to such a process in the future.[45] As a practical matter, therefore, an agency head will probably approve a rule that has been negotiated and recommended by the public and private parties. Under these circumstances, the members of the negotiating team effectively act as private lawmakers.

Another Category B regulator, the private standards-setting organization, wields great governmental power when public agencies issue regulations that incorporate private standards by reference.[46] During the

40. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 745 (1972) (Douglas, J., dissenting) (Federal agencies "are notoriously under the control of powerful interests who manipulate them through advisory committees.")

41. Under the Federal Administrative Procedure Act, an agency usually promulgates a rule by publishing notice of a proposed rule, receiving public comments, considering the comments, and then promulgating a final rule. *See* 5 U.S.C. § 553 (1982).

42. *See* Procedures for Negotiating Proposed Regulations (Recommendation Nos. 82-4 and 85-5), 1 C.F.R. §§ 305.82-4, 305.85-5 (1987) (recommendations of the Administrative Conference of the United States). *See generally* Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982) [hereinafter *Negotiating Regulations*]; Harter, *The Political Legitimacy and Judicial Review of Consensual Rules*, 32 AM. U.L. REV. 471 (1983) [hereinafter *Political Legitimacy*]; Perritt, *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L.J. 1625 (1986); Susskind & McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133 (1985).

43. *Political Legitimacy*, *supra* note 42, at 483-84.

44. *See* 1 C.F.R §§ 305.82-4(4)(g), 305.85-5(1) (1987); *Negotiating Regulations*, *supra* note 44, at 57-67; *Political Legitimacy supra* note 42, at 483-84.

45. *See Political Legitimacy*, *supra* note 42, at 484.

46. *See* American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolovel Corp., 456 U.S. 556, 559 (1982). The American National Standards Institute, Inc., one of the largest standards-setting organizations, estimates that 80% of its standards become mandatory. *See* Singer, *Who Will Set the Standards for Groups that Set Industry Product Standards?*, 12 NAT'L J. 721 (1980); *see also*, Hamilton, *supra* note 33, at 1386-87.

1970s, government agencies expanded their connections with these private organizations by adopting voluntary standards, sometimes modifying them and sometimes explicitly deferring to them instead of issuing their own.[47] Two federal agencies, the Consumer Product Safety Commission and the Office of Management and Budget, have tried to influence the procedures these private organizations use for developing consensual standards.[48]

A final example of Category B regulation involves a rapidly expanding area of private regulation: private arbitration compelled by a court (also known as court-ordered arbitration or court-annexed arbitration). Compulsory arbitration confers an important governmental power on private citizens: the power to adjudicate disputes. A growing number of state and federal courts are implementing compulsory arbitration pro-

47. For example, when OSHA was established, its enabling statute provided that "the Secretary shall, as soon as practicable . . . by rule promulgate as an occupational safety or health standard any national consensus standard . . . unless he determines that the promulgation of such a standard would not result in improved safety or health." 29 U.S.C. § 655(a) (1982), *construed in* American Fed'n of Labor v. Brennan, 530 F.2d 109, 115-21 (3d Cir. 1975) (statute created presumption in favor of adoption of national consensus standards).

The Consumer Product Safety Commission has issued a policy statement providing: "The Commission may find that a mandatory standard is not necessary where an existing voluntary standard appears to be reasonably adequate to eliminate or reduce the risk of injury associated with the product . . . and there is a sufficiently high degree of conformance to the voluntary standard." Consumer Product Safety Commission, *Commission Involvement in Voluntary Standards Activities*, E(1), 42 Fed. Reg. 58,727 (1977).

The Office of Management and Budget has adopted this policy regarding federal procurement: "Voluntary standards will be given preference over in-house standards in the absence of mandatory Government Standards unless use of such voluntary standards would result in impaired functional performance, unnecessary cost . . . anticompetitive effects or other significant disadvantages." Office of Management and Budget, *Federal Participation in the Development and Use of Voluntary Standards*, 6(a)(1), 45 Fed. Reg. 4,327 (1980); *see also* 1 C.F.R. § 305.78-4(6)-(7) (1987) (Recommendation 78-4(6)(7) of the Administrative Conference of the United States).

48. *See* Consumer Product Safety Commission, *supra* note 47, at D; Office of Management and Budget, *supra* note 47, at 6(c). The two agencies conditioned the federal government's participation in the development of consensual standards on whether the particular private organization follows specific minimum "due process" procedures. However, a 1977 federal bill that would have subjected the voluntary standards groups to extensive federal regulation failed to pass Congress. The bill proposed to give the Federal Trade Commission (FTC) authority to establish procedures for private standards-setting organizations and would have created a new agency to manage the voluntary standards program. *Voluntary Standards and Accreditation Act of 1977, S.825: Hearings Before the Subcomm. on Antitrust and Monopoly of the Comm. on the Judiciary*, 95th Cong., 1st Sess. 537-73, (1977).

Moreover, in 1980, Congress also passed a law requiring the FTC to terminate a rulemaking proceeding it had initiated to regulate private standards-setting organizations. 15 U.S.C. § 57a(i) (1982); *see also* S. REP. NO. 500, 96th Cong., 2d Sess. 1, 3, 5-6, 19, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 1102, 1104, 1107, 1120.

grams in which private volunteers serve as arbitrators.[49] Parties must have their case heard and decided by a private arbitrator before the case will be heard by a judge. The arbitrator's decision is usually not binding and either party can seek a trial de novo.[50] In theory, therefore, private-sector participation in adjudicating disputes is very limited. But, in practice, arbitrators' power is significant because most parties to arbitration do not take their cases to judicial trial.[51] Therefore, most decisions of private arbitrators are, in effect, final and binding.

Of the three categories, Category C presents the least complex public-private relationships for constitutional analysis because Category C regulation has, by definition, no formal connection with government. Category A involves more complex public-private relationships because formal deputization of private citizens disguises the private-sector involvement in governmental regulation. Catchall Category B presents the most complex public-private relationships for analysis because it encompasses a variety of relationships.[52] Before examining the constitutional issues raised by these three categories of private regulation, it is useful to put the constitutional analysis in context by comparing key characteristics of private regulators with the better known Fourth Branch of public regulators.

II. Comparing Private Regulators with Public Regulators

The Fifth Branch of government is similar to the better known Fourth Branch, comprising public regulators,[53] in that both exercise core

49. *See* S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 225-32 (1985) [hereinafter S. GOLDBERG]; Walker, *Court-Ordered Arbitration Comes to North Carolina and the Nation*, 21 WAKE FOREST L. REV. 901, 914 (1986).

50. *See* S. GOLDBERG, *supra* note 49, at 225.

51. If most parties to arbitration did take their cases to judicial trials, then the primary goals of arbitration—to divert cases from the courts, reduce costs, expedite dispute resolution, and increase party satisfaction—would not be realized. *See* S. GOLDBERG, *supra* note 49, at 226; Levin, *Court-Annexed Arbitration*, 16 U. MICH. J.L. REF. 537, 542-43 (1983) (less than two percent of cases reached trial de novo in Eastern District of Pennsylvania); Walker, *supra* note 49, at 916-17; *see also* Nejelski & Zeldin, *Court-Annexed Arbitration in the Federal Courts: The Philadelphia Story*, 42 MD. L. REV. 787, 807-12 (1983).

52. *See infra* notes 300-07, 316-25 and accompanying text.

53. "Fourth Branch" is commonly used to refer to the administrative agencies created by Congress. *See, e.g.*, PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, REPORT OF THE COMMITTEE, WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT 39-42 (1937) (independent regulatory commissions are "headless 'fourth branch' of the Government"); Strauss, *The Place Of Agencies In Government: Separation Of Powers And The Fourth Branch*, 84 COLUM. L. REV. 573, 581-96 (1984) (independent regulatory agencies and executive agencies are part of Fourth Branch; historical distinctions are not meaningful when agencies are examined from functional perspective). In this Article, regulatory administrative agencies are referred to as "public regulators."

governmental powers and share similar histories and justifications. But a crucial difference separates the two branches: public regulators are subject to extensive constitutional and statutory restrictions, whereas private regulators are not. This is a difference of constitutional significance.

A. The Parallel Powers of Private and Public Regulators

Both public and private regulators make laws and adjudicate disputes:[54] both formulate rules to regulate future conduct, and both consider evidence of past or present facts and render decisions in disputes.[55] But while public regulators[56] derive their powers from statutes,[57] many Category B and C private regulators derive their powers from nonlegal sources. Consumers Union, the Better Business Bureau, and voluntary standards-setting groups such as Underwriters Laboratories are purely private Category C organizations[58] that operate without statutory authority to make laws and adjudicate disputes.

Lacking a legislative grant of power, Category C organizations nevertheless have become influential regulators of the marketplace by build-

54. The basic difference between lawmaking and adjudication is reasonably clear. In a case dealing with the Federal Administrative Procedure Act, Justice Holmes drew the distinction in a way that is still useful today:

> A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.

Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908).

The Federal Administrative Procedure Act defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . ." 5 U.S.C. § 551(4) (1982). An "order," formulated in an adjudication, is defined as "the whole or a part of a final disposition . . . of an agency in a matter other than rulemaking but including licensing." 5 U.S.C. § 551(6) (1982). These definitions are not very helpful in characterizing hybrid activities like rate making, retroactive rulemaking, and professional licensing. *See* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE, §§ 7.1, 7.2 (2d ed. 1979); *see also* B. SCHWARTZ, ADMINISTRATIVE LAW §§ 4.1, 4.2 (2d ed. 1984).

55. For a description of the lawmaking and adjudicatory powers of several private regulators such as licensing boards, the Better Business Bureau, Consumers Union, voluntary standards-setting organizations, advisory committees, negotiated rulemaking groups, and compulsory arbitration programs, see *supra* notes 23-51 and accompanying text.

56. Public regulators include early governmental agencies such as the Federal Trade Commission, *see* 15 U.S.C. § 45(a) (1982); New Deal agencies such as the Federal Communications Commission, *see* 47 U.S.C. § 154 (1982); and more recent creations such as the Occupational Safety and Health Administration, *see* 29 U.S.C. §§ 661, 655 (1982), and the Environmental Protection Agency, *see* 42 U.S.C. § 4321 (1982).

57. *See* B. SCHWARTZ, *supra* note 54, §§ 1.5-1.6, § 4.3 at 151-52, §§ 8.1-9.27; Hanslowe, *supra* note 16, at 92-93.

58. *See supra* notes 25-37 and accompanying text.

ing outstanding professional reputations. Reputable members of the business community typically conform their business practices to the standards and decisions of these private regulators.[59] Consumers have also grown to rely on private agencies for information and protection in the marketplace.[60] Thus despite important legal differences between the powers of public regulators and private regulators, in practice the exercise of these powers often affects the marketplace in a substantially similar manner.[61]

B. Parallel Histories of Private and Public Regulators

The Fourth Branch of public regulators and the Fifth Branch of private regulators have developed in a parallel manner. The history of public regulation[62] can be traced back to the first session of the First Congress,[63] whereas the modern development of public regulation began with the establishment of the powerful Interstate Commerce Commission

59. *See* American Soc'y Of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 559 (1982) ("if a manufacturer's product cannot satisfy the applicable ASME code, it is at a great disadvantage in the marketplace"); Singer, *supra* note 46, at 721 ("many retailers carry only products that conform to [voluntary] standards"); *see also* Bluestone, *When Consumer Reports Talks, Buyers Listen—And So Do Companies*, BUS. WK., June 8, 1987, at 135 ("Many companies have made changes in their products after getting a bad rating from CU."). For a description of the way these organizations set standards and issue decisions, *see supra* notes 25-37 and accompanying text.

60. Consumers tend to buy products that are highly rated by Consumers Union, manufactured in conformance with voluntary standards, and sold by members of the Better Business Bureau. *See* LOUIS HARRIS & ASSOCIATES, CONSUMERISM IN THE EIGHTIES 19-21 (1982) (in opinion poll, Consumers Union and Better Business Bureau were rated first and second on effectiveness in protecting interests of consumers); Singer, *supra* note 46, at 721 ("many consumers rely on 'seals of approval' "); Bluestone, *supra* note 59, at 135 ("whether they're buying automobiles or life insurance . . . or practically anything else—millions of shoppers won't plunk down their money until they consult Consumer Reports").

61. Negotiated rulemaking and compulsory private arbitration provide two more examples of private actors without the legal power to bind parties but with the practical power to do so. *See supra* notes 41-45, 49-51 and accompanying text. For an interesting short history on the blurring of differences between public and private power, see Phillips, *The Inevitable Incoherence of Modern State Action Doctrine*, 28 ST. LOUIS U.L.J. 683, 721-33 (1984).

62. For an overview of the history and evolution of administrative agencies, see M. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 13-73 (1955); S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 22-40 (1985); R. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 19-416 (1941); J. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 4-6 (1980); R. PIERCE, S. SHAPIRO & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS §§ 2.2-2.4 (1985) [hereinafter PIERCE & SHAPIRO]; B. SCHWARTZ, *supra* note 54, §§ 1.10-1.11.

63. The first session of the First Congress enacted a statute delegating rulemaking authority to the President, 1 Stat. 95 (1789), and adjudicatory authority and licensing powers to port collectors, 1 Stat. 29 (1798); 1 Stat. 55 (1789).

(ICC) in 1887.[64] During the past one hundred years, however, as the number of public regulators has grown so has the number of private regulators. Moreover, the growth periods for both types of regulators have occurred during the same periods of time: the turn of the century,[65] during the New Deal era,[66] and the 1970s.[67]

64. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (codified as amended at 49 U.S.C. §§ 1-1240 (1982)) (regulating railroad industry).

65. Around the turn of the century, when Congress established such new governmental agencies as the ICC and the Federal Trade Commission, ch. 311, § 1, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41-58 (1987)), the private sector also assumed regulatory-type activities. Private professionals, such as doctors and lawyers, were appointed to their own governmental licensing boards, *see generally* S. GROSS, *supra* note 24, at 56-58, 98, and landowners were given the authority to control the use of property in their neighborhoods and communities, *see, e.g.*, Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1916) (holding constitutional an ordinance prohibiting property owner from erecting a billboard unless property owner obtained consent from majority of nearby property owners); Eubank v. City of Richmond, 226 U.S. 137 (1912) (declaring unconstitutional an ordinance authorizing "the owners of two-thirds of the property abutting on any street" to request the committee on streets to establish a building line). In the absence of specific legislative authority, the American Bar Association began accrediting law schools, *see The American Bar Association's Role in the Law School Accreditation Process: A Report of the ABA Section of Legal Education and Admissions to the Bar*, 32 J. LEGAL EDUC. 195 (1982), the predecessor to the Better Business Bureau began to monitor truth in advertising and to develop advertising codes and standards, *see* WANSLEY, HISTORY AND TRADITIONS (Council of Better Business Bureaus, Inc., 1983), and the private standards-setting organizations began to establish voluntary standards, *see* Hamilton, *supra* note 33, at 1368.

66. During the New Deal era of the 1930s, Congress created another round of governmental agencies, including the Securities and Exchange Commission, Security Exchange Act of 1934, ch. 404, tit. I, § 4, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78A-KK (1987)), the Federal Communications Commission, 47 U.S.C. § 154 (1934), and the National Labor Relations Board, National Labor Relations Act of 1935, ch. 372, § 1, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-183). During this era, Congress also delegated to the private sector the authority to create codes of fair competition, *see, e.g.*, Bituminous Coal Conservation Act of 1935, 49 Stat. 824, pt. III(g), *construed in* Carter v. Carter Coal Co., 298 U.S. 238, 310-12 (1936) (held unconstitutional), to approve the issuance of agricultural marketing orders, Bituminous Coal Act of 1937, 50 Stat. 127, 15 U.S.C. §§ 828-852 (1937), *repealed by* Pub. L. No. 89-554, § 8(a), 80 Stat. 649, 651 (1966), *construed in* Sunshine Anthracite Coal Co. v. Adkins, Collector of Internal Revenue, 310 U.S. 381, 399 (1940) (held constitutional), and to license and discipline security dealers, 15 U.S.C. §§ 78o-3 to 78s (1934). During this same period, private actors formed Consumers Union to provide consumers with information on goods and services. CONSUMER REPORTS, 1986 BUYING GUIDE ISSUE 2 (1985).

