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Recommended Citation

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Prepared for the Second Workshop on Self-Regulation
European University Institute, 14-15 Nov. 2003
Updated for Submission on 29 Feb. 2004

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Essay

AGENTS WITHOUT PRINCIPALS?: DELEGATION IN AN AGE OF DIFFUSE AND FRAGMENTED GOVERNANCE

*Peter L. Lindseth**

In an earlier essay, Professor Lindseth argued that the notion of delegation from the national legislature, as well as the principal-agent relationship that it implies, should be retained in our understanding of the transfer of regulatory power from the nation-state to supranational institutions. In this essay, Professor Lindseth extends this argument to self-regulation and privatization. He recognizes that the nature of regulatory power in an era of diffuse “governance” makes it difficult to sustain the notion of delegation empirically, because the effective holders of regulatory power do not operate under the national legislature’s supervision and control in any realistic sense. Nevertheless, Professor Lindseth asserts that, because constitutional institutions of national “government” – at the core of which he places the elected legislature – are still widely viewed as privileged expressions of national self-rule, this strongly suggests that we must retain some form of the notion normatively, even where its empirical underpinnings may be questionable. A specific historiographical perspective guides Professor Lindseth’s normative commitment to the notion of delegation. Self-regulation, privatization, and supranationalism should be understood historically as aspects of the same phenomenon of diffusion and fragmentation of normative power that began with the emergence of the modern administrative state in the first third of the twentieth century. As with the administrative state, any durable constitutional settlement of the emergent system of diffuse regulation will need to incorporate how changing structures of public governance are “experienced” in relation to historically-rooted ideas and values of legitimate government inherited from the past. Working from this perspective, Professor Lindseth examines the thesis recently advanced in the scholarly literature on privatization and self-regulation that describes the relationship between “government” and “governance” in terms of contract rather than of delegation. He finds that the primary drawback in the contractual approach, aside from the questionable parity it suggests between the public and private spheres in matters of public regulation, is the manner in which it renders the imposition of procedural and substantive constraints on private regulatory authority a matter of mere political expediency. Rather, he asserts that, when private actors exercise public regulatory power (that is, power exercised in pursuit of publicly-defined ends and backed up by the coercive power of the state), the imposition of such constraints becomes a matter of constitutional necessity. Such delegation constraints help to ensure that private actors remain within the bounds of their delegated authority and that they exercise their authority reasonably. More importantly, delegation constraints facilitate the flow of information about how delegated normative power is actually being used by private actors, and in this way are essential to governmental monitoring of norm-production in the diffuse system of governance. The imposition of delegation constraints is thus necessary to maintain the connection between the diffuse system

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of governance and the institutions of constitutional government that remain the primary locus of democratic legitimacy in modern political life.

* * *

Over the last one hundred and fifty years, on both sides of the Atlantic, a political-cultural consensus has arguably emerged regarding the constitutional role of the legislature as the cornerstone of representative democracy in the nation-state. The legislature is understood to serve – even if imperfectly and not without significant moments of contestation – as the privileged institutional expression of the capacity of the “people” or the “nation” to rule itself. Indeed, in theory, this is why the people “constituted” the legislature in the first place. Of course, this political-cultural understanding of the legislative role does not mandate that the elected assembly possess exclusive or even predominant power to produce legislative-type norms to govern society. Rather, the prevalent conception of representative democracy has tolerated a good deal of norm-production outside the legislative sphere, in particular in the executive or administrative domains. The elected assembly, rather, is understood as simply the legislative “principal” in the constitutional system, whose authorization is necessary to empower any specifically “public” regulatory regime, i.e., one that pursues politically defined goals and is ultimately backed up by the coercive power of the state for its implementation and enforcement. Except in those polities where the constitutional text provides for the production of certain norms without a specific legislative authorization (for example, via some provision for “autonomous regulatory power” in the executive), an initial legislative enactment is almost universally regarded as the *sine qua non* for the production and enforcement of public regulatory norms.¹

