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# Delegation to Private Parties in American Constitutional Law

GEORGE W. LIEBMANN\*

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## I. INTRODUCTION

In an age in which so much of constitutional litigation involves efforts to apply or expand the "state action" doctrine under the fourteenth amendment, it is surprising that so little attention has been paid to a major constitutional weapon of the 1930's: the doctrine of non-delegation to private parties.<sup>1</sup> Since the end of the Depression, comprehensive federal schemes of agricultural or industrial regulation have been undertaken less frequently, and the doctrine has usually found new application only in the states, primarily in zoning cases, cases involving the validity of privately established professional and industrial standards, and decisions relating to local option elections, the creation of special taxing districts, and state resale price maintenance laws.

At the time that Professors Jaffe and Hale wrote their surveys of the subject almost 40 years ago,<sup>2</sup> the basis for the doctrine seemed much clearer than it does today. Courts could wax vehement (though they did not always do so) when legislative enactments gave individuals the right to control the conduct and action of others. Belief in *laissez faire* and the sanctity of property rights could lead courts to overlook the ways in which the defense of private rights could produce results not greatly different from those which obtain as a result of delegation to private persons.

The history is a familiar one. At common law, private coercive power was not sanctioned. Thus the Supreme Court in 1917 readily granted an injunction against mild organizational efforts by a labor union on the basis that the union induced breach of an oral yellow dog contract, and thereby infringed the penumbra of protection cast around

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<sup>1</sup> "[T]he majority rule is that the power to legislate may not be delegated by the legislature to the people." 1 J. SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* § 306 (3d ed. F. Horack, Jr. 1943).

"Legislation may be held invalid if it empowers private persons to decide either what the law shall be or when a law shall be effective." 1 C.D. SANDS, [SUTHERLAND] *STATUTES AND STATUTORY CONSTRUCTION* § 4.11 (4th ed. 1972) (footnote omitted).

The present article, in concerning itself with delegation to private parties, is confined to an analysis of the cases passing upon legislative delegations. No effort is made here to consider the constitutional consequences of transfer of functions to private individuals by branches of the government other than the legislature, nor the doctrines which operate (or once operated) to restrict legislative delegations to administrative agencies. A recent work on numerous aspects of the doctrine is S. BARBER, *THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER* (1975).

<sup>2</sup> Jaffe, *Law Making by Private Groups*, 51 *HARV. L. REV.* 201 (1937); Hale, *Our Equivocal Constitutional Guaranties*, 39 *COLUM. L. REV.* 563 (1939). See also S. BARBER, *THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER* 72-107 (1975).

private contract rights.<sup>3</sup> And where legislative delegations rather than common law principles were involved, the Court five years earlier, in *Eubank v. City of Richmond*,<sup>4</sup> likewise struck down a zoning law which, by allowing two-thirds of the residents of a street to request establishment of building lines, compelled an owner to remove "an octagon bay window . . . which projected about three feet over the line." "[T]here is control of the property of plaintiff in error by other owners of property exercised under the ordinance. This, as we have said, is the vice of the ordinance."<sup>5</sup>

Given this constitutional background, and the volatile *Schechter*<sup>6</sup> and *Carter Coal*<sup>7</sup> decisions of the 1930's, one might be surprised to discover that more than 30 years has passed since any major Supreme Court decision turned on the question of delegation to private parties.<sup>8</sup> At first glance, it is tempting to conclude that the doctrine is slumbering in largely deserved desuetude.<sup>9</sup> Yet there are also indications that the

<sup>3</sup> *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917), discussed in Jaffe, *supra* note 2, at 215-16.

<sup>4</sup> 226 U.S. 137 (1912).

<sup>5</sup> *Id.* at 144.

<sup>6</sup> *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) ("Here . . . is an attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard." (Cardozo, J., concurring)).

<sup>7</sup> *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) ("This is legislative delegation in its most obnoxious form; for it is . . . to private persons whose interests may be . . . adverse to the interests of others in the same business.")

<sup>8</sup> *But see* note 82 *infra*. *Parker v. Brown*, 317 U.S. 341 (1943), appears to be the most recent case to extensively discuss the issue. On the *Parker* "state action" exception to the antitrust laws, see Verkuil, *State Action, Due Process and Antitrust: Reflections on Parker v. Brown*, 75 COLUM. L. REV. 328 (1975). See also Goldfarb v. Virginia State Bar, 95 S. Ct. 2004 (1975); *New Mexico v. American Petrofina, Inc.*, 501 F.2d 363 (9th Cir. 1974); *United States v. Oregon State Bar*, 385 F. Supp. 507 (D. Ore. 1974).

<sup>9</sup> See, e.g., Jaffe, *An Essay on Delegation of Legislative Power: II*, 47 COLUM. L. REV. 561, 581 (1947) ("Were the country to enter a new depression or become committed to general planning, insistence on the doctrine of the *Schechter* case might again provoke a constitutional crisis." "Realistically considered *Schechter* has been put in the museum of constitutional history."). See also *Yakus v. United States*, 321 U.S. 414, 452 (1944) (Roberts, J., dissenting), where it was said that the delegation holding of the *Schechter* case has been effectively overruled. The decision of course involved a wartime statute. The majority in *Yakus*, however, in distinguishing *Schechter*, observed that in that case "[t]he function of formulating the codes was delegated, not to a public official responsible to Congress or the Executive, but to private individuals engaged in the industries to be regulated." *Id.* at 424. *Schechter* was relied upon in the dissenting opinion of Justice Harlan in *Arizona v. California*, 373 U.S. 546, 626 (1963). It was approvingly referred to in *National Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974), for the proposition that Congress should not be presumed to have delegated the taxing power conferred on it by U.S. CONST. art. 1, § 8, cl. 1. See also *United States v. Mazurie*, 419 U.S. 544, 556 (1975), permitting a delegation to Indian tribal councils of authority to enact ordinances, subject to approval of the Secretary of the Interior, excluding certain transactions between Indians and non-Indians from a federal criminal statute. The limitations on delegation were held to be "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter."

doctrine remains with us, masquerading under various aliases—"equal protection" and "due process," to name only two. Consider the following disquieting developments.

First, the nondelegation doctrine still merits sporadic attention in the Supreme Court, although no majority has yet held it applicable. The most conspicuous recent example is the concurring opinion of Justice Brennan, joined in by Justices Douglas and Marshall, in *McGautha v. California*.<sup>10</sup> There, the three justices would have invalidated, partly on delegation grounds, a statute permitting a jury to fix the death penalty without guidelines from the legislature.<sup>11</sup> In addition, the recent resuscitation of *Schechter* in *National Cable Television Association v. United States*<sup>12</sup> indicates a potential revival of the doctrine at the federal level under proper conditions.

Second, nondelegation remains a vital issue at the state level. *Carter* is still enthusiastically cited by state courts,<sup>13</sup> and the doctrine has played a role in cases involving issues as diverse as public employee labor relations<sup>14</sup> and environmental law.<sup>15</sup>

Third, several recent cases decided on "state action" grounds might

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The delegation doctrine has also occasionally been involved in cases where criminal prosecutions are at issue. See *United States v. Sharpnack*, 355 U.S. 286, 298 (1958) (Douglas, J., dissenting); *Watkins v. United States*, 354 U.S. 178 (1957); see also Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 69-71 (1961), and notes 336-37 *infra*. See also *United States v. Robel*, 389 U.S. 258, 275 (1967) (Brennan, J., concurring); *McGautha v. California*, 402 U.S. 183, 272 nn.21-22 (1971) (Brennan, J., dissenting) citing a number of cases and Jaffe, *supra* note 2, for the proposition that "due process places limits on the manner and extent to which a state legislature may delegate to others powers which the legislature might admittedly exercise itself." The opinion, purportedly relying on K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 2.00 to 2.00-6 (Supp. 1970), further asserts a new form of "incorporationist" doctrine—that "precisely the same functions are performed by the Due Process Clause" of the fourteenth amendment with respect to the states as are performed by the constitutional separation of powers and the due process clause of the fifth amendment with respect to the federal government. 402 U.S. at 273 n.23. It should be noted that *McGautha*, *Louisiana v. United States*, 380 U.S. 145 (1965), and *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), involved delegation of adjudication or licensing powers, and not delegation of rulemaking powers. Cf. *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); cf. also Justice Marshall's concurring opinion in *FPC v. New England Power Co.*, 415 U.S. 345, 352 (1974).

<sup>10</sup> 402 U.S. 183, 248, 272 (1971).

<sup>11</sup> *Id.* at 272 n.22; see note 9 *supra*.

<sup>12</sup> 415 U.S. 336 (1974).

<sup>13</sup> *Corning Glass Works v. Ann & Hope, Inc.*, 294 N.E.2d 354, 361 (Mass. 1973) (nonsigner clause); *Bayside Timber Co. v. Board of Supervisors*, 20 Cal. App. 3d 1, 13, 97 Cal. Rptr. 431, 439 (1971); *General Elec. Co. v. Wahle*, 207 Ore. 302, 296 P.2d 635 (1956) (nonsigner clause). See also *Bulova Watch Co. v. Brand Distribs., Inc.*, 285 N.C. 467, 206 S.E.2d 141 (1974). See notes 174-215 *infra* & text accompanying.

<sup>14</sup> See note 119 *infra*.

<sup>15</sup> *Bayside Timber Co. v. Board of Supervisors*, 20 Cal. App. 3d 1, 97 Cal. Rptr. 431 (1971) (statute delegating to timber owners power to formulate forest practice rules with force of law an unlawful delegation).

just as easily have relied on the delegation doctrine.<sup>16</sup> If certain conduct may be labelled "state action" for purposes of the fourteenth amendment, there is often equal room for nondelegation to operate. That courts presently prefer equal protection rationales is no guarantee they will forever continue to do so.

Thus the time has come for a thorough reexamination of the non-delegation doctrine: its scope, applicability, and limitations. This article will attempt to demonstrate *first*, that a per se doctrine precluding delegation of legislative powers to private persons is not needed and would have unfortunate results; *second*, that the decided Supreme Court cases do not constitutionally impose such a doctrine; and *third*, that the numerous

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<sup>16</sup> The distinctions between a deprivation of due process or equal protection, and an unlawful delegation of legislative power are often obscure. Thus it is not surprising that the Court in *Carter* held that the Bituminous Coal Conservation Act of 1935 contained an improper delegation of legislative power, and *as such* deprived petitioners of "rights safeguarded by the due process clause of the Fifth Amendment." 298 U.S. at 311.

The shift in the focus of concern regarding state-sanctioned concentrations of private power is nothing short of astonishing. In 1961, objection was voiced over such matters as compulsory union membership, the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 608 (1970) (exempting certain marketing agreements and concomitant price-fixing from antitrust scrutiny), and nonsigner clauses sanctioned by various fair trade laws. Hanslowe, *Regulation by Visible Public and Invisible Private Government*, 40 TEXAS L. REV. 88, 101, 103, 110 (1961).

More recently, well-known developments in constitutional law have shifted attention to state-sanctioned power vested in creditors, public utilities, and the like. Based upon decisions such as *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969), and *Fuentes v. Shevin*, 407 U.S. 67 (1972), several lower courts were prepared to hold that all prejudgment seizures or suspensions of property interests violated the due process clauses of the fifth and fourteenth amendments. See, e.g., *Adams v. Egley*, 338 F. Supp. 614 (S.D. Cal. 1972); *Collins v. Viceroy Hotel Corp.*, 338 F. Supp. 390 (N.D. Ill. 1972); *Jones Press, Inc. v. Motor Travel Servs., Inc.*, 286 Minn. 205, 176 N.W.2d 87 (1970). But see *Mitchell v. W.T. Grant Co.*, 416 U.S. 562 (1974); see also 35 LA. L. REV. 221 (1974). Of course, a basic problem in any of these cases is a finding of "state action." Some courts held that statutory authorization of certain practices such as self-help repossession constituted sufficient state action in itself, even though no state official was directly involved in the seizure or retention. See, e.g., *Adams v. Department of Motor Vehicles*, 11 Cal. 3d 146, 520 P.2d 961, 113 Cal. Rptr. 145 (1974) (statute authorizing garageman's liens). Clearly, if courts are willing to find state action under such circumstances, definite parallels to the former abuses of the delegation doctrine exist. It may not be too much to say that the due process and equal protection clauses have in recent years been doing some of the work formerly done by the delegation doctrine. For a characterization of one theory of state action in terms of delegation, see Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355, 377-83 (1973). Cf. 2 F. POLLACK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 574-78 (2d ed. 1968). Cf. also *City of Amsterdam v. Helsing*, 79 Misc. 2d 676, 362 N.Y.S.2d 698 (Sup. Ct. 1974); *City of Warwick v. Warwick Regular Firemen's Ass'n*, 106 R.I. 109, 256 A.2d 206 (1969); Comment, *Collective Bargaining for Public Employees and the Prevention of Strikes in the Public Sector*, 68 MICH. L. REV. 260, 284-85 (1969).

In Verkuil, *State Action, Due Process and Antitrust: Reflections on Parker v. Brown*, 75 COLUM. L. REV. 328, 330-31 n.14 (1975), the author contrasts the meaning of "state action" in antitrust and fourteenth amendment contexts.

For a discussion of the relationship between the delegation doctrine and the equal protection clause, see notes 47-49 *infra* & text accompanying.

decided cases in lower courts demonstrate both the practical nonexistence of a per se rule against such delegations and the undesirability of such a rule. An attempt will be made in conclusion to define the appropriate contours of a more limited nondelegation doctrine.

Structurally, this article will follow in part the organization of Professor Jaffe's definitive 1937 work on the doctrine.<sup>17</sup> The goal is to update the analysis of the older cases, and to discuss the developments which have transpired in almost 40 years since Jaffe addressed the subject. Hopefully, the result will be guidance for courts and the bar, who may be forced to reacquaint themselves with an aspect of American constitutional law long thought moribund.

## II. INAPPROPRIATENESS OF AN UNQUALIFIED NONDELEGATION DOCTRINE

In recent years, the use of "state action" and antitrust doctrines to control concentrations of private power has led both scholars<sup>18</sup> and state courts<sup>19</sup> to view with a jaundiced eye legislative acts which confer additional powers on private persons. Commentators have assured us that the powers wielded by private groups constitute an unprecedented menace to liberty and democracy,<sup>20</sup> and have urged new departures in constitutional law as means of controlling these groups.<sup>21</sup>

As mentioned, it is the thesis of this article that the revived use of the *Carter* rule is neither demanded by recent developments in "state action" doctrine nor compatible with them. For as Professor Jaffe noted 38 years ago,

[P]articipation in law-making by private groups under explicit statutory "delegation" does not stand . . . in absolute contradiction to the traditional process and conditions of law-making; it is not incompatible with the conception of law. . . . [I]t institutionalizes a factor in law-making that we have, eagerly in fact, attempted to obscure.<sup>22</sup>

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<sup>17</sup> Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937) [hereinafter cited as Jaffe].

<sup>18</sup> See Wirtz, *Government by Private Groups*, 13 LA. L. REV. 440 (1953); Hanslowe, *supra* note 16; Conant, *Resale Price Maintenance: Constitutionality of Nonsigner Clauses*, 109 U. PA. L. REV. 539, 545-50 (1961); cf. *Lathrop v. Donohue*, 367 U.S. 820, 878 n.1 (1961) (Douglas, J., dissenting).

<sup>19</sup> See generally 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.14 (1958) and cases there cited.

<sup>20</sup> *E.g.*, Wirtz, *supra* note 18; Hanslowe, *supra* note 16.

<sup>21</sup> Wirtz, *supra* note 18, at 132-35. For a discussion of the relationship between "state action" in recent due process and equal protection cases and in the delegation doctrine, see note 16 *supra*.

<sup>22</sup> Jaffe at 220-21.

The "state action" cases reflect an increasing tendency on the part of courts to look at substance rather than form when engaged in preventing the arbitrary and oppressive use of private power. Yet courts still are alarmed by the forms of delegation, no matter how small the potentialities for oppression or abuse. Where statutes delegating power are upheld, courts frequently justify their decisions by maintaining that no power has been delegated, or by asserting that the statute was complete when it left the legislature and the ensuing acts of private parties are merely "but facts in contemplation of which [the statute] was enacted,"<sup>23</sup> or by finding that adequate standards exist,<sup>24</sup> even though standards are usually only meaningful as guidelines for a disinterested administrator. But realism demands that courts look in the second case, as in the first, to the nature of the power exercised, the political forces which operate to check its abuse, and the extent to which abuse of the power will oppress the persons on whom it is directly imposed. This is in fact what courts frequently do, but they vindicate unobjectionable statutes by finding that no delegation is present, rather than by holding the delegation permissible. There seems little justification in practice for continued adherence to a fictitious per se rule against delegation to private parties. Save where the delegation is so broad that the legislature cannot retrieve what it has delegated,<sup>25</sup> pronouncement upon a delegation question deals with the effects of a legislative act and not any alteration of legislative power.

The action courts take in "state action" (and increasingly in anti-trust) cases is limited in scope: they do not condemn as unconstitutional the existence of power in private groups, but merely impose upon them duties of fairness consistent with the public function, and have limited themselves in some measure by the traditional canons of judicial restraint which also govern their willingness to invalidate statutes.

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<sup>23</sup> *Weco Prods. Co. v. Reed Drug Co.*, 225 Wis. 474, 484, 274 N.W. 426, 430 (1937) (Wisconsin Fair Trade Act "complete" on leaving legislature).

<sup>24</sup> Note, *Delegation of Power to Private Parties*, 37 COLUM. L. REV. 447, 453 (1937). See *City of Biddeford v. Biddeford Teachers Ass'n*, 304 A.2d 287 (Me. 1973). Cf. H. FRIENDLY: *THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS* 21-22 (1962); Landis, Book Review, 30 U. CHI. L. REV. 597 (1963).

<sup>25</sup> Cf. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); Ehmke, *Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law*, 47 CORNELL L.Q. 50 (1961). See also *Amalgamated Meat Cutters & Butchers Workmen of N. America v. Connally*, 337 F. Supp. 737 (D.D.C. 1971). It could scarcely be asserted that delegations to private groups are, for constitutional purposes, not subject to revocation. That view might have found favor in the *Dartmouth College* case and in other early decisions under the contract clause; other cases are emphatic in stressing the inalienability of the police power. See *Norman v. Baltimore & O.R.R.*, 294 U.S. 240 (1935); *Home of the Friendless v. Rouse*, 75 U.S. (8 Wall.) 430 (1869).

Courts have proved willing to invalidate statutes (and find state action) in first amendment cases where the continuance of the political process is itself thought to be in danger<sup>26</sup> and to act to preserve traditional guarantees of fair trial and fair procedure.<sup>27</sup> The disenfranchisement or economic "exploitation" of minorities has more recently supplied another justification for judicial unwillingness to defer to the political will as reflected in legislative act or legislative inaction.<sup>28</sup> Beyond this courts have been loath to go. Economic due process continues to slumber;<sup>29</sup> despite the urgings of some, constitutional guarantees have not been applied to significantly limit the acts of corporations<sup>30</sup> and labor unions.<sup>31</sup>

Delegation cases, unlike "state action" cases, moreover, involve not legislative inaction but a clear policy choice by the legislature; courts may thus properly display greater reluctance to restrict private power that exists as a result of legislative choice, as has long been manifest in connection with delegation of powers not legislative in character. Legal historians remind us of the long-standing delegations of eminent domain powers,<sup>32</sup> and of the use of tax powers for the

<sup>26</sup> *E.g.*, *Marsh v. Alabama*, 326 U.S. 501 (1946); *but see* *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Associated Press v. United States*, 326 U.S. 1 (1945).

<sup>27</sup> *Cf.* *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963); *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941). *See also* cases cited note 16 *supra*; *see also* note 162 *infra* & text accompanying.

<sup>28</sup> *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Smith v. Allwright*, 321 U.S. 649 (1944); *see* note 16 *supra*. That *Shelley* is an equal protection and not a nondelegation case is made plain by the fact that the Court did not dispute that restrictive covenants utilizing nonprohibited classifications remain enforceable save as prohibited by statute. *See* *Bell v. Maryland*, 378 U.S. 226, 329 (1964) (Black, J., dissenting). *Cf.* Comment, *Validity Rules Concerning Public Zoning and Private Covenants: A Comparison and Critique*, 39 S. CAL. L. REV. 409 (1966).

<sup>29</sup> *Cf.* *McCloskey, Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34. *Cf. also* *Dandridge v. Williams*, 397 U.S. 471 (1970).

<sup>30</sup> Compare Berle, *The Developing Law of Corporate Concentration*, 19 U. CHI. L. REV. 639 (1952), with Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

<sup>31</sup> Compare Miller, *The Constitutional Law of the "Security State"*, 10 STAN. L. REV. 620 (1958), with Wellington, *The Constitution, The Labor Union, and Governmental Action*, 70 YALE L.J. 345 (1961). *But cf.* note 16 *supra*.

<sup>32</sup> *See generally* J. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES* 63-66 (1956) and authorities there cited. *Cf.* the early statutes allowing mill owners to flood neighboring lands upon payment of compensation to landowners, collected and upheld in *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9 (1885); *Georgia R.R. & Banking Co. v. Smith*, 128 U.S. 174 (1888) (upholding grant of eminent domain powers to railroads); *Berman v. Parker*, 348 U.S. 26 (1954) (upholding use of eminent domain powers where land conveyed to private developers). In the last case, the Court declared:

Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue

benefit of private individuals.<sup>33</sup> The "public use" limitation has been all but read out of the fifth amendment,<sup>34</sup> while the recent rash of local Industrial Development Authorities<sup>35</sup> remind us that the day of *Loan Association v. Topeka*<sup>36</sup> is no more. Despite Adam Smith,<sup>37</sup> the federal constitution, unlike those of many states, contains no interdiction against state-created monopolies,<sup>38</sup> as the rhetoric of the court in

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that this makes the project a taking from one businessman for the benefit of another businessman. . . . The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude.

*Id.* at 33-34. Cf. *Lathrop v. Donohue*, 367 U.S. 820 (1961); *IAM v. Street*, 367 U.S. 740 (1961); *Louisville Joint Stock Bank v. Radford*, 295 U.S. 555, 596, 602 (1935); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

<sup>33</sup> See C. JACOBS, *LAW WRITERS AND THE COURTS* (1954); McAllister, *Public Purpose in Taxation*, 18 CALIF. L. REV. 137, 241 (1930); McBain, *Taxation for a Private Purpose*, 29 POL. SCI. Q. 185 (1914); Virtue, *The Public Use of Private Capital: A Discussion of Problems Related to Municipal Bond Financing*, 35 VA. L. REV. 255 (1949). Leading cases include *Carmichael v. Southern Coal Co.*, 301 U.S. 495 (1937); *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930); *Green v. Frazier*, 253 U.S. 233 (1920); *Jones v. City of Portland*, 245 U.S. 217 (1917). Since taxation, like the regulation of money and credit, is felt by the community at large, there is more reason to believe that political checks will be adequate to control it than exists in the case of eminent domain or even in the case of ordinary exercises of the police power. See Pinsky, *State Constitutional Limitations on Public Industrial Financing: An Historical and Economic Approach*, 111 U. PA. L. REV. 265, 307 (1963).

<sup>34</sup> See *Berman v. Parker*, 348 U.S. 26 (1954); Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63.

<sup>35</sup> A representative enabling statute is the Indiana Local Industrial Development Act, IND. ANN. STAT. §§ 18-7-14-1 to -10 (Code ed. 1974).

<sup>36</sup> 87 U.S. (20 Wall.) 655 (1875) (invalidating as outside the powers of the legislature under the Kansas constitution a statute empowering a municipal authority to issue bonds in aid of manufacturing concerns).

<sup>37</sup> A. SMITH, *THE WEALTH OF NATIONS* ch. 10 (1776), is of course the classic denunciation of state monopoly grants. This antipathy did not always exist at the time the constitution was framed. See *American Fed'n of Labor v. American Sash & Door Co.*, 335 U.S. 538, 543 n.1 (1949) (Frankfurter, J., concurring), and the works there cited. The only reference to monopolies in the Federal Constitution is that in art. I, § 8, cl. 8 empowering Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ." Since this clause is supplemented by the commerce power, it does not operate as a restriction on federal power to grant monopolies other than patents and copyright. It may however have a negative thrust against state legislation in areas closely related to patent and copyright, at least where such legislation can be viewed as conflicting with federal patent and copyright statutes enacted pursuant to the constitutional authorization. See *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964). The above abortive efforts of several states to amend the commerce clause prior to its ratification to forbid congressional grants of monopolies are briefly discussed in F. FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* 12-13 (1937). On monopolies and the fourteenth amendment, see the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) (including the dissenting opinion of Justice Field), and their sequel, *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746 (1884) (involving the same slaughterhouse monopoly). See generally C. FAIRMAN, *MR. JUSTICE MILLER AND THE SUPREME COURT* ch. 8 (1939).