67. During the 1970s, Congress created a third round of federal regulatory agencies, *see generally* T. LOWI, THE END OF LIBERALISM 113-24 (2d ed. 1979); PIERCE & SHAPIRO, *supra* note 62, at 34-36, including the Environmental Protection Agency, Reorganization Plan Number Three of 1970, 35 Fed. Reg. 1563 (1970), the Consumer Product Safety Commission, Consumer Products Safety Act of 1972, Pub. L. No. 92-573, 86 Stat. 1207 (codified as amended at 15 U.S.C. §§ 2051-2083) (1987)), the Occupational Health and Safety Administration Occupational Health and Safety Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651-678) (1987)), and the Department of Energy, Department of Energy Act of 1977, Pub. L. No. 95-91, 91 Stat. 567 (codified as amended at 42 U.S.C. §§ 7101-7375) (1987)). While Congress was establishing these federal agencies, the private

The question whether this parallel development of public and private regulators is coincidental or is causally related goes beyond the scope of this Article. Undoubtedly, some of the private sector's initiatives were influenced by such factors as the independent need to standardize products[68] and build consumer confidence in the marketplace. Other initiatives were stimulated by the threat of governmental regulation.[69] Regardless of the reasons, this parallel development highlights another similarity between public and private regulators.

C. Parallel Justifications for Private and Public Regulators

Congress delegates lawmaking and adjudicatory responsibilities to public and private regulators for similar reasons, although there are several reasons for Congress to delegate to private regulators rather than public ones.[70]

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sector increased its involvement in making laws and adjudicating disputes. Both state legislatures and Congress created compulsory private arbitration programs for adjudicating disputes. *See supra* note 49 and accompanying text. Congress and federal agencies formalized the use of private consensual standards. *See supra* notes 47-48 and accompanying text. Governmental agencies began developing rules through negotiation among interested public and private parties. *See supra* notes 41-45 and accompanying text. After many years of governmental use of advisory committees, Congress enacted a law to formalize and regulate this source of private input into governmental decision making. Federal Advisory Committee Act, 5 U.S.C. app. (1982 & Supp. I 1983, Supp. II 1984, Supp. III 1985, Supp. IV 1986); *see* Perritt & Wilkinson, *supra* note 38, at 729 ("Congressional concern that the proliferation, duplication, and power of advisory committees effectively had made them 'a fifth arm of government' prompted Congress to consider methods of preventing advisory committee abuses."). And the Security and Exchange Commission recognized the private Financial Accounting and Standards Board as the official source of accounting principles. *See* P. MILLER & R. RUDDING, THE FASB: THE PEOPLE, THE PROCESS, AND THE POLITICS 16-22, 47-50 (1986); Strother, *The Establishment of Generally Accepted Auditing Standards*, 28 VAND L. REV. 201, 211-21 (1975).

68. *See, e.g.*, Hamilton, *supra* note 33, at 1331-32.

69. *See* Ginsberg, *Administration Efforts To Enhance The Opportunities For Self-Regulation*, 35 LAB. L.J. 731 (1984) (self-regulation "has been implemented to avoid potential or even threatened governmental regulation. . . . Increased involvement from self-certification can also help a firm to develop the knowledge it needs to argue against additional outside controls").

70. First, certain forms of private regulation involve more democratic decision making than that exercised by public regulators. Although public regulators typically provide for public input into rulemaking and adjudication, 5 U.S.C. §§ 553, 554, 556, 557 (1982), public regulators are usually not elected and tend to be politically independent. As a result, public regulators have been criticized as nonmajoritarian and unaccountable to the public. *See* J. FREEDMAN, *supra* note 62, at 71-72. This particular criticism is blunted by the use of some forms of private regulation that provide for active citizen participation in lawmaking and adjudication. For instance, some zoning laws have given private landowners the authority to approve or veto certain land uses. Moreover, advisory committees and negotiated rulemaking proceedings give citizens additional opportunities to participate in governmental decision making.

Second, because some forms of private regulation provide greater opportunities for affected parties to participate, the affected parties might find the decisions more acceptable. *See*

The first, and probably primary, reason Congress delegates governmental tasks to public regulators is their expertise.[71] This expertise rationale is also used to justify reliance on private regulators.[72] Private actors may have firsthand experience with the types of problems that call for governmental action.[73]

Second, by delegating to professional, expert public regulators, Congress reduces political influence over certain regulatory tasks.[74] To the

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Lawrence, *supra* note 16, at 656-57. For example, interested parties in a negotiated rulemaking proceeding might find the final rule more acceptable because they participate actively in the development of the rule, and licensees might find the decisions of governmental licensing boards more acceptable because their colleagues sit on those boards.

Third, the use of private regulators provides a vehicle for Congress to expand public resources through the use of private resources. Government accomplishes this expansion benefit by utilizing private experts on a voluntary basis or a *per diem* stipend basis, which is usually less expensive than hiring these experts as consultants or full-time employees. *See* Lawrence, *supra* note 16, at 656-57. This benefit accrues, for example, when government relies on an advisory committee for input and then pays the experts on the committee a stipend or only reimburses them for actual expenses, or when an agency convenes a negotiating group for developing a proposed regulation and then does not compensate the experts in the group.

Finally, the use of private regulators might provide a politically feasible interim route for regulating a marketplace when there is not sufficient political consensus for government to establish a new public regulator. *See* Lawrence, *supra* note 16, at 655-56. This might explain the history of the development of certain health and safety standards. Perhaps as a result of a lack of political consensus from the late 1800s to the 1970s, government and the public relied heavily on private standards-setting organizations rather than establishing governmental agencies to issue standards. Due to some alleged abuses by these private organizations, in the early 1970s a political consensus developed for Congress to establish several new federal agencies. As these new agencies formulated standards, however, the agencies continued to work with the private standards-setting organizations. *See supra* notes 33-37, 46-48 and accompanying text.

71. For example, rather than developing detailed safety and health standards itself, Congress has delegated this complex task to specialized agencies such as the Consumer Product Safety Commission, the Food and Drug Administration, and the Environmental Protection Agency. These agencies have the technical staff and expertise to formulate legal standards and to adjudicate complex disputes. *See* J. COMER, LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES 18 (1927); Jaffe, *supra* note 21, at 211-12; L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 35-37 (1965).

72. *See* Jaffe, *supra* note 21, at 212; Note, *Delegation of Governmental Power To Private Groups*, 32 COLUM. L. REV. 80-81 (1932); Note, *Delegation of Power To Private Parties*, 37 COLUM. L. REV. 447, 448 (1937); Note, *The State Courts and Delegation of Public Authority To Private Groups*, 67 HARV. L. REV. 1398, 1400 (1954).

73. As Professor Jaffe so pointedly stated, "Those performing the operation or constituting a part of the relation to be regulated are likely to have a more urgent sense of the problem and the possibilities of effective solution: experience, and experiment lie immediately at hand." Jaffe, *supra* note 21, at 212.

These private sector experts, however, might not be available to government because they are expensive to hire and are often committed to private employers. Lawrence, *supra* note 16, at 656-57. Government gains access to these private experts by appointing them to governmental licensing boards and advisory committees and by using consensual standards formulated by private standards-setting organizations. Jaffe, *supra* note 21, at 212.

74. *See* J. FREEDMAN, *supra* note 62, at 59-77; J. LANDIS, THE ADMINISTRATIVE PROCESS 111 (1938).

extent that this benefit is actually realized, the same benefit also arises from delegations to private regulators.[75]

Third, Congress delegates certain tasks to administrative agencies because of their flexibility.[76] Private regulators may even be more flexible because they may be less bureaucratic and less constrained by constitutional restrictions and mandated administrative procedures.[77]

Fourth, Congress delegates tasks that require consistent and continuous action to administrative agencies.[78] This type of task also can be accomplished by private regulators, as was the development of generally accepted accounting principles by the Financial Accounting Standards Board.

Finally, in order to conserve its limited time and resources, Congress delegates governmental tasks to both public and private regulators.[79]

This comparative examination of the powers, histories, and justifications for public and private regulators reveals several significant similarities between the Fourth and Fifth Branches. In contrast, the next section examines a distinguishing feature of constitutional significance: public and private regulators are subject to different levels of public accountability.

D. Nonparallel Systems of Accountability and Restrictions

Most public regulators are subject to extensive constitutional, statutory, and supervisory restrictions.[80] Most private regulators are not sub-

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75. This occurs when government appoints primarily private licensees to professional licensing boards, when regulatory agencies defer to accounting principles developed by the private Financial Accounting Standards Board, and when Congress delegates the licensing of security dealers to private associations.

76. *See* J. COMER, *supra* note 71, at 16-17.

77. *See* Lawrence, *supra* note 16, at 654-55.

> 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. . . .
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> However, most of the rigidity that affects government, so far as it exists at all, probably results not so much from the fact that it typically is bureaucratic. . . . 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.

Id. at 654-55.

78. *See* L. JAFFE, *supra* note 71, at 35-37.

79. *See* L. JAFFE, *supra* note 71, at 35-36; Jaffe, *supra* note 21, at 211-12.

80. *See infra* notes 83-99 accompanying text.

ject to such restrictions.[81] The degree to which private regulators are held accountable depends on the nature of the relationship between the private actor and the public sector.[82] To appreciate the extent to which private regulators are free of regulation, one must understand the extent to which public regulators are held accountable.

First, public regulators are subject to constitutional restrictions: as state actors, they may not abridge freedom of religion, speech, or press,[83] nor may they deprive any person of life, liberty, or property without due process of law.[84] In contrast, strictly private actors are not so constrained by the Constitution.[85] For instance, they are not constitutionally prohibited from discriminating on the basis of race[86] or taking another's property without a hearing.[87]

Second, public regulators are often made accountable for their actions by statute.[88] These statutory obligations include disclosure requirements, restrictions on employee activities, and mandatory decision-making procedures.[89] Courts have strictly interpreted these statutes to

81. *See generally* H. LINDE, G. BUNN, F. PAFF, & W. L. CHURCH, LEGISLATIVE AND ADMINISTRATIVE PROCESSES ch. 6 (1981) (discussing techniques for holding private delegates accountable); Lawrence, *supra* note 16, at 659-62.

82. *See infra* notes 103-23 and accompanying text.

83. U.S. CONST. amend. I.

84. U.S. CONST. amends. V, XIV.

85. To invoke the state action doctrine, a plaintiff must show (1) that a party has interfered with plaintiff's constitutional rights, and (2) that the party acted "under color" of state law. *See, e.g.*, Flagg Bros. v. Brooks, 436 U.S. 149, 155 (1978). For a discussion of the differences between public and private actors, see *infra* notes 214-53, 277-85 and accompanying text.

86. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

87. Flagg Bros. v. Brooks, 436 U.S. 149 (1978).

88. *See generally* Strauss, *Disqualifications of Decisional Officials in Rulemaking*, 80 COLUM. L. REV. 990 (1980); Note, *Fighting Conflicts of Interest in Officialdom: Constitutional and Practical Guidelines for State Financial Disclosure Laws*, 73 MICH. L. REV. 758 (1975); Note, *Government Fraud, Waste and Abuse: A Practical Guide to Fighting Official Corruption*, 58 NOTRE DAME L. REV., 1027 (1983); Note, *The Fiduciary Duty of Former Government Employees*, 90 YALE L.J. 189 (1980).

89. To facilitate public monitoring of governmental activities, the Freedom of Information Act, 5 U.S.C. § 552 (1982), requires government agencies to make certain information publicly available, and the Government in the Sunshine Act, 5 U.S.C. § 552b (1982), provides for public access to the deliberations of collegial agencies.

To facilitate public monitoring of potential conflicts of interest, financial disclosure laws require certain government employees to file detailed financial reports. *See, e.g.*, Legislative Personnel Financial Disclosure Requirements, 2 U.S.C. ch. 18 (1982 & Supp. III 1985); Executive Personnel Financial Disclosure Requirements, 5 U.S.C. app. §§ 201-211 (1982 & Supp. III 1985); Judicial Personnel Financial Disclosure Requirements, 28 U.S.C. app. §§ 301-309 (1982). To avoid actual conflicts of interest, other statutes forbid government employees from engaging in certain activities, such as participation in a matter in which the employee has a financial interest, 18 U.S.C. § 208 (1982 & Supp. IV 1986); 28 U.S.C § 528 (1982), and partici-

apply only to public actors, not to private ones.[90]

Third, public regulators are subject to indirect electoral accountability to the extent that they are appointed by public officials who are themselves subject to direct electoral accountability.[91] Private regulators are not always subject to even this degree of accountability.[92] The more attenuated the relationship between a private actor and the government, the less the private actor is held politically accountable. Formal deputies, such as members of state licensing boards, are more accountable to the electorate than are purely private standards-setting organizations such as the Consumers Union and the Better Business Bureau. Yet, even purely private organizations are subject to minimal political accountability: they have an incentive to act in a politically responsible way in order to avoid governmental regulation or takeover by elected officials who may be held electorally accountable for relying on the private sector.[93]

Fourth, public regulators are subject to extensive legislative, executive, and judicial oversight.[94] Congress regulates the activities of public regulators through oversight hearings, studies by the General Accounting Office and Congressional Budget Office, changes in enabling legisla-

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pation by a former government employee in certain government matters, 18 U.S.C. § 207 (1982).

To encourage sound governmental decision making, the Federal Administrative Procedure Act requires agencies to follow detailed notice and hearing procedures when it issues regulations or adjudicates cases. 5 U.S.C. §§ 553-558 (1982).

90. Courts have rejected application of the Freedom of Information Act to private organizations. *See, e.g.*, Forsham v. Harris, 445 U.S. 169, 179-80 (1980) (private organization receiving federal financial assistance); Public Citizen Health Research Group v. HEW, 668 F.2d 537, 543-44 (D.C. Cir. 1981) (medical peer review committee); Irwin Memorial Blood Bank v. American Nat'l Red Cross, 640 F.2d 1051, 1057 (9th Cir. 1979) (American Red Cross). The National Academy of Sciences has not qualified as a public agency even though it must report to Congress, performs investigations for departments of the federal government, and receives most of its funds from federal contracts. Lombardo v. Handler, 397 F. Supp. 792, 793-94, 802 (D.C. 1975), *aff'd*, 546 F.2d 1043 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 932 (1977).

91. Federal public regulators are nominated by the President and are subject to confirmation by the U.S. Senate. U.S. CONST. art. II, § 2.

92. *See* Perritt, *supra* note 42, at 1694 ("private delegates are even less politically accountable than agency officials"); Lawrence, *supra* note 16, at 684 ("the sorts of institutional safeguards that guard against self-interested action by public decisionmakers are absent with respect to private lawmakers").

93. *See* Ginsberg, *Administration Efforts to Enhance the Opportunities for Self-Regulation*, 35 LABOR L.J. 731 (1984) (Administrator for Information and Regulatory Affairs Office of U.S. Office of Management and Budget said self-regulation "has been implemented to avoid potential or even threatened governmental regulation. . . . [I]ncreased involvement from self-certification can also help a firm to develop the knowledge it needs to argue against additional outside controls."); *see also infra* text accompanying notes 121-23.

94. *See generally* PIERCE & SHAPIRO, *supra* note 62, § 5.1, chs. 3, 4 (1985). For a study of governmental oversight in New York State, see Abramson, *Regulating the Regulators in New York State — Part I*, 58 N.Y. ST. B.J. 22 (1986).

tion, and appropriations.[95] The President controls the activities of executive agencies through appointment and removal of top policy-making officials, implementation of reorganizational plans, review of proposed regulations, and actions by the Office of Management and Budget to shape budgetary requests and clear legislative proposals.[96] The judiciary, upon the initiative of interested parties, ensures that agency actions stay within constitutional and legislative bounds.[97] The systematic oversight applied to public regulators usually does not apply to private regulators, although sporadic governmental oversight occurs when the public is made aware of deficiencies in private regulation.[98]

Finally, in limited circumstances, public regulators are subject to accountability under tort law: private citizens can sue government officials individually or the government itself for damages, injunctive relief, and declaratory judgment. Even though doctrines of sovereign immunity and official immunity significantly restrict this mode of public accountability, important opportunities exist for tort suits against public regulators.[99] Private regulators are also subject to civil process,[100] but do not enjoy the immunities that protect public agencies.

Only some private regulators are subject to the extensive institutional restrictions of most public regulators. Most private regulators are subject to more limited and less developed restrictions. For example, the powers of private regulators are limited by nondelegation doctrines that prohibit government delegation of essential lawmaking powers and Article III judicial powers.[101] Moreover, if the private activities amount to state action within the meaning of the Fifth and Fourteenth Amendments, the activities are subject to constitutional restrictions.[102] Whether or not other restrictions apply depends on the details and the nature of the relationship between the public sector and the private actor. The type of relationship also determines the category of public-private regulatory relationships into which a private actor will fall.