In modern constitutional law, the term “delegation” is used to describe the transfer of authority from the legislative “principal” to a subordinate “agent” charged with the production and enforcement of regulatory norms on the principal’s behalf. There are numerous reasons why a legislature might choose to delegate. Limitations on legislative time or expertise is perhaps the most commonly cited reason, but legislatures might also choose to delegate as a kind of “commitment mechanism” to lock in a stream of future policy choices against the vicissitudes of electoral (particularly parliamentary) politics. Or perhaps the legislature will simply desire to avoid difficult

¹ The French Constitution of 1958, with its direct allocation of certain normative powers to the executive (see Article 37), is the most prominent example of constitutional provision for “autonomous regulatory power.” However, as has long been recognized in French public law, the precise scope of that autonomous power has been significantly narrowed by the decisions of both the Conseil d’Etat and the Conseil constitutionnel, in favor of the legislature’s power under Article 34 of the constitution. For the classic analysis of the case-law, see Louis Favoreu, “Les règlements autonomes n’existent pas,” 3 *Revue française de droit administratif* 871-84 (1987).

political questions over values or allocation of scarce resources, thus opting to transfer them to the administrative sphere. Whatever the reason for delegation, one legal constant should remain true: The recipient of the power will in theory be duty-bound to produce norms according to the legislature's defined policy goals.

The reality of the situation will of course be that the agent enjoys some measure of autonomy – often a significant amount, in fact – due to both vague delegations as well as the inherent limitations of the principal's capacity for supervision and control. Indeed, such autonomy may in fact be *intended* to overcome collective action problems within the legislature itself. Thus, the primary concern of a constitutional principal like a legislature is to ensure that the agent will not pursue its own interests rather than those of the legislature – what economists call the “agency cost problem.” To address this concern, the legislature imposes substantive and procedural constraints on an agent's delegated authority while also enlisting the aid of third parties – cabinet ministers, courts, private actors – in the task of supervision and control. These delegation constraints form the core of modern administrative law, a field whose principal *raison d'être* is to manage the inevitable agency autonomy that comes with legislative delegation and thus to reduce “agency costs.”

The purpose of managing agency autonomy is not, however, simply instrumental in this way. Rather, it also serves a special democratic-legitimizing function. The imposition of delegation constraints helps to maintain, to the greatest degree possible, the connection between the administrative agents and the constitutional principal in the system of representative democracy – the elected assembly. This ongoing connection helps to reconcile the reality of delegation (and the agency autonomy that inevitably comes with it) with the legal-cultural ideals of representative democracy grounded in the constitutional legislature that most liberal states have inherited from the eighteenth and nineteenth centuries.

Over the last several decades of the twentieth century, however, the notion of delegation, as well as the principal-agent relationship that it implies, have come under increasing strain. The diffusion and fragmentation of normative power away from constitutional legislatures over the course of the twentieth century reached a point that, to some observers at least, it has become questionable to claim empirically (if not normatively) that the legislature serves as the constitutional principal in the modern system of regulatory norm-production. Norms are produced, rather, in an amorphous regulatory system involving actors operating on multiple levels – international, supranational, national, regional, and local – some inside but many outside the confines of the state. In its earliest

stages, this diffusion usually involved transfers of normative power only to agents operating under the national executive's hierarchical control. More recently, however, this diffusion has involved shifts of power to a variety of other locations, not simply to "independent" agencies within the state (i.e., those technically not under the executive's control), but also to private and quasi-public entities outside the state's strict confines, even to institutions operating at the supranational or international level. It has become evident over the last several decades (especially to European scholars, where the supranational aspect of this phenomenon been particularly pronounced) that the production of regulatory norms usually involves a complex network of actors that includes not simply administrative officials but also quasi-public standard-making organizations, private business interests, trade unions, self-regulating professional bodies, public advocacy groups, "epistemic communities" of scientific and technological experts, as well as elected officials both legislative and executive (not to mention lawyers and judges).