<sup>38</sup> *But cf.* *Morey v. Doud*, 354 U.S. 457 (1957), where the equal protection clause

the *Noerr*<sup>39</sup> case under the antitrust laws reminds us, nor, indeed, does it prohibit delegations of legislative power. The restrictions, such as they are, on delegations to administrative agencies stem from notions relating to separation of powers not necessarily relevant where a delegation is to private groups.<sup>40</sup>

This is not to say that scope may not remain for circumspect use of the nondelegation doctrine. But its use should be restricted to the three great areas where the judicial activism inherent in declarations of unconstitutionality has most frequently been exercised. Where a delegation by virtue of its content or breadth calls into question the future operation of the political process, judicial scrutiny seems warranted. Also, where it relates to powers not legislative but judicial, and thus trenches on historic notions of fair hearing and fair trial, scrutiny seems warranted, particularly since judicial and licensing determinations are not readily subject to legislative correction. Finally, there may be scope for condemnation of delegations which operate against the interest of minorities disenfranchised in respect of the election of the legislature which authorized the delegation, though this limitation ought not to inspire acquiescence in the extravagant rhetoric of those who speak in terms of "disenfranchised" consumers<sup>41</sup> and thus render nugatory canons of restraint.

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was perhaps used for a similar purpose. See L. HAND, *THE BILL OF RIGHTS* 46-47 (1958). Cf. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 545 (1949) (Black, J., dissenting); *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829), for the rejection of what might have been efforts to use the commerce clause to invalidate state monopoly grants. Cf. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

It seems well established that the equal protection clause imposes few barriers in the way of monopoly grants through the device of "grandfather clauses." See *Brooks v. State Bd. of Funeral Directors & Embalmers*, 233 Md. 98, 195 A.2d 728 (1963), and cases there discussed. Cf. also *United States v. Maryland Sav. Share Ins. Corp.*, 400 U.S. 4 (1970); *Wampler v. Lecompte*, 282 U.S. 172 (1930). One commentator, at least, would have it do so. See Sharp, *The Old Constitution*, 20 U. CHI. L. REV. 529, 534 (1953). Cf. *In re Norwalk Call*, 62 Cal. 2d 185, 397 P.2d 426, -1 Cal. Rptr. 666 (1964). Any requirement of uniformity of application will of course impair the political feasibility of innovation, legislative or judicial. See *Johnson v. New Jersey*, 384 U.S. 719 (1966).

<sup>39</sup> *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135, 136-37 (1961), discussed at note 149 *infra* & text accompanying. But cf. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962).

<sup>40</sup> Perhaps the language of Justice Cardozo in another context is pertinent to a discussion of the doctrine: "Appeal is vaguely made to some constitutional immunity, whether express or implied is not stated with distinctness. . . . If the immunity vests upon some express provision of the Constitution, the opinion of the Court does not point us to the article or section." *Jones v. SEC*, 298 U.S. 1, 32-33 (1936) (Cardozo, J., dissenting).

<sup>41</sup> E.g., McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34; Reich, *The Public and the Nation's Forests*, 50 CALIF. L. REV. 381 (1962). Compare the more robust view taken in K. LEWELLYN,

The principle relating to breadth of delegations has been most actively delineated in the present federal law relating to delegations of rulemaking power to public bodies,<sup>42</sup> though the absence of the checks supplied by the appropriation and appointment powers and the lack of the self-imposed restraint resulting from public officers' oaths may be thought to justify a more rigorous application of the doctrine so as to confine to narrower limits the scope of powers conferrable upon private persons. Yet many of the vices thought to be inherent in delegation to private groups constitute violations of express constitutional mandates—particularly the requirements of due process and equal protection. Reliance on a general nondelegation principle to remedy all such violations would be inappropriate, but the proximity of the nondelegation principle to other constitutional safeguards deserves examination.

Historic notions of fairness and the difficulty of legislative correction may seem to justify a per se rule against delegation of judicial or licensing powers,<sup>43</sup> at least where inadequate review is provided. But the applicable constitutional provision here is the due process clause, not a vague "nondelegation" doctrine. Disqualification for pecuniary

JURISPRUDENCE 241-42 (1962):

When action by the specialists on a point of constitutional change pinches the personal toes of Albert Jones too sharply, Albert is likely to react as he does to less fundamental change of similar effect. . . . If only one of an unorganized class or ruck, he groans and gets nowhere, unless the pressure is painful and sustained enough to lock his fellows and himself together into an interested group.

<sup>42</sup> See 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.15, at 150-51 (1958). There are no significant constitutional requirements as to procedure in rulemaking: "In absence of statutory requirement of hearing, and in absence of a dispute of adjudicative facts, the case law ordinarily does not require either a speech-making hearing or a trial-type hearing for rule making." *Id.* § 6.12, at 405.

<sup>43</sup> One may surmise that even now the most perceptive courts are motivated much more by the degree of protection against arbitrariness than by the doctrine about standards that they write about in their opinions. . . . By and large, the safeguards required for adjudication are greater than those required for general rule making.

*Id.* § 2.15, at 151.

The lawyer's chief concern with "the rule of law" was earlier considered to be that of setting out procedural safeguards to insure nonarbitrary solution to the problems of the individual. . . . When a city council, nominally a legislative body, passes zoning regulations, grants variations therefrom, provides for slum clearance, and does numerous other acts which affect directly individuals, it affects them in much the same way that an administrator does. The courts do often indiscriminately apply the same rules when both of these categories of actions are questioned, but speak in different terms when general ordinances affecting all persons in the area are considered.

J. WINTERS, STATE CONSTITUTIONAL LIMITATIONS ON SOLUTIONS OF METROPOLITAN AREA PROBLEMS 147 (1961) (footnote omitted).

bias has at times been used as a substitute for a doctrine barring delegation of judicial powers;<sup>44</sup> however, the "rule of necessity" may frequently operate to render this solution inadequate.<sup>45</sup> Controversies in this area thus do and should turn on where the line between judicial and legislative function falls.<sup>46</sup>

The fact that every delegation of legislative authority involves a nexus with state power may justify application of equal protection standards to the content of rules made by private parties when the courts are invoked to enforce these rules: "jurisdiction always is jurisdiction only to decide constitutionally."<sup>47</sup> If delegation of judicial powers to private parties is to be barred, application of equal protection standards to delegated legislation would seem warranted, since the equal protection clause, taken in its narrowest meaning,<sup>48</sup> may be regarded as a prohibition against adjudication under the guise of legislation somewhat akin to the constitutional prohibition against bills of attainder.<sup>49</sup>

<sup>44</sup> *E.g.*, *Smith v. Department of Regis. & Educ.*, 412 Ill. 332, 106 N.E.2d 722 (1952).

<sup>45</sup> 2 K. DAVIS, *supra* note 42, § 12.04.

<sup>46</sup> *Cf.* F. HAYEK, *THE CONSTITUTION OF LIBERTY* 209 (1950); *quoted in Kurland, Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 5 (1961):

[C]lassification in abstract terms can always be carried to the point at which . . . the class singled out consists only of particular known persons or even a single individual. . . . [N]o entirely satisfactory criterion has been found that would always tell us what kind of classification is compatible with equality before the law.

*Compare Peery v. Virginia Bd. of Funeral Directors & Embalmers*, 203 Va. 161, 123 S.E.2d 94 (1961), *with In re Mayor of New York*, 246 N.Y. 72, [*In re Elm St.*] 158 N.E. 24 (1927) (Cardozo, C.J.).

<sup>47</sup> Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1402 (1953), *reprinted in* P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 330, 360 (2d ed. 1973). *Cf.* *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 177-79 (1972).

<sup>48</sup> Note the conflicting views taken in the opinions in *Douglas v. California* 372 U.S. 353 (1963); *cf.* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

<sup>49</sup> *See City of Amsterdam v. Helsby*, 79 Misc. 2d 676, 362 N.Y.S.2d 698 (Sup. Ct. 1974). *Cf.* *Hurtado v. California*, 110 U.S. 516, 535-36 (1884):

Law is something more than mere will exerted as an act of power. It must not be a special rule for a particular person or particular case . . . thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other . . . arbitrary exertions of power under the forms of legislation.

It may be noted that for Justice Frankfurter many cases which for others involved problems under substantive clauses resolved themselves into questions of procedural due process. *See Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 121 (1952) (Frankfurter, J., concurring); *United States v. Lovett*, 328 U.S. 303, 322, 328-29 (1946) (Frankfurter, J., concurring); F. FRANKFURTER, *OF LAW AND MEN* 14-15 (1956).

### III. HISTORICAL QUALIFICATION OF THE NONDELEGATION DOCTRINE

The zoning intervention case of *Eubank v. City of Richmond*, already described,<sup>50</sup> was shortly followed by *Thomas Cusack Co. v. City of Chicago*.<sup>51</sup> There the Court, under the influence of traditional property law concepts, upheld a similar state statute phrased in terms of consent rather than objection, declaring that the provision allowing lifting of the zoning prohibition by consent "is not a delegation of legislative power, but is . . . a familiar provision affecting the enforcement of laws and ordinances."<sup>52</sup> Here, the inroad upon the doctrine was perceived as shielded by tradition. The vitality of the non-delegation doctrine per se was later attested to, however, by the subsequent invalidation of a similar consent ordinance in the *Roberge*<sup>53</sup> case, where the Court observed: "There is no provision for review under the ordinance; [the neighbors'] failure to give consent is final. They . . . are free to withhold consent for selfish reasons or arbitrarily . . ." *Cusack* was distinguished on the basis that "the [prohibited uses] . . . were liable to endanger . . . safety and decency . . ."

The vehement rhetoric in the *Schechter* case directed at the specific delegations to code authorities gave the doctrine added force.

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 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.<sup>54</sup>

In *Schechter*, however, the Court did admit the possibility of some lawful delegations to private persons. The opinion distinguished

[i]nstances . . . in which Congress has availed itself of such assistance; as *e. g.*, in the exercise of its authority over the public domain, with respect to the recognition of local customs or rules of miners as to mining claims, or, in matters of a more or less technical nature, as in designating the standard height of draw-bars.<sup>55</sup>

The decisive factor for Justice Cardozo, whose concurring opinion has probably better stood the test of time, was the presence of

<sup>50</sup> See text accompanying notes 4-5 *supra*.

<sup>51</sup> 242 U.S. 526 (1917).

<sup>52</sup> *Id.* at 531.

<sup>53</sup> *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 122 (1928).

<sup>54</sup> *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935).

an attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard. Here in effect is a roving commission to inquire into evils and upon discovery correct them.<sup>56</sup>

Narrower delegations to private groups would apparently be valid, at least if subject to presidential approval—an approval which Cardozo recognized would be formal at best.

Delegation in such circumstances is born of the necessities of the occasion. . . . Nor is the substance of the power changed because the President may act at the instance of trade or industrial associations having special knowledge of the facts. Their function is strictly advisory; it is the *imprimatur* of the President that begets the quality of law.<sup>57</sup>

But *imprimatur* and authorship are very different things.

This isolated grappling with real issues had little influence on the Supreme Court's later delegation decisions. In *Carter v. Carter Coal Co.*,<sup>58</sup> a federal statute making maximum hours and minimum wages agreed upon by a majority of miners and producers of two-thirds of the annual national tonnage of coal binding on the remainder was held invalid, the delegation doctrine serving as an alternate ground:

The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interest of others in the same business.<sup>59</sup>

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<sup>56</sup> *Id.* (footnotes omitted). The mining statute referred to was the Act of July 26, 1866, ch. 262, 14 Stat. 251. It had been upheld by way of dictum in *Butte City Water Co. v. Baker*, 196 U.S. 119, 126 (1905). The railroad drawbar statute was the Act of Mar. 2, 1893, ch. 196, 27 Stat. 531. It had been applied and by inference upheld in *St. Louis & Iron Mt. & So. Ry. v. Taylor*, 210 U.S. 281, 286 (1908).

<sup>57</sup> 295 U.S. at 551 (Cardozo, J., concurring). See *Amalgamated Meat Cutters & Butchers Workmen of N. America v. Connally*, 337 F. Supp. 737 (D.D.C. 1971).

<sup>58</sup> 295 U.S. at 552 (Cardozo, J., concurring). Justice Cardozo at this point in his opinion cited *Doty v. Love*, 295 U.S. 64, 71 (1935), where the Court, speaking through Cardozo, upheld a Mississippi statute empowering a state superintendent of banks, with court concurrence, to reopen closed banks where 75 percent of the depositors had signed "freezing-of-deposits agreements" providing for deferred return of their deposits. Cf. *United States Mortgage Co. v. Matthews*, 293 U.S. 232 (1934), rejecting a challenge under the equal protection clause to a statute requiring the assent of 25 percent of mortgage holders to obtain a summary foreclosure decree.

<sup>59</sup> 298 U.S. 238 (1936).

<sup>60</sup> *Id.* at 311. One commentator has contended that the delegation holding rested on "the indefiniteness of the group" to which power was delegated, and that its sweeping language is "dictum." Note, *The Disqualification of Administrative Officials*, 41 COLUM. L. REV. 1384, 1398 n.79 (1941).

The ban on delegation sprang from the fifth amendment due process clause,<sup>60</sup> and not, as Justice Harlan was later to assume,<sup>61</sup> from abstract doctrines about the vesting of legislative power having their source in article I.

The Court in *Carter* thus may have departed somewhat from its earlier position in *Schechter*, where it laid stress upon "the prerogatives and duties of Congress." It may also have departed from its position in *Booth v. Indiana*.<sup>62</sup> In that case, a state statute requiring coal operators to install washrooms upon request of 20 or more employees was held valid against a delegation challenge, the Court observing that "[t]he Supreme Court of the State decided that the law could be called into operation by petition, and in the decision no Federal question is involved."<sup>63</sup> The choice of the fifth amendment due process clause in *Carter* might suggest that article I notions impose no per se ban on federal delegations to private parties, which are to be judged by the more flexible criterion of due process. But *Carter* may also suggest that such constitutional restrictions as may exist apply equally to the states by virtue of the fourteenth amendment—a result which would not obtain if the prohibition found its source in article I.

Since the fifth amendment was used, the restriction on delegation in federal statutes may be thought less severe than it otherwise could be. However, the Court cited *Schechter*, *Eubank*, and *Roberge*, and observed that "it is unnecessary to do more than refer to decisions of this court which foreclose the question."<sup>64</sup> The concurring opinion of Chief Justice Hughes appeared to find limitations on delegation in article I as well as the fifth amendment:

Such a provision, apart from the mere question of the delegation of legislative power, is not in accord with the requirement of due process of law which under the Fifth Amendment dominates the regulations which Congress may impose.<sup>65</sup>

The fiction of nondelegability was adhered to in the *Old Dearborn*

<sup>60</sup> See Jefferson, *The Supreme Court and State Separation and Delegation of Powers*, 44 COLUM. L. REV. 1 (1944).

<sup>61</sup> *Lathrop v. Donohue*, 367 U.S. 820, 855 (1961) (concurring opinion).

<sup>62</sup> 237 U.S. 391 (1915).

<sup>63</sup> *Id.* at 397. It is usually thought that, subject to the limitations imposed by procedural due process, the states are free to distribute their powers among public bodies as they see fit. *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 615 n.13 (1974); *McGautha v. California*, 402 U.S. 183, 272 n.21 (1971) (Brennan, J., dissenting); *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957); *Crowell v. Benson*, 285 U.S. 22, 57 (1932) (dictum); *Dreyer v. Illinois*, 187 U.S. 71 (1902); *Forsyth v. Hammond*, 166 U.S. 506 (1897).

<sup>64</sup> 298 U.S. at 311.

<sup>65</sup> *Id.* at 318.

case,<sup>66</sup> where the Court, influenced again by familiar property and contract doctrines, upheld the provision of the Illinois Fair Trade Act requiring persons with notice of manufacturer-retailer price maintenance contracts to adhere to the prices established in them, even where such persons did not assent to the terms of the contracts—a form of delegated rulemaking power. The Court distinguished *Eubank, Roberge, and Carter*:

In those cases the property affected had been acquired without any preëxisting restriction in respect of its use or disposition. . . . Here, the restriction, already imposed with the knowledge of appellants, ran with the acquisition and conditioned it.<sup>67</sup>

Mr. Justice Jackson, among others, was to be puzzled by the differing results reached by Justice Sutherland in *Carter and Old Dearborn*. "Taken together, the decisions suggest that the labor provisions of the Coal Act were 'obnoxious' not so much to the Constitution as to the judicial sense of what was good for the business community."<sup>68</sup>

In *Highland Farms Dairy, Inc. v. Agnew*,<sup>69</sup> the Court declined to make clear whether a state statute delegating rulemaking power could be invalidated on the basis of the nondelegation doctrine. There a Virginia statute set up a state milk marketing board with authority to fix minimum rates. The Court, echoing *Booth*, emphatically rejected the challenge to this delegation. "The statute challenged as invalid is one adopted by a state. This removes objections that might be worthy of consideration if we were dealing with an act of Congress."<sup>70</sup> But the statute also provided for cancellation of minimum price regulations upon petition of a majority of the producers affected. As to this power to repeal, the Court was more ambivalent.

Delegation to official agencies is one thing, there being nothing in the concept of due process to require that a particular agency shall have a monopoly of power; delegation to private interests or unofficial groups with arbitrary capacity to make their will prevail as law may be something very different. . . .

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<sup>66</sup> *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*, 299 U.S. 183 (1936). A number of commentators have asserted that the *Old Dearborn* case, on its facts, did not uphold a "nonsigner clause" since the defendant there had signed a contract, though the court treated it as ineffective. *Id.* at 187. It is sufficient to observe that no contract was present in the companion cases of *McNeil v. Joseph Triner Corp.*, 299 U.S. 183 (1936), and *Pep Boys, Inc. v. Pyroil Sales Co.*, 299 U.S. 198 (1936).

<sup>67</sup> 299 U.S. at 194. *Cf. O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251 (1931).

<sup>68</sup> R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 164 (1941).

<sup>69</sup> 300 U.S. 608 (1937).

<sup>70</sup> *Id.* at 612.

Without acceptance or rejection of the distinction in its application to this statute, we think it is enough to say that the power of cancellation has not been exercised or even threatened.<sup>71</sup>

In *Currin v. Wallace*,<sup>72</sup> decided in 1939, the Supreme Court upheld a statute empowering the Secretary of Agriculture to establish markets for the inspection and certification of tobacco, no such market to be established "unless two-thirds of the growers, voting at a prescribed referendum, favor it."<sup>73</sup> The Court, citing *Cusack*, observed that "Congress has merely placed a restriction upon its own regulation by withholding its operation as to a given market 'unless two-thirds of the growers voting favor it.'"<sup>74</sup> *Carter* was distinguished as a case "where a group of producers may make the law and force it upon a minority,"<sup>75</sup> while *Roberge* was disposed of largely on the basis that the zoning regulation there was beyond the police power: "[A] prohibition of an inoffensive and legitimate use of property . . . imposed not by the legislature but by other property owners . . ."<sup>76</sup>

Similar conclusions were reached in the case of *United States v. Rock Royal Co-operative, Inc.*<sup>77</sup> The Court followed *Currin v. Wallace* in upholding the statute, and was undisturbed by the fact that a single cooperative league, empowered to vote on behalf of its members, was able to cast over half the votes counted in the referendum: "[I]nasmuch as Congress could place the Order in effect without any vote, it is permissible for it to provide for approval or disapproval in such way or manner as it may choose."<sup>78</sup>

<sup>71</sup> *Id.* at 614.

<sup>72</sup> 306 U.S. 1 (1939).

<sup>73</sup> *Id.* at 6.

<sup>74</sup> *Id.* at 15.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 16.

<sup>77</sup> 307 U.S. 533 (1939).

<sup>78</sup> *Id.* at 578. "Of 38,627 votes counted as valid in the referendum, 33,663 or 87.1 percent were in favor of the issuance of the Order and 4,964 or 12.9 percent were opposed. Of the favorable votes, the League cast 22,287." *Id.* at 557. See also *H.P. Hood & Sons, Inc. v. United States*, 307 U.S. 588 (1939); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 735 (1973) (Douglas, J., dissenting) ("J. G. Boswell Co. commands the greatest number of votes, 37,825, which are enough to give it a majority of the board of directors."). In upholding such distributions of voting power in water districts, the Supreme Court noted in a companion case:

We cannot agree with the dissent's intimation that the Wyoming Legislature has in any sense abdicated to a wealthy few the ultimate authority over land management in that State. The statute authorizing the establishment of improvement districts was enacted by a legislature in which all of the State's electors have the unquestioned right to be fairly represented. Under the act, districts may be formed only as subdivisions of soil and water conservation districts. . . . And a precondition to their formation referendum is a determination by a board of supervisors of the affected conservation district, popularly

In *Sunshine Anthracite Coal Co. v. Adkins*,<sup>79</sup> the Court upheld, on the authority of *Currin v. Wallace*, a statute setting up industry boards each empowered "on its own motion or when directed by the [public] Commission" to propose minimum prices which "may be approved, disapproved, or modified by the Commission." The prices thus set were applicable to code members alone, but a 19½ percent tax was imposed on non-code-members. The opinion of Justice Douglas took the view that "[t]he members of the code function subordinately to the Commission. . . . Since law-making is not intrusted to the industry, this statutory scheme is unquestionably valid."<sup>80</sup> The Court did not rely on the facade of voluntarism that the option of paying the tax in place of price regulation might have been thought to supply.

In *Parker v. Brown*,<sup>81</sup> it was not felt necessary even to discuss the delegation problem when the Court upheld a California statute, the effectiveness of which was conditioned on both initiation of action by private persons and a referendum of producers following pro forma approval by the state, thus reducing the *Carter* doctrine to a hollow shell. Yet this result was achieved without once directly questioning the proposition that legislative power could not be delegated to private persons, and later cases have likewise upheld delegations sub silentio.<sup>82</sup>

ected by both occupiers and owners of land within the district, that the watershed improvement district is both necessary and administratively practicable. *Associated Enterprises v. Toltec Watershed Improvement Dist.*, 410 U.S. 743, 744-45 (1973). In the *Salyer* case, *supra*, it was noted that the scheme there at issue required the concurring approval of the State Treasury, the State Department of Water Resources, a majority of landowners voting in an unweighted election, and a weighted majority.

<sup>79</sup> 310 U.S. 381 (1940).

<sup>80</sup> *Id.* at 399.

<sup>81</sup> 317 U.S. 341 (1943). The statute was upheld against challenges based on the Sherman Act and commerce clause. See *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 176 n.19 (1963); *United States v. Borden Co.*, 308 U.S. 188, 199 (1939). In *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the Court upheld a Washington minimum wage statute under which wage scales could be promulgated by a public board only after recommendations by a conference constituted on a principle of interest representation. See also *Opp Cotton Mills v. Administrator, Wage & Hour Div.*, 312 U.S. 126 (1941).

<sup>82</sup> Thus in *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552 (1947), the Supreme Court upheld a statute vesting licensing powers in a board consisting entirely of river pilots, and providing that the board should license only persons who had served a six month apprenticeship as river pilots. Four judges dissented on equal protection grounds. A newer challenge to the statute involved in *Kotch* was similarly unsuccessful. See *Brechtel v. Board of Examiners of Bay Pilots*, 230 F. Supp. 18 (D. La. 1964); *accord*, *Register v. Milam*, 188 So. 2d 785 (Fla. 1966).

Another indication of the shifting scope of the doctrine is illustrated by the fate of *Kesler v. Department of Pub. Safety*, 369 U.S. 153, 181-82 (1962), sustaining as not in conflict with the federal bankruptcy act a state statute allowing judgment creditors of motorists involved in automobile accidents to initiate the suspension and consent to the restoration of drivers' licenses. *Kesler* was overruled in *Perez v. Campbell*, 402 U.S.