Of the three categories,[103] Category A actors—formally deputized private regulators—are most likely to be subject to the extensive restrictions set out above. Because these private regulators are by definition

95. PIERCE & SHAPIRO, *supra* note 62, at ch. 3.
96. *Id.* at §§ 4.1, 4.3, 9.5.
97. *Id.* at § 5.1; 5 U.S.C. §§ 701-706 (1982).
98. *See infra* notes 121-23 and accompanying text.
99. *See* B. SCHWARTZ, *supra* note 54, at §§ 9.17-.27; P. SCHUCK, SUING GOVERNMENT (1983).
100. *See infra* notes 109-20 and accompanying text.
101. *See infra* notes 125-84, 270-76 and accompanying text.
102. *See infra* notes 185-253, 272-96 and accompanying text.
103. *See supra* notes 21-52 and accompanying text.

public actors, they are usually subject to constitutional restrictions, disclosure rules, conflict-of-interest laws,[104] and legislative, executive, and judicial oversight.[105]

Category B actors—those who have a formal connection with government—maintain a variety of public-private relationships. The details of each relationship determine whether a particular Category B organization is subject to the conventional system of public accountability and restrictions. For example, if the private actors function as a governmental advisory committee, their activities are at least subject to the open meetings and freedom-of-information laws set forth in the Federal Advisory Committee Act.[106] When a rules-negotiation group acts as an advisory committee it should be subject to the same controls, because in such a case the group's work product is technically a recommendation to an agency head.[107] In contrast, even if a federal agency adopts a private national consensus standard,[108] the private standard developer would probably not be subject to these controls because it is autonomous from the federal agency.

Finally, Category C actors—having no formal connection with government—are purely private actors. Their activities are usually exempt from the constitutional and statutory constraints[109] and the systematic legislative, executive, and judicial oversight that apply to public actors.[110] These private actors, along with some Category B organizations,[111] are instead subject to a less developed, ad hoc system of civil law accountability and restrictions. For instance, if a private secured party seizes the security upon default without obtaining a judicial determination,[112] he must do so without breaching the peace.[113] If a private warehouse owner

104. *See supra* notes 83-90 and accompanying text.

105. *See supra* notes 94-98 and accompanying text.

106. *See* Federal Advisory Committee Act, 5 U.S.C. app. § 10 (1982 & Supp. I 1983, Supp. II 1984, Supp. III 1985, Supp. IV 1986).

107. Federal Advisory Committee Act, 5 U.S.C. app. § 3(2) (1982).

108. *See, e.g.*, 29 U.S.C. § 655(a), (b)(8) (1982) (Secretary of Labor shall promulgate "as an occupational safety or health standard any national consensus standard" unless standard would not improve safety or health.).

109. *See supra* notes 83-100 accompanying text; *infra* notes 231-37 and accompanying text.

110. *See supra* notes 94-98 and accompanying text.

111. *See supra* notes 112-15 and accompanying text.

112. In this situation the secured party acts, as a judge in a creditor-debtor dispute. The secured party determines whether the debtor is in default and then enforces the functional equivalent of a judgment by taking possession of the property. *See, e.g.*, Uniform Commercial Code (UCC) § 9-503.

113. *See, e.g.*, People v. Halliday, 237 A.D. 302, 303, 261 N.Y.S. 342, 344 (3d Dep't 1932) (vendor does not have authority to retake property if doing so will cause breach of peace); Hilliman v. Cobado, 131 Misc. 2d 206, 499 N.Y.S.2d 610 (Sup. Ct. 1986) (secured party who

wants to dispose of stored property, she must do so in accordance with law[114] or be held liable for damages and possibly conversion.[115] If a private retailer does not have a reasonable belief that a person is shoplifting, the retailer might be held liable for defamation and false imprisonment.[116] And if a purely private organization such as the Better Business Bureau publishes a report with reckless disregard for its truth or falsity, the organization might be held liable for defamation and intentional interference with a business relationship.[117] Finally, if a private organization is a " 'quasi-public' institution, [it] owes its members a general duty to provide fair and impartial procedures, to base its decisions on the evidence, and to avoid arbitrary and capricious actions."[118]

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committed breach of peace was not permitted to repossess cattle because he disregarded orders by debtor and sheriff to leave premises).

114. *See, e.g.*, Uniform Commercial Code § 7-210.

115. For a case decided prior to the enactment of UCC § 7-210, see Weinstein v. Santini Transfer Co., 155 Misc. 139, 278 N.Y.S. 388 (City Ct. 1935). In *Weinstein*, a warehouse owner's sale of stored goods for payment of storage charges constituted conversion of goods when he failed to comply with the state lien law. The warehouse owner was liable for the value of the stored goods.

116. *See, e.g.*, Bonkowski v. Arlan's Dep't Store, 12 Mich. App. 88, 162 N.W.2d 347 (1968) (shopper accused of shoplifting by private store security officer), *modified*, 383 Mich. 90, 174 N.W.2d 765 (1970); Zayre of Va., Inc. v. Gowdy, 207 Va. 47, 147 S.E.2d 710 (1966) (plaintiffs recovered damages for defamation and false imprisonment after private store security guard falsely accused them of stealing).

117. Antwerp Diamond Exch. v. Better Business Bureau, 130 Ariz. 523, 637 P.2d 733 (1981); *see also* Montgomery v. Dennison, 363 Pa. 255, 69 A.2d 520 (1949). In *Montgomery*, the director of the Better Business Bureau acted on an anonymous telephone tip and sent out letters alleging that the plaintiff had accepted a bribe. The director was held liable for libel and defamation because he acted without probable cause. Furthermore, the court found he acted with malice by mailing letters to eight people, when one letter to the proper authority would have generated an appropriate investigation. Plaintiff was awarded compensation as well as general damages for pain and suffering.

118. North Jersey Secretarial School v. National Ass'n of Trade and Technical Schools, 597 F. Supp. 477, 479 (D.D.C. 1984), *vacated for want of subject matter jurisdiction*, 802 F.2d 1483 (D.C. Cir. 1986) (district court found due process analogy appropriate and found that due process had been provided); *see also* Marjorie Webster Junior College v. Middle States Ass'n of Colleges and Secondary Schools, 432 F.2d 650, 655 (D.C. Cir. 1970) (increasing importance of private associations has led to increased judicial supervision), *cert. denied*, 400 U.S. 965 (1970); Wisconsin Ave. Assocs. v. 2720 Wisconsin Ave. Coop. Ass'n, 441 A.2d 956, 963 (D.C. 1982) ("Like promoters or directors of a corporation, developers of a housing cooperative occupy a fiduciary position with respect to the individual members of the cooperative."), *cert. denied*, 459 U.S. 827 (1982); Gashgai v. Maine Medical Ass'n, 350 A.2d 571, 575 (Me. 1976) (based on the association's by-laws, court applied a contract rationale to justify judicial intervention into its activities); Falcone v. Middlesex County Medical Soc'y, 34 N.J. 582, 596, 170 A.2d 791, 799 (1961) ("in a case presenting sufficiently compelling factual and policy considerations, judicial relief will be available to compel admission to membership [to a private voluntary membership association]"). *See generally* Chafee, *The Internal Affairs of Associations Not For Profit*, 43 HARV. L. REV. 993 (1930); Note, *Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983 (1963).

Purely private actors are also held accountable to the public under antitrust laws.[119] Holding antitrust laws applicable to an association of manufacturers, the Supreme Court characterized the private actors as "in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations. . . ."[120]

Other limiting influences on Category C regulators are market forces and direct government intervention. If a private regulator performs poorly, for example if the Better Business Bureau does not enforce its code of ethics, a more effective competitor might emerge. Ultimately, the new competitor could put the BBB out of business. Moreover, if an ineffective private regulator comes to the attention of public officials,[121] they might impose specific accountability obligations on the private regulator[122] or assume the responsibilities of the private regulator.[123]

These differing systems of accountability form the crucial distinction between the Fourth and Fifth Branches of government, a distinction that warrants explicit consideration when courts evaluate the constitutionality of the private regulators' activities. The next section, which outlines

119. Antitrust liability might be found when an economically interested party tries to bias the decision-making process of a private standards-setting body, Allied Tube & Conduit Corp. v. Indian Head, Inc. 108 S. Ct. 1931 (1988), when physicians use a private hospital peer-review committee to disadvantage a competitor, Patrick v. Burget, U.S.L.W. 4430 (1988), and when the BBB and an attorney conspire to distribute false and misleading information, Economy Carpets Mfrs. and Distribs. v. Better Business Bureau, 333 So. 2d 765 (La. Ct. App. 1976). Antitrust liability was found when the code of ethics of the American Medical Association made it unethical for doctors to be employed by group health organizations, American Medical Ass'n v. United States, 130 F.2d 233, 245-48 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943), when a major hospital in a community restricted the staff privileges of physicians, Weiss v. York Hosp., 745 F.2d 786, 791 n.1 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985), and when a private standards-setting organization issued an anticompetitive interpretation of a voluntary standard, American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp., 456 U.S. 556 (1982).

120. Fashion Originators' Guild of Am. v. Federal Trade Comm'n, 312 U.S. 457, 465 (1941) (private organization enforced plan to stop others from copying textile and clothing designs).

121. *See supra* note 93 and accompanying text.

122. For example, concerns about the way private standards-setting organizations were developing these standards led Congress to consider imposing restrictions on these private organizations. *See supra* note 48. *See generally* Hanslowe, *supra* note 16, at 132-34 (discussing "process of imposing quasi-constitutional limitations on private economic power groups wielding quasi-governmental powers").

123. For example, congressional dissatisfaction with the adequacy of voluntary safety standards is one reason for the creation of the Consumer Product Safety Commission to establish governmental safety standards. *See* NATIONAL COMMISSION ON PRODUCT SAFETY, FINAL REPORT OF THE NATIONAL COMMISSION ON PRODUCT SAFETY (1970); Hamilton, *supra* note 33, at 1400-02.

key constitutional doctrines for evaluating private sector activities, describes how the Supreme Court has treated this crucial distinction.

III. The Incoherent Constitutional Status of Private Regulators

The path to understanding the constitutional status of private regulators is paved with four different constitutional doctrines: nondelegation of lawmaking, nondelegation of Article III judicial power, procedural due process, and state action. These doctrines form the constitutional foundation of a Fifth Branch of government. Unfortunately, each of these areas is fraught with confusion.[124] This confusion is compounded when it becomes necessary to consider the different systems of accountability for public and private regulators.

A. Federal Nondelegation Doctrines

The federal Constitution prohibits the delegation of essential federal lawmaking power and Article III judicial power.[125] Such delegations are generally unconstitutional.[126] The nondelegation doctrines are easy to state, but they present difficult conceptual problems when applied.

The nondelegation doctrines are derived from the separation of powers principle, which is implicit in the structure of the Constitution. The separation of powers principle suggests that the core governmental powers of lawmaking and adjudication should be exercised by separate branches of government. Exercise of each of these powers is subject to a system of checks and balances that limits governmental powers, and in

124. Professor Kenneth Culp Davis concluded that the case law of nondelegation to private parties "has not crystallized any consistent principles." 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 193 (1978). Soon after the Supreme Court decided Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), Professor Martin Redish characterized the Article III cases as "a distinguished—if largely confused and unprincipled—line of cases." Redish, *Legislative Courts, Administrative Agencies and The Northern Pipeline Decision*, 1983 DUKE L.J. 197, 228 (1983). He also criticized the procedural due process cases for failing to make progress "toward establishing broad guidelines for treating the question of how much process is due." Redish & Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 456 (1986). The late Judge Friendly declared that Professor Charles Black's 1967 description of state action cases as a "conceptual disaster area" is still accurate. Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1290 (1982); *see* Black, *The Supreme Court, 1966 Term — Forward: State Action, Equal Protection, and California Proposition Fourteen*, 84 HARV. L. REV. 69, 95 (1967).

125. Because delegation of executive power is not usually the subject of private regulation, such delegation is not discussed in this section.

126. *See infra* notes 131, 158-62 and accompanying text.

turn protects the public from governmental tyranny.[127] But the separate branches were not intended to be airtight; as a matter of governmental necessity, the exercise of these powers has not been, and could not be, fully separated. Shared exercise of powers, including delegation to administrative agencies, is essential to effective government.[128]

Although the Supreme Court has made an effort to accommodate delegations, the Court has failed to produce a coherent approach to evaluating their constitutionality.[129] The delegation of power to private actors puts even greater stress on the nondelegation doctrines because private actors are not subject to the same system of constitutional, statutory, and oversight restrictions as public actors.[130] But this crucial difference in accountability has been handled erratically, and sometimes even ignored, by the Supreme Court. As a result, the Court has also produced an incoherent approach to the constitutional evaluation of private delegations.

1. Federal Nondelegation of Lawmaking

The nondelegation of lawmaking doctrine does not bar all delega-

127. *See, e.g.*, Myers v. United States, 272 U.S. 52, 293 (1926) ("The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."). *See generally* C. MONTESQUIEU, THE SPIRIT OF LAWS in 38 GREAT BOOKS OF THE WESTERN WORLD 70 (Hutchins ed. 1952); THE FEDERALIST No. 47, at 336 (J. Madison) (B. Wright ed. 1961); THE FEDERALIST No. 48, at 343 (J. Madison) (B. Wright ed. 1961); THE FEDERALIST No. 51, at 356 (J. Madison) (B. Wright ed. 1961).

128. *See, e.g.*, Thomas v. Union Carbide Agricultural Prods. Co., 473 U.S. 568, 594 (1985) ("To hold otherwise [in this Article III case] would be to erect a rigid and formalistic restraint on the ability of Congress to adopt innovative measures."); Sunshine Anthracite Coal Co. v. Adkins, Collector of Internal Revenue, 310 U.S. 381, 398 (1940) ("Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility."); *see also* R. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSION chs. VI, X, XI (1941). *See generally* THE FEDERALIST Nos. 47 & 48 (J. Madison); 1 K. DAVIS, *supra* note 124, at §§ 2:2-2:5, 3:2-3:4; L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 28-35 (1965).

129. *See infra* notes 131-46, 158-79 and accompanying text.

130. *See, e.g.,*, National Ass'n of Regulatory Util. Comm'rs v. FCC, 737 F.2d 1095 (D.C. Cir. 1984); *see also supra* notes 80-123 and accompanying text.

> As attention to this area of our law [nondelegation doctrine] grows, it refocuses thought on one of the rationales against excessive delegation: the harm done thereby to principles of political accountability. Such harm is doubled in degree in the context of a transfer of authority from Congress to an agency and then from agency to private individuals. The vitality of challenges to the former type of transfer is suspect, but to the latter, unquestionable.

National Ass'n of Regulatory Util. Comm'rs., 737 F.2d at 1143 n.41.

tion of lawmaking powers, only delegation of "essential" functions.[131] Throughout the history of nondelegation doctrine, the United States Supreme Court has employed a series of flexible,[132] incoherent,[133] and "theoretically unsatisfactory"[134] constitutional tests. These tests include "contingency" theory: the legislature may make a legislative determination conditional upon a delegate's finding that a certain contingency has occurred;[135] "fill up the details" theory: the legislature may enact a primary standard and then delegate to an administrator the limited responsibility of implementing the details;[136] and "intelligible principle" theory: delegation is proper if the legislature articulates an objective to guide the exercise of delegated powers.[137] The Court has also used narrow statu-

131. *See, e.g.*, Panama Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935):

> The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested. . . . The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.

See also Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42-43 (1825):

> It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. . . . The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.

132. *See* L. JAFFE, *supra* note 128, at 48-73, 85.

133. *See* Schoenbrod, *The Delegation Doctrine: Could The Court Give It Substance?*, 83 MICH. L. REV. 1223, 1229-31 (1985).

134. *See* J. FREEDMAN, *supra* note 62, at 78-80.

135. *See, e.g.*, Field v. Clark, 143 U.S. 649, 680, 692-93 (1892). Upholding the delegation, the *Field* Court found that the legislature had properly exercised its discretion by providing that tariffs should be imposed on imported goods when the President finds that such tariffs are needed. The delegation to the President was limited to ascertaining the requisite fact that tariffs were needed. *See also* The Cargo of Brig Aurora, 11 U.S. (7 Cranch) 382, 384 (1813). The *Aurora* Court upheld delegation to the President of the power to declare when Europeans "ceased to violate the neutral commerce of the United States," a finding which would terminate a congressionally imposed retaliatory embargo against European trade. For a more detailed discussion of this theory, see S. BARBER, THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER, 53-63 (1975).