While the semblance of traditional hierarchical "government" may persist in the constitutional nation-state (at the core of which is the legislature), the empirical reality is much more one of diffuse and fragmented "governance," a term often used in the literature precisely because it suggests that there does not exist any privileged source of normative power (or democratic legitimacy) at the summit of the regulatory system. From this perspective, although national constitutional traditions may mandate that we view regulatory norm-production merely in terms of a delegation from the national parliament (and hence properly subject to the parliament's control and supervision), the complexities of modern governance have made it impossible to sustain this view any longer. One might fairly say that, in these circumstances, the notion of a delegation should be avoided precisely because it suggests a principal-agent relationship between national parliaments and the great variety of regulatory actors in the diffuse system of governance that simply does not exist. Even if the norm-producing agents (never easy to identify) could be said to derive their authority from their purported constitutional principals at the national level, the process of regulatory norm-production today operates with so much effective autonomy that it would seem impossible for anyone realistically to assert that the agents work under the control or supervision of a national constitutional principal in any meaningful hierarchical sense.

Rather, in this polyarchical regulatory environment, national parliaments (the locus of democratic legitimacy in classical constitutional theory), as well as government ministers (who also derive their own legitimacy from their national office), seem to be merely one set of actors among many, with certain powers at their disposal

but hardly a decisive influence over the regulatory process. Indeed, one might well say that national legislatures and executives are themselves simply “agents” in a diffuse and fragmented regulatory system comprised of “agents without principals.” As a consequence, the regulatory system seems perhaps to have lost its classically democratic pedigree, at least as notion of representative democracy has been historically in the constitutional nation-state. Henceforth, perhaps, the only basis upon which to judge the regulatory system will be on its “out-puts” – that is, on the quality of the regulatory norms it produces – rather than on the degree of connection it possesses with institutions of constitutional “government” on the national level.² Indeed, for some observers, the diffusion of power away from institutions of constitutional “government” on the national level may well present an exciting prospect, because it will allow us to reconceptualize the very nature of democracy in order to conform it better to the realities of modern “post-national” governance.

The position I have just described has its attractions but is ultimately flawed for both normative and positive reasons, as I have argued extensively in an earlier piece that dealt with the phenomenon of supranationalism in Europe.³ The aim of this contribution is to extend this argument to another form of diffusion and fragmentation of normative power in the modern era – self-regulation and private service provision – two inter-related phenomena that have become increasingly prevalent not just in Europe but in most advanced countries over the last several decades. I begin from the following premise: The notion of delegation, and the principal-agent relationship that it implies, are intimately bound up with our continuing political-cultural attachment (for better or worse) to national constitutional bodies as the privileged, although perhaps not exclusive, expressions of democratic legitimacy. This attachment is not just a *normative commitment* – an assertion of how things “ought” to be (if that were so, then my argument could rightly be dismissed as simply quaint and outdated). Rather, this attachment reflects a prevalent psychological state – an *empirical reality* – born of historical experience that still gives a significant meaning to popular understandings of what constitutes a legitimate “democratic” order. Because these understandings help to motivate and shape ongoing political action, they should not be ignored or theorized away, even as they exist in obvious tension with the diffusion and fragmentation of regulatory power over the last half-century, both within and

² This is how I understand the position described, if not necessarily advocated, by Neil Walker in his comments on an earlier draft of this paper presented at the Workshop on Self-Regulation at the European University Institute in November 2003.

³ Peter Lindseth, Delegation is Dead, Long Live Delegation: Managing the Democratic Disconnect in the European Market-Polity, in *Good Governance in Europe’s Integrated Market* (Joerges and Dehousse eds., 2002), 139-163.

beyond the state.