## IV. SPECIFIC EXAMPLES OF THE DOCTRINE

A. *Statewide Referenda; Local Option*

The conception of delegation of legislative power has been applied in a large number of cases involving statewide referenda and local option elections. The cases do so largely under the compulsion of state court precedents which in turn follow the remarkable early Delaware case of *Rice v. Foster*.<sup>83</sup> There the court observed:

[O]ur republican government was instituted by the consent of the people. The characteristic which distinguishes it from the miscalled republics of ancient and modern times, is, that none of the powers of sovereignty are exercised by the people; but all of them by separate, co-ordinate branches of government in whom those powers are vested . . . . These co-ordinate branches are intended to operate as balances, checks and restraints, not only upon each other, but upon the people themselves; to guard them against their own rashness, precipitancy, and misguided zeal; and to protect the minority against the injustice of the majority.<sup>84</sup>

But what of the tyranny of legislative majorities, chosen by the same electors that vote in a proposed referendum? To this question, the court rejoined in the language of Burke's Address to the Electors of Bristol: "The representative owes to his constituents, not only his industry, but his judgment: and he betrays, instead of serving them, if he sacrifices it to their opinions."<sup>85</sup> This proposition is clearly unexceptionable. But the court went further, for the act in question involved a prohibition statute. Might not a conscientious representative, without violating Burke's precepts, conclude that the desirability of the statute was itself a function of the public's attitude toward it? Later experience attests to the wisdom of such a view, yet the court declined to permit the statute to be conditioned on popular acceptance. "The sovereign power . . . of this State, resides with the legislative, execu-

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637, 651-52 (1971); see *Bell v. Burson*, 402 U.S. 535 (1971), invalidating a related provision on procedural due process grounds.

An amusing sidelight to the delegation cases is provided by *Helvering v. Lerner Stores Corp.*, 314 U.S. 463, 468 (1941). There the court sustained a statute allowing taxpayers to choose between alternate tax bases, holding it was not a delegation since "Congress has fixed the criteria in light of which the choice is to be made [by the taxpayer]." In *Duhame v. State Tax Comm'n*, 65 Ariz. 268, 179 P.2d 252 (1947) a similar provision was upheld on the basis that the taxpayer "applied" the law rather than made it. Surely the obvious observation to make in these cases is that the taxpayer is not delegated the right to regulate anyone's conduct but his own.

<sup>83</sup> 4 Del. (4 Harr.) 479 (1847).

<sup>84</sup> *Id.* at 487.

<sup>85</sup> 2 E. BURKE, WORKS 89, 96 (7th ed. 1881), quoted in *id.* at 490.

tive, and judicial departments. Having thus transferred the sovereign power, the people cannot resume or exercise any portion of it."<sup>86</sup>

It was of this case that Justice Holmes was to write, in a dissenting opinion taking the opposite view,

The question is not whether the people of their own motion could pass a law without any act of the Legislature. That no doubt, whether valid or not, would be outside the Constitution. So perhaps might be a statute purporting to confer the power of making laws upon them. But the question . . . is whether an act of the Legislature is made unconstitutional by a proviso that, if rejected by the people, it shall not go into effect. If it does go into effect, it does so by the express enactment of the representative body. . . . I agree that the discretion of the Legislature is intended to be exercised. I agree that confidence is put in it as an agent. But I think that so much confidence is put in it that it is allowed to exercise its discretion by taking the opinion of its principal if it thinks that course to be wise. . . . The contrary view seems to me an echo of Hobbes's theory that the surrender of sovereignty by the people was final. I notice that the case from which most of the reasoning against the power of the Legislature has been taken by later decisions states that theory in language which almost is borrowed from the Leviathan. . . . Hobbes urged his notion in the interest of the absolute power of King Charles I., and one of the objects of the Constitution of Massachusetts was to deny it.<sup>87</sup>

### 1. Statewide Referenda

At the time that Professor Jaffe wrote in 1937, the majority of courts persisted in a refusal to allow legislatures to condition the passage of laws on statewide referenda,<sup>88</sup> though a number of states took Holmes' view. But practical needs led a large number of states to refuse to follow the early Delaware court in disallowing local option elections;<sup>89</sup> indeed three states had been led to overrule earlier holdings in order to validate such local referenda.<sup>90</sup> And this was so even though

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<sup>86</sup> 4 Del. (4 Harr.) at 488. Compare the similar Hobbesian view of the court in *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 124, 96 Cal. Rptr. 601 (1971), with its proposition that a state cannot by delegating taxing and spending powers to local governments produce results which it could not validly achieve through its own direct measures. *But cf.* *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 54 n.110 (1973).

<sup>87</sup> Opinions of the Justices, 160 Mass. 586, 593, 594-95, [*In re* Municipal Suffrage to Women] 36 N.E. 488, 491-92 (1894) (Holmes, J., dissenting).

<sup>88</sup> Cases from Alabama, California, Illinois, Iowa, Louisiana, Massachusetts, New Hampshire, and Texas. *Contra*, cases from Georgia, Michigan, Vermont, and Wisconsin (dictum). See Jaffe at 222 nn. 45 & 46.

<sup>89</sup> Valid: California, Illinois, Indiana, Massachusetts, New York, Pennsylvania. Void: Delaware, Iowa, Texas. Jaffe at 223 n.47.

<sup>90</sup> *Id.* The states were California, Indiana, and Pennsylvania.

from a purely formal standpoint there is less justification for delegation by a legislature to voters of a county than there is for delegation to the voters of a state. The second group, Jaffe points out, has constitutional significance; the first does not.<sup>91</sup> Indeed, the Delaware court found an anomaly in allowing state law to be modified "by the will of a majority of the citizens who voted in [a] county, although it might be against the will of a majority of the citizens of the State. . . ."<sup>92</sup>

Since Jaffe's article, developments in this branch of the doctrine have been laggard. The Supreme Court of Wisconsin reaffirmed its adherence to the minority view upholding statewide referenda.<sup>93</sup> The Arkansas court upheld a statewide referendum by analogy to the local option cases, thus joining the minority states.<sup>94</sup> In addition, a number of other states have begun whittling away at the majority rule although continuing to pay lip service to it.<sup>95</sup> In Oregon, the legislature has been allowed to make the effectiveness of an act contingent upon the rejection of another act at a referendum.<sup>96</sup> In Kentucky, where the issuance of bonds is constitutionally subject to public approval, the court has allowed a referendum on an act removing the interest limitation on an issue of unsold bonds, pointing to the fact that the question would not have arisen but for the public approval of the bond issue itself.<sup>97</sup> The Supreme Court of Alabama had reaffirmed its adherence to the majority view, which applies in that state to tax questions only.<sup>98</sup> However, Alabama has more recently taken a stance similar to Oregon's in upholding a statute whose effectiveness was contingent upon the adoption of a related constitutional amendment; the latter required voter approval.<sup>99</sup> Most telling is the recent decision of the Supreme Court of the United States in *James v. Valtierra*,<sup>100</sup>

<sup>91</sup> *Id.* at 224.

<sup>92</sup> *Rice v. Foster*, 4 Del. (4 Harr.) 479, 491 (1847). See also Holmes, J., dissenting, in *Opinions of the Justices*, 160 Mass. 586, 594, [*In re* Municipal Suffrage to Women] 36 N.E. 488, 492 (1894): "The objection [to constitutionality], if sound, would seem to have equal force against all forms of local option. But I will consider the question when it arises. The difference is plain between that case and one where the approval required is that of the sovereign body."

<sup>93</sup> *State ex rel. Broughton v. Zimmerman*, 261 Wis. 398, 52 N.W.2d 903 (1952).

<sup>94</sup> *Fulkerson v. Refunding Bd.*, 201 Ark. 957, 147 S.W.2d 980 (1941).

<sup>95</sup> *Busch v. Turner*, 26 Cal. 2d 817, 161 P.2d 456 (1945); cf. *Geiger v. Board of Supervisors*, 48 Cal. 2d 832, 313 P.2d 545 (1957); *Application of Oklahoma Building Bonds Comm'n*, 410 P.2d 521 (Okla. 1966); *Application of Oklahoma Indus. Fin. Auth.*, 360 P.2d 720 (Okla. 1961).

<sup>96</sup> *Marr v. Fisher*, 182 Ore. 383, 187 P.2d 966 (1947).

<sup>97</sup> *Walton v. Carter*, 337 S.W.2d 674 (Ky. App. 1960).

<sup>98</sup> *In re Opinions of the Justices*, 232 Ala. 56, 166 So. 706 (1936).

<sup>99</sup> *Opinion of the Justices*, 287 Ala. 326, 251 So. 2d 744 (1971).

<sup>100</sup> 402 U.S. 137, 141 (1971).

with its ringing dictum that “[p]rovisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice.” *Valtierra* may well have sounded the final doom of the *Rice v. Foster* doctrine.

## 2. Local Option Laws

Virtually all state courts now recognize the validity of local option laws. In addition to the six states listed by Professor Jaffe,<sup>101</sup> 19 other states have squarely upheld the validity of such acts.<sup>102</sup> The willingness of the courts to uphold the local option is founded on what is perceived to be a practical need for local approval of liquor and tax laws, the courts taking the view that “the constitution itself does not require the impracticable or impossible.”<sup>103</sup> In the language of an early New Jersey case,

it has always been recognized as a legitimate part of the legislative function, as well as a duty in harmony with the spirit of our institutions, to enable the people, in whom all power ultimately resides, to control the police powers in communities for themselves.<sup>104</sup>

There are still some limitations on local option elections, however. The election acts are usually upheld on the theory that they are complete statutes, the execution of which merely happens to be contingent on a local event. Where, by an accident of draftsmanship, approval of the act itself is made contingent on local acceptance, the courts may follow the example of a Rhode Island decision which invalidated an act which “in its present form does not purport to be a completed act by the legislature in performance of its legislative function under the constitution.”<sup>105</sup>

In addition, some courts, such as those of Tennessee, invalidate acts which depend on a single election for effectiveness, holding that the act of a legislature is not complete unless it retains continuing validity regardless of immediate approval.<sup>106</sup> By contrast, a Missouri court upheld an enactment on the basis that

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<sup>101</sup> See note 89 *supra*.

<sup>102</sup> See 16 C.J.S. *Constitutional Law* § 142 n.93 (1956) and cases there cited; *id.* (Supp. 1974); 2 E. McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 4.08-10 (3d ed. F. Ellard 1966).

<sup>103</sup> See *Reynolds v. Dallas County*, 203 S.W.2d 320 (Tex. Civ. App. 1947).

<sup>104</sup> *Paul v. Gloucester County*, 50 N.J.L. 585, 603-04, 15 A. 272, 280 (Ct. Err. & App. 1888).

<sup>105</sup> *Opinion to the Governor*, 62 R.I. 316, 328, 6 A.2d 147, 153 (1939).

<sup>106</sup> *Halmontaller v. City of Nashville*, 206 Tenn. 64, 332 S.W.2d 163 (1960) (holding single elections invalid).

the statute does not delegate to the people the power to discontinue and recreate the separate officers of recorder at pleasure, but only permits them to vote on the question of joining the two officers; and when there has been such joinder it would seem the voting power of the people under the section is exhausted.<sup>107</sup>

Some traces of the earlier position remain. Thus a North Carolina court invalidated a statute which allowed the voters of a town to authorize a municipal racing commission to establish a racetrack outside the town, the statute being regarded as an imposition on the residents of the outlying district.<sup>108</sup> But if the earlier reasoning is rejected, it should not apply to this sort of case either, since a legislature in which residents of the outlying district are represented has determined that the construction of the track would not offend state policy, and has merely conditioned its approval on ratification by the persons who are to put up the funds. No licensing function is involved; if delegation questions are made to run on the distinction between rulemaking and adjudication, statutes which merely require popular assent to legislative acts ought not to fall.

### B. *Creation of Special Districts*

Many American statutes allow property owners to petition and vote for the creation of special taxing districts, the boundaries of which are defined by the petition.

Districts of this sort are created for a variety of reasons.<sup>109</sup> The special taxing district is a flexible device, and can be used to cut across municipal lines which would otherwise inhibit the development of integrated services. In recent years, it has found increasing use in more developed regions as a means of evading statutory or constitutional municipal debt limits.

Where the districts are created by the act of a legislature, they are constitutionally unassailable, even though the legislature may be giving mere pro forma approval to proposals by private parties. Where, however, the petition/referendum device is authorized by statute, courts have been concerned with protecting dissenting property owners within the proposed district. Both due process and nondelegation doctrines have been invoked to require that a hearing be given to dissenting

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<sup>107</sup> State *ex inf.* Crain *ex rel.* Peebles v. Moore, 339 Mo. 492, 501, 99 S.W.2d 17, 22 (1936).

<sup>108</sup> State *ex rel.* Taylor v. Carolina Racing Ass'n, 241 N.C. 80, 84 S.E.2d 390 (1954).

<sup>109</sup> See M. POCK, INDEPENDENT SPECIAL DISTRICTS: A SOLUTION TO THE METROPOLITAN AREA PROBLEM (1962); Willoughby, *The Quiet Alliance*, 38 S. CAL. L. REV. 72 (1965).

property owners and that an official be vested with discretion to reject districts that would be of no benefit to dissenting property owners' lands. The Supreme Court in 1926 required such a procedure for due process reasons:

Where a local improvement territory is selected, and the burden is spread by the legislature . . . , the owners of property in the district have no constitutional right to be heard on the question of benefits. . . . But it is essential to due process of law that such owners be given notice and opportunity to be heard on that question where, as here, the district was not created by the legislature, and there has been no legislative determination that their property will be benefited by the local improvement.<sup>110</sup>

The decision whether a particular landowner's property is to be included within a district is thus properly regarded by the courts as action partaking of the character of an adjudication, rather than an exercise of rulemaking power, where the determination is made by neighbors rather than by the representatives of the public at large.<sup>111</sup>

Though in early years courts were sometimes willing to uphold the creation of special districts without a hearing when tax rates charged in them were nominal,<sup>112</sup> this course of action has been foreclosed by other decisions.<sup>113</sup> Courts thus consistently strike down the creation of districts when no safeguards are present.<sup>114</sup> But when provision for hearing and discretionary disapproval is made, courts have consistently upheld the creation of new districts.<sup>115</sup> The sole concern of the courts in most cases has been the protection of dissenting property owners; considerations of general public policy rarely enter into decisions.<sup>116</sup> This approach seems appropriate in the light of the

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<sup>110</sup> *Browning v. Hooper*, 269 U.S. 396, 405-06 (1926). *See Embree v. Kansas City & Liberty Blvd. Road Dist.*, 240 U.S. 242 (1916).

<sup>111</sup> *Cf.* text accompanying note 73 *supra*.

<sup>112</sup> *Davis v. State*, 141 Ala. 84, 37 So. 454 (1904) (fencing district).

<sup>113</sup> *Summerville v. North Platte Valley Weather Control Dist.*, 170 Neb. 46, 101 N.W.2d 748 (1960) (holding district invalid for lack of hearing though only one mill tax). *Cf. Syfie v. Tri-County Hosp. Dist.*, 186 Neb. 478, 184 N.W.2d 398 (1971).

<sup>114</sup> *Id.* *See also State ex rel. Jones v. Brown*, 338 Mo. 448, 92 S.W.2d 718 (1936); *Anderson v. Carlson*, 171 Neb. 741, 107 N.W.2d 535 (1961) (due process grounds).

<sup>115</sup> *See, e.g., Miller v. Ryan*, 54 So. 2d 60 (Fla. 1951) (advertising district); *Dortch v. Lugar*, 255 Ind. 545, 266 N.E.2d 25 (1971); *Martin v. Ben Davis Conservancy Dist.*, 238 Ind. 502, 153 N.E.2d 125 (1958) (conservation district); *Evans v. West Norriton Twp. Mun. Auth.*, 370 Pa. 150, 87 A.2d 474 (1952) (pure stream authority); *Branch v. Salt Lake County Serv. Area No. 2—Cottonwood Hts.*, 23 Utah 2d 181, 460 P.2d 814 (1969) (County Service Area Act). In *Kriz v. Klingensmith*, 176 Neb. 205, 125 N.W.2d 674 (1964), discretion in the county board to reject a district was held sufficient to sustain the statute, though no notice or hearing was provided for. The court held that no hearing was requisite until an actual assessment was sought to be imposed.

<sup>116</sup> *But see State ex rel. Attorney-General v. County School Bd.*, 181 Miss. 818, 181

analysis of the delegation doctrine developed above.

It might seem appropriate for courts to use substantive due process doctrines to hold that the general enabling statutes must direct the courts to make some inquiry into the bona fides of a district as a political organ, as well as into whether the use of district funds will benefit the total area encompassed within a district, for in many cases the creation of special districts has been approved even though the use of the device may be oppressive to the interests of future residents and bondholders.<sup>117</sup> In approaching the problems presented by new districts, courts frequently assume attitudes redolent of the spirit of the old frontier. The special district is viewed as a form of social contract which enables neighbors on the isolated prairie to unite for the common good.<sup>118</sup> The recent proliferation of special districts created to support activities ranging from tourist promotion to weather control, calls the accuracy of this earlier view into question. Without provision in enabling acts for some judicial scrutiny, the use of tax district funds to engage in promotional advertising and to finance business enterprises will merely become a means of permanently placing tax burdens upon large stretches of land regardless of any benefits accruing to future residents. Collective bargaining agreements with taxing districts might also be thought to raise problems,<sup>119</sup> though the issues in this area are

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So. 313 (1938) (rights of citizens outside district to convenient schools must be found not impaired).

<sup>117</sup> *But cf. In re Arch Hurley Conservancy Dist.*, 52 N.M. 34, 191 P.2d 338 (1948) (court must find that all of district will benefit). Concern for the welfare of future citizens was advanced as a ground for judicial intervention some time ago in Reich, *The Public and the Nation's Forests*, 50 CALIF. L. REV. 381 (1962). For a discussion of the use of the generations-yet-to-come argument in traditional and current environmental thought, see Meyers, *An Introduction to Environmental Thought: Some Sources and Some Criticisms*, 50 IND. L.J. 426, 450 (1975).

<sup>118</sup> The classic approach is that of Cooley:

[A]s the burdens of municipal government must rest upon [the corporators'] shoulders, and especially as by becoming incorporated they are held, in law, to undertake to discharge the duties the charter imposes, it seems eminently proper that their voice should be heard on the question of their incorporation.

T. COOLEY, *CONSTITUTIONAL LIMITATIONS* 129 [\*118] (3d ed. 1874); *id.* at 236 (8th ed. 1927) (citing cases).

<sup>119</sup> See K. HANSLOWE, *THE EMERGING LAW OF LABOR RELATIONS IN PUBLIC EMPLOYMENT* 21-24 (1967). Certain courts have held that it would be an impermissible delegation of legislative power to allow teachers to bargain collectively with school boards. *Fellows v. LaTronica*, 151 Colo. 300, 377 P.2d 547 (1962); *accord*, *Rockey v. School Dist. #11*, 32 Colo. App. 203, 508 P.2d 796 (1973). See *Board of Educ. v. Scottsdale Educ. Ass'n*, 17 Ariz. App. 504, 498 P.2d 578 (1972) (rev'g trial ct.), *trial ct. reversal sustained on other grounds*, 109 Ariz. 342, 509 P.2d 612 (1973); *Schryver v. Schirmer*, 84 S.D. 352, 171 N.W.2d 634 (1969); *Joint School Dist. v. Wisconsin Emp. Rel. Bd.*, 37 Wis. 2d 483, 155 N.W.2d 78 (1967) (dictum); *Annot.*, 31 A.L.R.2d 1142, 1170 (1953) and cases therein cited.

The issue of delegation in collective bargaining can sometimes be profitably considered as a matter of subdelegation—that is, whether the state had delegated to the

not different from those which arise in the law of municipal corporations generally. And controls over the capacity of taxpayers to prejudice other residents or bondholders also seem indicated.<sup>120</sup> But again it may be doubted that the nondelegation doctrine is the appropriate means through which to impose controls. Indeed, judicial checks would seem inappropriate for many of the same reasons that judicial checks on government expenditures and monetary policy are inappropriate. The burden of dispensations in favor of special districts falls, at least in the first instance, on the public at large.

### C. Restrictions on the Use of Property

The confusion of thought prevalent in this area of the law is nowhere more apparent than in the cases relating to the imposition and removal of zoning restrictions. The history is a familiar one. The three leading Supreme Court cases have generated much subsequent confusion. In *Eubank v. City of Richmond*,<sup>121</sup> decided in 1912, the Court invalidated a statute allowing two-thirds of the residents of a street to require revisions in a building line. Five years later, in *Thomas Cusack Co. v. City of Chicago*,<sup>122</sup> the Court upheld a statute requiring written consent from the owners of the greater part of the frontage on

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school board or municipality the powers it was seeking to subdelegate (by bargaining). Cf. IND. ANN. STAT. § 20-7.5-1-1(d) (Code ed. 1975). In most states, school boards exercise only those powers specifically delegated to them by the state legislature; see, e.g., Gary Teachers Union, Local 4, AFT v. School City, 152 Ind. App. 591, 284 N.E.2d 108 (1972). Subdelegation problems always involve initial questions of whether the subdelegating body possessed the powers it sought to delegate away. This inquiry is a matter of statutory construction, as it must be where municipal powers arise solely from statute, and the charge is that the city acted ultra vires. Ultra vires resolution, being statutory, is preferable to resolution by recourse to the delegation doctrine, which is a constitutional argument. For cases applying (and attempting to distinguish) both ultra vires and delegation doctrines, see *City & County of San Francisco v. Cooper*, 13 Cal. 3d 898, 534 P.2d 403, 120 Cal. Rptr. 707 (1975); *Jefferson Elementary School Dist. v. Bent*, 41 Cal. App. 3d 962, 116 Cal. Rptr. 554 (1974).

Similar delegation problems arise where municipalities or school boards agree to settle impasses in bargaining by arbitration (interest arbitration). Comment, *Collective Bargaining for Public Employees and the Prevention of Strikes in the Public Sector*, 68 MICH. L. REV. 260, 281-88 (1969). Cf. Gary Teachers Union, Local 4, AFT v. School City, 152 Ind. App. 591, 284 N.E.2d 108 (1972) (grievance arbitration). The mandatory interest arbitration provisions of Maine's teacher bargaining law survived attack against a charge of unconstitutional delegation, lacking enforceable standards, where it was argued that legislative policymaking would be delegated to the arbitrators required to be used in the event of impasse. *City of Biddeford v. Biddeford Teachers Ass'n*, 304 A.2d 287 (Me. 1973) (evenly divided court) (citing and discussing delegation cases in the field of public employment labor relations), construed in *Finks v. State Highway Comm'n*, 328 A.2d 791, 795 n.2 (Me. 1974).

<sup>120</sup> Jaffe at 226 and cases there cited. Cf. *Application of Johnston*, 69 Idaho 139, 204 P.2d 434 (1949).

<sup>121</sup> 226 U.S. 137 (1912). Cf. *Gorieb v. Fox*, 274 U.S. 603 (1927).

<sup>122</sup> 242 U.S. 526 (1917), discussed in text accompanying notes 50-53 *supra*.

a street as a prerequisite to the erection of billboards. The Court distinguished between the imposition and the lifting of restrictions:

The plaintiff in error cannot be injured, but obviously may be benefited by this provision, for without it the prohibition of the erection of such billboards in such residence sections is absolute. He who is not injured by the operation of a law or ordinance cannot be said to be deprived by it of either constitutional right or of property.<sup>122a</sup>

Finally, in *Washington ex rel. Seattle Title Trust Co. v. Roberge*,<sup>123</sup> the Court struck down an act requiring consent of two-thirds of the owners of neighboring property to authorize the construction of an old people's home. The Court distinguished the *Cusack* case on the basis that the billboards were recognized as a nuisance whereas the old age home was not.

It is easy to scoff at the Supreme Court's distinctions, and many commentators have indulged in this obvious pleasure.<sup>124</sup> It has been said of *Eubank* and *Cusack*, "[i]n either case, the action or non-action of the property owners would be the chief factor in determining whether or not a building line should be established. . . . [The difference] is a matter of mathematics rather than of legal principle."<sup>125</sup> Commentators have had an easier time in squaring *Roberge* and *Cusack*: since *Village of Euclid v. Ambler Realty Co.*<sup>126</sup> used a nuisance criterion to measure the validity of zoning ordinances, the provision in *Roberge* may have been invalid because it undertook to prohibit nonnuisances, not because it allowed exemptions to the prohibition by the consent of neighbors. Yet the vindication in *Cusack* of a statute allowing neighbors to consent to nuisances may still seem a paradox:

Shall the owner of an isolated apartment house be permitted to erect and maintain a fire-trap with the consent of his tenants?  
Shall a grocer be allowed to sell deleterious foods with the consent

<sup>122a</sup> *Id.* at 530.