136. *See, e.g*, Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825) (upholding congressional delegation to federal courts to promulgate their own procedural rules; courts were only "fill[ing] up the details"); *see also* United States v. Grimaud, 220 U.S. 506, 509, 516-17 (1911) (upholding a congressional delegation to the Secretary of Agriculture to promulgate rules and regulations to preserve public forest lands). For a more detailed discussion of this theory, see S. BARBER, *supra* note 135, at 63-72.

137. *See, e.g.*, J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 401-02, 409 (1928). In *Hampton*, the Court upheld delegation to the President of authority to adjust tariff rates when the rates failed to "equalize . . . differences in costs of production." Even though the delegation gave the President authority to exercise his discretion, the Court upheld the

tory construction to avoid the delegation issue.[138]

These diverse judicial approaches have not made it difficult to predict how the Supreme Court will decide a delegation question because, regardless of its doctrinal basis, the Court has almost always upheld delegations of power.[139] Until recently, it was suggested that the nondelegation doctrine was "abandoned,"[140] was "dead,"[141] was "almost a complete failure,"[142] "has had no reality in the holdings"[143] and, in a more positive characterization, operated only as a "caveat, a hint of reserved power."[144]

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delegated power because Congress had laid down "an intelligible principle" to define the authority. *See also* Buttfield v. Stranahan, 192 U.S. 470, 494, 496 (1904) (upholding delegation to administrator authority to establish uniform standards for importing tea because Congress had fixed a "primary standard"—to exclude the lowest grade of tea); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). The two later cases, *Panama Refining* and *Schechter Poultry*, are significant not only because they are the only two cases declaring delegation of lawmaking power to a government official unconstitutional, but also because the Court's reasoning in each case involved a variation on the "intelligible principle" theory. In *Panama Refining*, the Court found that delegation to the President failed to include an intelligible principle for regulating interstate transportation of petroleum products in contravention of state law. 293 U.S. at 406-08, 410, 415-20. In *Schechter Poultry*, the Court could not find an intelligible principle that would support the delegation to the President of the authority to approve "codes of fair competition" proposed by the private sector. 295 U.S. at 529-42. *See also* Yakus v. United States, 321 U.S. 414, 419-20 (1944). In *Yakus* the Court used an intelligible principle analysis to uphold broad delegation of economic power to fix prices for goods and services. The standards required the administrator to effectuate the statutory objectives and to issue regulations that "in his judgment [are] generally fair and equitable." The Supreme Court recently applied the intelligible principle test to uphold the delegation of "significant discretion" to the independent U.S. Sentencing Commission. Mistretta v. United States, 109 S. Ct. 647, 654-58 (1989). For a more detailed discussion of this theory, see S. BARBER, *supra* note 135, at 72-107.

138. *See, e.g.*, Kent v. Dulles, 257 U.S. 116, 117-18, 123-30 (1958) (narrowly construing Secretary of State's authority to issue passports, Court invalidated regulation denying passports to members of Communist Party); *see also* National Cable Television Ass'n v. United States, 415 U.S. 336, 337, 341-43 (1974) (narrowly construing enabling statute of Federal Communications Commission, Court avoided constitutional question raised by alleged delegation of power to tax). For a recent example of this technique, see Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 645 (1980) (restricting authority of Occupational Safety and Health Administration by interpreting broad delegation narrowly and concluding that "[i]n the absence of a clear mandate in the act, it is unreasonable to assume that Congress intended to give the [administrator] the unprecedented power").

139. The only two exceptions are *Panama Refining* and *Schechter Poultry*. *See supra* note 137. *See generally* K. DAVIS, *supra* note 124, at §§ 3:1, 3:2.

140. Justice Marshall has concluded that the doctrine "has been virtually abandoned by the Court for all practical purposes" except when personal liberties are involved. Federal Power Comm'n v. New England Power Co., 415 U.S. 345, 352-53 (1974) (Marshall, J., concurring).

141. Schoenbrod, *supra* note 133, at 1233.

142. Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969).

143. 1 K. DAVIS, *supra* note 124, at 150.

144. L. JAFFE, *supra* note 71, at 85.

A growing number of Supreme Court justices have expressed renewed interest in applying the nondelegation doctrine to congressional delegations.[145] This renewed interest has stimulated a variety of proposed answers to the question: When is a delegation unconstitutional? The diversity of the responses indicates the great difficulty involved in formulating a coherent nondelegation doctrine.[146]

145. *See* Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 671-88 (1980) (Rehnquist, J., concurring); American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 543-48 (1981) (Rehnquist, J., dissenting, Burger, C.J., joining). Justice Rehnquist would have held that the delegation of legislative power to an administrative agency was unconstitutional in *American Petroleum Inst.*, a position with which Chief Justice Burger agreed in *American Textile Mfrs.* In Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 944-59 (1983), a majority of the Court, consisting of Chief Justice Burger joined by Justices Brennan, Marshall, Blackmun, Stevens, and O'Connor, held unconstitutional a legislative veto provision that improperly delegated legislative power to one house of Congress. In Bowsher v. Synar, 478 U.S. 714 (1986), Justice Burger joined by Justices Brennan, Powell, Rehnquist, and O'Connor, held unconstitutional a delegation of executive power to an officer of Congress—the Comptroller General. Concurring separately, Justice Stevens, with whom Justice Marshall joined, would also have held the delegation an unconstitutional delegation of legislative power. 478 U.S. at 737.

146. These proposals include the following: a theory of separation of powers at "the very apex of government," under which separation of functions and checks and balances apply only to Congress, the President, and the Supreme Court, *see* Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 667 (1984); an "institutional competence" theory under which courts would declare unconstitutional any delegation of power if its proper exercise is "closely dependent upon the unique institutional competence of Congress," *see* J. FREEDMAN, *supra* note 62, at 94; and the "doctrine of constitutional supremacy," under which the Constitution is viewed as the supreme law that specifies a certain arrangement of offices and powers, and Congress may not destroy this constitutional arrangement through abdication, *see* S. BARBER, *supra* note 135, at 36-37. *See also* Freedman, *Delegation of Power and Institutional Competence* (Book Review), 43 U. CHI. L. REV. 307, 310-311 (1976). Another proposal is "Article I review/ultra vires review," under which courts would first undertake a review under Article I to determine whether the legislature has performed its fundamental constitutional task of setting basic governmental policy. *See* Note, *Rethinking the Nondelegation Doctrine*, 62 B.U.L. REV. 257 (1982). According to this approach, courts would rarely assess a legislature's power to delegate because most administrative action is interstitial. The first part of this inquiry is limited to ensuring that the legislature has provided the necessary guidelines. In the second part of the analysis, a court determines whether the agency has acted within the scope of its delegated power.

Another approach is a theory of "strict application" of the nondelegation doctrine with an enlightened view of legislative power. Schoenbrod, *supra* note 133, at 1252-60, 1275-81. Professor Schoenbrod focuses on whether the delegation involves power that is "legislative" in character. Many of the hard cases, he contends, do not involve legislative power. He suggests that legislative power does not involve interpretation or application of rules, nor the exercise of powers that are "executive" in character. He further refines the definition of legislative power by distinguishing between "rules" statutes and "goals" statutes.

Finally, Professor Davis proposes a theory of nondelegation based on adequate administrative safeguards against arbitrary powers. 1 K. DAVIS, *supra* note 124, at § 3:15. Professor Davis recommends adopting a reconstituted nondelegation doctrine whose "purpose should be neither to prevent delegation of legislative power nor to require meaningful statutory standards; its purpose should be the deeper one of protecting against unnecessary and uncontrolled

In private-delegation cases, the United States Supreme Court has further complicated nondelegation theory by failing to give careful attention to the crucial distinction between a delegation to a private actor and a delegation to a public one: the differences in their levels of accountability.[147] The Court's failure is illustrated by a series of four landmark New Deal cases in which the Court struck down two delegations and upheld two delegations to the private sector.[148]

In both *Schechter Poultry Corp. v. United States*[149] and *Carter v. Carter Coal Co.*,[150] the Supreme Court gave considerable weight to the difference in the public accountability of public and private regulators. In both cases, the Court invalidated the delegations. In *Schechter*, the Court asked:

> But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and

discretionary power." *Id.* at 206. Courts should uphold a delegation "as long as the broad purpose is discernible and . . . protections against arbitrary power are provided." *Id.* at 208.

147. *See supra* notes 80-123 and accompanying text.

148. Recent decisions of lower federal courts also have inconsistantly analyzed private-sector action. Some decisions have given attention to the difference in levels of accountability between public and private actors. *See, e.g.*, Cospito v. Heckler, 742 F.2d 72, 90 (3d Cir. 1984) (Becker, J., dissenting) ("[T]he JCAH [Joint Commission on the Accreditation of Hospitals] was not accountable to either the government or the individuals most affected by its decisions." The JCAH, a private organization, was not required to hear all viewpoints, its regulations were not subject to governmental review, and it had unfettered discretion when applying regulations.), *cert. denied*, 407 U.S. 1131 (1985); Todd & Co. v. SEC, 557 F.2d 1008, 1014 (3d Cir. 1977) ("The S.E.C. . . . should not cavalierly dismiss procedural errors affecting the rights of those subjected to sanctions but should insist upon meticulous compliance by the private organization [NASD]."); Birth Control Centers, Inc. v. Reizen, 508 F. Supp. 1366, 1375 (E.D. Mich. 1981) ("The defect lies in the delegation of unguided power to a private entity, whose self-interest could color its decision to assist licensure of a competitor."), *vacated in part on other grounds*, 743 F.2d 326 (1984).

Most decisions, however, have ignored this crucial distinction, limiting their analyses merely to recognizing the private characteristics of the actor. *See, e.g.*, Poe v. Menghini, 339 F. Supp. 986, 994 (D. Kan. 1972); United Citizens Party v. South Carolina State Election Comm'n, 319 F. Supp. 784, 787 (D.S.C. 1970). Other decisions have upheld delegations to private regulators by ignoring the differences in accountability and relying instead on reasoning used by the Court in Currin v. Wallace, 306 U.S. 1 (1939), and United States v. Rock Royal Co-op., 307 U.S. 533 (1939). *See, e.g.*, Prudential Property and Casualty Co. v. Insurance Comm'n, 534 F. Supp. 571, 580 (D.S.C. 1982); Corum v. Beth Israel Medical Center, 373 F. Supp. 550, 552-53 (S.D.N.Y. 1974); Simon v. Cameron, 337 F. Supp. 1380, 1382-83 (C.D. Cal. 1970). For a discussion of *Currin* and *Rock Royal Co-op.*, see *infra* notes 153-56, 300-07 and accompanying text.

149. 295 U.S. 495 (1935) (challenging federal statute that authorized President to approve codes of fair competition on application of trade group).

150. 298 U.S. 238 (1936) (challenging statute that authorized less than all producers and mine workers to determine maximum daily and weekly hours of labor and labor wages for all producers and workers).

> beneficent for the rehabilitation and expansion of their trade or industries? . . . The answer is obvious. Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress.[151]

In *Carter Coal*, the Court was even more direct, concluding, "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."[152]

Several years later, however, in two other cases the Supreme Court ignored this difference between public and private regulators and upheld congressional delegation of legislative power to the private sector.[153] In one case, private tobacco growers were vested with the power to veto any action by the Secretary of Agriculture designating a tobacco market.[154] In the other case, private milk producers were vested with the power to veto any agricultural marketing order proposed by the Secretary of Agriculture with the approval of the President.[155] The private actors in these cases were given the authority to make a governmental decision jointly with a public officer. And, in both cases, the Court failed to recognize this public-private partnership, examining the constitutionality of the delegation to private actors under the same test that it applied to public delegations. Thus, in part because the Supreme Court has failed to give consistent attention to the public accountability of private delegates,[156] the "Court has yet to state a satisfactory theory of the principles gov-

151. *Schechter*, 295 U.S. at 537.

152. *Carter Coal*, 298 U.S. at 311.

153. Two turn-of-the-century cases provide another example of the Supreme Court's failure to analyze the involvement of the private sector in governmental decision making. St. Louis Iron Mountain Ry. v. Taylor, 210 U.S. 281 (1908) (rejecting argument that Congress had unconstitutionally delegated power to American Railway Association, Court failed to recognize private sector's role); Buttfield v. Stranahan, 192 U.S. 470 (1904) (upholding authority of Secretary of the Treasury to determine which teas may be imported, Court ignored private sector's role in developing standards for tea); *see also* Parker v. Brown, 317 U.S. 341 (1943) (upholding state statute, Court ignored authority delegated to private sector to approve an action before government could institute it). *Cf.* Highland Farms Dairy v. Agnew, 300 U.S. 608, 613-14 (1937) (recognizing argument that distinction exists between delegation to official agencies and delegation to private ones).

154. Currin v. Wallace, 306 U.S. 1, 6 (1939). Under the federal statute, in any market designated as a tobacco market, no tobacco could be sold without being inspected and certified in accordance with agency standards.

155. United States v. Rock Royal Co-op., 307 U.S. 533, 547-48 (1939).

156. *Currin*, 306 U.S. at 15-16. The Court viewed the authority given to the private sector to veto a proposed tobacco market (*Currin*) or to veto a proposed agricultural marketing order (*Rock Royal Co-op.*) as a decision by Congress to "merely place a restriction upon its own regulation by withholding its operation." *Currin*, 306 U.S. at 15. The Court viewed the power

erning the delegation of power to private parties."[157]

2. *Federal Nondelegation of Article III Judicial Power*

The nondelegation of judicial power doctrine generally bars the delegation of Article III cases from non-Article III tribunals.[158] The purpose of Article III is to preserve an independent federal judiciary, which is essential for maintaining the constitutional system of separation of powers. An independent judiciary also protects "individual litigants from decisionmakers susceptible to majoritarian pressures."[159] Article III establishes an independent judiciary by creating a separate judicial branch[160] and granting life tenure to federal judges during their "good behavior," with the guarantee that their compensation will not be re-

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to veto as the mere power to fill in the details. *Id.*, at 15-16; *see infra* notes 300-07 and accompanying text.

The few commentators who have tried to formulate a coherent private delegation theory have paid specific attention to the reduced public accountability of private actors. For instance, Professor Freedman concludes that the key to clarifying nondelegation doctrine is to focus on the "character of the delegate." Freedman, *supra* note 146, at 334. He asks whether the "delegate is competent to perform the specific task delegated to him." *Id.* at 335. In answering this question, Professor Freedman notes that:

> One of the reasons that delegations of legislative power to the President are so often sustained undoubtedly relates to a recognition of his special character as a delegate. He is a public official, sworn to uphold the Constitution and laws of the United States, constrained to public spiritedness by the nation's traditions and history's certain judgment, and within the reach of a number of political and finally electoral processes.

Id. at 334. In contrast, Professor Freedman points out, "[r]arely are private parties exercising delegated legislative power circumscribed by such profound imperatives." *Id.*

In a detailed study of private delegations, another commentator has suggested that eight factors should be weighed when applying the nondelegation doctrine. At least four of these factors concern the degree to which the private actor is subject to public accountability. Liebmann, *supra* note 21, at 717-18. These four factors are as follows: (1) "Are the actions of private delegates subject to no further public or judicial review, or to review only upon attenuated standards such as the substantial evidence rule?"; (2) "Are the private delegates chosen by a process involving public consent, as by nomination or confirmation by elected officials?"; (3) "Are the private delegates sworn to oaths of office?"; and (4) "Do the private delegates have pecuniary interests in the determinations to be made?" *Id.* at 718.

157. Freedman, *supra* note 146, at 321; *see also* 1 K. DAVIS, *supra* note 124, at 193.

158. Professor Redish, however, contends that the work of a non-Article III tribunal "cannot be functionally or theoretically distinguished" from the work of an administrative agency. Redish, *supra* note 124, at 201.

159. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 860 (1986) (Brennan, J., dissenting, Marshall, J., joining).

160. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

duced during their tenure.[161] Article III also specifies the types of cases that fall within the jurisdiction of the federal judicial branch.[162] Unfortunately, the Supreme Court has not coherently elaborated on which cases must be decided by an Article III court and which cases may be delegated.[163]

In *Northern Pipeline Construction Co. v. Marathon Pipe Co.*,[164] a plurality attempted to clarify the nondelegation of Article III judicial power doctrine by reducing the precedent

> to three narrow situations not subject to [Article III restrictions] each recognizing a circumstance in which the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers.[165]

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161. "The Judges . . . shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1.

162. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a state shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. CONST. art. III, § 2, cls. 1, 2.

163. When the Supreme Court adopted the "inherently judicial" test, which simply bars a non-Article III court from exercising any power that is "inherently judicial," the Court failed to define "inherently judicial." *See, e.g.*, Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856) (proceeding against governmental customs collector did not involve exercise of judicial power); *see also Ex parte* Bakelite Corp., 279 U.S. 438 (1929) (holding Court of Customs Appeals an Article I court). In a more recent dissenting opinion, Justice White pointed out that "the Court [in *Murray's Lessee*] presented no examples of such issues that are judicial 'by nature' and simply failed to acknowledge that Art. I courts already sanctioned by the Court . . . were deciding such issues all the time." Northern Pipeline Construction Co. v. Marathon Pipe Co., 458 U.S. 50, 107 (1982); *see also* Redish, *supra* note 124, at 199.

Another test used by the Court, the "adjunct test," is no easier to administer. Under this test, "when Congress creates a substantive federal right, it [can assign] to an adjunct some functions [but the adjunct's functions] must be limited in such a way that 'the essential attributes' of judicial power are retained in the Art. III court." *Northern Pipeline*, 458 U.S. at 80-81. The meaning of "the essential attributes of judicial power" is unclear.

164. 458 U.S. 50 (1982).

165. *Id.* at 64. Justice White, in his dissent, disagreed with the plurality's assertion that the three situations were narrow ones. Justice White stated that "[t]he plurality opinion has the

Of the three "narrow" exceptions to nondelegation,[166] only the one concerning the public-private rights test[167] is likely to have any constitutional implications for the activities of private regulators. The Court has upheld delegations of power to adjudicate cases involving "public rights,"[168] but has strictly prohibited delegations involving "private rights."[169]

In *Thomas v. Union Carbide Agricultural Products Co.*,[170] the Supreme Court moved away from *Northern Pipeline's* strict application of the public-private rights test and instead applied the test with pragmatic flexibility.[171] The Court blurred the private-public rights distinction by stating that Congress had created "a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary."[172]

The Supreme Court recently continued down its pragmatic path in

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appearance of limiting Art. I courts only because it fails to add together the sum of its parts. Rather than limiting each other, the principles relied upon complement each other; together they cover virtually the whole domain of possible areas of adjudication." *Id.* at 105.

166. The plurality's first two "narrow" situations cover the establishment of territorial courts, *id.* at 64, and courts-martial, *id.* at 66.

167. Justice White, dissenting, said he thought the public-private rights distinction had received its "death blow" in Crowell v. Benson, 285 U.S. 22 (1932). *Northern Pipeline*, 458 U.S. at 109. Strictly applying the public-private rights distinction, the plurality held that the delegation to Article I bankruptcy judges was unconstitutional because bankruptcy courts adjudicate state-created private rights. *Id.* at 71.

168. The *Northern Pipeline* plurality stated:

> [T]he public-rights doctrine also draws upon the principle of separation of powers, and a historical understanding that certain prerogatives were reserved to the political Branches of Government. The doctrine extends only to matters arising 'between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments' . . . and only to matters that historically could have been determined exclusively by those departments."

Northern Pipeline, 458 U.S. at 67-68 (quoting Crowell v. Benson, 285 U.S. 22, 50 (1932)).

169. "In contrast, 'the liability of one individual to another under the law as defined,' *Crowell v. Benson*, is a matter of private rights. Our precedents clearly establish that *only* controversies in the former category [of public rights] may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination." *Id.* at 69-70 (emphasis in original) (citation omitted).

170. 473 U.S. 568 (1985). This case involved an Article III challenge to a compulsory arbitration program established under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). The Act authorizes the Environmental Protection Agency to permit one pesticide company to use data submitted by another company only if the applicant offers to compensate the original company for use of the data. If the private parties are unable to agree on the amount of compensation, either party may initiate binding arbitration proceedings. *Id.* at 571-75 (1975).

171. *Id.* at 589.

172. *Id.* at 594.

Commodity Futures Trading Commission v. Schor,[173] in which it upheld an administrative agency's jurisdiction over an Article III common-law counterclaim. The Court noted that "in reviewing Article III challenges, we have weighed a number of factors . . . with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary."[174] The Court further muddled the public-private rights dichotomy by carving out of the private rights category a subcategory for state common-law rights—the type of claim "assumed to be at the 'core' of matters normally reserved to Article III courts."[175] Rather than prohibit the delegation of all such private state claims, the Court undertook a "searching" examination of the congressional arrangement to determine what effect delegation would have on separation of powers.[176]

This practical, but highly judgmental, approach has the advantage of giving Congress the flexibility "to adopt innovative measures."[177] However, this approach also makes it more difficult to determine whether a scheme is constitutional because it reduces the "degree of coherence in this area of law."[178] Moreover, the practical approach may inappropriately favor upholding delegations to non-Article III tribunals.[179]

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173. 478 U.S. 833 (1986).

174. *Id.* at 851. The Court concluded that "there is little practical reason to find that this single deviation from the agency model is fatal to the congressional scheme." *Id.* at 852.

175. *Id.* at 853.

176. In *Schor*, the Court found that the "limited CFTC [Commodity Futures Trading Commission] jurisdiction over a narrow class of common law claims as an incident to the CFTC's primary, and unchallenged, adjudicative function does not create a substantial threat to the separation of powers." *Id.* at 854 (citing Thomas v. Union Carbide Agricultural Prods. Co., 473 U.S. 568, 589 (1985)). The Court viewed "the magnitude of any intrusion on the Judicial Branch [as] *de minimis*." *Id.* at 856.

177. *Union Carbide*, 473 U.S. at 594; *see also* Thomas, *Formalism and Functionalism: From* Northern Pipeline *To* Thomas v. Union Carbide Agricultural Products Co., 37 SYRACUSE L. REV. 1003, 1020-36 (1986).

178. *Schor*, 478 U.S. at 851.

179. In his *Schor* dissent, Justice Brennan suggested that this practical approach involves balancing legislative interests in promoting the benefits of the legislative enactment against competing interests in judicial independence and that the balance is "weighted against judicial independence." *Id.* at 863. Professor Redish agrees with this:

> A built-in bias will invariably favor the legislative interest because there is an inherent inequality in the weighing process: an immediately recognizable, concrete interest is balanced against an interest wholly prophylactic in nature, and therefore one whose benefits will never be immediately recognizable. . . . [S]alary and tenure provisions protect against subtle or unstated pressure on the judiciary. Presumably, it was because it would be virtually impossible to detect undue pressure that the framers chose to insert these prophylactic protections. Thus, any case-by-case balancing process will always tend to find the benefit of maintaining these protections illusory.

In *Union Carbide*, the only recent Supreme Court case involving an Article III challenge to a private adjudication, the majority at least recognized that the non-Article III judges would be private actors.[180] But in upholding the delegation, the majority did not analyze the implications of this crucial fact; instead it concluded summarily that delegation did not "diminish the likelihood of impartial decisionmaking."[181] Justice Brennan, concurring, failed even to observe the private sector involvement; instead, he mischaracterized the actors as public ones.[182]

This failure to analyze the implications of relying on private adjudicators[183] would not threaten the independence of the judiciary if the Court construed Article III strictly to prohibit any non-Article III tribunal from adjudicating private rights. But, as the Court shifts toward the more pragmatic and flexible approach adopted in *Union Carbide* and *Schor*,[184] its failure becomes significant. By not considering the extent to

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Redish, *supra* note 124, at 221-22; *see also* Fullerton, *No Light At The End Of The Pipeline: Confusion Surrounds Legislative Courts*, 49 BROOKLYN L. REV. 207, 235-40 (1983). Professor Redish criticizes the public-private rights dichotomy as "a standard wholly unwarranted by constitutional language, history, policy, or theory." Redish, *supra* note 124, at 204.

180. *Union Carbide*, 473 U.S. 568 (1985). The non-Article III decision maker would have been a private arbitrator appointed by the Federal Mediation and Conciliation Service and subject to its regulations. The arbitrator's decision would have been final, except for limited Article III judicial review of "fraud, misrepresentation or other misconduct." *Id.* at 573-74 n.1 (quoting FIFRA § 3(c)(1)(D)(ii), 7 U.S.C. § 136a(c)(1)(D)(ii)). The regulations of the Federal Mediation and Conciliation Service emphasize that

> [p]ersons who are listed on the Roster and are selected or appointed to hear arbitration matters or to serve as factfinders do not become employees of the Federal Government by virtue of their selection or appointment. Following selection or appointment, the arbitrator's relationship is solely with the parties to the dispute.

29 C.F.R § 1404.4(c) (1987).

181. The majority concluded that "[r]emoving the task of evaluation from agency personnel to *civilian* arbitrators, selected by agreement of the parties or appointed on a case-by-case basis by an independent federal agency, surely does not diminish the likelihood of impartial decision-making, free from political influence." *Union Carbide*, 473 U.S. at 590 (emphasis added).

182. Brennan noted that "at its heart the dispute involves the exercise of authority by a Federal Government arbitrator in the course of administration of FIFRA's comprehensive regulatory scheme. As such it partakes of the characteristics of a standard agency adjudication." *Id.* at 600-01.

183. Recent decisions of lower federal courts also have failed to analyze the implications of private sector involvement. *See, e.g.*, Board of Trustees v. Thompson Bldg. Materials, Inc., 749 F.2d 1396, 1406 (9th Cir. 1984) (upholding delegation to arbitrators "in this limited area of congressionally created statutory rights" where Article III courts retain "authority to decide de novo all issues of law and to review factual findings for a clear preponderance of the evidence . . ."), *cert. denied*, 471 U.S. 1054 (1985); United Transp. Union v. Consolidated Rail Corp., 593 F. Supp. 1346, 1352 (Regional Rail Reorg. Ct. 1984) ("Since Congress may require parties to vindicate statutory rights before particularized tribunals, we do not believe a limited [Article III] review of these tribunals presents an Article III problem.").

184. *See supra* notes 170-79 and accompanying text.

which private actors are free from official restraints, the Court may not accurately assess the impact of private delegation on the independence of the judiciary. This neglect may undermine the principle of separation of powers.

B. Procedural Due Process

If delegation is state action,[185] the delegate must provide procedural due process to the parties whose interests are at stake.[186] Determining what procedures a delegated actor must employ is not an easy task. The Constitution provides that government cannot deprive any person "of life, liberty, or property, without due process of law,"[187] but this general language does not provide much guidance. Nor has the Court developed a reliable judicial approach to determining what process is due.

Whether an individual involved in a dispute has a constitutional right to be heard depends on whether the dispute is legislative or adjudicative.[188] In general, a legislative dispute involves legislative facts and formulation of general rules for future conduct.[189] An individual usually will not have a personal right to be heard in a legislative dispute.[190] In contrast, an adjudicative dispute involves adjudicative facts and determination of the present rights of parties, based on current or past events.[191] Under these circumstances, an individual usually has a right to be heard.[192]

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185. *See infra* notes 214-52 and accompanying text.

186. Before procedural due process restrictions apply, the private action must constitute state action and affect a constitutionally protected interest. Private regulatory action might also be subject to review under substantive due process standards. *See infra* notes 286-89 and accompanying text.

187. U.S. CONST. amends. V, XIV, § 1.

188. *See infra* notes 189-95 and accompanying text.

189. *See, e.g.*, Prentis v. Atlantic Coastline Co., 211 U.S. 210, 226 (1908); 5 U.S.C. § 551(4) (1976); *see also* K. DAVIS, *supra* note 57, at §§ 7:1-7:3.

190. *See, e.g.*, Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, 435 U.S. 519, 524 (1978) (Court will rarely overturn agency rulemaking for failure to use more procedures than required by statute), *remand*, 685 F.2d 459 (D.C. Cir. 1982); *see also* Atkins v. Parker, 472 U.S. 115, 130 (1985) ("[T]he participants in the food-stamp program had no greater right to advance notice of the legislative change . . . than did any other voters."); Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1165-66 (D.C. Cir. 1979) ("When a proceeding is classified as rulemaking, due process ordinarily does not demand procedures more rigorous than those provided by Congress."), *cert. denied*, 447 U.S. 921 (1980). For an interesting argument that due process applies to public and delegated private lawmaking, see Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976); *see also* Lawrence, *supra* note 16, at 682-84.

191. *See* sources cited *supra* note 189; 5 U.S.C. § 551(6) (1982).

192. *See, e.g.*, Philadelphia Co. v. SEC, 175 F.2d 808, 817 (D.C. Cir. 1948) (Under the Due Process Clause, "adjudicatory action cannot be validly taken by any tribunal, whether judicial or administrative, except upon a hearing."), *vacated as moot*, 337 U.S. 901 (1949) (per curiam);

This important distinction between legislative and adjudicative disputes crystallized at the beginning of the century in *Londoner v. Denver*[193] and *Bi-Metallic Co. v. Colorado*.[194] A comparison of the two cases reveals that the line between legislative and adjudicative disputes is difficult to draw. Even though both cases involved decisions by governmental bodies to increase property taxes, the Supreme Court recognized a due process right to be heard in one case, but not the other.[195]

When a dispute is categorized as adjudicative—meaning that a right to be heard exists and that a constitutionally protected interest is at stake[196]—the issue of what process is due arises. The Supreme Court continues to view due process as "flexible," requiring "such procedural protection as the particular situation demands."[197]

The Supreme Court determines what process is due by applying a

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see also 2 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 17.1 (1986) [hereinafter ROTUNDA & NOWAK].

193. 210 U.S. 373 (1908).

194. 239 U.S. 441 (1915).

195. In *Bi-Metallic*, the Court distinguished *Londoner* as follows:

> In *Londoner v. Denver*, . . . a local board had to determine 'whether, in what amount, and upon whom' a tax for paving a street should be levied for special benefits. A relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds, and it was held that they had a right to a hearing. But that decision is far from reaching a general determination dealing only with the principle upon which all the assessments in a county had been laid [as in *Bi-Metallic*].

Id. at 445-46.

Professor Davis attempted to clarify the distinction by distinguishing between adjudicative and legislative facts:

> Facts pertaining to the parties and their businesses and activities, that is, adjudicative facts, are . . . not to be determined without giving the parties a chance to know and to meet any evidence that may be unfavorable to them, that is, without providing the parties an opportunity for trial. The reason is that the parties know more about the facts concerning themselves and their activities than anyone else is likely to know, and the parties are therefore in an especially good position to rebut or explain evidence that bears upon adjudicative facts. Yet people who are not necessarily parties, frequently the agencies and their staffs, may often be the masters of legislative facts. Because the parties may often have little or nothing to contribute to the development of legislative facts, the method of trial often is not required for the determination of disputed issues about legislative facts.

1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02, at 413 (1st ed. 1958). Professor Davis' refinement has been criticized as "circular" and "elusive." Nathanson, Book Review, 70 YALE L.J. 1210, 1211 (1961) (reviewing K. DAVIS, *supra*). For additional criticisms, see Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1268 (1975); Kestenbaum, *Rulemaking Beyond APA: Criteria for Trial-Type Procedures and the FTC Improvement Act*, 44 GEO. WASH. L. REV. 679, 691-93 (1976); Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 521 (1970).

196. *See infra* note 286.

197. Schweiker v. McClure, 456 U.S. 188, 200 (1982) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

three-part balancing test. In *Mathews v. Eldridge*,[198] the Court balanced the private claimant's interest, "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," against the pertinent governmental interest.[199]

This balancing test has been severely criticized.[200] Some scholars argue that "one cannot accurately predict how any specific case will be decided . . . unless one knows the personal value systems of those doing the balancing."[201] Others suggest that because the balancing test "weighs an inevitable and immediately recognizable administrative cost against a largely prophylactic interest in the use of specific procedural protections. . . . it is likely that the Court's balancing test . . . will generally find in favor of the governmental interest."[202] Although alternatives have been proposed,[203] the Supreme Court has nevertheless remained

198. 424 U.S. 319 (1976) (Social Security recipient has no right to evidentiary hearing prior to termination of disability benefits).

199. *Id.* at 335.

200. *See, e.g.*, K. DAVIS, ADMINISTRATIVE LAW TREATISE 241 (2d ed. 1978 & Supp. 1982) (*Eldridge* factors "do not include the kind of question to be determined"); ROTUNDA & NOWAK, *supra* note 192, § 17.8, at 265; Marshaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 30 (1976) ("[T]he failing of *Eldridge* is its focus on questions of technique rather than on questions of value."); Redish & Marshall, *supra* note 124, at 473; Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 154-56 (1978) (balancing "would inevitably dilute or eliminate dignitary protection").