In twentieth-century public law, the notion of delegation was never intended to deny the fact of normative autonomy in a diffuse and fragmented system of governance. This kind of autonomy has been, for the last half century at least, a fact of political life in the modern administrative state, flowing from both organizational complexity and, in more recent cases, formal legal right. Undoubtedly, the expansion of normative autonomy for regulatory actors reflects a fundamental change in our understanding of the forms of democratic self-rule, in which we now tolerate much broader freedom, for example, for technocratic “expertise” from political (particularly parliamentary) interference.⁴ The notion of delegation has, however, provided the legal-cultural justification for the establishment of a whole range of substantive and procedural control mechanisms (including, most recently, increased direct participation in, and transparency of, regulatory processes), that are designed to manage that autonomy in ways that can be broadly understood as democratic in a historically recognizable, if still evolving, sense. These constraints quite rightly reflect some suspicion of the claim of expertise, which too often is used to mask essentially political questions over values, or the allocation of scarce resources, questions that should at some point be presented to democratically-legitimate political institutions for ultimate decision. The fact that the diffusion and fragmentation of regulatory power – as well as the claims of expertise – now spill outside the strict legal confines of the constitutional nation-state (whether to the private sphere or to the supranational or international level) does not alter the case for managing new forms of agency autonomy in similarly democratic directions. Insulating expert decision making through private or supranational delegations may have its place, but as a general proposition I question the underlying premise that such delegations are justified because there exists an easily identifiable realm of technical expertise free from politics or even simple errors of judgment.⁵ In this sense, delegation of authority outside the confines of the state, whether to the supranational level or to the private sphere, without democratically-legitimizing oversight and control, is no more compelling than when such delegation occurs within the confines of the state.

⁴ See, e.g., *Brunner v. European Union Treaty*, BVerfGE 89, 155 (October 12, 1993), translated in English at [1994] 1 C.M.L.R. 57, and 33 I.L.M. 388 (1994) (the *Maastricht Decision*), in particular the passage at 33 I.L.M. at 439, in which the Court relied on notions of technocratic expertise, as well as the political incapacities of parliaments to rule on complex “technical” issues under electoral and interest group pressures, to rationalize the shift in normative power from the German Parliament to an independent European Central Bank.

⁵ Cf. Jeffrey J. Rachlinski and Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 *Cornell L. Rev.* 549 (2002).

To cast my argument in Weberian terms, the notion of delegation, and the principal-agent relationship it implies, remain necessary to counterbalance “bureaucratization in all its institutional forms”⁶ – at whatever level of governance and in whatever guise, public or private. In this way, delegation as a normative-legal principle, and the control mechanisms it mandates, will also hopefully help us find a way to “preserv[e] intact a dynamic order of politics and thus at the same time political freedom,” at least in a historically recognizable form.⁷

Cultural-Historical Dialectic: Changing Structures of Governance and the “Experience” of Constitutional Self-Government

My insistence on the notion of delegation as a normative-legal principle is rooted in a specific historiographical perspective. The late British historian E.P. Thompson once described the process of historical change this way: “[H]istorical change eventuates . . . because changes in productive relationships are experienced in social and cultural life, refracted in men’s ideas and their values, and argued through their actions, their choices and their beliefs.”⁸ As a committed historian of the left,⁹ the analytical point of departure for Thompson was, of course, “changes in productive relationships” – that is, changes in the relationship of individuals or social groups to the ownership of the means of production, in a material-structural sense. As this passage also suggests, however, Thompson’s approach was not exclusively concerned with material-structural change. Understanding the direction of history, rather, required an understanding of how such change was “*experienced* in social and cultural life.”¹⁰ Understanding this sort of experience involved, for Thompson, two inter-related aspects: first, how those material-structural changes were interpreted (“refracted”) in the prevailing system of ideas and values; and second, how those

⁶ This is Mommsen’s gloss on Weber. See Wolfgang J. Mommsen, *The Political and Social Theory of Max Weber: Collected Essays* 13 (1989).

⁷ *Id.*

⁸ E.P. Thompson, “History and Anthropology, Lecture Given at the Indian History Congress (Dec. 30, 1976),” in E.P. Thompson, *Making History: Writings on History and Culture* 222 (1994).