<sup>123</sup> 278 U.S. 116 (1928), discussed in text at note 53 *supra*.

<sup>124</sup> *E.g.*, Freund, *Some Inadequately Discussed Problems of the Law of City Planning and Zoning*, 24 ILL. L. REV. 135, 142-44 (1929); Havighurst, *Property Owners' Consent Provisions in Zoning Ordinances*, 36 W. VA. L.Q. 175 (1930); McBain, *Law-Making by Property Owners*, 36 POL. SCI. Q. 617 (1921); Jaffe at 226-28.

<sup>125</sup> McBain, *supra* note 124, at 637 n.4. Of course, there may be differences in the amount of social conflict generated by the two types of provisions. It might also be argued that a purchaser of land subject to a consent statute takes subject to the restriction, but since the market may discount in advance the imposition or removal of a restriction there is little difference between the *Eubank* and *Cusack* statutes in this respect.

<sup>126</sup> 272 U.S. 365 (1926).

of his customers? . . . Merely to ask such questions is to answer them.<sup>127</sup>

The vindication of consent statutes may be due to the judicial indulgence toward the dispensing power manifest in other contexts.<sup>128</sup> It may seem justified, too, to those who take the view that "it is difficult to imagine a more appropriate use of the police power, than that which imposes a limitation upon the use of property for the protection of community property values."<sup>129</sup> The courts have not purported to sustain zoning statutes on this basis,<sup>130</sup> though perhaps they should have done so. If this view of the zoning function is taken, the *Eubank-Cusack* distinction can be rationalized:

In the *Eubank Case* there seems to have been more of an attempt to invest property owners with powers similar to those of an administrative board. In the cases where the question is strictly one of consent of property owners expressed by action, it is clearer that they are merely permitted to waive a statutory right passed chiefly for their protection.<sup>131</sup>

But one need not go on with attempts at distinctions. For the purposes of this analysis, these statutes are all of a piece. Many state courts, despite *Cusack*, have invalidated consent statutes even where possible nuisances are not involved.<sup>132</sup> Their hostility—and the hostility of the Supreme Court to delegation in *Eubank* and perhaps that in *Roberge*—rests on considerations foreign to distinctions between prohibitory and consent statutes, or between nuisances and innocent uses. The hostility rests rather on a dislike of delegation of powers of an essentially judicial character. Since zoning statutes, unlike statutes of the type sustained in *Jackman v. Rosenbaum Co.*,<sup>133</sup> are thought to rest on the police power rather than on "the community's understanding of the reciprocal rights and duties of neighboring landowners,"<sup>134</sup> delegation of their detailed administration to private groups raises

<sup>127</sup> *McBain*, *supra* note 124, at 637.

<sup>128</sup> Compare the law relating to government gratuities summarized in 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE ch. 28 (1958).

<sup>129</sup> *McBain*, *supra* note 124, at 639.

<sup>130</sup> In the *Euclid* case, 272 U.S. at 387-88, the Court observed: "The ordinance . . . must find [its] justification in some aspect of the police power . . . . [T]he law of nuisances . . . may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the power."

<sup>131</sup> *Havighurst*, *supra* note 124, at 181.

<sup>132</sup> The cases in this area are collected in A. RATHKOPF, LAW OF ZONING AND PLANNING ch. 29 (3d ed. 1956 & Supp. 1974).

<sup>133</sup> 260 U.S. 22 (1922) (sustaining a statute immunizing a person reconstructing a party wall from liability to his neighbor for incidental damages).

<sup>134</sup> 2 P. FREUND, A. SUTHERLAND, M. HOWE, & E. BROWN, CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS 1336-37 (2d ed. 1961).

problems akin to those presented by private licensing schemes. Laws which so literally make persons go as supplicants to their neighbors may thus seem especially unattractive to the courts.

Hence, many courts and writers have been concerned with the evil of purchased consents.<sup>135</sup>

You cannot with yard stick decide whether the location of [a] saloon would be an injury. It may or may not be an injury . . . . But if you give power to every person within twenty-five feet of every proposed liquor store to determine that question for himself, you put into his hands a great power which he is likely to abuse. . . . To give a neighboring real estate owner an uncontrollable right to object may . . . be given him the whip hand over the applicant for a license; and it will depend entirely upon the character of him who holds that whip, whether this instrument of castigation be used for the owner's protection or be applied in securing unjust booty. The existing law was put on the statute book with no view of limiting in number the licenses granted, or of enhancing the value of one man's real estate at the expense of another. It was put there as a shield for property owners against what might be an injury to them. . . . [I]t was not designed to be used as a sword. But when you give the absolute right to object, you have put into the hands of men an irresistible weapon.<sup>136</sup>

Thus it can be suggested that the validity of zoning consent statutes ought to turn on the extent to which the statutes encourage the twin evils of *ad hominem* determinations and purchased consents. Where a statute permits landowners over a reasonably wide area to legitimize otherwise forbidden uses, the determination made, if not limited to

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<sup>135</sup> *Doane v. Chicago City Ry. Co.*, 160 Ill. 22, 45 N.E. 507 (1895), is a leading early case invalidating purchased consents. Of course, a purchased consent may be regarded as a private substitute for compensation in eminent domain, but the cost of the consent will be more related to benefit than damage and the prospects for inequities as between neighbors will be much greater. Similar problems arise under private leases requiring landlord consent to alterations. In *Gorieb v. Fox*, 274 U.S. 603 (1927), the Supreme Court sustained a statute requiring new houses to conform to the setback lines established by houses on the same street at the time of the enactment of the statute. Compare *Sierra Constr. Co. v. Board of Appeals*, 12 N.Y.2d 79, 187 N.E.2d 123, 236 N.Y.S.2d 53 (1962), where the court, in a 4-3 decision, sustained an ordinance requiring setback lines of new houses to conform to those established by houses on the same street which were themselves built after enactment of the ordinance. The decision seems correct; the houses were not built for the purpose of regulating the conduct of the later builder, nor are there possibilities of *ad hominem* determinations and purchased consents under such an ordinance.

<sup>136</sup> Argument of Louis D. Brandeis, on behalf of the Massachusetts Protective Liquor Dealers' Ass'n, before the Joint Comm. on Liquor Law of the Massachusetts Legislature, Feb. 27, 1891, reprinted in 1 *Hearings on the Nomination of Louis D. Brandeis Before a Subcomm. of the Senate Comm. on the Judiciary* 1057, 1065 (1916).

a specific case, is legislative rather than essentially judicial in character. Validation of such statutes is not inconsistent with the thesis tendered here, even though the area of the referendum may not encompass whole townships so as to come under the rule of the local option cases. But the ordinary ordinance requiring consent of neighbors would properly seem to be more vulnerable to challenge, unless the view of the *Rosenbaum* case is taken.

Other courts have followed no consistent patterns in upholding or invalidating consent provisions. Statutes have been invalidated where consent was required to operate schools,<sup>137</sup> gin mills,<sup>138</sup> and filling stations,<sup>139</sup> but validated where commercial enterprises,<sup>140</sup> used auto lots,<sup>141</sup> liquor licenses,<sup>142</sup> taxi stands,<sup>143</sup> and, more recently, "adult" theatres<sup>144</sup> were made subject to the requirement. A statute limiting a zoning board's discretionary power to grant zoning variances to cases where variances were requested by two-thirds of the residents of a district was invalidated,<sup>145</sup> a surprising result in light of *Cusack* since the petition did not bind the zoning board and was hence equivalent to only a consent provision. Another court upheld a statute providing that zoning variances required a three-fourths instead of majority vote by a board vested with discretionary powers when a protest petition signed by 20 percent of area residents was filed against a zoning change.<sup>146</sup> This result seems consistent with *Cusack*, since this is only an elaborate consent provision.

The courts have not even been consistent in cases involving petitions rather than consent provisions, despite the *Eubank* case. A North Carolina court upheld a statute giving the owners of property at an intersection the power (but not the duty) to compel rezoning of their

<sup>137</sup> *Yanow v. Seven Oaks Park, Inc.*, 18 N.J. Super. 411, 87 A.2d 454 (Ch. Div. 1952), *rev'd in part*, 11 N.J. 341, 94 A.2d 482 (1953).

<sup>138</sup> *Wilcher v. Sharpe*, 236 N.C. 308, 72 S.E.2d 662 (1952).

<sup>139</sup> *Willis v. Town of Woodruff*, 200 S.C. 266, 20 S.E.2d 699 (1942). *Cf. Niggel v. City of Columbia*, 254 S.C. 19, 173 S.E.2d 136 (1970).

<sup>140</sup> *Leighton v. City of Minneapolis*, 16 F. Supp. 101 (D. Minn. 1936); *O'Brien v. City of St. Paul*, 285 Minn. 378, 173 N.W.2d 462 (1969).

<sup>141</sup> *People v. Gottlieb*, 337 Mich. 276, 59 N.W.2d 289 (1953).

<sup>142</sup> *Beacon Liquors v. Martin*, 279 Ky. 468, 131 S.W.2d 446 (1939).

<sup>143</sup> *In re Petersen*, 51 Cal. 2d 177, 331 P.2d 24 (1958) (abutting property).

<sup>144</sup> *Nortown Theatre, Inc. v. Gribbs*, 373 F. Supp. 363, 368-69 (E.D. Mich. 1974) (citing *Cusack*).

<sup>145</sup> *State ex rel. Foster v. City of Minneapolis*, 255 Minn. 249, 97 N.W.2d 273 (1959). *Cf. O'Brien v. City of St. Paul*, 285 Minn. 378, 173 N.W.2d 462 (1969) (sustaining a consent ordinance). A result similar to the result in the *Foster* case was reached in *Marta v. Sullivan*, 248 A.2d 608 (Del. 1968).

<sup>146</sup> *Herrington v. County of Peoria*, 11 Ill. App. 3d 7, 295 N.E.2d 731 (1973). *See also Farmer v. Meeker*, 63 N.J. Super. 56, 163 A.2d 729 (L. Div. 1956).

property when the municipality rezones two other corners at the same intersection.<sup>147</sup> The court took the view that the statute was valid since it merely prescribed the conditions under which the zoning power was to be exercised. By contrast, the Illinois Supreme Court invalidated a statute making changes in street names mandatory when petitioned for by 60 percent of the residents of a street.<sup>148</sup> This case would seem to be de minimis even under the *Eubank* rule. It is doubtful whether the interest of dissenting property owners in the present street name can supply the basis of a constitutionally noticeable deprivation of right.

#### D. Determination of Professional and Industrial Standards

The frequent legislative adoption of privately sponsored professional and industrial standards represents another area in which the courts have had occasion to invoke the nondelegation doctrine.

##### 1. Statutes Adopting Pre-existing Lists and Codes

The adoption of privately formulated lists and codes has not troubled the courts when the legislative act adopts a private code in the form in which it stood at the time that the legislation was passed. This result is clearly sound. The *Noerr* and *Pennington* decisions<sup>149</sup> serve to remind us that freedom for private groups to seek their legislative ends is itself constitutionally protected. The fact that a legislature adopts, by name, a private code rather than enacting a detailed bill drawn up by the same interest group is scarcely of constitutional significance. And the acceptance of a rule which would not distinguish between the legislative effusions of a small parochial interest group and a private organization like the American Law Institute would seem clearly untenable. Though courts have occasionally been troubled by such legislation by reference, the public filing of the code coupled with the principle that "that is certain which can be made certain" has usually proved sufficient to allay their misgivings.

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<sup>147</sup> *Marren v. Gamble*, 237 N.C. 680, 75 S.E.2d 880 (1953). Cf. *Zopf v. City of Wilmington*, 273 N.C. 430, 160 S.E.2d 325 (1968).

<sup>148</sup> *People ex rel. Chicago Dryer Co. v. City of Chicago*, 413 Ill. 315, 109 N.E.2d 201 (1952).

<sup>149</sup> *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *UMW v. Pennington*, 381 U.S. 657 (1965). Cf. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). See Costilo, *The Scope of the Noerr-Pennington Doctrine*, 34 ANTITRUST L.J. 141 (1967). It is not without significance that the *Noerr* doctrine has been held partly inapplicable in the context of judicial as distinct from legislative action. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

One court has recently intimated the unconstitutionality of such a statute. *Costanzo v. New Jersey Racing Comm'n*, 126 N.J. Super. 187, 313 A.2d 618 (App. Div. 1974).

## 2. Educational Accreditation Statutes

The adoption of future standards promulgated by private groups has understandably given the courts greater difficulty. One major battleground has involved the adoption of classifications of professional schools issued by medical and bar associations. Graduation from a privately accredited school has frequently been made a prerequisite to the obtaining of a license to practice. The early appeal of this legislation derived from the view that professional men themselves were better qualified to gauge the quality of professional education than any legislative committee or administrative board could be. Thus it is not surprising that a Kansas court, writing shortly after the beginning of the reform movement in medical education initiated by the *Flexner Report*,<sup>156</sup> strongly upheld a statute requiring graduation from a medical school on the "A" or "B" list issued by the American Medical Association,

the membership of which and the purpose of which are not disclosed, but which we may presume to consist of eminent men in the medical profession who are prompted by a laudable desire to elevate the standard of their profession and the standard of medical schools.<sup>151</sup>

The more restrictive practices adopted by professional accrediting agencies<sup>152</sup> coincided with a more skeptical attitude on the part of the courts toward the legislative adoption of their private lists. Though a Florida court upheld a statute requiring veterinarians to be graduates of approved schools, the opinion did not squarely meet the delegation question, declaring only that the statute was "reasonable under the police power."<sup>153</sup> The same court, in two prior cases, had upheld similar statutes by construing the word "accredited" to mean that the school in question was accredited at the time the legislation was enacted,<sup>154</sup> following the example of a Rhode Island court.<sup>155</sup> But the Florida

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<sup>150</sup> A. FLEXNER, *MEDICAL EDUCATION IN THE UNITED STATES AND CANADA* (1910).

<sup>151</sup> *Jones v. Kansas State Bd. of Medical Regis. & Educ.*, 111 Kan. 813, 814, 208 P. 639 (1922); *accord, Ex parte Gerino*, 143 Cal. 412, 77 P. 166 (1904). See also *Hewitt v. Charier*, 33 Mass. (16 Pick.) 353 (1835), typical of the 19th century cases.

<sup>152</sup> See *Jaffe* at 230; *cf. Quirin, Physician Licensing and Educational Obsolescence: A Medical-Legal Dilemma*, 36 ALBANY L. REV. 503, 505-07 (1972).

<sup>153</sup> *State ex rel. Kaplan v. Dee*, 77 So. 2d 768 (Fla. 1955).

<sup>154</sup> *Attwood v. State ex rel. Newman*, 53 So. 2d 825 (Fla. 1951); *Spencer v. Hunt*, 109 Fla. 248, 147 So. 282 (1933).

<sup>155</sup> *Allen v. State Bd. of Veterinarians*, 72 R.I. 372, 52 A.2d 131 (1947). *Cf. State v. Hynds*, 61 Ariz. 281, 148 P.2d 1000 (1944), where the court upheld a statute requiring graduation from an approved school of chiropody, without construing the statute, noting only that it did not delegate power to an association.

court took a more indulgent view of an adoption of a bar association list. There the word "accredited" was construed to mean that the school in question was currently approved by the association,<sup>156</sup> members of the bar apparently being considered above suspicion.

The newer attitude toward professional association lists is probably most accurately reflected in a more recent District of Columbia Circuit decision<sup>157</sup> subjecting decisions of accrediting agencies to review under the due process clause. The decision may, despite the deferential standard applied by the court, portend a new attitude.

The lack of administrative or economic checks on the capacity of professional associations to restrict members and the importance of the right to practice to those excluded from a profession has understandably tempted the courts to use the nondelegation doctrine to invalidate statutes requiring graduation from approved schools. Yet the use of the doctrine in this context raises problems under our analysis—problems similar to those raised by *Joint Anti-Fascist Refugee Committee v. McGrath*.<sup>158</sup> The power to designate approved schools may be thought to operate as a rulemaking rather than a licensing power when individual doctors themselves make complaint about the statute, since it is, in form, a licensing power only in relation to the schools themselves. The view here taken stresses the correctives which operate upon abuses of rulemaking powers; abuses of rulemaking powers are more visible, fall on and thus give rise to reaction by the community at large, and may more readily be redressed after the event. Licensing powers, by contrast, bear more heavily on particular individuals, while

<sup>156</sup> *Ex parte* State Bd. of Law Examiners, 141 Fla. 706, 193 So. 753 (1940).

<sup>157</sup> *Marjorie Webster Junior College v. Middle States Ass'n of Colleges & Secondary Schools*, 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970). In *People v. Barksdale*, 8 Cal. 3d 320, 337, 503 P.2d 257, 269, 105 Cal. Rptr. 1, 13 (1972), there are dicta to the effect that "reliance upon the standards of professional accrediting bodies is not an unconstitutional delegation of governmental power if it is neither arbitrary, unreasonable, nor discriminatory." Cf. Kessel, *Price Discrimination in Medicine*, 1 J.L. & Econ. 20, 27-29 (1958). Statutes which merely provide for education in a school maintaining standards equal to those prevailing in approved schools do not disturb the courts. See *State ex rel. Beck v. Gleason*, 148 Kan. 1, 79 P.2d 911 (1938). For an earlier view, see E. FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY 47 (1928):

In attempting to secure desirable standards, the legislature may deem it advisable not to establish such standards directly by law or even by administrative regulation, but to rely upon parties to put their own house in order. . . .

[A] form of such utilization is the official employment of organizations having a recognized monopoly of representation of interests. This type is found in the regulation of professions. It was formerly common, but is somewhat inconsistent with modern principles of public law. New York dropped the system in 1910, but it still survives to some extent in England (Royal College of Veterinary Surgeons).

<sup>158</sup> 341 U.S. 123 (1951). Cf. *Barrows v. Jackson*, 346 U.S. 249 (1953); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

abuses of them are less likely to be brought to public view or be susceptible of easy correction. It is clear under this view that the schools have reason to complain of the delegation, and it may be thought reasonable to allow their graduates to complain on their behalf where the accrediting system was not in operation at the time of the applicant's enrollment. Where it was in operation when the applicant enrolled, more difficult problems are presented. The widespread use of a statutory requirement of graduation from an "accredited" college or university suggests that it would be highly awkward to adopt a blanket rule of invalidity. Thus it is by no means clear that delegations to professional groups of power to generate standards (number of books, of instructors, etc.) which schools must meet to be licensed ought to be considered invalid per se merely because they may be restrictive. Where the standards are arbitrary the delegation, at least in its exercise, may fail on equal protection grounds; had the celebrated pre-World War II refusal to charter foreign medical schools been implemented by rule it might still have been vulnerable in this respect.<sup>159</sup>

### 3. Health and Safety Standards

The several cases invalidating the incorporation into building codes of future electrical wiring standards formulated by associations of insurance underwriters<sup>160</sup> do not raise the analytical problems suggested by the medical accreditation cases. The wiring cases seem incorrect under our analysis, since they involve mere rulemaking powers. The fact that the economic interests of insurance companies may point to the maintenance of unworkably high safety standards does not justify invalidation on delegation grounds. And though privately enforced standards have been met with suspicion in antitrust cases where formulated in part by competitors of persons against whom they are enforced,<sup>161</sup> it may be suggested under our analysis that this sort of bias in

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<sup>159</sup> See Note, *The State Courts and Delegation of Public Authority to Private Groups*, 67 HARV. L. REV. 1398 (1954). The accreditation of hospitals by the Joint Commission on Accreditation of Hospitals raises similar delegation problems. Worthington & Silver, *Regulation of Quality of Care in Hospitals: The Need for Change*, 35 LAW & CONTEMP. PROB. 305, 320 n.68 (1970).

<sup>160</sup> Such statutes were invalidated in *City of Tucson v. Stewart*, 45 Ariz. 36, 40 P.2d 72 (1935) (here the approved methods were made only prima facie evidence); *Agnew v. City of Culver City*, 147 Cal. App. 2d 144, 304 P.2d 788 (1956); *State v. Crawford*, 104 Kan. 141, 177 P. 360 (1919); *Hillman v. Northern Wasco County People's Util. Dist.*, 213 Ore. 264, 323 P.2d 664 (1958). However, a more recent case upheld a similar statute against attack on delegation grounds, finding no actual delegation. *Kingery v. Chapple*, 504 P.2d 831, 836-37 n.13 (Alaska 1972).

<sup>161</sup> Cf. *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 658 (1961), where a boycott by public utilities of persons using gas burners failing to conform to American Gas Association standards was held a per se violation of the Sherman

rulemaking (apart from equal protection problems its results may raise) ought not to raise delegation problems when the rules are regularly enforced through the courts. Enforcement of privately formulated standards by private boycott involves a licensing as well as a rulemaking function not present where the rules are enforced at law. Though the Sherman Act boycott cases clearly rest on antipathy toward "private government"<sup>162</sup> and not on economic effects alone, their lessons are not clearly applicable to delegation cases involving rulemaking functions only.

Judicial suspicion of electrical wiring codes has not extended to

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Act. The Association consisted of utilities, manufacturers of gas burners, and pipeline companies. In a suit brought against the Association by a manufacturer of unapproved burners, the Court observed that the association's "tests are not based on 'objective standards,' but are influenced by respondents, some of whom are in competition with petitioner, and thus its determinations can be made 'arbitrarily and capriciously.'" It is not clear that the result in this case rests on the participation of competitors in the association. See Bird, *Sherman Act Limitations on Non-Commercial Concerted Refusals to Deal*, 1970 DUKE L.J. 247; Comment, *Use of Economic Sanctions by Private Groups: Illegality Under the Sherman Act*, 30 U. CHI. L. REV. 171 (1962). Cf. *Roofire Alarm Co. v. Royal Indem. Co.*, 202 F. Supp. 166 (E.D. Tenn. 1962), *aff'd*, 313 F.2d 635 (6th Cir.), *cert. denied*, 373 U.S. 949 (1963), holding that a primary boycott by a testing association, none of whose members were in competition with the plaintiff, was not actionable under the Sherman Act.

<sup>162</sup> The antipathy toward "private government" is reflected in many Sherman Act cases and, of course, plays a prominent role in that Act's folklore. See, e.g., T. ARNOLD, *THE BOTTLENECKS OF BUSINESS* (1940). In *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 242 (1899), it was said that the condemned violation "trenches upon the power of the national legislature and violates the statute." In *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457, 465 (1941), it was said that "the combination is 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 . . . ." See also *Associated Press v. United States*, 326 U.S. 1, 19 (1945). But cf. *Sugar Institute v. United States*, 297 U.S. 553, 598 (1936): "Voluntary action to end abuses and to foster fair competitive opportunities in the public interest may be more effective than legal processes. And cooperative endeavor may appropriately have wider objectives than merely the removal of evils which are infractions of positive law." Cf. also the curious decision in *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963) (holding that the availability to a private group of a statutory exemption from the antitrust laws was dependent upon the extent of the hearing the private group accorded to nonmembers), *construed in* *Gordon v. New York Stock Exch.*, 95 S. Ct. 2598 (1975).

It is significant that the references to "private government" rarely occur in the context of simple price-fixing, where the price-fixing is unaccompanied by elements of boycott. It has been suggested that there are even limitations on the per se illegality of boycotts, some commentators finding these in noncommercial purpose. See Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 Nw. U.L. Rev. 705 (1962); Cf. *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 213 n.7 (1959). Others hold that the per se prohibition extends only to secondary, as opposed to primary, boycotts. See Comment, *Use of Economic Sanctions by Private Groups: Illegality Under the Sherman Act*, 30 U. CHI. L. REV. 171 (1962). For a classic attack on boycotts as a form of private government, see Stephen, *On the Suppression of Boycotting*, 20 THE NINETEENTH CENTURY 765 (1886). See generally Posner, *Exclusionary Practices and the Antitrust Laws*, 41 U. CHI. L. REV. 506 (1974).

legislative adoption of the pharmacopoeia compiled by the United States Pharmacopoeial Convention,<sup>163</sup> an organization composed of federal agencies, national medical and pharmaceutical associations and schools of medicine and pharmacy.<sup>164</sup>

#### 4. Prevailing Wage Laws

In the cases involving so-called "prevailing wage" statutes a number of judges have likewise taken an indulgent view. Courts have had little difficulty in rejecting contentions that statutes directing administrative commissions to determine and pay prevailing local wages to state employees constitute an unconstitutional delegation to the commissions.<sup>165</sup> Where statutes provide for the payment of prevailing union wage rates, courts have been sharply split. In 1922, the Supreme Court of Wisconsin divided 4 to 3 in invalidating a statute which would have required a city council to pay wages equal to those "paid to members of any regular and recognized organization of . . . skilled laborers . . . ."<sup>166</sup> The court read the statute as imposing a purely ministerial duty on the council to accept any union wage scale.