201. ROTUNDA & NOWAK, *supra* note 192, § 17.8, at 265.

202. Redish & Marshall, *supra* note 124, at 473.

203. Justice Rehnquist has advocated a positivist approach to procedural due process, concluding "that where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet." Arnett v. Kennedy, 416 U.S. 134, 153-54 (1974) (plurality opinion), *reh'g denied*, 417 U.S. 977 (1974); *see also* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 559, (1985) (Rehnquist, J., dissenting). This positivist approach has the benefit of clarity and predictability: whatever procedure the legislature provides will satisfy due process. This position has not yet been supported by a majority of the Supreme Court, and its constitutional underpinnings have been extensively criticized. *See, e.g.*, Redish & Marshall, *supra* note 124, at 457-68.

A variety of proposals have been advanced by legal scholars. One recommends the adoption of procedures designed to preserve core due process values. *See id.* at 474-505, stating that "the purpose of the clause is to ensure the most accurate decision possible," *id.* at 476, and that "most of the proposed values are inherently tied to the instrumental justification" of producing an accurate decision, *id.* at 482. Redish and Marshall conclude that "the participation of an independent adjudicator is . . . an essential [due process] safeguard." *Id.* at 475. Another commentator proposes implementation of management systems rather than new adversarial procedures. *See* Marshaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772 (1974). For a criticism of this proposal, see

loyal to the *Eldridge* balancing test.[204]

Moreover, the Supreme Court has failed in procedural due process cases, as it has failed in nondelegation cases,[205] to distinguish consistently between public and private delegations of power. For example, in a case charging a state board of optometry with bias,[206] the lower court focused on the public-private relationship. The court concluded that the optometry board's actions "would possibly redound to the personal benefit" of the private practitioners serving on it.[207] Based on this finding, the Supreme Court held that the personal interests of the board members were sufficient grounds for disqualification.[208] In *Schweiker v. McClure*,[209] on the other hand, in which the use of private insurance carriers to adjudicate claims under a governmental insurance plan was challenged, the Court barely acknowledged that Congress had delegated adjudicatory responsibilities to the private sector and not to a public agency.[210] The Court, however, did not give this fact any weight. Instead, the Court treated the private regulators as if they were public ones.[211] The Court indulged a presumption that the private hearing officers were unbiased and held that the complaining party had the burden of showing bias or deficient procedures.[212]

B. SCHWARTZ, *supra* note 54, § 5.31, at 266-67. Yet another commentator favors the development of several archetypes of fair procedures and their adaptation to particular situations. *See* Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1144-49 (1984).

204. In 1985 alone, the members of the Supreme Court applied the *Eldrige* balancing test in at least three cases. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542-48 (1985) (finding a cause of action for challenging adequacy of procedures for terminating school district employees); Black v. Romano, 471 U.S. 606, 617-25 (1985) (Marshall, J., concurring, Brennan, J., joining) (upholding adequacy of procedures for revoking prisoner's probation); Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 319-34 (1985) (upholding constitutionality of limitation on fees for legal representation in service-related death or disability claims).

205. *See supra* notes 147-56, 180-84 and accompanying text.

206. Gibson v. Berryhill, 411 U.S. 564 (1973).

207. *Id.* at 578. The District Court noted that optometrists in private practice accounted for slightly more than half of all the optometrists in Alabama, but filled all the positions on the Board of Optometry. Therefore, any decisions to suspend operations of businesses employing optometrists would benefit members of the board and their colleagues in private practice. *Id.*; *see also* Wall v. American Optometric Ass'n, 379 F. Supp. 175 (N.D. Ga. 1974) (Board of Examiners in Optometry, composed of only dispensing optometrists, deprived other optometrists of right to impartial tribunal), *aff'd sub nom.* Wall v. Hardwick, 419 U.S. 888 (1974).

208. *Gibson*, 411 U.S. at 579.

209. 456 U.S. 188 (1982) (describing statutory authority to use private insurance carriers and specific procedures carriers must follow when resolving insurance claims).

210. *Id.* at 188.

211. *Id.* at 195 ("[T]he hearing officers in this case serve in a quasi-judicial capacity, similar in many respects to that of administrative law judges.").

212. *Id.* at 195-96, 200.

The implications of *McClure* are extraordinary: as long as congressional delegation does not violate the nondelegation of Article III judicial power doctrine, Congress has the constitutional authority to delegate judicial power to private actors who need only comply with the same general due process requirements as public actors. By treating public and private actors similarly, this proposition ignores the crucial differences in their public accountability,[213] and therefore permits private actors to exercise judicial power subject to fewer safeguards than their public counterparts.

C. State Action Doctrine

State action cases[214] under the Due Process Clauses[215] present the only constitutional cases in which the Court is faced squarely with the question whether a particular action is governmental or purely private.[216] This is a critical issue for private regulation: if the private regulator's action is purely private, then for the most part the action is free from constitutional restraints.[217] If, on the other hand, the private regulator's action is governmental in character, it is "state action," and is subject to constitutional restrictions.[218] Unfortunately, the Supreme Court has not produced a coherent state action doctrine.[219]

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213. *See supra* notes 80-123 and accompanying text; B. SCHWARTZ, *supra* note 54, § 6.14, at 312 (asking if *McClure* is "a return to non-ALJ or even non-APA hearing officers?").

214. The term "state action" is a misnomer. To be precise, "state action" applies only to actions by a state that are subject to restraints under the Fourteenth Amendment, and "federal action" applies to actions by the federal government that are subject to restraints under the Fifth Amendment. The more general phrase "governmental action" encompasses both state and federal action. *See* ROTUNDA & NOWAK, *supra* note 192, at 157.

215. The Court makes an effort to accommodate the constitutional policies, including state action doctrine, that are designed to protect the public against the risk of governmental tyranny and to preserve for the private sector a zone of freedom. *See, e.g.*, Lugar v. Edmondson Oil Co., 457 U.S. 922, 936-37 (1982); Flagg Bros. v. Brooks, 436 U.S. 149, 156 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349-50 (1974); *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1149 (1978 & Supp. 1979); Phillips, *The Inevitable Incoherence of Modern State Action Doctrine*, 28 ST. LOUIS U.L.J. 683, 723-24 (1984).

216. As discussed above, the Court has either not recognized, or given erratic attention to, the private character of the actors when it has applied the nondelegation of lawmaking doctrine, the nondelegation of Article III judicial power doctrine, and procedural due process. *See supra* notes 147-56, 180-84, 206-13 and accompanying text.

217. Only the Thirteenth Amendment, which prohibits slavery, applies to private action. U.S. CONST. amend. XIII. *See* ROTUNDA & NOWAK, *supra* note 192, at 156-57.

218. As recently restated by the Supreme Court, "Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment's Due Process Clause, and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be." NCAA v. Tarkanian, 109 S. Ct. 454, 461 (1988).

219. The doctrine has been called a "conceptual disaster area," Black, *The Supreme Court, 1966 Term — Forward: "State Action," Equal Protection, and California's Proposition 14*, 81

A recent line of creditor-debtor cases illustrates the doctrinal confusion.[220] The core facts in all but one[221] of these cases are similar: the creditors were private actors who adjudicated disputes. In each case, a private creditor decided unilaterally that money was owed and took government-like action to collect the debt with only nominal judicial supervision.[222]

In the first four cases, *Sniadach v. Family Finance Corp.*,[223] *Fuentes v. Shevin*,[224] *Mitchell v. W.T. Grant Co.*,[225] and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,[226] the Supreme Court never discussed whether the private creditors debt-collection procedures constituted state action, but the Court implicitly found state action in each case when it considered

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HARV. L. REV. 69, 95 (1967); Friendly, *The Public-Private Penumbra — Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1290 (1982), "inevitabl[y] incoheren[t]," Phillips, *supra* note 215, at 683, and easily manipulated "to protect the autonomy of business enterprises against the claims of consumers, minorities, and other relatively powerless citizens," Brest, *State Action and Liberal Theory: A Case Note On* Flagg Brothers, Inc. v. Brooks, 130 U. PA. L. REV. 1296, 1330 (1982). Judge Friendly concluded that "[i]f we now know more about the location of the border between public and private action, this is rather because the Court has pricked out more reference points than because it has elaborated any satisfying theory." Friendly, *supra*, at 1291. And even the Supreme Court has stated that it is an "impossible task" to "fashion and apply a precise formula" for determining the presence of state action. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

220. Lugar v. Edmondson Oil Co., 457 U.S. 922; Flagg Bros., Inc. v. Brooks, 436 U.S. 149; North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

221. In *Mitchell*, 416 U.S. 600, the private creditor applied *ex parte* to a judge, as opposed to a court clerk, for a writ of sequestration under a state statute. The judge issued the writ based on a clear and detailed evidentiary showing that grounds for issuing the writ existed. *Id.* at 601-07. *Cf. infra* note 222.

222. In *Sniadach*, 395 U.S. 337, the lawyer of the private creditor initiated prejudgment garnishment of machinery under a state statute. In an *ex parte* application, he requested the clerk of the court to issue a summons and then served the garnishee, who froze a portion of the debtor's wages. *Id.* at 338-39. In *Fuentes*, 407 U.S. 67, the private creditor applied *ex parte* to a court clerk for a prejudgment writ of replevin under a state statute. The clerk issued the writ based on the creditor's bare assertion that the creditor was entitled to the writ. *Id.* at 69-78. In *North Georgia Finishing*, 419 U.S. 601, a private creditor applied *ex parte* to a court clerk for a prejudgment garnishment under a state statute. The clerk issued the writ based on a conclusory affidavit of the creditor that the creditor was entitled to it. *Id.* at 601-07. In *Flagg Bros.*, 436 U.S. 149, before obtaining a money judgment or even a temporary *ex parte* order, the private creditor—a warehouse owner—decided to sell stored goods to satisfy moving and storage fees allegedly owed him by the property owner. *Id.* at 151-55. In *Lugar*, 457 U.S. 922, the private creditor applied *ex parte* to a court clerk for a prejudgment writ of attachment under a state statute. The clerk issued the writ based on the allegation that the debtor was, or might be, disposing of property in order to defeat his creditors. *Id.* at 924-25.

223. 395 U.S. 337 (1969).

224. 407 U.S. 67 (1972).

225. 416 U.S. 600 (1974).

226. 419 U.S. 601 (1975).

the issue whether the due process rights of the debtors had been violated.[227] In contrast, the Court in *Flagg Bros. v. Brooks*[228] and *Lugar v. Edmondson Oil Co.*[229] specifically addressed the state action issue and, in so doing, tried to reconcile the four earlier creditor-debtor cases. The results in these two cases illustrate the Court's difficulty in applying state action doctrine.[230]

The Supreme Court has so narrowed the public function component of the state action doctrine as to render it almost meaningless.[231] The Court now recognizes state action in private activities only when they are traditionally and "exclusively" governmental.[232] Since it began applying this "public function" test, the Court has not found state action.[233] The Court's conceptual uncertainty with this test was illustrated in *Flagg Bros.*, in which the Court held that "the settlement of disputes between debtors and creditors is not traditionally an exclusive public function."[234] In this narrow and controversial application of the public function doc-

227. In *Sniadach, Fuentes,* and *North Georgia Finishing,* the Court found due process violations.

228. 436 U.S. 149 (1978).

229. 457 U.S. 922 (1982).

230. In *Flagg Bros.*, the majority simply concluded that, "This total absence of overt official involvement plainly distinguishes this case from earlier decisions imposing procedural restrictions on creditors' remedies." 436 U.S. at 157. The dissent disagreed vigorously. Justice Stevens claimed that the majority's view—that the case involved only a private deprivation of property—"is fundamentally inconsistent with, if not foreclosed by, our prior decisions which have imposed procedural restrictions on the State's authorization of certain creditors' remedies." *Id.* at 169 (Stevens, J., dissenting, White, J., and Marshall, J., joining).

The *Lugar* majority opinion stated that:

> Beginning with *Sniadach v. Family Finance Corp.* . . . the Court has consistently held that constitutional requirements of due process apply to garnishment and prejudgment attachment procedures whenever officers of the State act jointly with a creditor in securing the property in dispute. . . . [P]rivate use of the challenged state procedures with the help of state officials constitutes state action.

457 U.S. at 932-33. The dissent viewed the precedent differently. Justice Powell noted that "[n]one of the cases alleged that the private creditor was a joint actor with the State. . . ." *Id.* at 952 (Powell, J., dissenting, Rehnquist, J., and O'Connor, J., joining).

231. For a description of the history and evolution of the public function doctrine, see ROTUNDA & NOWAK, *supra* note 192, at § 16.2; M. SCHWARTZ & J. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES § 5.11 (1986).

232. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352-53 (1974) (provision of electrical service by private utility operating under government franchise is not a public function); *see also* Phillips, *supra* note 215, at 705.

233. San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 107 S. Ct. 2971 (1987) (coordination of amateur sports); Blum v. Yaretsky, 457 U.S. 991 (1982) (provision of nursing home care); Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (special education for children); Flagg Bros. v. Brooks, 436 U.S. 149 (1978) (settlement of disputes); Hudgens v. NLRB, 424 U.S. 507 (1976) (operation of shopping mall).

234. *Flagg Bros.*, 436 U.S. at 161-62.

trine,[235] the majority undermined their clear holding not only by failing to adhere to its view of the exclusivity test,[236] but also by leaving open the possibility that other forms of dispute settlement might constitute a public function.[237]

The Supreme Court's state action theory is easily manipulated. For example, when applying the "government regulation" test,[238] the Court has used the following formula:

> The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State. . . . [T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.[239]

A comparison of the majority and dissenting opinions in four of the five most recent cases[240] demonstrates how easy it is to manipulate this judicial approach: each case finds majority and dissent applying the same test for state action and arriving at opposite results.

In *Jackson v. Metropolitan Edison Co.*,[241] the Court found that a

235. In *Flagg Bros.*, Justice Stevens vigorously disagreed with this application of the exclusivity test. He concluded that "[w]hether termed 'traditional,' 'exclusive,' or 'significant,' the state power to order binding, nonconsensual resolution of a conflict between debtor and creditor is exactly the sort of power with which the Due Process Clause is concerned." *Id.* at 176.

236. Justice Stevens, in his dissent, pointed out that, "As the Court is forced to recognize, its notion of exclusivity simply cannot be squared with the wide range of functions that are typically considered sovereign functions, such as education, fire and police protection, and tax collection." *Id.* at 173 n.10.

237. The majority stated, "This is not to say that dispute resolution between creditors and debtors involves a category of human affairs that is never subject to these constitutional constraints. We merely address the public-function doctrine as respondents would apply it to this case." *Id.* at 162 n.12. For a discussion of the majority's application of the public function doctrine see *id.* at 172 n.8 (Stevens, J., dissenting).

238. Under the government regulation test, the Court determines whether the government regulates the challenged private action so extensively that the action constitutes state action. *See, e.g.*, Public Utils. Comm'n v. Pollak, 343 U.S. 451, 461-63 (1952) (government regulation of bus company was sufficient to constitute government action). The test, however, was limited in Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175-77 (1972) (government regulation of liquor license did not implicate discriminatory policies of private club enough to constitute state action), and Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349-59 (1974) (insufficiently close nexus between state and challenged action of regulated entity).

239. *Jackson*, 419 U.S. at 350-51 (citing *Moose Lodge*, 407 U.S. at 176-77 (1972)); *see also* San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 107 S. Ct. 2971, 2984-86 (1987); Blum v. Yaretsky, 457 U.S. 991, 1004 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 841 (1982).

240. The fifth case is *San Francisco Arts & Athletics*, 107 S. Ct. 2971 (1987). Holding that the U.S. Olympic Committee was not a governmental actor, the majority said "[e]ven extensive regulation by the government does not transform the actions of the regulated entity into those of the government." *Id.* at 2985. Neither of the dissenting opinions addressed this issue.