⁹ Although a Marxist, Thompson’s ideological interests seemed to wane over time even as his historical approach remained grounded on the left. Thompson confessed in his later years “that I’m less and less interested in Marxism as a Theoretical System. I’m neither pro- nor anti- so much as bored with some of the argument that goes on. . . . I feel happier with the term ‘historical materialism.’” Agenda for Radical History, in *Making History*, above n.8, 360-61.

¹⁰ Thompson, “History and Anthropology,” above n.8, at 222 (emphasis added). This cultural-historical approach found clear expression in Thompson’s masterwork, *The Making of the English Working Class* (1963), and also formed the core of his later dispute with “structural” Marxists, led by Althusser. See E.P. Thompson, *The Poverty of Theory* (1978). In an equally classic statement, Richard Hofstadter echoed Thompson in his definition of the object of history as a discipline, writing that of the appropriate focus is “not only the analysis but the expression of human experience,” and that the historian should try to understand not simply “how life may be controlled” but also “how it may be felt.” Richard Hofstadter, *History and the Social Sciences*, in Fritz Stern ed., *The Varieties of*

interpretations motivated, or gave meaning to, subsequent social and political action.¹¹

Although Thompson was speaking as a cultural historian of the working classes, he was also describing an approach that historians in other domains and of other political persuasions can usefully adopt.¹² This includes, most importantly for our purposes, historians concerned with the evolution of public law and governance over the last century. Rather than focusing on changing productive relationships, as Thompson did, historians of public law should focus on how changing *structures of public governance* have been “experienced” in relation to historically-rooted ideas and values of legitimate government inherited from the past. Structures of public governance have evolved as a consequence of shifting material demands and constraints that societies have placed on their prevailing system of legal norm-production and enforcement, whether centered in the state or elsewhere. As these demands and/or constraints have grown, structures of governance have shifted accordingly, whether consciously or not, resulting in a new system of norm-production and enforcement. These new structures of governance, however, have arguably outpaced prevailing understandings of what constitutes a legitimate legal and political order – that is, in the “refraction” of this reality through ideas or values of legitimacy inherited from the past, the new structures are often found wanting in any number of respects (hence, for example, the constant refrain about the “democratic deficit” in supranational governance in the European Union, or the nationalist strain in some of the elements of the anti-globalization discourse).

The gap between socio-institutional reality and historically-embedded conceptions of democratic legitimacy need not necessarily lead to a breakdown in the system. Such a disconnect will, however, likely stimulate a dialectic in which both structures of governance and understandings of a legitimate legal and political

History (1973), 370.

¹¹ This gloss on Thompson is intentionally evocative of the Weberian concept of meaningful social action. See Max Weber, *Economy and Society*, vol. 1 (Roth et al., eds. 1978), 4 (“Action is ‘social’ insofar as its subjective meaning takes account of the behavior of others and is thereby oriented in its course”).

¹² Even if Thompson’s methodological approach was born of his Marxist commitments, a strong claim can be made that it was in fact ideologically neutral. Although Thompson believed, as he argued in *The Making of the English Working Class*, above n.8, that the dialectical relationship of material structures and ideas and values must culminate in revolutionary socialism in the working class, the unpredictable direction of material-structural change suggested that the working class as a revolutionary force could also be “unmade” or “remade.” The emergence of the modern welfare state in the twentieth century suggested, as Charles Maier has written, that it was possible to incorporate “a large enough segment of the working classes” into the political and economic order of modern capitalism for it to stabilize itself. Charles S. Maier, “The Two Postwar Eras and the Conditions for Stability in Twentieth-Century Western Europe,” in *In Search of Stability: Explorations in Historical Political Economy* (1987), 184. Indeed, as Maier has also extensively argued, the emergence of corporatist politics in interwar western Europe demonstrated that the capitalist ruling class was also capable of being “recast.” See generally Charles S. Maier, *Recasting*

order are forced to adjust in the face of the reciprocal influences of the other.¹³ In turn, the perceived disconnect inevitably influences subsequent political choices about how to structure the system of governance in the future.