In 1953, the Illinois Supreme Court, without discussion, invalidated a similar "union wage" statute.<sup>167</sup> A Kentucky court, four years before, however, upheld a statute requiring the payment of the prevailing rates as set in union collective bargaining contracts "if there are such agreements . . . in the locality applying to a sufficient number of employes to furnish a reasonable basis for considering those rates to be the prevailing rates in the locality."<sup>168</sup> The fact that the delegated power was subject to market control thus legitimized the statute. The rationalization that such statutes are valid because the private actions were legislatively noticed "facts" may not be fictitious in "prevailing wage" cases. More recently, a South Dakota court struck down a similar statute directed at Sioux Falls firemen, finding, as did the Wisconsin

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<sup>163</sup> Such statutes were upheld in the cases of *White v. State Bd. of Pharmacy*, 285 App. Div. 486, 138 N.Y.S.2d 448 (1955); and *State v. Wakeen*, 263 Wis. 401, 57 N.W.2d 364 (1953). For a similar view, see *Osco Drug, Inc. v. Pharmacy Exam. Bd.*, 61 Wis. 2d 689, 695, 214 N.W.2d 47, 50 (1974) (Hansen, J., dissenting).

<sup>164</sup> For a description of the organization, see Note, *State Regulation of Drugs: Who May Sell "Patent and Proprietary" Medicines*, 63 YALE L.J. 550, 552 n.10 (1954).

<sup>165</sup> See generally Annot., 18 A.L.R.3d 944, 965-69 (1968) and cases there cited. Criminal statutes of this type can raise void-for-vagueness problems. See *Connally v. General Constr. Co.*, 269 U.S. 385 (1926). The federal Davis-Bacon Act, 40 U.S.C. § 276a (1970), and Walsh-Healey Act, 41 U.S.C. § 35 (1970), embody similar standards.

<sup>166</sup> *Wagner v. City of Milwaukee*, 177 Wis. 410, 411, 188 N.W. 487 (1922).

<sup>167</sup> *Bradley v. Casey*, 415 Ill. 576, 114 N.E.2d 681 (1953).

<sup>168</sup> *Baughn v. Gorrell & Riley*, 311 Ky. 537, 540, 224 S.W.2d 436, 438 (1949) (quoting the statute).

court in 1922, that "neither the city commission nor any agency thereof retains any power or discretion to ascertain or determine what are prevailing wages . . . . The trade unions and private contractors . . . absolutely fix the same."<sup>169</sup> On the other hand, the New Jersey Supreme Court found no difficulty in sustaining that state's prevailing wage statute.<sup>170</sup>

### 5. Union and Company Rules

The recognition by unemployment insurance appeal boards of union rules limiting allowable periods of employment of members as good cause for relinquishing employment has troubled some courts. An Ohio court invalidated such a course of action,<sup>171</sup> while a New York court upheld it only after noting that the board had discretion to reject unreasonable rules.<sup>172</sup> Judicial hostility to the use of such rules probably derives from doubts as to their wisdom as a matter of public policy rather than from views as to procedural unfairness. For here again, the delegation, if any, would seem to involve the power to make rules rather than the power to adjudicate rights. Where the effect of the use of a rule is to significantly increase a former employer's insurance premiums (as opposed to state contributions), he may, however, be thought under this formula to possess an interest which the delegation doctrine should protect, if the union rule in question applies to his employees alone and not to members of the union employed elsewhere. However, it may be significant in this connection that "company rule" tort doctrines have little troubled the courts, though rules of such limited scope may be thought in effect to amount to adjudications of the rights of those subject to them. Their validity may be saved by the fact that they appear in a contractual setting. Since the existence of the employment relationship is voluntary on both sides, both union rules and company rules may be thought not to raise delegation prob-

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<sup>169</sup> Schryver v. Schirmer, 84 S.D. 352, 358-59, 171 N.W.2d 634, 638 (1969). A possible distinction from prior cases was articulated by the court: "We see very little or no similarity between the character of the work performed by city firemen and that of the . . . tradesmen designated in the ordinance." *Id.* at 637. A statute which set a wage rate for municipal employees based on that in a neighboring municipality was upheld in Kugler v. Yocum, 69 Cal. 2d 371, 445 P.2d 303, 71 Cal. Rptr. 687 (1968).

<sup>170</sup> Male v. Ernest Renda Contracting Co., 64 N.J. 199, 314 A.2d 361 (1974).

<sup>171</sup> Chambers v. Ohio Bureau of Unemp. Comp., 15 Ohio Supp. 106, 30 Ohio Op. 1 (C.P. 1944), *rev'd sub nom.* Chambers v. Owens-Ames-Kimball Co., 44 Ohio L. Abs. 146, 62 N.E.2d 496 (Ct. App. 1945), *rev'd*, 146 Ohio St. 559, 33 Ohio Op. 60, 67 N.E.2d 439 (1946).

<sup>172</sup> *In re Fiol*, 279 App. Div. 963, 111 N.Y.S.2d 288, *appeal denied*, 280 App. Div. 901, 115 N.Y.S.2d 311 (1952), *remanded*, 305 N.Y. 264, 112 N.E.2d 281 (1953), *on remand*, 284 App. Div. 519, 132 N.Y.S.2d 533 (1954), *aff'd*, 309 N.Y. 661, 128 N.E.2d 317 (1955).

lems, since those subject to them can readily remove themselves from their scope.<sup>173</sup>

### E. Resale Price Maintenance

The doctrine forbidding delegations to private parties has achieved its greatest importance in recent years in connection with state court decisions invalidating the so-called "nonsigner" clauses of state resale price maintenance statutes. The high courts of 16 states, including the important commercial states of California, Illinois, New Jersey, and New York, have upheld the statutes. The highest courts of 25 states, including those of Massachusetts, Pennsylvania, North Carolina and Michigan, have invalidated the statutes.<sup>174</sup> In addition, "new type" statutes proceeding on an implied contract theory making receipt of goods prima facie evidence of agreement to adhere to price conditions have been upheld by the Supreme Court of Virginia<sup>175</sup> and by a controlling minority of the Supreme Court of Ohio,<sup>176</sup> while a statute providing for resale price maintenance by notice attached to the goods was upheld in New Jersey in an early case.<sup>177</sup>

Many of the state court decisions invalidating price maintenance statutes have rested in whole or in part on nondelegation grounds.<sup>178</sup> A number of courts have also declared that all delegations to private parties are forbidden, regardless of standards or safeguards which may be present,<sup>179</sup> one court distinguishing between delegations to private and public bodies in this respect.<sup>180</sup> Other courts, adopting a restrictive view of legislative power, take the position that the legislature may not forbid one who has acquired a commodity to determine its resale price, absent a substantial "public interest."<sup>181</sup> Still others,

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<sup>173</sup> As to conformity with "company rules" as evidence of due care in negligence actions, see C. GREGORY & H. KALVEN, *CASES AND MATERIALS ON TORTS* 143-45 (2d ed. 1969). See also Jaffe at 113-49. On the reach of corporate bylaws, see A. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 71-77 (10th ed. 1960); 3 R. POUND, *JURISPRUDENCE* 652-54 (1959).

<sup>174</sup> The cases are collected in 2 *TRADE REG. REP.* ¶ 6021. The most recent example is *Bulova Watch Co. v. Brand Distribs., Inc.*, 285 N.C. 467, 206 S.E.2d 141 (1974).

<sup>175</sup> *Standard Drug Co. v. General Elec. Co.*, 202 Va. 367, 117 S.E.2d 289 (1960), *appeal dismissed*, 368 U.S. 4 (1961).

<sup>176</sup> *Hudson Distribs. v. Upjohn Corp.*, 174 Ohio St. 487, 190 N.E.2d 460 (1963), *aff'd*, 377 U.S. 386 (1964).

<sup>177</sup> *Ingersoll & Bro. v. Hahne & Co.*, 88 N.J. Eq. 222, 101 A. 1030 (Ch. Ct. 1917).

<sup>178</sup> *E.g.*, *Corning Glass Works v. Ann & Hope, Inc.*, 294 N.E.2d 354 (Mass. 1973); *Bulova Watch Co. v. Brand Distribs., Inc.*, 285 N.C. 467, 206 S.E.2d 141 (1974).

<sup>179</sup> *E.g.*, *Bissell Carpet Sweeper Co. v. Shane Co.*, 237 Ind. 188, 143 N.E.2d 415 (1957). But see *Louisiana Motor Vehicle Comm'n v. Wheeling Frenchman*, 235 La. 332, 103 So. 2d 464 (1958).

<sup>180</sup> *General Elec. Co. v. Wahle*, 207 Ore. 302, 296 P.2d 635 (1956).

<sup>181</sup> This may well be the modern view. See *Bulova Watch Co. v. Brand Distribs.*,

despite requirements of "free and open competition" in the acts, invalidated the statutes for want of standards.<sup>182</sup> Some pointed to the lack of safeguards such as hearing and judicial review.<sup>183</sup> At least one court invalidated an act on the basis that by creating an antitrust exemption, the act would allow private parties to repeal a law; but the court would presumably have been satisfied with the act if no antitrust prohibition existed.<sup>184</sup> Finally, a number of courts, engaging in formal distinctions between delegation of power to make law and delegation of power to apply it, have condemned the acts on the curious ground that no *duty* exists to set a resale price.<sup>185</sup> To these courts, mandatory price maintenance, such as that provided in the liquor trade in some states, stands on a better footing than purely permissive legislation, despite the fact that the available economic checks are less significant.

The courts that have upheld the acts against challenge on delegation grounds have utilized varied reasoning. Some, following the federal *Old Dearborn* case,<sup>186</sup> take the view that the acts merely protect the continuing property of a manufacturer in his trademark. Others take the view that the actions of private parties authorized by the statutes do not involve the exercise of legislative power at all, since the legislature could not itself constitutionally establish the price of a particular branded article, as distinct from a commodity.<sup>187</sup> Similar reasoning ap-

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Inc., 285 N.C. 467, 206 S.E.2d 141 (1974).

<sup>182</sup> *E.g.*, *Miles Laboratories v. Eckerd*, 73 So. 2d 680 (Fla. 1954).

<sup>183</sup> *E.g.*, *American Home Prods. Corp. v. Homsey*, 361 P.2d 297 (Okla. 1961).

<sup>184</sup> *McGraw Elec. Co. v. Lewis & Smith Drug Co.*, 159 Neb. 703, 68 N.W.2d 608 (1955).

<sup>185</sup> *E.g.*, *General Elec. Co. v. Wahle*, 207 Ore. 302, 296 P.2d 635 (1956).

<sup>186</sup> *Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*, 299 U.S. 183 (1936). On the willingness of courts to authorize delegations when linked to familiar categories of property or contract, see Note, *The State Courts and Delegation of Public Authority to Private Groups*, 67 HARV. L. REV. 1398 (1954). Cases at common law not involving constitutional questions have occasionally authorized what are in effect "delegations," by analogy to equitable servitudes on land. *Cf.* Chafee, *Equitable Servitudes on Chattels*, 41 HARV. L. REV. 945 (1928). Of course, even land servitudes may be viewed as "delegations." Perhaps their respectability derives from the fact that they have been traditionally recognized at common law. That only underlines the fact that the nondelegation doctrine rests largely on a confusion of the familiar with the necessary. For suggestions that decisions in this area should turn on the extent to which survival outside the contract is feasible, see Chafee, *The Internal Affairs of Associations*, 43 HARV. L. REV. 993, 1021-23 (1930).

<sup>187</sup> *Scovill Mfg. Co. v. Skaggs Payless Drug Stores*, 45 Cal. 2d 881, 291 P.2d 936 (1955). See Hale, *Our Equivocal Constitutional Guaranties*, 39 COLUM. L. REV. 563, 576 (1939):

[I]t is . . . seldom recognized that when the state is enforcing contract and property rights at common law it is using its compulsory powers to effectuate the wills of private persons, and doing so in a manner which forces other private persons to forego the exercise of liberties which the state could not constitutionally deny them in furtherance of any legislative policy of its own other

appears to lie behind the decisions upholding newer statutes on the basis that the acts merely alter private commercial law.<sup>183</sup> Other courts find in the "free and open competition" clause an adequate statutory standard, even though such standards guide only courts and not the rulemakers where acts of private parties (as opposed to public agencies) are at issue.<sup>189</sup> A federal court, in the second *Schwegmann* case, found adequate safeguards in the operation of market forces.<sup>190</sup> A number of early courts upheld the nonsigner clauses by analogy to *Lumley v. Gye*.<sup>191</sup> This analogy on its face is not invalid where a manufacturer may restrict his distribution to signers of contracts.<sup>192</sup> But recent anti-trust decisions make it doubtful that he may lawfully do so,<sup>193</sup> while some courts have refused to protect price maintenance contracts against induced breach even where distribution is thus limited.<sup>194</sup> Finally, there

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than that of enforcing contracts or protecting property.

Pushed to its extreme, the nondelegation doctrine could be viewed as precluding any public protection or recognition of private property rights, *cf.* Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927), or at least any legislative extension or enforcement of them that goes beyond the "common law." *Cf.* Bell v. Maryland, 378 U.S. 226, 286, 304 (1964) (Goldberg, J., concurring); Katzenbach v. Morgan, 384 U.S. 641, 657 (1966) (emphasis added): "[T]he principle that calls for the closest scrutiny of distinctions in laws denying fundamental rights . . . is inapplicable; for the distinction challenged by appellees is presented only as a limitation on a reform measure . . ." [!] *See also* San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 54-55 (1973); Macmillan v. Board of Educ., 430 F.2d 1145 (2d Cir. 1970).

<sup>188</sup> A trial judge upheld the "implied contract" provision of the Virginia act by analogy to contracts of adhesion in insurance law. *See* Brief for Appellant at 3-4, Standard Drug Co. v. General Elec. Co., 368 U.S. 4 (1961).

<sup>189</sup> *See, e.g.*, Corning Glass Works v. Dichter, 102 N.H. 505, 161 A.2d 569 (1960). *Cf.* Vornado, Inc. v. Corning Glass Works, 255 F. Supp. 216 (D.N.J. 1966).

<sup>190</sup> *Schwegmann Bros. Giant Super Mkts. v. Eli Lilly & Co.*, 205 F.2d 788, 792 (5th Cir.), *cert. denied*, 346 U.S. 856 (1953):

It was, we think, within the province of the legislature to assume that economic laws constitute a sufficient restraint against capricious or arbitrary price fixing by the producer. As pointed out long ago by Louis D. (later Mr. Justice) Brandeis, the producer "establishes his price at his peril—the peril that if he sets it too high, either the consumer will not buy or, if the article is, nevertheless, popular, the high profits will invite even more competition."

*Cf.* Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220, 225 n.5 (1949).

<sup>191</sup> 2 El. & B. 216, 118 Eng. Rep. 749 (Q.B. 1853). *See* Max Factor & Co. v. Kunsman, 5 Cal. 2d 446, 55 P.2d 177, *aff'd*, 299 U.S. 198 (1936). *Cf.* Bissell Carpet Sweeper Co. v. Shane Co., 237 Ind. 188, 143 N.E.2d 415 (1957), where the nonsigner clause was upheld insofar as it codified this doctrine.

<sup>192</sup> Where distribution was thus restricted, it could be presumed that any nonsigner selling goods had induced the breach of a signer's contract. *See* Sunbeam Corp. v. Payless Drug Stores, 113 F. Supp. 31 (N.D. Cal. 1953). This doctrine, in more highly developed form, supplies the basis of resale price maintenance in Germany, where actions against nonsigners are not expressly provided by statute. *See* Schapiro, *The German Law Against Restraints of Competition—Comparative and International Aspects*, 62 COLUM. L. REV. 1, 201, 207 (1962).

<sup>193</sup> *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944). *Cf.* Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934, 946 (5th Cir. 1975).

<sup>194</sup> *See, e.g.*, Sunbeam Corp. v. Masters of Miami, 225 F.2d 191 (5th Cir. 1955).

are, as might be expected, courts which uphold the statutes after hewing to formal distinctions between the delegation of power to make a law and the delegation of power to apply it.<sup>195</sup>

It is thus apparent that considerable confusion of thought has accompanied judicial consideration of the delegation problem presented by these statutes. This confusion has been particularly apparent in connection with efforts to induce federal courts to invalidate state legislation on nondelegation grounds, since, as discussed above, it is not clear which provision of the federal constitution operates to restrict the delegation of legislative power by state governments.<sup>196</sup> Similar observations can be made as to challenge of federal enabling acts on delegation grounds, since these acts can be questioned only on the dubious basis that they delegate power to repeal federal statutes, not on the basis that they empower private parties to legislate in regard to the conduct of other individuals.<sup>197</sup>

Most of the cases embodying such arguments do little more than announce conclusions.<sup>198</sup> The cases upholding the statutes on the basis

*But see* Stauffer Chem. Co. v. Allied Gas & Chem. Co., 328 F. Supp. 785 (S.D. Iowa 1971).

<sup>195</sup> *E.g.*, *Eli Lilly & Co. v. Saunders*, 216 N.C. 163, 4 S.E.2d 528 (1939); *Weco Prods. Co. v. Reed Drug Co.*, 225 Wis. 474, 274 N.W. 426 (1937). *But cf.* *Corning Glass Works v. Ann & Hope, Inc.*, 294 N.E.2d 354, 362 (Mass. 1973).

<sup>196</sup> *See* the concurring opinion of Justices Harlan and Frankfurter in *Lathrop v. Donohue*, 367 U.S. 820, 855 (1961) (emphasis in original):

Moreover, it is by no means clear to me in what part of the Federal Constitution we are to find the prohibition of *state-authorized* self-regulation of and by an economic group that the *Schechter* case found in Article I as respects the Federal Government. Is state-authorized self-regulation of lawyers to be the occasion for judicial enforcement of Art. IV, § 4, which provides that "The United States shall guarantee to every state in this union a Republican form of government . . . ?"

Justice Douglas, dissenting, was able only to observe that "[a] self-policing provision whereby lawyers were given the power to investigate and disbar their associates would raise under most, if not all, *state* constitutions the type of problem posed in [*Schechter*]." 367 U.S. at 878 n.1 (emphasis added). *See generally* D. McKEAN, *THE INTEGRATED BAR* (1963).

<sup>197</sup> *Cf.* *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526 (1917). *But see* *Railway Employees Dep't, AFL v. Hanson*, 351 U.S. 225 (1956), where closed shop contracts were held to constitute state action since a federal enactment removed barriers to their validity imposed by state law. Even this rule would not necessarily extend to conduct legitimized by a federal enactment which removes barriers to validity imposed by *federal* law. *See* *United States v. National Ass'n of Sec. Dealers*, 95 S. Ct. 2427 (1975). There might also be a paradox in holding first, that the acts of price-maintaining manufacturers are "legislative," so as to run afoul of the delegation doctrine; and second, that such acts are private acts so as to require special federal antitrust immunity despite the rule of *Parker v. Brown*, 317 U.S. 341 (1943). *See* *Rahl, Resale Price Maintenance, State Action, and the Antitrust Laws*, 46 ILL. L. REV. 349 (1951). *See also* *Rahl, Control of an Agent's Prices: The Simpson Case—A Study in Antitrust Analysis*, 61 NW. U.L. REV. 1 (1966).

<sup>198</sup> There is merit in Justice Hughes' remark in *Carter* that this approach "would

that the power delegated is one the legislature could not itself directly exercise are made of more substantial stuff, in the light of suggestions by some scholars that the inability of a legislature to regulate in detail may justify greater breadth of delegation.<sup>199</sup> But this too does not reach the central question if the nondelegation doctrine is to be viewed primarily as an aspect of procedural rather than substantive due process.<sup>200</sup>

Even if scope is left for a rule against delegation of rulemaking powers, there is no reason to believe that the statutes should fall, for the breadth of the delegation at issue is far narrower than that of those condemned in the *Schechter* and *Carter* cases: each delegate is accorded power to regulate the prices of a single trademarked article, not of an industry. Where the market power of a manufacturer is small, the power can scarcely be considered tantamount to a power to license or exclude.<sup>201</sup> Delegations to control persons in a chain of title fall well along the continuum which connects legislation and voluntary contract: where subjection to a regulation can be avoided at relatively small cost, it may not be altogether fictitious to consider that failure to avoid it may amount to implied assent.<sup>202</sup> The intimate connection between enforcement of price maintenance by legal action and enforce-

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remove all restrictions upon the delegation of legislative power, as the making of laws could thus be referred to any designated officials or private persons whose orders or agreements would be treated as 'events,' with the result that they would be invested with the force of law having penal sanctions." 298 U.S. at 318.

<sup>199</sup> Jaffe, *An Essay on Delegation of Legislative Power*, 47 COLUM. L. REV. 561 (1947). Resale price maintenance in the book trade has been defended on this basis. *In re Net Book Agreement*, 1 W.L.R. 1347 (R.P.C. 1962); *In re Associated Booksellers of New Zealand*, [1962] N.Z.L.R. 1057 (Trade Prac. App. Auth.). The copyright monopoly has been similarly defended. Chafee, *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 519 (1945).

<sup>200</sup> See Note, *The State Courts and Delegation of Public Authority to Private Groups*, 67 HARV. L. REV. 1398 (1954).

<sup>201</sup> Of course, critics of the legislation frequently contend that the power to impose price conditions is equivalent to the power to exclude. But courts, paradoxically, have frequently viewed statutes which require manufacturers to set resale prices with greater indulgence than statutes which merely permit them to do so. Cf. *Allied Properties v. Department of Alcoholic Beverage Control*, 53 Cal. 2d 141, 150, 346 P.2d 737, 741-42 (1959), where it was observed:

One of the new features is that the Alcoholic Beverage Control Act requires, rather than permits, producers and wholesalers to set retail prices. This fact, however, does not render the function of a producer or wholesaler legislative in character but, to the contrary, decreases his discretion since he is not free to determine whether fair trading should occur. While mandatory fair trading means that retailers cannot obtain merchandise free from price restrictions, this is due to the determination of the Legislature, not the action of the producers and wholesalers.

See also *Schenley Affil. Brands Corp. v. Kirby*, 21 Cal. App. 3d 177, 98 Cal. Rptr. 609 (1971).

<sup>202</sup> This was the view of the *Old Dearborn* case, 292 U.S. at 192.

ment by individual refusal to deal makes the point clearer.<sup>203</sup> For the purposes of constitutional law,<sup>204</sup> if not of antitrust law, Justice Holmes' dissenting observation in the *Beech-Nut*<sup>205</sup> case may seem sufficient, at least where the market power of manufacturers is small:

I cannot see how it is unfair . . . to say to those to whom the respondent sells, and to the world, you can have my goods only on the terms that I propose, when the existence of any competition in dealing with them depends on the respondent's will.

This is in accordance with the thesis of this article: that delegations to private parties ordinarily become objectionable only where they involve the power to adjudicate, not the power to make rules enforceable by the ordinary processes of law. Of course, the "fair trade" case differs somewhat from the cases where the institution of legal actions to enforce privately formulated rules is left to a public officer.<sup>206</sup> Under most "fair trade" statutes, enforcement is left to actions brought by private persons, thus perhaps opening up possibilities of favoritism and selective enforcement not present where enforcement is vested in public officers. But it may be doubted that this fact enhances the possibilities of arbitrariness in enforcement: where

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<sup>203</sup> See Levi, *infra* note 204. Cf. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division II*, 75 YALE L.J. 373 (1966); Bork, *A Reply to Professors Gould and Yamey*, 76 YALE L.J. 731 (1967); Bork, *Resale Price Maintenance and Consumer Welfare*, 77 YALE L.J. 950 (1968).