241. 419 U.S. 345 (1974).

utility company's termination of service was not state action, even though the utility was extensively regulated, because the state did not "put its own weight on the side of the" utility's procedures for terminating electrical service.[242] Justice Marshall, dissenting, found that the State had in fact approved the private utility's termination procedures.[243]

In *Blum v. Yaretsky*,[244] the Court found that decisions by private physicians and nursing home administrators were not state action, despite extensive state regulation of the nursing home, because the decisions to discharge or transfer patients "ultimately turn[ed] on medical judgments made by private parties according to professional standards that [were] not established by the State."[245] Justice Brennan, however, in his dissent, concluded that "[t]he State has set forth precisely the standards upon which the level-of-care determinations are to be made, and has delegated administration of the program to [private] nursing home operators."[246]

In *Rendell-Baker v. Kohn*,[247] the Court found that a private school's decisions were not state action despite extensive regulation of the school because the "regulators showed relatively little interest in the school's personnel matters" that led to the termination of the teachers and a vocational counselor.[248] In his dissent, Justice Marshall concluded that the private school was subject to a variety of regulations covering "almost every aspect of a private school's operations, including . . . personnel policies."[249]

Finally, in *Moose Lodge No. 107 v. Irvis*,[250] the Court found that the guest policies of a private club were not state action even though the club was extensively regulated in connection with its liquor license, because the regulations played "absolutely no part in establishing or enforcing [private] guest policies" that barred serving blacks.[251] In his dissent, Justice Brennan found the State's "liquor regulations intertwine[d] the State with the operation of the Lodge bar in a 'significant way [and lent the State's] authority to the sordid business of racial discrimination.' "[252]

242. *Id.* at 357.
243. *Id.* at 370 (Marshall, J., dissenting).
244. 457 U.S. 991 (1982).
245. *Id.* at 1008.
246. *Id.* at 1026-27 (Brennan, J., dissenting, Marshall, J., joining).
247. 457 U.S. 830 (1982).
248. *Id.* at 841.
249. *Id.* at 846 (Marshall, J., dissenting, Brennan, J., joining).
250. 407 U.S. 163 (1972).
251. *Id.* at 175.
252. *Id.* at 186 (Brennan, J., dissenting, Marshall, J., joining).

Unlike nondelegation and procedural due process cases, state action cases specifically consider the private character of the actors. In particular, the Court has had to examine public-private relationships in order to determine whether particular actions constitute state action. Unfortunately, the Court has not produced a coherent doctrine when it finally directly confronted the application of the Constitution to private actions.[253]

D. Nondelegation Doctrine and Due Process: Commingling of Concepts

When it has examined the constitutionality of private regulation, the Supreme Court has not maintained a clear distinction between the nondelegation of legislative power doctrine and the Due Process Clause. Instead, the Court has commingled the two concepts and, as a result, has produced some murky rationales for its decisions.

The most glaring example of this commingling is found in *Carter Coal*.[254] Striking down a congressional delegation of lawmaking to the private sector, the Court inexplicably relied on the Due Process Clause.[255] A series of early state zoning cases in which the Supreme Court used the Due Process Clause as a vehicle for applying the nondelegation principle to state enactments also serve as examples of the Court's commingling.[256]

253. Professor Tribe recently revised his earlier description of the state action doctrine as "inevitably bankrupt." L. TRIBE, *supra* note 215, at 1149-57 (1978). He now concludes "that the Supreme Court's state action cases display a surprisingly coherent pattern once one gets past their often neuralgic prose and views the cases through a suitably sequenced combination of two different lenses." L. TRIBE, CONSTITUTIONAL CHOICES 248 (1985). Professor Tribe suggests first using a "close-up lens" to focus on the actual participants—the "state actors," and then using a "telephoto lens . . . to examine the substantive law that provides the picture's background." *Id.* In contrast, Professor Phillips attempts "to demonstrate that the incoherence of modern state action law is virtually inevitable" due to public-private blurring caused by the rise to power of large institutionalized private groups, an activist government, and the "corporate state," and by a growing concern for the protection of individual rights. Phillips, *supra* note 215, at 721-38.

254. Carter v. Carter Coal Co., 298 U.S. 238 (1936).

255. The Court held, "This is legislative delegation in its most obnoxious form. . . . 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." *Id.* at 311-12 (citing Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1934); Eubank v. Richmond, 226 U.S. 137, 143 (1912); Seattle Trust Co. v. Roberge, 278 U.S. 116, 121-122 (1928)). *But see* Lathrop v. Donohue, 367 U.S. 820, 855 (1961) (Harlan, J., concurring) (arguing that *Schecter* was based on Article I grant of legislative power rather than the Due Process Clause).

256. *Seattle Trust Co.*, 278 U.S. at 121-23 (1928) (delegation of power to landowners was unconstitutional under Due Process Clause because statute lacked standards to restrain decision making of landowners, omitted any provision for review, and did not bind private landowners to any official duty); *see also* New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96,

This commingling of concepts has also occurred in some of the creditor-debtor cases. In *Fuentes*, for example, the Court implicated the nondelegation principle when it found a state statute violated due process because it gave private parties the authority to "unilaterally invoke state power to replevy goods from another."[257] In *Flagg Bros.*, Justice Stevens noted in dissent that he would have applied the Due Process Clause to a state statute which, he said, delegated the power to resolve disputes to a private party.[258]

This commingling of the nondelegation doctrine and the Due Process Clause is a persistent practice.[259] Some commingling is probably the result of sloppy judicial analysis, and some is probably deliberate—to justify applying the federal Constitution to state statutes. Regardless of its cause, the mixing of concepts has produced muddled judicial rationales. Commentators have even suggested that courts should replace the nondelegation doctrine with the Due Process Clause.[260] Until the Supreme Court articulates a consistent approach, the commingling of nondelegation and due process concepts is likely to continue.

114-27 (1978) (Stevens, J., dissenting) (Stevens would have held delegation of power to temporarily prohibit opening of new car dealership an "unconstitutional exercise of uncontrolled government power" under Due Process Clause, relying in part on *Carter Coal*); City of Eastlake v. Forest City Enters, 426 U.S. 668 (1976); Cusack Co. v. City of Chicago, 242 U.S. 526 (1917). Of course, the Court could not have used the federal nondelegation doctrine in these cases because the doctrine does not apply to state delegations of lawmaking.

257. Fuentes v. Shevin, 407 U.S. 67, 93 (1972).

258. Flagg Bros. v. Brooks, 436 U.S. 149, 176 (1978) (Stevens, J., dissenting, White, J., and Marshall, J., joining) ("[T]he state power to order binding, nonconsensual resolution of a conflict . . . is exactly the sort of power with which the Due Process Clause is concerned. And the State's delegation of that power to a private party is, accordingly, subject to due process scrutiny.").

259. In 1938, the nondelegation of legislative power doctrine was thought to be "just as easily and logically available under the Due Process Clause." Cushman, *The Constitutional Status of the Independant Regulatory Commissions*, 24 CORNELL L.Q. 13, 33 (1938). And in 1975, 37 years later, essentially the same observation was made: "several recent cases decided on 'state action' grounds might just as easily have relied on the delegation doctrine. If certain conduct may be labeled 'state action' for purposes of the fourteenth amendment, there is often equal room for nondelegation to operate." Liebmann, *supra* note 21, at 653-54; *see also* Note, *supra* note 146, at 262 n.24 (concluding that "[n]ondelegation review is often associated with the constitutional guarantee of due process").

260. In Professor Jaffe's classic 1937 article, he suggested that it might be desirable to drop delegation as a constitutional category and instead "regard the question simply as one of reasonableness within the due process clause." Jaffe, *supra* note 21, at 248. Professor Lawrence, in the most recent article on the subject, rejected the use of the state version of nondelegation doctrine and recommended that state courts evaluate the exercise of private governmental power under their state due process provisions. Lawrence, *supra* note 16, at 662, 672-75, 694-95. *See also* Note, *The State Courts and Delegation of Public Authority to Private Groups*, 67 HARV. L. REV. 1398, 1408 (1954) (recommending that rule against delegation be regarded as extension of due process).

While failing to consistently recognize the differences between public and private delegations,[261] the Supreme Court has produced incoherent doctrines on federal nondelegation of lawmaking, federal nondelegation of Article III judicial power, due process, and state action when private regulators are involved. The next section proposes an analysis that integrates these four areas of constitutional law and addresses their interrelationships. This analysis should promote a systematic and coherent constitutional evaluation of the activities of private regulators.

IV. Promoting a Constitutionally Coherent Analysis of Activities of Private Regulators

A. A Systematic Five-Step Inquiry

Although the Court's application of the four constitutional doctrines just examined contributes to the confusion about the constitutional status of private regulatory activity, the four doctrines also provide the basis for a more coherent judicial approach. Using the following analysis will not eliminate all of the confusion, but it will narrow the issues by integrating the four key areas of constitutional law into a systematic five-step inquiry that highlights private involvement in the exercise of governmental powers. A court analyzing a private regulatory action should consider the following questions:

(1) Does the case involve a private actor?
(2) Does the private actor make laws and/or adjudicate disputes?
(3) Is there an unconstitutional delegation of federal lawmaking or Article III judicial power?
(4) Does the action by the private regulator constitute state action?
(5) Does the state action comply with due process?

1. Does the Case Involve a Private Actor?

At the outset, a court should determine whether a case involves a private actor. As discussed above, the Supreme Court has failed frequently to consider this threshold question in nondelegation and procedural due process cases.[262] In some cases, the Court has applied the same constitutional analysis to private actors that it applies to public actors.[263] The Court's approach overlooks that private actors are not accountable to the public to the same extent as public actors. Private actors enjoy a "zone of freedom" under the Constitution to do things the

261. *See supra* notes 125-260 and accompanying text.
262. *See supra* notes 147-56, 180-84, 205-13 and accompanying text.
263. *See supra* notes 153-56 and accompanying text; *infra* notes 300-07 and accompanying text.

government cannot,[264] and they are exempt from many of the obligations and restrictions that apply to public actors.[265] Therefore, it is important to recognize at the outset whether a private actor is involved.. If there is no private actor, this inquiry ends and the Court can proceed with its standard analysis of government actions. If a private actor is involved,[266] however, this threshold fact indicates the need to proceed to the next step of this inquiry.

2. *Does the Private Actor Make Laws and/or Adjudicate Disputes?*

The next step is to determine whether the private actor is exercising core governmental powers.[267] If the private actor is not making laws[268] or adjudicating disputes,[269] there is no constitutional issue and this analysis is concluded. But the finding that a private actor is exercising governmental type power does not, in itself, violate the Constitution. Such a finding merely places the constitutional inquiry into the context of private regulatory activity.

3. *Is There an Unconstitutional Delegation of Federal Lawmaking or Article III Judicial Power?*

Neither of the two nondelegation doctrines has been interpreted so strictly as to bar all delegations. A strict interpretation would simplify the application of the nondelegation doctrines, but the Court has recognized that Congress needs flexibility to effect innovative legislative schemes.[270] Thus, the Court has upheld a broad range of delegations, putting forward various theories for distinguishing between permissible

264. *See supra* notes 83-87, 216-17 and accompanying text.

265. *See supra* notes 80-123 and accompanying text.

266. Usually it is easy to determine whether a case involves a private actor. One interesting exception occurred in United States v. Mazurie, 419 U.S. 544 (1975), in which the issue was whether Indian tribes were private actors. The Supreme Court reversed the court of appeal's conclusion that Congress' delegation of authority to tribal officials was invalid because the tribe was a private organization. The Supreme Court held that the Indian tribes were not just private organizations, they were "unique aggregations possessing attributes of sovereignty." *Id.* at 556-57.

267. *See supra* notes 12-16, 54-61 and accompanying text. This Article examines only the lawmaking and adjudicative powers.

268. *See, e.g.*, Sunshine Coal Co. v. Adkins, 310 U.S. 381, 388-99 (1940) (private coal producers did not make laws but only made proposals to National Bituminous Coal Commission, which had authority to approve, disapprove, or modify proposals).

269. *See, e.g.*, New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 108-09 (1978) (protesting dealers were not adjudicating disputes or exercising judicial power when their protests temporarily enjoined the establishment of new dealerships); Mitchell v. W. T. Grant Co., 416 U.S. 600, 616 (1974) (private creditor was not adjudicating dispute but only making *ex parte* showing to judge who made the decision).

270. *See supra* notes 125-84 and accompanying text.

and impermissible delegations of lawmaking[271] and judicial power.[272]

Theories of nondelegation of lawmaking have in common a definition of lawmaking that obligates Congress to make "important choices of social policy" and to provide the delegate "with an 'intelligible principle' to guide the exercise of the delegated discretion."[273] Theories of nondelegation of judicial power have in common a conception that judicial power must be exercised by Article III judges.[274] Any private delegation that oversteps these narrow definitions of lawmaking[275] and judicial power[276] is unconstitutional; such a conclusion ends this analysis. That does not mean, however, that all other delegations of lawmaking and judicial power are constitutional. The private delegation might still constitute state action, and if it does, it must comply with due process.

4. Does the Action By the Private Regulator Constitute State Action?

This question confronts directly the distinction between purely private conduct and private conduct that constitutes state action. State actions are subject to constitutional restrictions.[277]

A court's finding that a private action (step one) resembles lawmaking or adjudication (step two) does not necessarily lead to the conclusion that the action constitutes state action.[278] The three categories of public-

271. Theories include the "contingency" theory, "filling up the details" theory, and the "intelligible principle" theory. *See supra* notes 135-37 and accompanying text.

272. Theories include the "inherently judicial" power test, the "adjunct" test, and the "public right-private right" test. *See supra* notes 164-79 and accompanying text.

273. Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring); *see also* B. SCHWARTZ, supra note 57, at §§ 2.1-2.2. *But see* 1 K. DAVIS, *supra* note 124, at §§ 3:1-3:7 (Supreme Court has upheld many delegations that lack standard or "intelligible principle").

274. *See, e.g.*, Northern Pipeline Constr. Co. v. Marathon Pipe Co., 458 U.S. 50 (1982) (attempting to clarify definition of Article III judicial power by reducing precedent to three situations in which Article III restrictions do not apply).

275. *See, e.g., Industrial Union Dep't*, 448 U.S. at 672, 687. Justice Rehnquist concurred in this public agency case, stating that Congress had improperly delegated its lawmaking responsibility for deciding "whether the statistical possibility of future deaths should ever be disregarded in light of the economic costs of preventing those deaths." He felt this was a critical policy decision that Congress must make.

276. *See, e.g.*, Thomas v. Union Carbide Agricultural Prods. Co., 473 U.S. 568 (1985) (Court held delegation to private arbitrators did not violate Article III); *Northern Pipeline Constr. Co.*, 458 U.S. at 50 (plurality in public agency case, holding delegation of judicial power to non-Article III bankruptcy courts violated Article III).

277. For an explanation of the difference between state and federal action cases, see *supra* note 214.

278. The Court did not find state action in *Moose Lodge*, even though it recognized that the Supreme Lodge had adopted a bylaw that barred non-Caucasian guests from visiting local Moose Lodges. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166, 176, 179 (1972). Nor did the Court find state action in *Flagg Bros.*, even though it recognized that private enforcement

private relationships set forth in this Article[279] could guide a judicial approach to the state action question.

The most complex state action analysis arises in the context of delegation to Category B actors. This category encompasses a wide range of public-private relationships,[280] which are subject to review under the public function test[281] and the various governmental contact tests.[282] But merely identifying a case as one that falls within Category B does not simplify the state action analysis; the tests must still be understood and applied anew to each public-private relationship. The real benefit of categorizing cases lies in identifying the easier cases for state action analysis—the *non*-Category B cases.

Category A represents the easiest set of cases for finding state action. In these cases, the government has formally deputized a private actor. Since, by definition, the private actor has been made a public actor, its action will constitute state action.[283]

Category C encompasses the cases least likely to involve state action. Here, government has no formal connection with the activities of

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of a warehouse owner's lien meant the warehouse owner was resolving disputes between private parties. Flagg Bros. v. Brooks, 436 U.S. 149, 157-64 (1978); *see also* Blum v. Yaretsky, 457 U.S. 991 (1982) (decisions of private nursing homes to discharge or transfer Medicaid patients did not constitute state action); Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (private school decisions to discharge employees did not constitute state action).

279. *See supra* notes 21-52 and accompanying text.

280. *See supra* notes 38-51 and accompanying text.

281. *See supra* notes 231-52 and accompanying text.

282. The various governmental contact tests, including the government regulation test, *see supra* notes 238-52 and accompanying text, encompass a group of state action tests that focus on the relationship between governement and the private actor. The inquiry may be cast in different ways. Has the state provided sufficient encouragement or command to the private action to constitute state action? *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948). *But cf.* Flagg Bros. v. Brooks, 436 U.S. 149, 164-66 (1978) (in sufficient state encouragement when there is mere denial of judicial relief or when statute "permits but does not compel" private sale). Does the government have a symbiotic relationship with the private actor? *See, e.g.*, Burton v. Wilmington Parking Auth. 365 U.S. 715, 722 (1961). Is government providing sufficient direct aid to the challenged private action? *See, e.g.*, Gilmore v. City of Montgomery, 417 U.S. 556 (1974); Norwood v. Harrison, 413 U.S. 455 (1973). *But cf.* San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 107 S. Ct. 2971 (1987) (USOC did not become state actor when Congress helped it obtain funding); Blum v. Yaretsky, 457 U.S. 991 (1982) (substantial state funding of private nursing homes did not make them state actors); Rendell-Baker v. Kohn, 457 U.S. 830, 841 (1982) ("Acts of . . . private contractors [schools] do not become acts of the government by reason of their significant or even total engagement in performing public contracts"). *See generally*, ROTUNDA & NOWAK, *supra* note 192, at § 16.4.