The constitutional dimension of the emergence of the modern welfare state in advanced industrial countries from the 1920s to the 1950s provides a good example of this dialectical interaction. On the one hand, the emergence of the welfare state clearly responded to political demands for increased state intervention into economic and social relations.¹⁴ On the other hand, it built on new forms of administrative governance that, even in countries with long-established bureaucratic traditions, entailed a delegation of normative power to the national executive and its technocratic subordinates that defied contemporaneous understandings of the appropriate distribution of powers in a liberal-democratic state.¹⁵ As normative power shifted out of the legislative and into the executive and technocratic spheres, elected assemblies (parliaments) lost their constitutional centrality as loci of norm-production and as instruments of democratic control. Given the extent to which earlier (particularly nineteenth-century) conceptions of constitutional self-government had regarded elected assemblies as cornerstones of democratic legitimacy, the relative shift in authority out of the legislative and into the executive and administrative spheres presented a real legal-cultural challenge.

In this interaction of structures of governance and ideas of legitimacy, the emergence of modern administrative governance in the interwar period (particularly with the extensive transfer of normative power out of the legislative sphere) was often interpreted as an abdication on the part of legislatures of their constitutional

Bourgeois Europe: Stabilization in France, Germany, and Italy in the Decade after World War I (1975).

¹³ Cf. Sarah Hanley, *Engendering the State: Family Formation and State-Building in Early Modern France*, *French Historical Studies* 16:1 (Spring 1989), 5-6 (describing “the historical process as a renewable dialogue or cultural conversation, wherein history is culturally ordered by existing concepts, or schemes of meaning, at play in given times and places; and culture is historically ordered when schemes of meaning are revalued and revised as persons act and reenact them over time. One might regard this process of reordering as one that ‘counterfeits culture’; that is, as a process that replicates the perceived original but at the same time (consciously or unconsciously) forges something quite new.”).

¹⁴ As a special committee of the British parliament – the “Committee on Ministers’ Powers” – reported in 1932: “The truth is that if Parliament were not willing to delegate law-making power, Parliament would be unable to pass the kind and quantity of legislation which modern public opinion requires” – a statement that could have applied equally well to the French and German parliaments of the same period. *Report of the Committee on Ministers’ Powers* Cmd. 4060 (London: Stationery Office, 1932), 23. For further discussion, see Peter L. Lindseth, *The Contradictions of Supranationalism: European Integration and the Constitutional Settlement of Administrative Governance, 1920s-1980s* (Ph.D. dissertation, Department of History, Columbia University, 2002), Part One.

¹⁵ See generally Peter L. Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s*, 113 *Yale L. J.* ____ (forthcoming 2004).

function as democratic representative of the national political community.¹⁶ It was only after 1945 that historical notions of constitutional self-government were reconciled in any stable way with widespread delegation. This was accomplished in part through the consolidation of the chief executive as plebiscitarian leader and as instrument of democratic legitimation in its own right, as well as through the development of secondary forms of legislative oversight and control and, more importantly, the advent of heightened judicial review of executive and administrative action.¹⁷ In this way, the legitimacy of new forms of administrative governance came to be mediated through the branches of government historically understood as endowed with constitutional authority, whether democratic (i.e., executive or legislative) or judicial, while also allowing the delegation to proceed. These socio-institutional and legal-cultural adjustments, particularly the forms of mediated legitimacy that I have just briefly described, helped to cast the postwar administrative state as broadly “constitutional” and “democratic” even as the distribution of powers within the state had fundamentally changed.