<sup>204</sup> It was suggested at an earlier time that individual refusals to deal were themselves constitutionally protected. See Levi, *The Parke, Davis-Colgate Doctrine: The Ban on Resale Price Maintenance*, 1960 SUP. CT. REV. 258, 284 n.143, citing *Grenada Lumber Co. v. Mississippi*, 217 U.S. 433, 440 (1910) ("That any one of the persons engaged in the retail lumber business might have made a fixed rule of conduct not to buy his stock from a producer or wholesaler who should sell to consumers in competition with himself, is plain. No law which would infringe his freedom of contract in that particular would stand.") The force of that decision is strengthened rather than weakened by the fact that it involved a secondary as opposed to primary refusal to deal, and hence countenanced injury to an innocent neutral. That legislation (*e.g.*, open-occupancy and dealer franchise statutes) impairing the right may be valid would seem by now to be clear. Significantly, the restriction of the use of trespass statutes to enforce refusals to deal based on racial distinctions took place against a background of collective discrimination, including secondary boycotts. For other authorities suggesting the narrowing scope of the individual right, see, in addition to the antitrust cases discussed in *Parke, Davis*, the following authorities: *Bergen Drug Co. v. Parke, Davis & Co.*, 307 F.2d 725 (3d Cir. 1962) (refusal to deal with treble damage suitor held antitrust violation); *Schnapps Shop, Inc. v. H. W. Wright & Co.*, 377 F. Supp. 570 (D. Md. 1973). See Posner, *Exclusionary Practices and the Antitrust Laws*, 41 U. CHI. L. REV. 506 (1974). These antitrust decisions are of arguable merit in the light of the fact that section 1 of the Sherman Act purports to reach only contracts, combinations, and conspiracies. 15 U.S.C. § 1 (1970).

<sup>205</sup> *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 457 (1921) (Holmes, J., dissenting).

<sup>206</sup> See *Moog Indus. v. FTC*, 355 U.S. 411 (1958) (indicating the wide discretion left to the FTC).

private suits are involved, courts are bound by equitable doctrines to refuse or lift injunctions where a showing of uniform enforcement is not made,<sup>207</sup> while public prosecutors are in practice left much greater discretion in bringing enforcement actions—discretion limited only by the restraints which *Yick Wo v. Hopkins*<sup>208</sup> imposes on systematic discrimination, and not by the purely theoretical “duty to prosecute.”<sup>209</sup>

The “fair trade” statutes do not confer on any single delegate the right to deprive another person of the opportunity to pursue a lawful calling, nor do they authorize price maintenance by monopolists or agreements between those to whom power is delegated. Attacks on the statutes for their supposed want of standards or of procedural safeguards such as public hearings and judicial review seem misconceived.<sup>210</sup> Standards are today required, if at all, only as a means of defining the subject matter of the power to be exercised by administrators; they have limited impact on the judgment of either public administrators or reviewing courts in appraising the proper exercise of delegated powers. And there is no constitutional requirement of hearing or review or even of an impartial tribunal when legislation or rulemaking is at issue;<sup>211</sup> to decry the lack of such safeguards is again to confuse legislation with adjudication.<sup>212</sup> The “fair trade” statutes do not resemble licensing statutes in either form or substance. The power delegated is a rule-making power, and the statutes, whatever their economic merits,<sup>213</sup> do little to restrict vocational opportunities but rather have the opposite purpose and tendency.<sup>214</sup> If the statutes are to be condemned, it is fair

<sup>207</sup> The discretion of trademark proprietors under the fair trade acts is limited by a number of equitable doctrines which do not restrict public agencies. Where uniform enforcement is not shown, courts may refuse or dissolve injunctions, or grant them conditionally. In addition, disfavored retailers may sue their competitors under many state acts.

<sup>208</sup> 118 U.S. 356 (1886).

<sup>209</sup> See, e.g., *State v. LeVien*, 44 N.J. 323, 209 A.2d 97 (1965).

<sup>210</sup> E.g., *Conant, Constitutionality of Non-Signer Clauses*, 109 U. PA. L. REV. 539 (1961).

<sup>211</sup> See cases cited in 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.19 (1958) (review); 1 *id.* § 7.19 (Supp. 1970) (hearing).

<sup>212</sup> Cf. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915); *Bell Tel. Co. v. FCC*, 503 F.2d 1250, 1266 (3d Cir. 1974).

<sup>213</sup> For a vigorous economic defense of the practice, see P. ANDREWS & F. FRIDAY, FAIR TRADE: REALE PRICE MAINTENANCE RE-EXAMINED (1950). Such works, however, are in a distinct minority. See, e.g., *Hudson, Constitutionality of the Florida Fair Trade Act and Continuing Myths of Resale Price Maintenance*, 24 U. FLA. L. REV. 641 (1972). The issues are ably defined in A. NEALE, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 336-64 (2d ed. 1970).

<sup>214</sup> Cf. the justification of the practice in THE BRANDEIS GUIDE TO THE MODERN WORLD 218 (A. Lief ed. 1941):

The fixing of the price has possibly prevented one retailer from selling the article a little lower than the other, but the fixing of that price has tended not to

to suggest that the condemnation should proceed on the basis of the doctrines through which those courts which care to do so have traditionally expressed their notions as to economic policy. The nondelegation doctrine, properly treated, should be preserved to other ends.<sup>215</sup>

#### F. Administration of Law and Representation of Interests

The participation of private interests in the choice of members of public boards, and the delegation to private associations of authority to administer regulatory schemes, have been the subject of much discussion by writers on administrative law.<sup>216</sup> While most courts and scholars would agree with Justice Cardozo's statement in *Schechter* that "[w]hen the task that is set before one is that of cleaning house, it is prudent as well as usual to take counsel of the dwellers,"<sup>217</sup> their views on specific problems exhibit little consistency.

Less than 50 years ago, Ernst Freund could observe that "[n]either in the United States federal service nor in New York are there bodies constituted on the principle of interest representation." Freund went on to make the suggestive comment that:

Altogether, lay co-operation seems to be utilized more in England than in America. Probably this is due to the higher development in England of professionalism in the civil service. Nominally, it is true that ruling powers in England are largely in the hands of politically constituted officials; but in substance, decisions are inevitably controlled by the professional staff. It serves then to temper the odium of adverse rulings and to remove resulting friction, if a popular element enters into the administration. This consideration was certainly conspicuous in the creation of the English tax commissioners. But in America there is no

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suppress but to develop competition, because it has made it possible in the distribution of those goods to go to an expense and to open up another sphere of merchandising which would have been absolutely impossible without a fixed price. The whole world can be drawn into the field. Every dealer, every small stationer, every small druggist, every small hardwareman can be made a purveyor of that article by comprehensive advertising and you have stimulated, through the fixed price, the little owner as against the department store.

<sup>215</sup> Decisions condemning price maintenance statutes contrast strangely with the reluctance of many of the same state courts to narrow the range of administrative actions made unreviewable by statute, and with the willingness of many courts to justify arbitrary denial of occupational licenses on the basis that "privileges" rather than "rights" are involved. See cases cited in 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.19 (Supp. 1970).

<sup>216</sup> See, e.g., W. GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS 116-44 (1941). Delegation problems inherent in student or faculty adjudicatory discipline committees in state colleges and universities are discussed in Hornby, *Delegating Authority to the Community of Scholars*, 1975 DUKE L.J. 279.

<sup>217</sup> A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 552 (1935) (concurring opinion).

similar contrast between professionalism and nonprofessionalism. The classified civil service is a relatively recent thing, and not permanent or a career in the English sense. Officials are not as yet a class apart. We accept the jury system but are not inclined to apply a similar idea to the administration. The sporadic instances of lay service in the administration have shown no vitality.<sup>218</sup>

Three types of arrangement generate most of the delegation cases in this field. Under some statutes, private groups are empowered to appoint members of state boards, subject to no requirement of official approval. Other statutes vest in private associations or occupational groups a nominating function, or require that members of a public agency be appointed from members of specified groups. Still other statutes accord existing private groups authority to govern certain fields, without formally cloaking them with the mantle of public authority by placing them under oath or providing for their payment.

In considering the way in which courts have dealt with these arrangements, it is best to classify the cases according to the nature of powers delegated, rather than according to the type of body to which they are delegated. It is appropriate to begin with private licensing and disciplinary schemes, before turning to delegations of rulemaking powers and delegations of the power to administer public funds and resources.

## 1. Delegation of Judicial and Licensing Powers

### a. To existing private groups

Courts have demonstrated fairly consistent hostility toward statutes vesting licensing powers in private groups when these groups are not clothed in the raiment of a public board and no review is provided. Two New York cases invalidating statutes vesting licensing powers over harness race starters and horse trainers in private groups such as the

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<sup>218</sup> E. FREUND, *ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY* 52 (1928). A few federal bodies had been constituted on the principle of interest representation prior to Freund's work. See generally Chamberlain, *Democratic Control of Administration*, 13 A.B.A.J. 186 (1927). Note in particular Act of May 28, 1924, ch. 202, § 3, 43 Stat. 177, 178; Act of June 7, 1924, ch. 315, § 2, 43 Stat. 599 (District of Columbia Optometry Board, Dental Board); Act of Feb. 28, 1920, ch. 91, § 304, 41 Stat. 456, 470 (Railway Labor Board provision of Esch-Cummings Act). The Federal Reserve Board open-market committees elected by directors of federal reserve banks pursuant to 12 U.S.C. § 263 (1970) supply one such example. The participation of three members elected by bar associations in the seven-man judicial nominating commissions under the so-called Missouri Plan provide another less clear example. Delegations to professional bodies, like delegations to public utilities, are frequently deemed unobjectionable by reason of the "duty to serve" assumed to limit such bodies in the exercise of the granted powers, or by reason of the job mobility and consequent greater independence of professionals. See A. DE GRAZIA, *PUBLIC AND REPUBLIC* 219 (1951).

New York Jockey Club are typical here.<sup>219</sup> In Pennsylvania, a statute permitting three private organizations to select a near-majority of a committee charged with disbursement of funds collected pursuant to the Harness Racing Act was held invalid.<sup>220</sup> Cases in other states have invalidated statutes requiring the unanimous consent of existing banks in a community as a condition precedent to the licensing of new banks.<sup>221</sup> A New Jersey court invalidated a statute delegating to the State Medical Society power to approve or veto group medical-surgical plans. The court stressed the fact that "the Medical Society . . . has an interest in promoting the welfare of the only existing medical service corporation [Blue Shield] in this State."<sup>222</sup> An accompanying statute denying licenses to medical service corporations in any county in which 51 percent of the practicing physicians were not participating physicians was also invalidated by a divided court.<sup>223</sup>

A number of "automobile anti-bootlegging" statutes generated similar judicial hostility. The statutes limit the sale of new cars to dealers franchised by automobile manufacturers, and were enacted at the behest of dealers who feared the competition of "discount houses" selling cars surreptitiously obtained from overstocked franchises.<sup>224</sup> In invalidating such a statute on delegation grounds, a divided Ohio court described it as an unlawful delegation, arguing that "the case at bar is even more emphatic because private automobile manufacturers from out of the state are vested with power to determine who shall sell new cars in this state."<sup>225</sup> A number of other courts have struck down the statutes on equal protection grounds.<sup>226</sup> However, a Louisiana court

<sup>219</sup> *Fink v. Cole*, 302 N.Y. 216, 97 N.E.2d 873 (1951); *Murtha v. Monaghan*, 7 Misc. 2d 568, 169 N.Y.S.2d 137 (Sup. Ct.), *aff'd mem.*, 5 App. Div. 2d 695, 169 N.Y.S.2d 1010 (1957), *aff'd mem.*, 4 N.Y.2d 897, 151 N.E.2d 83 (1959).

<sup>220</sup> *Hetherington v. McHale*, 329 A.2d 250 (Pa. 1974).

<sup>221</sup> *Union Trust Co. v. Simmons*, 116 Utah 422, 211 P.2d 190 (1949). *See also Montana-Dakota Util. Co. v. Johanneson*, 153 N.W.2d 414 (N.D. 1967) (invalidating statute requiring consent of a rural electric cooperative as a condition to granting a certificate of convenience to a public utility).

<sup>222</sup> *Group Health Ins. v. Howell*, 40 N.J. 436, 447, 193 A.2d 103, 109 (1963). *See also Humane Soc'y of the United States v. New Jersey State Fish & Game Council*, 129 N.J. Super. 239, 322 A.2d 841 (Ch. Div. 1974) (appointment to Fish and Game Council limited to sportsmen, farmers, or commercial fishermen).

<sup>223</sup> *Group Health Ins. v. Howell*, 43 N.J. 104, 202 A.2d 689 (1964).

<sup>224</sup> *See generally Heuerman, Dealer Territorial Security and "Bootlegging" in the Auto Industry*, 1962 Wis. L. Rev. 486.

<sup>225</sup> *Ohio Motor Vehicle Dealers' & Salesmen's Lic. Bd. v. Memphis Auto Sales*, 103 Ohio App. 347, 356, 3 Ohio Op. 2d 377, 382, 142 N.E.2d 268, 274 (1957). The decision also condemned the statute as violative of a constitutional prohibition against "special laws" and on substantive due process grounds.

<sup>226</sup> *E.g.*, *Joyner v. Centre Motor Co.*, 192 Va. 627, 66 S.E.2d 469 (1951), which condemned an "anti-bootlegging" statute as a special law, the decision also partly resting on delegation grounds. The constitutionality of a similar South Dakota statute was upheld,

upheld such a statute with the observation that "[t]he right of the manufacturer to choose its dealers is merely the right of the freedom of contract."<sup>227</sup> An earlier case invalidating the Louisiana Fair Trade Act was unconvincingly distinguished. It seems clear that the court's decision rests on its view that "this business produces more open competition through advertisement, sales promotion and other media than any other that comes to our mind and we think that it is truly representative of free enterprise as practiced in a democracy."<sup>228</sup> Thus the policy-based distinction for a time made by the Supreme Court in the *White Motor*<sup>229</sup> case is translated into state constitutional doctrine. The result seems peculiarly unfitting since the degree of industrial concentration in the auto industry makes any delegation broader in scope than in the ordinary resale price maintenance case and since the power delegated here is, in effect, a licensing power. But the power exercised may, because of the existence of a chain of title, still seem to more closely resemble contract than legislation; taken in this light, the court's result may seem reasonable even if its distinction of the "fair trade" cases does not.

Another provocative decision also dealt with licensing powers thought to have been delegated to a purely private group without provision for judicial review. In *Blumenthal v. Board of Medical Examiners*,<sup>230</sup> the California Supreme Court, speaking through Justice Traynor, invalidated on delegation grounds a statute requiring five years experience with a dispensing optician as a condition to licensure. The court observed that the statute

confers upon presently licensed dispensing opticians the unlimited and unguided power to exclude from their profession any or all persons. . . .

. . . Delegated power must be accompanied by suitable safeguards to guide its use and to protect against its misuse. . . .

. . . The conclusion is inescapable that the experience

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the dissent urging application of the nondelegation doctrine. *In re Hinesley*, 82 S.D. 552, 558, 150 N.W.2d 834, 837 (1967); *accord*, *Semke v. State ex rel. Oklahoma Motor Vehicle Comm'n*, 465 P.2d 441 (Okla. 1970) (within police power).

<sup>227</sup> *Louisiana Motor Vehicle Comm'n v. Wheeling Frenchman*, 235 La. 332, 346, 103 So. 2d 464, 469 (1958). *Cf. Annot.*, 7 A.L.R.3d 1173, 1192 (1956).

<sup>228</sup> 235 La. at 350, 103 So. 2d at 471.

<sup>229</sup> *White Motor Co. v. United States*, 372 U.S. 253 (1963). *See Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

<sup>230</sup> 57 Cal. 2d 228, 368 P.2d 101, 18 Cal. Rptr. 501 (1962). *Cf. D'Amico v. Board of Medical Examiners*, 11 Cal. 3d 1, 520 P.2d 10, 112 Cal. Rptr. 786 (1974). The analogy of many such statutory schemes to the medieval and post-medieval guilds is a close one, though this fact ought not be considered dispositive of their validity. *See Grant, The Guild Returns to America*, 4 J. POLITICAL 303, 458 (1942).

necessary to qualify a person to dispense optical goods . . . is obtainable in a variety of ways.<sup>231</sup>

This case seems of arguable merit as an application of the non-delegation doctrine. The licensing power here may be too widely scattered for it to be thought that an identifiable private group has been given the power by a single adjudication to dispose of an individual's rights. Thus the case may be one more appropriate for the use of economic due process rather than the delegation doctrine; if the delegation doctrine is used, there is no weighing of interests and no clear stopping place short of the drastic proposition that all mandatory apprenticeship schemes are per se unconstitutional.<sup>232</sup>

The California judges might have done well to remember that medical internship requirements provide another instance of the survival in the professions of mandatory apprenticeship requirements. Their financial aspects have been under fire,<sup>233</sup> and there have also been cases subjecting hospitals to equal protection requirements on the basis that they exercise delegated licensing power,<sup>234</sup> but one would be astonished to see it contended that internship requirements per se are constitutionally impermissible.

It may be true that the contemporary movement, within and increasingly without the traditional professions, has been away from apprenticeship and toward educational requirements, and that the latter may seem to partake of a greater objectivity. Learned Hand would have understood these developments well:

As the social group grows too large for mutual contact and appraisal, life quickly begins to lose its flavor and its significance. Among multitudes relations must become standardized; to standardize is to generalize, and to generalize is to ignore all those authentic features which mark, and which indeed alone create, an individual. . . .

. . . .

. . . [T]he day has clearly gone forever of societies small enough for their members to have personal acquaintance with each other, and to find their station through the appraisal of those who have any first-hand knowledge of them.<sup>235</sup>

<sup>231</sup> 57 Cal. 2d at 235, 236, 235, 368 P.2d at 104, 105, 104, 18 Cal Rptr. at 504, 505, 504.

<sup>232</sup> One might contrast older state bar association requirements of apprenticeship.

<sup>233</sup> Cf. Bittenwieser, *The Young Doctors' Dilemma*, 193 THE NATION 429 (1961).

<sup>234</sup> See, e.g., *Eaton v. Grubbs*, 329 F.2d 710 (4th Cir. 1964); *Greisman v. Newcomb Hosp.*, 40 N.J. 389, 192 A.2d 817 (1963). But see *People v. Barksdale*, 8 Cal. 3d 320, 337, 503 P.2d 257, 270, 105 Cal. Rptr. 1, 13 (1972).

<sup>235</sup> *Proceedings in Memory of Mr. Justice Brandeis*, 317 U.S. ix, xiii-xiv, xv (1942) (remarks of Learned Hand).

An apprenticeship scheme for river pilots, not dissimilar to that involved in the *Blumenthal* case, was vindicated by the Supreme Court against due process challenge in the much disputed case of *Kotch v. Board of River Port Pilot Commissioners*.<sup>236</sup> There the record revealed that the apprenticeship requirements operated to restrict entry to the friends and relatives of present river pilots. "Mark Twain," one critic of the *Kotch* decision has suggested, "would surely have felt constrained in the most fundamental sense, if his youthful aspiration to be a river-boat pilot had been frustrated by a State-ordained system of nepotism."<sup>237</sup> However, that writer seems in fact to have felt more amused than constrained by the traditional restrictions on river pilotage.<sup>238</sup>

There are, of course, other examples of statutes delegating licensing powers to private groups without provision for review. Perhaps statutes validating marriages performed by church officials fall into the same category. There, however, the licensing power is usually not exclusively conferred on church officials, and such officials are in any case scattered and numerous. Furthermore, the delegation here may be thought to relate to a dispensing power, and may be viewed as more immune to attack on that account,<sup>239</sup> while the ministerial as opposed to discretionary character of the determination is also relevant.

It is merely a matter of accepting as authentic an act done under supposedly inherent guaranties of regularity. The practice may involve problems in the way of insuring impartial and reliable certification, and perhaps also service on reasonable terms; it is a compromise arrangement due to expediency or practical necessity;

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<sup>236</sup> 330 U.S. 552 (1947). The *Blumenthal* case was extended even further by the decision in *Rosner v. Peninsula Hosp. Dist.*, 224 Cal. App. 2d 115, 36 Cal. Rptr. 332 (1964), which invalidated as a delegation of power to insurance companies a statute requiring doctors in state hospitals to post malpractice insurance. This decision in effect precluded the state from electing to use the market as an appraiser of the qualifications of its doctors (since there was no showing that insurance companies would be motivated by considerations other than profit in deciding whether to insure particular doctors). While most of the delegation decisions thus far considered would be applauded by devotees of a free market, the *Rosner* case well revealed that the doctrine can cut both ways, since invalidation of statutes on this ground will frequently present the state with only two alternatives: no regulation at all, or regulation via public ownership or direct administrative control.

<sup>237</sup> McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 46.

<sup>238</sup> See Twain's amusing account, *The Pilots' Monopoly*, in LIFE ON THE MISSISSIPPI ch. 15 (1967). Twain himself seems not to have been adverse to resale price maintenance either. See *Clemens v. Estes*, 22 F. 899 (C.C.D. Mass. 1885).

<sup>239</sup> Cf. *McGautha v. California*, 402 U.S. 183, 199-201 (1971); Note, *The Power of Dispensation in Administrative Law—A Critical Survey*, 87 U. PA. L. REV. 201 (1938).

the secularization of marriage in Germany represents a repudiation of the compromise in favor of pure officialism.<sup>240</sup>

No discussion of statutes providing for private adjudication of offenses without review would be complete without mention of *Dr. Bonham's Case*.<sup>241</sup> That case, the first and last British venture into judicial review of legislative acts,<sup>242</sup> held bad a statute allowing the College of Physicians to fine persons practicing medicine in London for more than one month without a license from the college, where half the fine was to go to the college and half to the king. "The censors cannot be judges, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture . . . ."<sup>243</sup> Neither that case nor later cases<sup>244</sup> questioned the private licensing arrangement itself where a direct pecuniary interest was not as plainly present, though *Bonham's Case* is memorable not only for Lord Coke's homilies<sup>245</sup> and for what it says about judicial review but also for its recitals of standards for licensing<sup>246</sup> and for its early observations on the tort immunity of quasi-judicial officers,<sup>247</sup> including private persons exercising delegated powers.

Statutes requiring job printing done for government agencies to bear a union label have been invalidated with some consistency,<sup>248</sup> usually on the basis that they violate equal protection or antimonopoly clauses in state constitutions. Such statutes, particularly where they require the label of a named union,<sup>249</sup> could be viewed as delegating an un-

<sup>240</sup> E. FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY 48 (1928) (footnotes omitted).

<sup>241</sup> 8 Co. 113b, 2 Brown. 255, 77 Eng. Rep. 646 (1610).

<sup>242</sup> See generally Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30 (1926).

<sup>243</sup> 8 Co. at 118a, 77 Eng. Rep. at 652. Cf. *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

<sup>244</sup> See especially *Groenvelt v. Burwell*, 1 Raym. 213, 252, 454, 91 Eng. Rep. 1038, 1065, 1202 (K.B. 1697-99); which modified several of the holdings in *Bonham's Case*; see also *College of Physicians v. Levett*, 1 Raym. 472, 91 Eng. Rep. 1214 (K.B. 1699).

<sup>245</sup> "And it was well ordained, that the professors of physic should be profound, sad, discreet, &c. and not youths, who have no gravity and experience . . . ." 77 Eng. Rep. at 651.

<sup>246</sup> "[F]ive manner of persons were to be promoted, as appears by the said Act, those who were: 1, profound; 2, sad; 3, discreet; 4, groundly learned; 5, profoundly studied." *Id.*

<sup>247</sup> 77 Eng. Rep. at 657-58. These questions are no more settled now than they were then. See K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 26.01-.07 (Supp. 1970).

<sup>248</sup> See, e.g., *Upchurch v. Adelsberger*, 231 Ark. 682, 332 S.W.2d 242 (1960). See generally 10 E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 29.48 (1966), and cases there cited.

<sup>249</sup> Two cases invalidating statutes requiring the label of a specific union are *Upchurch v. Adelsberger*, 231 Ark. 682, 332 S.W.2d 242 (1960); *International Printing Pressmen & Assistants Union v. Meier*, 115 N.W.2d 18, 20 (N.D. 1962):

checked licensing power, and might perhaps be distinguished from "prevailing union wage" statutes in this respect.<sup>250</sup> But since the time of the Wagner Act, governments have been allowed to afford various degrees of positive aid to the process of unionization.<sup>251</sup> The mere requirement that contractors be engaged in collective bargaining relationships with their employees would not seem to contravene equal protection standards, though requiring a contract with a specific union might do so, or might (passing the problem of standing) be viewed as denying procedural due process to contractors by delegating licensing functions.