283. *See, e.g.*, Gibson v. Berryhill, 411 U.S. 564 (1973) (state board of optometry, composed of private optometrists, must comply with due process); *see also supra* notes 23-24 and accompanying text.

the private regulator.[284] But when they perform government-like functions, private regulators are subject to review under the limited public function test of the state action doctrine.[285]

If a private actor can fairly be characterized as a private regulator whose actions constitute state action, the last step in the analysis is to determine whether the actions comply with due process.

5. *Does the State Action Comply with Due Process?*

Even if the private actor (step one) makes laws or adjudicates disputes (step two) pursuant to a delegation that does not violate the nondelegation doctrines (step three), and the activities constitute state action (step four), the private regulator is not yet beyond constitutional scrutiny. Assuming that a constitutionally protected interest is at stake,[286] the private regulator must comply with due process. Although private regulation is also limited by substantive due process,[287] a proce-

284. But if their activities are government funded, this may be enough of a governmental connection to convert the funded activities into Category B activities. If so, the private action would be analyzed under the governmental regulation tests, *see supra* note 238.

285. As the public function doctrine has been substantially narrowed, it probably does not present a practical constitutional threat to private activities. *See supra* notes 231-33 and accompanying text. This is especially true after *Flagg Bros.*, in which the Court held that private settlement of disputes is not an exclusive public function. Flagg Bros. v. Brooks, 436 U.S. 149, 161 (1978). Nonetheless, a narrow view of the doctrine still presents a theoretical threat. Even in *Flagg Bros.*, the Court qualified its holding by emphasizing that "[t]his is not to say that dispute resolution between creditors and debtors involves a category of human affairs that is never subject to constitutional constraints." *Id.* at 162 n.12. Furthermore, the Court has found state action in older public function cases even though no formal delegation to the private actor took place. *See* Evans v. Newton, 382 U.S. 296 (1966) (private park operated with racial restriction), *remand*, 221 Ga. 870, 148 S.E.2d 329 (1966); Terry v. Adams, 345 U.S. 461 (1953) (pre-primary elections by private political clubs), *reh'g denied*, 345 U.S. 1003 (1953); Marsh v. Alabama, 326 U.S. 501 (1946) (privately owned town performed normal functions of a city); Smith v. Allwright, 321 U.S. 649 (1944) (establishment of white primary system by state political party convention).

286. The Due Process Clauses of the Fifth and Fourteenth Amendments protect life, liberty, and property. One of these constitutionally protected interests must be adversely affected by a private regulator in order for the Due Process Clauses to apply. Since Board of Regents v. Roth, 408 U.S. 564 (1972), the Supreme Court has interpreted these three discrete interests literally and restrictively, *see* ROTUNDA & NOWAK, *supra* note 192, at 205-06, and "[n]o satisfactory unifying principle for determining what interests are or are not protected by due process have been developed." 2 K. DAVIS, *supra* note 54, at § 11:1; *see also* Rubin, *supra* note 203, at 1047.

In a private regulation case, this issue might arise in a claim that a private actor injured a claimant's personal reputation, an interest that the Supreme Court has not yet recognized as a constitutionally protected interest under the Due Process Clauses, *see* ROTUNDA & NOWAK, *supra* note 192, at 230-32, 244-45.

287. Under substantive due process, a court will overturn legislation only if the law has no rational relationship to a legitimate goal of government. *See, e.g.*, New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978). Or, if a law limits a "fundamental right," it must

dural due process claim is more likely to arise.[288] Therefore, procedural due process is the focus of the fifth and final step of this constitutional inquiry.

Procedural due process applies not only to public adjudicatory actions,[289] but also to private adjudicatory actions that amount to governmental action.[290] Procedural due process does not, however, usually apply to strictly lawmaking activities.[291] The issue whether an activity is legislative or judicial has been decisive in determining whether procedural due process restrictions apply to the actions of private regulators.[292] Unfortunately, the line between lawmaking and adjudication is not always clear.[293]

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promote a compelling or overriding governmental interest. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1941). *See generally* ROTUNDA & NOWAK, *supra* note 192, at §§ 14.6, 15.4, 15.5-.7.

The Equal Protection Clause also applies to state action under the Fourteenth Amendment and has been interpreted to apply to federal action under the Due Process Clause of the Fifth Amendment. An analysis of classifications under the Equal Protection Clause is similar to the analysis undertaken under substantive due process. *See* ROTUNDA & NOWAK, *supra* note 192, at § 14.7.

288. This is so because substantive due process imposes only limited constitutional restraints. The Court will uphold any law for which conceivable justification can be made so long as no fundamental right is implicated. If a fundamental right is at stake, however, the Court will subject the justification to "strict scrutiny." *See* ROTUNDA & NOWAK, *supra* note 192, at §§ 14.6, 15.4-.7.

289. *See supra* note 192 and accompanying text.

290. In Schweiker v. McClure, 456 U.S. 188 (1982), the Supreme Court applied the Due Process Clause to a federal program that delegated to private insurance carriers the full and final authority to adjudicate claims for federal health insurance benefits. *Id.* at 189-91. Neither the statute nor the agency's regulations provided for governmental review of the decisions. The Court rejected the claims that the private hearing officers were not impartial and that due process required the use of additional procedures in order to reduce the risk of error. *Id.* at 195-200. And, in a series of state creditor-debtor cases, the Supreme Court applied the Due Process Clause to actions of private creditors, who were in effect adjudicating creditor-debtor disputes. *See supra* notes 220-22 and accompanying text.

291. *See supra* note 190 and accompanying text.

292. *See supra* notes 190-95 and accompanying text.

293. In a series of zoning cases, the power to regulate the use of private property was given to private citizens. When the private citizens' group was the general electorate, the Supreme Court viewed the decision-making power as legislative and therefore held that due process did not apply. City of Eastlake v. Forest City Enters., 426 U.S. 668 (1976). The Court held that the requirement that zoning changes be approved by public referendum meant only that the people had reserved to themselves the power to legislate. *Id.* at 675. In his dissent, Justice Stevens, with whom Justice Brennan joined, viewed the decision to amend the zoning code as adjudicative and concluded that the use of a popular vote did not comport with the procedure required by due process. *Id.* at 680-94.

However, when the delegated private citizens were neighboring property owners, the decision-making power was held to be adjudicative and therefore had to comply with due process. Eubank v. Richmond, 226 U.S. 137 (1912). The Court held that the authority of neighboring private landowners to impose a building line was invalid under the Due Process Clause be-

If procedural due process does apply, the decision-making process must comport with constitutional standards. The Supreme Court usually determines this by employing the three-part *Eldridge* balancing test.[294] This Article contends that the Court's constitutional analysis should account for the crucial fact that private actors are subject to less public accountability than public actors.[295] This distinction should be part of a due process analysis (step five), rather than a nondelegation analysis (step three), because the Due Process Clause has the tradition and precedent necessary to confront the constitutional implications of private sector involvement in governmental-type decision making.[296]

B. Benefits Achieved From the Five-Step Inquiry

At least three benefits can be realized by using this approach for evaluating the constitutionality of the activities of private regulators. This Section also suggests how the inquiry might work in practice.

(1) The first and foremost advantage of this five-step inquiry is that it brings to the forefront of constitutional analysis the crucial fact that the private sector is involved in the exercise of governmental powers. As discussed above in detail, the Court has ignored private sector involvement in some cases and has recognized but failed to analyze its implications in other cases.[297] If the Court had explicitly focused on the involvement of the private sector, as the first two parts of this inquiry require, then it might not have upheld some of these private delegations. In *McClure*,[298] if the Court had focused on the private characteristics of the insurance carriers,[299] it might have found their adjudicatory activities constitutionally deficient under the Due Process Clause because private actors are less accountable than public ones.

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cause the local ordinance did not establish any standards to limit the exercise of the power. *Id.* at 143-45. In Seattle Trust Co. v. Roberge, 278 U.S. 116 (1928), the Court held that the authority of neighboring private landowners to approve the use of land for a philanthropic home for children or for old people was invalid under the Due Process Clause because the landowners were not required to conform to any standards, were not bound by any official duty, and their actions were not subject to review. *Id.* at 121-22. The majority in *Eastlake* distinguished these two earlier cases by concluding that "the standardless delegation of power to a limited group of property owners condemned by the Court in *Eubank* and *Roberge* is not to be equated with decisionmaking by the people through the referendum process." *City of Eastlake*, 426 U.S. at 678.

294. *See supra* notes 197-204 and accompanying text; *see also supra* notes 209-13 and accompanying text.

295. *See supra* notes 198-204 and accompanying text.

296. *See* Lawrence, *supra* note 16, at 659-62, 682-94; *see also supra* note 260.

297. Schweiker v. McClure, 456 U.S. 188 (1982).

298. *See supra* notes 147-56, 180-84, 205-13 and accompanying text.

299. *See supra* notes 209-13 and accompanying text.

(2) This five-part inquiry not only highlights private sector involvement in governmental decision making, but it also helps clarify the underlying complex public-private relationship. It does this by explicitly separating the nondelegation (step three), state action (step four), and due process (step five) analyses. The danger of collapsing these three steps into one is illustrated by the *Currin*[300] and *Rock Royal Co-op.*[301] cases.

In *Currin*, the Court relied on administrative agency cases,[302] and thus failed to appreciate that the delegation gave the *private* growers of tobacco the power to make binding the Secretary of Agriculture's designation of tobacco markets.[303] In *Rock Royal Co-op.*, *private* producers of milk had the final say on the effectiveness of certain agricultural marketing orders proposed by the Secretary of Agriculture and the President.[304] The Court did not recognize that these conditions gave the private parties the power to act jointly with the Secretary of Agriculture,[305] and that their power to "fill in the details"[306] amounted to veto power over governmental action. Moreover, by using the administrative agency cases to evaluate both the public and private actions, the Court failed to focus on the crucial difference between participation by a public official and participation by the private sector. The Court treated both actors similarly, and having upheld the public delegation, probably felt obliged to uphold the private delegation.[307]

On the other hand, if the Court had recognized that separate inquiries under nondelegation doctrine (step three), state action doctrine (step four), and the Due Process Clause (step five) were warranted, it might have concluded that the involvement of the public official was constitutional but the involvement of the private actor was not. Under this proposed five-step inquiry, the Court might have recognized private sector involvement in lawmaking (steps one and two), concluded that this type of lawmaking did not violate the nondelegation doctrine (step three), and held that the veto power constituted state action (step four). Then, by pursuing a separate due process inquiry (step five), the Court would have focused specifically on whether the private growers had any conflicts of

300. Currin v. Wallace, 306 U.S. 1 (1939).

301. United States v. Rock Royal Co-op., 307 U.S. 533 (1939).

302. 306 U.S. at 15-16. In *Rock Royal Co-op.*, the Supreme Court simply relied on *Currin*, 307 U.S. at 577-78. *See supra* notes 154-56 and accompanying text.

303. *Currin*, 306 U.S. at 5-6.

304. *Rock Royal Co-op.*, 307 U.S. at 542-48.

305. 306 U.S. at 15-16; *see also* 307 U.S. at 577-78.

306. 306 U.S. at 15.

307. 306 U.S. at 16-18; *see also* 307 U.S. at 574-77.

interest that would make their involvement in governmental decision making unconstitutional.

(3) Finally, this type of inquiry highlights the interrelationships among the key constitutional doctrines and helps clarify which constitutional issues should be examined. This endeavor is facilitated by use of the three categories of public-private relationships.

If a private regulator fits into either Category A[308] (governmental deputy) or Category C[309] (purely private), the public-private issues are less complex and the five-step inquiry may proceed on a fast track. If the private actor falls within Category A, because there is a formal state deputization of the private actor, the federal nondelegation doctrines (step three) will not apply, and state action (step four) is obvious. The constitutional issue will usually be limited to whether the action complies with due process (step five). This is what happened in *Gibson v. Berryhill*[310] when the Supreme Court assessed the constitutionality of an action by the Alabama Board of Optometry, which was composed "solely of optometrists in private practice"[311] (steps one and two). Article III did not apply because the case involved state rather than federal judicial power, (step three) and state action by a state board was obvious (step four). Therefore, the narrow constitutional issue was whether the Board's action violated due process (step five).[312]

If a private actor appears to fall within Category C because there is no formal connection between government and the private actor, the nondelegation doctrines (step three) are unlikely to apply, and the constitutional issue will usually be confined to whether the private action constitutes state action (step four). Because the public function test for state action has been so narrowly construed,[313] the due process issue (step 5) will probably not be reached.

However, if a private actor falls within Category A and involves a federal delegation, or falls within Category B,[314] the public-private relationship will be more complex. Multiple constitutional issues will be involved and a full five-part analysis will usually be warranted.[315]

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308. *See supra* notes 22-24 and accompanying text.

309. *See supra* notes 25-37 and accompanying text.

310. 411 U.S. 564 (1973).

311. 411 U.S. at 578 (1973).

312. The Court found that the personal interests of the members of the board disqualified them from adjudicating the dispute. *Id.* at 578-79.

313. *See supra* notes 231-37 and accompanying text.

314. *See supra* notes 38-51 and accompanying text.

315. For a Category B case involving state delegation, only four of the five parts of the inquiry need be pursued. Step three on the federal nondelegation doctrines can be omitted

This five-step inquiry also would eliminate the confusion generated by commingling nondelegation doctrine and due process concepts.[316] The *Carter Coal* case provides an unusally clear example of the confusion that could be eliminated. In that case, the Supreme Court recognized the involvement of the private producers and miners (step one) in the making of laws to fix maximum hours and minimum wages (step two). But the Court mixed up nondelegation doctrine (step three) with the Due Process Clause (step five) by analyzing the issue in terms of delegation but deciding the case under the Due Process Clause.[317] This confusion could have been avoided if the Court had separated the nondelegation inquiry (step three) from the due process inquiry (step five).

This five-part analysis was employed, although imperfectly[318] and incompletely,[319] in *Union Carbide*.[320] There, the Court evaluated the constitutionality of a congressional delegation to private adjudicators. The Court recognized that arbitrators appointed by the Federal Mediation and Conciliation Service (step one)[321] were authorized to adjudicate disputes between private pesticide firms (step two),[322] and that the delegation did not violate the nondelegation of Article III judicial power doctrine (step three)[323]. The Court also found that the delegation pursuant to a federal statute constituted governmental action (step four)[324] and complied with due process (step five).[325]

Conclusion

In conclusion, it must be emphasized that this five-step inquiry will not cure all the problems associated with the application of the nondele-

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because the step does not apply to state delegations. But a four-step inquiry should still clarify the remaining constitutional issues that need to be examined.

316. *See supra* notes 254-60 and accompanying text.

317. Carter v. Carter Coal Co., 298 U.S. 238, 310-11 (1936); *see also supra* notes 254-55 and accompanying text.

318. *See supra* notes 180-82 and accompanying text.

319. *See infra* notes 324-25.

320. 473 U.S. 568 (1985).

321. *Id.* at 572-75, 590-91.

322. *Id.* at 571-75.

323. *Id.* at 593-94.

324. The Court did not specifically examine whether or not governmental action existed, presumably because it thought state action was obvious. However, the Court implicitly found governmental action when it reached the due process issue. *See infra* note 325 and accompanying text.

325. While the Court found that the federal statute did "not obstruct whatever [Article III] judicial review might be required by due process," it did "not identify the extent to which due process may require review of determinations by the arbitrator" because the parties had dropped the due process claims. 473 U.S. at 592-93.

gation doctrines, the Due Process Clause, and state action doctrine.[326] The benefits of this analysis are that it highlights private sector involvement, exposes the underlying public-private relationship, reduces the commingling of constitutional concepts, and recognizes the interrelationships among key constitutional doctrines. As a result, the proposed systematic inquiry should contribute to the development of a more coherent constitutional analysis of the activities of the Fifth Branch of private regulators.

326. *See supra* notes 124-261 and accompanying text.