Courts have generally been willing to vindicate delegation of licensing powers to purely private groups where de novo review is provided in a public agency or in the courts. The best-known example of this willingness is that supplied by the National Association of Securities Dealers. This organization was created pursuant to the Maloney Act of 1938<sup>252</sup> as a body, equipped with disciplinary powers over its members, whose determinations are subject to review de novo by the Securities and Exchange Commission, which in turn is subject to a lesser degree of review by the courts. The Act so structures the apparatus of securities regulation as to in effect require that all brokers and dealers belong to the NASD. Nonmembers of the group are deprived by statute of the opportunity to participate in important distributions, so that membership is in effect compulsory for persons not members of a stock exchange. The delegation was summarily upheld.<sup>253</sup> Other legislative proposals would have broadened it by allowing NASD orders

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Here we are not concerned with a law which requires union labor or the use of a union label, but we are considering the validity of a statute which requires the use of one particular union label . . . to the detriment of all other union labels. Thus the argument advanced by the appellants—that the requirement of a union label guarantees superior work—is irrelevant because the Conrad company does have a union label; it merely does not have the right to use the particular label which is required by our law.

<sup>250</sup> See notes 166-68 *supra*.

<sup>251</sup> See 65 AM. JUR. 2d *Public Works and Contracts* § 201 (1972).

<sup>252</sup> 15 U.S.C. § 78o-3 (1970). See generally *Nassau Sec. Serv. v. SEC*, 348 F.2d 133 (2d Cir. 1965); Rutter, *The National Association of Securities Dealers*, 7 VILL. L. REV. 611 (1962).

<sup>253</sup> *R.H. Johnson & Co. v. SEC*, 198 F.2d 690, 695 (2d Cir.), cert. denied, 344 U.S. 855 (1952). See *United States v. National Ass'n of Sec. Dealers*, 95 S. Ct. 2427 (1975) (by implication). Cf. *United Black Fund, Inc. v. Hampton*, 352 F. Supp. 898, 904 (D.C. Cir. 1972). See generally Jennings, *Self Regulation in the Securities Industry: The Role of the Securities and Exchange Commission*, 29 LAW & CONTEMP. PROB. 663, 679-90 (1964); Hed-Hoffmann, *The Maloney Act Experiment*, 6 B.C. IND. & COM. L. REV. 187 (1965); Rediker, *Civil Liability of Broker-Dealers Under SEC and NASD Suitability Rules*, 22 ALA. L. REV. 15 (1969); Comment, *Implied Civil Liability Arising from Violation of the Rules of the National Association of Securities Dealers*, 8 LOY. L.A.L. REV. 151 (1975).

to become effective without a stay pending appeal to the Securities and Exchange Commission.<sup>254</sup>

The availability of de novo review in the courts has also been the basis on which delegation of disciplinary functions to an "integrated bar" association has been upheld in state courts.<sup>255</sup> It is difficult to say whether de novo review by a public administrative agency subject in turn to some check by the courts is in practice a greater or lesser safeguard than direct de novo judicial review, but both approaches have been upheld where tested.

Cases involving the Railway Labor Adjustment Board supply another instance where de novo review in the courts was thought necessary and sufficient to protect due process where purely private persons were given judicial functions. The Railway Labor Act<sup>256</sup> provides that either party to a grievance dispute may refer it to the National Railway Adjustment Board.<sup>257</sup> The Act had been construed to give the Board, a group composed of equal numbers of private persons designated by labor and management, exclusive primary jurisdiction over the dispute to the exclusion of any common law remedy available to the employee<sup>258</sup> or the employer.<sup>259</sup> It had been held that due process does not demand that employees be allowed judicial review of board decisions denying claims,<sup>260</sup> even though this result allowed employers, by referring cases to the Board, to deprive employees of a common law remedy which would otherwise exist. However, due process had been held to demand that the employer be given a right to judicial review of money judgments against him. The courts, taking note of the private composition of the Board, held that nothing less than de novo review is sufficient to preserve the constitutionality of the statute as applied to the employer,<sup>261</sup> though it had been held that this

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<sup>254</sup> The Securities Act amendment of 1964 retained the automatic stay pending appeal to the SEC but allowed the SEC after notice and brief hearing (upon affidavit and oral argument) to set aside the stay in particular cases. 15 U.S.C. § 78o-3(g) (1970); *cf.* *Harwell v. Growth Programs, Inc.*, 451 F.2d 240 (5th Cir. 1971) (existence of antitrust immunity a question of fact); *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289 (1973).

<sup>255</sup> *See* *Hogan v. State Bar*, 36 Cal. 2d 807, 228 P.2d 554 (1951). *Cf.* note 196 *supra*.  
<sup>256</sup> 45 U.S.C. §§ 151-63, 181-88 (1970).

<sup>257</sup> *See generally* Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 *YALE L.J.* 567, 584 (1937).

<sup>258</sup> *Union Pac. Ry. v. Price*, 360 U.S. 601 (1959).

<sup>259</sup> *Gunther v. San Diego & Ariz. E. Ry.*, 382 U.S. 257 (1965); *Ruffin v. Division 3, Nat'l R.R. Adjustment Bd.*, 368 F. Supp. 990, 992-93 (E.D. Pa. 1973).

<sup>260</sup> *See Pennsylvania R.R. v. Day*, 360 U.S. 548 (1959), which, however, involved an independent action in the district court, not an effort to seek de novo review of the Board's award.

<sup>261</sup> *Washington Terminal Co. v. Boswell*, 124 F.2d 235 (D.C. Cir. 1941), *aff'd by an equally divided Court*, 319 U.S. 732 (1943). *Cf.* *Barnett v. Pennsylvania Reading Sea-*

review need not take place until the employee brings a suit to enforce the award and hence that the employer did not have a right to a declaratory judgment as to the award's validity.<sup>262</sup> The denial to the employee of a right to review was presumably justified on the basis that the act itself deprives him of any common law right of action for matters within the exclusive jurisdiction of the Board; the Board is not held to ordinary due process standards since it can only confer benefits on the employee, not deprive him of extant rights.<sup>263</sup> This justification for denial of review to employees assumes that the Board remedy is exclusive and primary, and that courts are deprived of jurisdiction over claims even though neither party has referred a claim to the Board. The fact that a money claim is involved, and the holding that the availability of state remedies for railroad labor contract violations is determined by federal law<sup>264</sup> may present seventh amendment problems, since the statutory remedy is a direct substitute for one available at common law.<sup>265</sup> Though the act provides only that parties "may" refer disputes to the Board, not that they "shall" refer them there, it has been construed to give the Board exclusive jurisdiction (save for wrongful discharge claims).<sup>266</sup> If the act were read more literally, it would in effect delegate to the employer the right to deprive an employee of a claim cognizable at common law by referring a case to the Board. But even this delegation might not be thought fatal to the statute, since courts have upheld statutes giving employers the right to deprive employees of common law tort claims by setting up workmen's compensation plans not required of all employers.<sup>267</sup> The delegation to the employer has been thought permissible because of the employee's voluntary entry into the employment contract. The fact that under the Railway Labor Act cases wrongful discharge claims

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shore Lines, 245 F.2d 579 (3d Cir. 1957). The carrier's right of review was narrowly limited by 45 U.S.C. § 153 (1970) to jurisdictional questions, fraud or corruption, *id.* § 153(1) (p), and awards "actually and indisputedly without foundation in reason or fact," 1966 U.S. CODE CONG. & AD. NEWS 2287, and a corresponding right of review given to employees. The constitutionality of this limitation of the employers' former right was sustained without reference to the *Washington Terminal* decision in *Brotherhood of R.R. Trainmen v. Denver & Rio Grande W. R.R.*, 370 F.2d 833 (10th Cir. 1966), *cert. denied*, 386 U.S. 1018 (1967).

<sup>262</sup> *Reisman v. Caplin*, 375 U.S. 440 (1964); *Washington Terminal Co. v. Boswell*, 124 F.2d 235 (D.C. Cir. 1941); *Rossi v. Trans World Airlines*, 350 F. Supp. 1263 (C.D. Cal. 1972).

<sup>263</sup> See K. DAVIS, ADMINISTRATIVE LAW TREATISE § 28.13 (Supp. 1970).

<sup>264</sup> *IAM v. Central Airlines*, 372 U.S. 682 (1963).

<sup>265</sup> See P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 737-38 (2d ed. 1973).

<sup>266</sup> *Pennsylvania R.R. v. Day*, 360 U.S. 548 (1959).

<sup>267</sup> *National Bank Bldg. v. Goldsmith*, 204 Okla. 45, 226 P.2d 916 (1951).

(as distinguished from grievance claims) initially remained cognizable at common law<sup>268</sup> suggests the extent to which the existence of a contractual or chain-of-title relationship will lead courts to sustain delegations deemed impermissible where such a relationship is absent or has terminated.<sup>269</sup> But since the waiver of common law rights is incorporated by force of law into all contracts in the industry, an "unconstitutional conditions" problem is present that is not present in cases allowing employers the option of divesting employees of common law rights by setting up workmen's compensation plans or allowing a single party to an agreement to bypass the courts by referring a claim to binding arbitration where a contract so provides. It is worth noting that in the recent cases involving the validity as a matter of procedural due process of the delegations to private parties inherent in replevin procedures and cognovit notes, the Supreme Court has distinguished between contracts of adhesion and arm's-length contracts.<sup>270</sup>

*b. To public boards appointed from private groups*

Where the private persons to whom licensing powers are delegated are formally sworn as public officials, the courts have been prone to hold that something less than de novo court review will suffice to sustain the statutory scheme.<sup>271</sup> The fact that members of a board must be

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<sup>268</sup> *Moore v. Illinois Cent. R.R.*, 312 U.S. 630 (1941); *but cf. Slocum v. Delaware, L. & W.R.R.*, 339 U.S. 239 (1950), involving a subsisting employment relationship. The distinction is sometimes said to rest not on contract notions but on the fact that future relations between the railroad and other employees are less involved in discharge than in grievance cases. *Moore* was overruled, the constitutional question being expressly reserved, in *Andrews v. Louisville & N.R.R.*, 406 U.S. 320 (1972). Justice Douglas dissented on constitutional grounds. The prevailing opinion perhaps significantly stresses the absence of pre-existing remedies at common law. *Id.* at 324.

<sup>269</sup> A state remedy for wrongful discharge has been held unavailable under the NLRA; *see Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), where the alternative was a public administrative remedy. Significantly, in distinguishing *Moore*, the Court referred to "the various distinctive features of the administrative remedies provided by the [Railway Labor] Act. . . . *e.g.* the makeup of the Adjustment Board, the scope of review from monetary awards and the ability of the Board to give the same remedies as could be obtained by court suit," as possibly justifying provision for an alternative remedy to Adjustment Board procedures in discharge cases. *Id.* at 657 n.14.

<sup>270</sup> Even the removal of grievance claims from the courts disturbed Justice Black. *See id.* (Black, J., dissenting); *Smith v. Evening News Ass'n*, 371 U.S. 195, 204-05 (1962) (Black, J., dissenting). As to replevin and cognovit notes, compare *Fuentes v. Shevin*, 407 U.S. 67 (1972) (nonwaiver of procedural rights by contract of adhesion), discussed in note 16 *supra*, with *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972) (waiver by arm's-length contracts).

<sup>271</sup> The validity of statutes requiring appointment of boards from industry panels usually arises in a procedural due process rather than nondelegation context. *See, e.g., Floyd v. Thornton*, 220 S.C. 414, 68 S.E.2d 334 (1951); *Fleisher v. Duncan*, 195 Ga. 309, 24 S.E.2d 15 (1943); *Lucas v. State ex rel. Board of Medical Regis. & Exam.*, 229 Ind. 633, 99 N.E.2d 419 (1951). *See also* the cases collected in Jaffe at 231 n.78. *But see*

appointed from a particular occupational group, or from lists furnished by that group, ordinarily does not disturb the courts where some judicial review is provided. The Supreme Court in the *Kotch* case made reference to the right of states to choose their own public officers;<sup>272</sup> courts generally have taken the view that the controls imposed by appointment, appropriation, and removal powers and the oaths taken by public officers make adequate a lesser measure of judicial review than that necessary to preserve statutes delegating licensing or disciplinary powers to purely private groups. Thus a Virginia court in 1950 upheld a statute creating a milk marketing board composed of producers, distributors, and consumers. The court emphasized that

[m]embers of the Commission are appointed by the Governor and subject to removal at his pleasure . . . . To hold the act unconstitutional on the ground that two members of the Commission are interested in the production and distribution of milk would be to apply the same qualifications to members of an administrative agency created by the legislature as is required of judges in trying cases. . . . Any person aggrieved by an order of the Commissions refusing to issue a license . . . is given a right of appeal to this court.<sup>273</sup>

c. To public boards appointed by private groups

Statutes which provide for the direct appointment of board members by private groups have received a more hostile reception from the courts, though here too the weight of judicial opinion still seems to favor validity. A Delaware act giving state chairmen of political parties authority to designate members of a county board of elections was invalidated by a divided court, which distinguished cases in which "the appointments are to be made from a list of names which allows the appointing power to exercise some discretion."<sup>274</sup> But older "state ac-

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*Kachian v. Optometry Exam. Bd.*, 44 Wis. 2d 1, 170 N.W.2d 743 (1969). Even if the minority view—that a public official's oath and his removability are not sufficient guarantees of an absence of bias—is taken, one might still suggest that a distinction be drawn between legislative functions such as rate-fixing on the one hand and judicial functions such as license revocation on the other.

<sup>272</sup> See notes 47 & 236 *supra* & text accompanying. *Bui cf.* *Bullock v. Carter*, 405 U.S. 134 (1972).

<sup>273</sup> *Board of Supervisors v. State Milk Comm'n*, 191 Va. 1, 60 S.E.2d 35, *appeal dismissed*, 340 U.S. 881 (1950). See also *Southeast Milk Sales Ass'n v. Swaringen*, 290 F. Supp. 292, 307 (1968) ("A person aggrieved . . . has a right of appeal and to be heard *de novo* . . .").

<sup>274</sup> *State ex rel. James v. Schorr*, 45 Del. 18, 28, 65 A.2d 810, 814 (1948). *Contra* *Driscoll v. Sakin*, 121 N.J.L. 225, 1 A.2d 881 (Sup. Ct. 1938). The distinction was vigorously rejected by the dissenting judges in *Schorr*:

As the important question is whether the Constitution prohibits the delegation of the legislative power to appoint statutory officers to persons not mem-

tion" cases treating political parties as being bound to the standards of conduct required of state agencies cast doubt on whether such statutes do delegate power to private groups.<sup>275</sup> It may also be urged that the board serves an adversary and mediatory rather than judicial function, and that group representation is proper since "[t]o insure honest elections it is essential that the county board be made up at least by the choice of both powerful political parties."<sup>276</sup>

Legislative acts permitting private groups to name members of various public boards cannot be cavalierly dismissed as efforts by narrow-minded occupational groups to insulate themselves from public regulation or scrutiny. For enactments of this sort frequently arise from a felt need for professional expertise, or, more frequently, from a desire to insulate a particular governmental function from "politics" in its invidious sense. The statute relating to the selection of the New York City Board of Education sustained in *Lanza v. Wagner*<sup>277</sup> probably falls into this category. That statute, and others founded on similar political premises, have not met with uniform acclaim. The perennial and protracted controversy over the so-called Missouri Plan for the selection of judges and the role accorded bar associations under it<sup>278</sup> sheds light upon the political issues which lurk in this field—a

bers of the State government, we are unable to see how any of the cases relied on by the minority of this Court can be distinguished on the ground that the named agents were only required to appoint from a list of names furnished by each of the major political parties. The number that could be named from any one political party was, also, limited.

45 Del. at 40, 65 A.2d at 820 (Harrington, C., dissenting).

<sup>275</sup> *Nixon v. Condon*, 286 U.S. 73 (1932), was, to be sure, alluded to by the court in its decision. *But cf. O'Brien v. Brown*, 409 U.S. 1 (1972). *See generally* Annot., 97 A.L.R.2d 361 (1964).

<sup>276</sup> 45 Del. at 37, 65 A.2d at 819 (Harrington, C., dissenting). *Cf. United Citizens Party v. South Carolina State Election Comm'n*, 319 F. Supp. 784 (D.S.C. 1970), invalidating a statute which had the effect of permitting a major party to exclude minor parties from the ballot by altering its primary and convention dates.

<sup>277</sup> 11 N.Y.2d 317, 183 N.E.2d 670, 229 N.Y.S.2d 380, *appeal dismissed*, 371 U.S. 74 (1962).

<sup>278</sup> Of course, delegation of the power to name judges is somewhat different from delegation of power to name administrators whose decisions are subject to some measure of judicial review. But the delegation contemplated by the typical "Missouri Plan" scheme is a limited one. Usually, the governor is required to select judicial appointees from persons recommended by a panel, half of whose members are selected by the governor or legislative and half of whom are elected by the bar. Bar associations serve on nominating committees in the bar elections, though nomination by petition remains possible. *See, e.g., K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS* 33-34 n.24 (1960). *Cf. A. DE GRAZIA, PUBLIC AND REPUBLIC* 103, 214-19 (1951); 1 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 119 (1934). Hostility toward delegation of judicial powers to persons not drawn from the community at large or selected by politically responsible officials may account for the demise of the "special jury" in the United States. *Cf. Fay v. New York*, 332 U.S. 261 (1947).

field where the advocates of a greater measure of professional power and responsibility stand opposed to the contemporary representatives of the Jacksonian strain in American political thought. The merits of such controversies need not be discussed here, beyond observing that committing their resolution to democratic legislatures hardly seems to do violence to democratic ideals.

Denunciations of state statutes creating industry-dominated state boards sometimes proceed from a dislike of the policy objectives which such state boards frequently foster—the protection of small, local businesses and the prevention of innovation and change.<sup>279</sup> In creating such boards, legislators cannot be unaware of the nature of the policies which they prospectively ratify. Dislike of policy cannot justify constitutional invalidation. Economic folly and social wisdom may at times go hand-in-hand;<sup>280</sup> and more than one modern judge would remind us that

[a] motive to build up through legislation the quality of men may be as creditable in the thought of some as a motive to magnify the quantity of trade. Courts do not choose between such values in adjudging legislative powers. They put the choice aside as beyond their lawful competence.<sup>281</sup>

But this is not to say that some of the statutes considered above may not be challenged on procedural grounds. Adjudication or licensing by a board of interested tradesmen does raise questions of bias and

<sup>279</sup> See, e.g., M. FRIEDMAN, *CAPITALISM AND FREEDOM* (1962).

<sup>280</sup> Cf. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* pt. 4, ch. 7, at 675-76 (G. Lawrance transl., J. Mayer & M. Lerner eds. 1966):

In our day everything threatens to become so much alike that the peculiar features of each individual may soon be entirely lost in the common physiognomy. Our forefathers were always prone to make an improper use of the idea that private rights should be respected, and we are by nature inclined to exaggerate the opposite view, that the interest of the individual should always give way to the interest of the many.

It would seem that sovereigns now only seek to do great things with men. I wish that they would try a little more to make men great, that they should attach less importance to the work and more to the workman, that they should constantly remember that a nation cannot long remain great if each man is individually weak, and that no one has yet devised a form of society or a political combination which can make a people energetic when it is composed of citizens who are flabby and feeble.

<sup>281</sup> *Fox v. Standard Oil Co.*, 294 U.S. 87, 100 (1935) (Cardozo, J.) (upholding Kentucky chain store tax act). Cf. *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 541 (1933) (Brandeis, J., dissenting); *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 114 (1928) (Holmes, J., dissenting) (invalidating act requiring majority of shareholders in drug-stores to be registered pharmacists). The continuing force of the latter case was questioned in *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220, 225 (1949), and the case was later overruled.

lack of fairness,<sup>282</sup> even when the board members are sworn as public officials and subject to political controls. Such actions are open to objections that private rulemaking and rate-fixing are not. For denial of a license or application of a sanction bear more heavily on particular individuals than the announcement of general rules, even when these rules are aimed at a particular group or particular manner of doing business. Moreover, arbitrariness and unfairness in rulemaking and rate-fixing is readily susceptible to legislative detection and control, whereas unfairness in consideration of a particular application or offense is unlikely to be brought to public view, and even when disclosed may be explained away on the basis of particular facts or may be found difficult of redress or correction.

Courts, however, ought not go so far as to accept as a constitutional requirement a recent suggestion for legislative reform of the licensing field:

The legislature could . . . provide for registration of all who wished to be licensed. . . . Then, in order to maintain high levels of rectitude, provision could be made for a decree of suspension or revocation upon a finding, after suitable judicial proceedings, that the licensee had misrepresented his skill or training, had demonstrated his incompetence, or had engaged in dishonorable conduct relevant to his occupation.

This proposal envisages the creation of an appropriate administrative agency . . . to initiate actions in court by the filing of duly detailed complaints . . . .<sup>283</sup>

It is clear, as those making such proposals would concede, that a number of occupations are not suited to such loose control. Medicine is, no doubt, the most obvious case in point. It likewise seems clear that any professional regulatory board will, whether deliberately so designed or not, tend to contain members of the affected profession. One might suggest that courts are usually unsuited to the making of judgments as to which occupations do, and which do not, require licensing or regulation. One might further suggest that judicial control over occupational licensing boards is best achieved by focusing on their functions, rather than on their composition. Where the function of the board is merely to make rules, the composition of the board would seem quite irrelevant. The constitution does not demand that legislators be unbiased or that their lives be free of conflicting interests when

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<sup>282</sup> See K. DAVIS, ADMINISTRATIVE LAW TREATISE § 12.03 (Supp. 1970).

<sup>283</sup> W. GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS 149-50 (1956) (footnote omitted). Cf. F. HAYEK, THE CONSTITUTION OF LIBERTY 227, 492 n.9 (1960).

they pass on legislation; there is no reason to impose more onerous requirements on administrators performing legislative functions. Any cure for arbitrariness or invidious discrimination on the part of regulatory boards should find its source in the doctrines of equal protection that likewise limit the actions of legislatures.

## 2. Delegation of Rulemaking Powers

The delegation to private groups of rulemaking powers has ordinarily met with more gentle treatment at the hands of the courts, notwithstanding *Carter* and *Schechter*. Where an arrangement requires the assent of a large percentage of producers, or where it is based upon arrangements negotiated by them (even though these arrangements may have been negotiated in contemplation of the statutory scheme), both the temptations of the market and political exigencies impose important checks.<sup>284</sup> Nor are abuses under such schemes unlikely to be perceived and corrected by the public.

These considerations may account for the vindication by the Supreme Court and by state courts of marketing schemes, both agricultural and industrial, whose differences from that condemned in the *Carter* case are more formal than real. Thus, statutory schemes requiring programs initiated by public authorities to be approved by a referendum of producers have been sustained,<sup>285</sup> as have schemes which cannot operate until initiated by a specified number of producers.<sup>286</sup> State courts have bridled where power is delegated to private groups to fix prices<sup>287</sup> or the hours of operation of independent businesses<sup>288</sup> without any formal checks by public officers, but this hostility is not as apparent where the power delegated relates to the hours and conditions of work of employees<sup>289</sup>—a throwback, perhaps, to the days

<sup>284</sup> Cf. Jaffe at 234–53.

<sup>285</sup> *E.g.*, *H.P. Hood & Sons, Inc. v. United States*, 307 U.S. 588 (1939); *Schwegmann Bros. Giant Super Mkts. v. McCrory*, 237 La. 767, 112 So. 2d 606, *appeal dismissed*, 361 U.S. 114 (1959); and the cases cited in Jaffe at 241 n.110 (all involving agricultural schemes). Cf. *Walker v. Louisiana Exp'y Auth.*, 274 So. 2d 716, 722 (La. App. 1973).

<sup>286</sup> *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940) (labor standards); *Spiers v. Magnolia Petroleum Co.*, 206 Okla. 503, 244 P.2d 843 (1951) (oil unitization acts); *Palmer Oil Corp. v. Phillips Petroleum Co.*, 204 Okla. 543, 231 P.2d 997 (1951), *appeal dismissed*, 343 U.S. 390 (1952).

<sup>287</sup> *State v. Allstate Ins. Co.*, 231 Miss. 869, 97 So. 2d 372 (1957) (insurance rates). Cf. *Annot.*, 54 A.L.R.3d 916, 918–22 (1973) (barbershops).

<sup>288</sup> *Hollingsworth v. State Bd. of Barber Examiners*, 217 Ind. 373, 28 N.E.2d 64 (1940) (barber's prices and hours); *Opinion of the Justices*, 337 Mass. 796, 151 N.E.2d 631 (1958); *Reyne v. Trade Comm'n*, 113 Utah 155, 192 P.2d 563 (1948).

<sup>289</sup> *See Booth v. State*, 179 Ind. 405, 100 N.E. 563 (1913), *aff'd*, 237 U.S. 391 (1915) (installation of washrooms required on petition); *Porter Coal Co. v. Davis*, 231 Ala. 359, 165 So. 93 (1935) (appointment of weighman on petition of miners).

prior to *Nebbia v. New York*.<sup>290</sup>

The courts have ordinarily had little difficulty with statutes delegating rulemaking or price-fixing powers to boards made up of members of an industry.<sup>291</sup>

The 1953 California case of *State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc.*<sup>292</sup> announced a different rule, condemning a statute allowing a board "made up of six active members of the industry, and one member of the public at large" to set minimum rates.<sup>293</sup> A strong dissenting opinion by Justice Traynor emphasized the fact that "[t]he members of the State Board of Dry Cleaners are appointed by the Governor and approved by the Senate. They are officials of the state, paid by the state for administering the law, and their acts are reviewed by the judiciary."<sup>294</sup> This emphasis on the political checks inherent in the appointment and confirmation of public officials is of even greater validity as applied to statutes which confer a removal power upon a state governor. In addition, the oaths of office taken by board members may have some restraining influence.<sup>295</sup> As noted above, however, a different attitude may be proper where licensing or adjudicatory functions are at issue.<sup>296</sup> In 1972, California adhered to the *Thrift-D-Lux* rule in *Allen v. California Board of Barber Examiners*,<sup>297</sup> invalidating a law which permitted the Board, composed primarily of members of that profession, to set minimum barbershop prices. The intermediate court found the act was a "delegation of a power to fix prices," holding *Thrift-D-Lux* squarely applicable.<sup>298</sup> It should be noted that the Board possessed the enforcement power of license re-

<sup>290</sup> 291 U.S. 502 (1934).

<sup>291</sup> See the cases cited in notes 271 & 286 *supra*.

<sup>292</sup> 40 Cal. 2d 436, 254 P.2d 29 (1953). The court observed that "[w]here the Legislature attempts to delegate its powers to an administrative board made up of interested members of the industry . . . that delegation may well be brought into question." *Id.* at 449, 254 P.2d at 36. An asserted lack of standards was also emphasized. In *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940), a statute similar to that in the *Thrift-D-Lux* case was invalidated on substantive due process grounds and for want of standards. The court observed that the composition of the board though "[n]ot of itself sufficient to invalidate the statute . . . invites the scrutiny of the Court as to the public nature of the objectives really pursued . . . ." *Id.* at 762, 6 S.E.2d at 864-65. *But cf.* *Union School Dist. v. Commissioner of Labor*, 103 N.H. 512, 176 A.2d 332 (1961), upholding a statute giving an industry-dominated board power to set the "prevailing wage rate." See generally Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1793-1802 (1975).

<sup>293</sup> 40 Cal. 2d at 448, 254 P.2d at 36.

<sup>294</sup> *Id.* at 456, 254 P.2d at 40.

<sup>295</sup> *Fox v. Mohawk & Hudson River Humane Soc'y*, 165 N.Y. 517, 59 N.E. 353 (1901) is the leading case stressing this distinction.

<sup>296</sup> See text accompanying notes 283-84 *supra*.

<sup>297</sup> 25 Cal. App. 3d 1014, 102 Cal. Rptr. 368 (1972).

<sup>298</sup> *Id.* at 1020, 102 Cal. Rptr. at 372.

vocation.

Similarly, the making of criminal legislation by private delegates may be constitutionally objectionable. Since violation of such legislation carries about it a moral stigma, it may not be inappropriate to insist that its enactment be reserved to the legislature or some other body fully representative of the sense of the community at large. This view has been apparent in some of the cases involving delegation to private parties<sup>299</sup> as well as in the early reluctance,<sup>300</sup> since overcome, to allow public administrative bodies to promulgate penal regulations, and in the continuing reluctance to allow the size of penalties to be set by private groups. Similar thoughts may underlie the recent invalidation on procedural due process grounds of state replevin statutes.<sup>301</sup>

### 3. Delegation of Administrative Powers

Another important class of delegations are those that might be denominated delegations of administrative powers—powers which do not involve the making of rules enforced and enforceable in the ordinary courts, and yet which do not in their exercise bear so heavily on particular persons as to constitute licensing or adjudication.<sup>302</sup> Such delegations are often little noted in the reported cases. One student of this area has called for

an emphasis on administration as distinguished from administrative law. Law can promote but it can also impede. The ultimate answers to our besetting problems . . . are not to be found in judicial utterances, for they are essentially the problems of laymen in fields calling for more than what mere law has to offer.<sup>303</sup>

Delegations to private parties of the character here under consideration take place when the legislature entrusts the management of public functions to private institutions, or significantly supports such institutions in their activities.

The litigation surrounding such delegations usually concerns the

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<sup>299</sup> See *Olinger v. People*, 140 Colo. 397, 344 P.2d 689 (1959) (voters of conservancy districts invalidly delegated authority to enact penal ordinances); *People v. Malmud*, 5 Misc. 2d 65, 158 N.Y.S.2d 838 (Spec. Sess.), *rev'd on other grounds*, 4 App. Div. 2d 86, 164 N.Y.S.2d 204 (1957) (invalid delegation of voice in making penal rules to bondholders of bridge and tunnel authority). For an analysis similar to that in *McGautha v. California*, 402 U.S. 183 (1971), discussed in text accompanying notes 10-11 *supra*, see *Cockley v. People*, 168 Colo. 280, 450 P.2d 1013 (1969) (jury).

<sup>300</sup> *United States v. Grimaud*, 220 U.S. 506 (1911).

<sup>301</sup> *E.g.*, *Fuentes v. Shevin*, 407 U.S. 67 (1972). *Cf.* *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 619 (1974) ("the process proceeds under judicial supervision and management").

<sup>302</sup> See generally P. WOLL, *ADMINISTRATIVE LAW: THE INFORMAL PROCESS* (1963).

<sup>303</sup> Landis, Book Review, 30 U. CHI. L. REV. 597, 600 (1963).

duties of the delegates under the equal protection clause rather than the validity of the delegation itself. Where litigation does take place under the doctrine, the delegations are usually upheld. Thus an Illinois court, in an opinion by Justice Schaefer, upheld a statute providing that a railroad terminal authority could, by contract, vest in a committee "including but not limited to" interested railway companies authority to supervise and manage terminal facilities.<sup>304</sup> The court observed that the statute allowed the authority to

avail itself of the services of those who are presumably most familiar with the problems involved. To this extent it contemplates that delegation of administrative duties, but in this we see no constitutional violation. . . . If this sensible and apparently harmless provision should be abused, a question not now presented would arise.<sup>305</sup>

The court did not make clear the constitutional basis of its reservation. Likewise, a federal court sustained a statute vesting in private banks the trusteeship of funds belonging to certain Indian tribes.<sup>306</sup> The court, citing *Berman v. Parker*,<sup>307</sup> noted that the powers involved were essentially managerial in character. A statute delegating to a quasi-public corporation the power to provide recreational facilities was upheld with the explanation that provision of recreational facilities was not a "purely municipal function."<sup>308</sup> Similarly, the familiar sort of statute vesting various powers in a volunteer fire department was upheld in a Wisconsin decision against challenge on nondelegation grounds.<sup>309</sup> A Wyoming court has upheld a municipal employment bargaining law, including a compulsory arbitration clause, against a nondelegation challenge.<sup>310</sup>

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<sup>304</sup> *People ex rel. Adamowski v. Chicago R.R. Terminal Auth.*, 14 Ill. 2d 230, 151 N.E.2d 311 (1958). See also *People ex rel. Hanrahan v. Caliendo*, 50 Ill. 2d 72, 277 N.E.2d 319 (1971) (Urban Transportation District Act).

<sup>305</sup> 14 Ill. 2d at 240, 151 N.E.2d at 317.

<sup>306</sup> *Crain v. First Nat'l Bank*, 324 F.2d 532 (9th Cir. 1963).

<sup>307</sup> 348 U.S. 26 (1954). Cf. *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 729 (1973), holding the principles of the reapportionment cases inapplicable to a water district "not exercis[ing] what might be thought of as 'normal governmental' authority." *Contra*, *City of Amsterdam v. Helsby*, 79 Misc. 2d 676, 362 N.Y.S.2d 698 (Sup. Ct. 1974), holding in violation of the equal protection clause a state statute requiring compulsory arbitration of public employee labor disputes, since impasse arbitrators wield governmental power but were not chosen in accordance with the one-man, one-vote rule.

<sup>308</sup> *Board of County Comm'rs v. White*, 79 Wyo. 420, 445, 335 P.2d 433, 442 (1959).

<sup>309</sup> *Rockwood Volunteer Fire Dep't v. Town of Kossuth*, 260 Wis. 331, 50 N.W.2d 913 (1952).

<sup>310</sup> *State ex rel. Fire Fighters Local 946, IAFF v. City of Laramie*, 437 P.2d 295 (Wyo. 1968). See generally note 119 *supra*.

It may be noted that there has been little litigation concerning the validity of statutes according private police degrees of immunity from suit and rights of a nature similar to those accorded public officials.<sup>311</sup> It would not be difficult to equate the powers typically accorded such police with adjudicatory powers, the delegation of which has traditionally been condemned, since extrajudicial exercises of the powers of police impinge on the rights of particular individuals, and cannot easily be equated merely with rulemaking. However, the courts have generally given effect to the immunities extended to private policemen.<sup>312</sup> Since the end of the days of groups like the Pennsylvania Coal and Iron Police,<sup>313</sup> the subject has not been a live issue, though statutes authorizing so-called "industrial police" survive in some states. It has been made plain that the acts of the remaining "private police" constitute "state action" subject to the fourteenth amendment equal protection guarantees.<sup>314</sup> The absence of litigation contesting the validity of "industrial police" laws has made it unnecessary for the courts to consider the reach, if any, of Justice Jackson's dictum<sup>315</sup> about the state's monopoly on violence as applied to legislative grants of powers of arrest and immunities like those available to police, or to consider the source in the constitution of any limitations upon such grants. It was, fittingly, Justice Frankfurter who called a halt in two of the mass picketing cases<sup>316</sup> to expansion even of the techniques used by the labor and civil rights movements:

It must never be forgotten . . . that the Bill of Rights was the child of the Enlightenment. Back of the guaranty of free speech lay faith in the power of an appeal to reason by all the peaceful means of gaining access to the mind. It was in order to avert force and explosions due to restrictions upon rational modes

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<sup>311</sup> Of course, at common law the police had rights little greater than those of private citizens. See Hall, *Legal and Social Aspects of Arrest Without a Warrant*, 49 HARV. L. REV. 566 (1936).

<sup>312</sup> See, e.g., *Fagan v. Pittsburgh Terminal Coal Corp.*, 297 Pa. 109, 149 A. 159 (1930). But cf. *Dart Drug, Inc. v. Linthicum*, 300 A.2d 442 (D.C. App. 1973). See generally Annot., 92 A.L.R.2d 15, 51-61 (1963). Cf. IND. ANN. STAT. §§ 35-3-2-1 to -6 (Code ed. 1975) for authority and immunity for shopkeepers in detaining suspected shoplifters.

<sup>313</sup> See Shaloo, *The Private Police of Pennsylvania*, 146 ANNALS 55 (1929). See generally Comment, *Private Police Forces: Legal Powers and Limitations*, 38 U. CHI. L. REV. 555 (1971).

<sup>314</sup> *Griffin v. Maryland*, 378 U.S. 130 (1964); *United States v. Hoffman*, 498 F.2d 879 (7th Cir. 1974).

<sup>315</sup> See *Dennis v. United States*, 341 U.S. 494, 561 577 (1951) (Jackson, J., concurring).

<sup>316</sup> *Hughes v. Superior Ct.*, 339 U.S. 460 (1950); *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941).

of communication that the guaranty of free speech was given a generous scope.<sup>317</sup>

Legislation has again focused attention on the problems surrounding government use of private groups to administer its programs. Various antipoverty measures contained provisions for the channelling of funds through private organizations, thus again proving, if proof were needed, that institutions commonly thought to be "vested interests" are not the sole beneficiaries of the governmental delegations here considered. Recent education bills contain extensive provisions for aid to private and parochial institutions, while direct grants in aid to private colleges are a commonplace. On the one hand, administration of public programs through private groups makes possible a greater variety of approaches, promotes diversity by offsetting the effect on private activities of universal taxation and makes it possible for the government to aid programs assumed to be beneficial which it would not be thought proper for the government to administer directly.<sup>318</sup> It makes possible the use for government purposes of existing private institutions and provides leverage to induce change in those institutions—including such institutions as the church and the family. It also can provide means of bypassing other publicly responsible agencies at state and local levels through creation of and assistance to new private groups. Contrariwise, administration through private groups can be viewed as destructive of their autonomy,<sup>319</sup> or as a deleterious means of allowing the government to avoid accountability for its actions, or as promotive of an excessive amount of separatism and segregation: economic, racial, or religious (the latter charge is frequently levelled at programs for aid to private and religious education and may perhaps, with equal justice, be levelled at many means-tested programs).<sup>320</sup> It also may be viewed as aggrandizing the power of aggregates, whether governmental or private, at the expense of the individual.<sup>321</sup>

These conflicts arising in respect to any transfer of governmental powers or resources to private groups have long been at the center of

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<sup>317</sup> *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941).

<sup>318</sup> *See King v. Smith*, 392 U.S. 309 (1968).

<sup>319</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>320</sup> *See M. FRIEDMAN, CAPITALISM AND FREEDOM* (1962); E. WEST, *EDUCATION AND THE STATE: A STUDY IN POLITICAL ECONOMY* (2d ed. 1970); Boulding, Book Review, 33 U. CHI. L. REV. 615 (1966). *See also* J.S. MILL, *On Liberty*, in *UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT* 81, 216-17 (A. Lindsay ed. 1950).

<sup>321</sup> *Cf. Kurland, Foreward—Church and State in the United States: A New Era of Good Feelings*, 1966 WIS. L. REV. 215; Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, 1973 DUKE L.J. 1217.

the controversies surrounding the meaning and scope of the establishment clause—itsself a prohibition of one form of delegation. It has been suggested above that one standard for determining the permissibility of delegations should be whether the powers delegated to private groups are legislative in character or rather are judicial: greater safeguards may be required in the latter case than in the former. Many of the most important objections to government aid to private groups, as *Lemon v. Kurtzman*<sup>322</sup> makes clear, center on the extent to which government aid may destroy the autonomy of private institutions, or the extent to which inadmissible favoritism toward particular political or religious groups, classes or persons may be practiced. Most distributions of government largesse, since they depend on appropriations and taxation falling on the community at large, do not merit judicial review since the operative political checks are sufficient. The same may be said even if the suggestions of Professors Corwin,<sup>323</sup> Jaffe,<sup>324</sup> and Reich<sup>325</sup> are accepted and all or nearly all government disbursements or allocations are made potentially subject to judicial review on broader constitutional grounds, such as equal protection. The canons of restraint that remain relevant continue to relate to the distinction between legislation and adjudication. If the legislature determines that a broad class of beneficiaries be aided, and the beneficiaries and amounts of benefits are defined according to a limited number of objective standards so that only ministerial tasks need be carried out by the government, then the delegation in all its implications would seem a delegation subject to adequate political checks, and judicial invalidation would be inappropriate. If, on the other hand, the effect of the delegation is to leave government officials broad powers to choose among prospective private recipients, then many of the dangers giving rise to the existing constitutional bars to specific types of delegations are present, political checks are less adequate, and judicial invalidation of the totality of the delegation as well as of its implementation may be more appropriate.<sup>326</sup> Perhaps two specific examples may point the moral. In two establishment clause cases the Maryland Court of Appeals respectively invalidated state grants to certain named religious colleges,<sup>327</sup> yet sus-

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<sup>322</sup> 403 U.S. 602 (1971).

<sup>323</sup> E. CORWIN, *THE TWILIGHT OF THE SUPREME COURT* (1934).

<sup>324</sup> Jaffe, *The Right to Judicial Review II*, 71 HARV. L. REV. 769 (1958).

<sup>325</sup> Reich, *The New Property*, 73 YALE L.J. 733 (1964).

<sup>326</sup> Similar tests are of course relevant in determining when administrative agencies should act by decision and when they should act by rule. Cf. A. PERKELIS, *LAW AND SOCIAL ACTION* 90 (1950).

<sup>327</sup> *Horace Mann League of the United States v. Board of Pub. Works*, 242 Md. 645, 220 A.2d 51 (1966).

tained tax exemptions in favor of churches and church-run educational institutions.<sup>328</sup> In justification of the disparity in results, the court, was able to advance only an historical justification: logically both forms of grant were "establishments," but "logic is a minion of the law, not its master."<sup>329</sup> Under the Maryland court's reasoning, the New York "scholar-incentive" plan, based on direct grants to students coupled with added grants to the institutions they elect to attend, would also be invalid unless partially upheld on the perhaps somewhat disingenuous basis that it aids the student and not the institution.<sup>330</sup> Yet surely tax exemptions to religious and charitable institutions, tax credits for tuition, and direct grants to students or per capita to the institutions they attend are not subject to many of the objections to which direct grants to named colleges are subject, or to which federal research grants in varying amounts to specific universities are subject.<sup>331</sup> Where blanket per capita grants or tax exemptions are given to a wide class of institutions, the dangers of favoritism, destruction of the autonomy of private groups or aggrandizement of powers of the government that are among the principal bases of the establishment clause and similar "public use" provisions are not present in anything like the same measure.

## V. CONCLUSIONS

What conclusions may be drawn from this protracted review of the history in our law of the notion that "delegations to private parties are invalid"?

The first conclusion is a negative one: that the nondelegation doctrine, in its commonly expressed form, is nonsense. As to this we may refer to the words of John Chipman Gray:

Especially valuable is the negative side of analytic study. On the constructive side it may be unfruitful; but there is no better method for the puncture of windbags. Most of us hold in our minds a lot of propositions and distractions which are in fact identical, or absurd or idle, and which we believe, or pretend to

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<sup>328</sup> *Murray v. Comptroller of the Treasury*, 241 Md. 383, 216 A.2d 897, cert. denied, 385 U.S. 816 (1966); see also *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

<sup>329</sup> 241 Md. at 399, 216 A.2d at 906.

<sup>330</sup> See *Norwood v. Harrison*, 413 U.S. 455, 464 (1973); *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930). Cf. *Kurland, Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 14 (1961).

<sup>331</sup> It may be well to allude here to the less fashionable portions of President Eisenhower's farewell speech, including the reference to government-financed research contracts as "virtually a substitute for intellectual curiosity." *Farewell Radio and Television Address to the American People*, Jan. 17, 1961, in 1960-61 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: DWIGHT D. EISENHOWER ¶ 421, at 1035, 1038 (1961).

ourselves to believe, and which we impart to others as true and valuable. If our minds and speech can be cleared of these, it is no small gain.<sup>332</sup>

The second conclusion is that it is a pernicious notion that private rights can only be contracted and not expanded,<sup>333</sup> and that a wide scope can and does remain for government conferral of power on private groups and individuals, particularly where the powers conferred are not judicial or licensing powers, or are subject to public review. As to this, and as to the related questions presented by the growth of the "state action" doctrines, we may refer to the timely cautionary words of Alexander Pekelis:

Plato, who knew how to be consequent, and Socrates, who knew how to choose his interlocutors, clearly saw the links between unity of a society and the total destruction of the element of arbitrariness in all human relations, beginning with the relations between man and wife, parent and child. If we try to match their intellectual courage, we shall concede that unless a certain element of capriciousness and arbitrariness is introduced in the world, unless differences which are in a sense arbitrary, nonrational differences are admitted, preserved, and protected, unless our society is a society of societies, a community of communities, real freedom cannot be achieved. . . .

. . . .

. . . . The more unisonal harmony of which Aristotle speaks is attempted in the American system through the peculiarity of a constitutional control which is not dissimilar to the judge's control of a jury. It leaves ample room for nonrational, intuitional, experimental, and arbitrary elements. It renounces, by definition, the idea of perfection, makes justice a question of degree, and is satisfied with keeping the juror's whim or discretion and the several governments' discretion or whim within the minimum limits of reason, and thus to reconcile diversity with equality and the rule of law with the freedom of men.<sup>334</sup>

The third conclusion relates to the appropriate standards for testing the validity of statutes assailed as violative of the nondelegation doctrine. Among the factors that should be weighed are the following:

1. Does the statute confer upon private delegates the power not only to make rules but to apply the law to particular individuals?

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<sup>332</sup> J. GRAY, *THE NATURE AND SOURCES OF THE LAW* 2 (1921).

<sup>333</sup> Some, even, would restrict private rights to the constitutional minimum. See Henkin, *Some Reflections on Current Constitutional Controversy*, 109 U. PA. L. REV. 637 (1961).

<sup>334</sup> A. PEKELIS, *Private Governments and the Federal Constitution*, in *LAW AND SOCIAL ACTION* 91, 124-26 (1950).

2. 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?

3. Are the private delegates chosen by a process involving public consent, as by nomination or confirmation by elected officials?

4. Are the private delegates sworn to oaths of office?

5. Do the private delegates have pecuniary interests in the determinations to be made?

6. Is a power to define criminal acts or impose penal sanctions delegated?

7. Is the delegation one of powers threatening the state's monopoly of violence, or one of a breadth and scope threatening the ultimate corrective powers of the legislature?

8. Is the delegation, if one of administrative powers or financial resources, one in which the delegates and their powers are defined according to a limited number of objective standards, or is it rather one which accords the government broad powers to pick and choose among prospective delegates?

Consideration of these questions will, it is believed, serve to clarify, if not to resolve, most of the issues raised by the nondelegation doctrine in its contemporary applications.

The final conclusion is that the distinction—now so eroded—between legislative and judicial functions<sup>385</sup>—is more relevant in resolving these problems of delegation than many have been prone to assume. There is still merit in Mr. Justice Jackson's familiar proposition:

Procedural fairness, if not all that originally was meant by due process of law, is at least what it most uncompromisingly requires. Procedural due process is more elemental and less flexible than substantive due process. It yields less to the times, varies less with conditions, and defers much less to legislative judgment. Insofar as it is technical law, it must be a specialized responsibility within the competence of the judiciary on which they do not bend before political branches of the Government, as they should on matters of policy which comprise substantive law.<sup>386</sup>

Of course, insistence on procedural fairness has implications for the substance of legislation.

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<sup>385</sup> See *Reynolds v. Sims*, 377 U.S. 533 (1964); *Linkletter v. Walker*, 381 U.S. 618 (1965); cf. *Mishkin, Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965).

<sup>386</sup> *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting).

[P]leadings must be filed and evidence presented before a judgment could be had; cause must be shown, forms filled out, compliance with license conditions proved, before executive or administrative action. Herein the effect of the the law's formality was similar to that of the law's insistence on generalizing (abstracting) from particulars. In both respects the availability of legal process encouraged men to increase their awareness of relationships among things and events and thereby to sharpen their eyes to the existence of gains and costs and the sources of gain or cost.<sup>337</sup>

Indeed, nothing dramatizes this more than the far-reaching effects of much recent legislation of a procedural character—the National Environmental Policy Act,<sup>338</sup> for example. The answer to the political needs and forces giving rise to delegations is not to be found in blanket condemnation of delegation nor in a constitutionally compelled unitary state. It is rather to be found in focusing on the difference between rulemaking and adjudication, and in insistence that delegations in the later category be subject to adequate judicial or public review. Only thus can we, in dealing with this limited but important congeries of problems, live up to Whitehead's reminder that

[t]he art of free society consists first in the maintenance of the symbolic code; and secondly in fearlessness of revision, to secure that the code serves those purposes which satisfy an enlightened reason;<sup>339</sup>

a definition which demands that we be prepared, in Holmes' words, "to learn to transcend our own convictions and to leave room for much that we hold dear to be done away with short of revolution by the orderly change of law."<sup>340</sup>

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<sup>337</sup> J. HURST, *LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY* 142 (1960).

<sup>338</sup> 42 U.S.C. §§ 4321, 4331–35, 4341–47 (1970).

<sup>339</sup> A. WHITEHEAD, *SYMBOLISM, ITS MEANING AND EFFECT* 88 (1927).

<sup>340</sup> O.W. HOLMES, *Law and the Court*, in *COLLECTED LEGAL PAPERS* 291, 295 (1920).