New Dimensions of the Diffusion and Fragmentation of Regulatory Power

Of course, this process of redistribution of normative power continues, although its roots – both within and beyond the state – are directly linked to the development of the modern administrative state itself over the course of the twentieth century. Administrative governance as it emerged in the middle third of the last century did not merely involve the “fusion” of power in the national executive (at the expense of the legislature), but also the “diffusion” of power into a complex and far-reaching technocratic sphere (at the expense of the plebiscitarian chief executive itself). In fact, from early on, it was understood that administrative governance sometimes spilled outside the strict confines of the state.¹⁸ Even as the administrative state in the postwar decades came to depend on the

¹⁶ In 1926, for example, the French socialist Léon Blum argued that the emergent practice in France of *pleins pouvoirs* and *décrets-lois* (“plenary powers” and “decree laws”) was “not only a violation of the Constitution, but a violation of national sovereignty, of which you [the members of parliament] are the representatives but not the masters, and which you do not have the right to delegate to others.” *J.O., Chambre des députés, débats* (July 8, 1926), 2773. At the other end of the political spectrum Lord Hewart, the Lord Chief Justice of England, famously published a book in 1929 provocatively entitled *The New Despotism*, in which he argued that delegation of legislative and adjudicative powers to the executive posed a grave threat to “the two leading features” of the British constitution, “the Sovereignty of Parliament and the Rule of Law.” Lord Hewart of Bury, *The New Despotism* (London: Ernest Benn, 1929), 17.

¹⁷ See Lindseth, *The Contradictions of Supranationalism*, above n.14, Section 2.4; and Lindseth, *The Paradox of Parliamentary Supremacy*, above n.15, Part IV.

¹⁸ As the Committee on Ministers’ Powers noted in 1932, “Ministers of the Crown are the chief repositories of such powers, but they are conferred also, in differing degrees upon Local Authorities, statutory corporations and companies, Universities, and representative bodies of solicitors, doctors and other professions.” Report of the

plebiscitarian leadership of the chief executive as an instrument of hierarchical democratic legitimation, the diffuse and fragmented character of administrative governance often defied the executive's capacity for hierarchical oversight and control. The inadequacies of strictly political controls of this type arguably accounts, at least in part, for the increasing importance of judicial review as a form of "non-hierarchical" legitimation; that is, as a means by which the legislature could enlist judges and private litigants in the task of supervising the administrative sphere.¹⁹ Operating in conjunction with the legislature's secondary oversight functions, administrative litigation and judicial review served as an additional means of reducing the agency costs that inevitably flowed from technocratic autonomy in the administrative state.²⁰

Responding to both new demands for flexible and decentralized norm-production, as well as to financial constraints on the state structure, the diffusion and fragmentation of regulatory power has only accelerated over the course of the last several decades. This process can be broken down into two dimensions, one internal to the state and the other external. First, within the state, beyond the reality of organizational complexity (which has always allowed for *de facto* technocratic independence from hierarchical political control), more recently there has been intentional recourse to, or experimentation with, decentralized governance as a means of market regulation. Most prominently, this has entailed *autorités administratives indépendantes* and quasi-autonomous regulatory offices,

Committee on Ministers' Powers, above n.14, at 4. See also Louis Jaffe, *Law Making by Private Groups*, 51 *Harv. L. Rev.* 201 (1937).

¹⁹ This demand for judicial review as an alternative to hierarchical political control is aptly demonstrated by the reforms which ensued in Britain in the mid-1950s following the so-called "Crichel Down affair." For a contemporaneous overview, see J.A.G. Griffith, *The Crichel Down Affair*, 18 *Modern L. Rev.* 557 (1955); see also Carleton Kemp Allen, *Law and Orders: An Inquiry into the Nature and Scope of Delegated Legislation and Executive Powers in English Law* 344-46 (2d ed. 1956). The details of the affair need not concern us here, but suffice it to say that it exposed problems relating to administrative secrecy, organizational complexity, the lack of clear lines of authority, and opportunities for unfairness which these factors created. To quell the public outcry that flowed from the affair, the British government established a Committee on Administrative Tribunals and Enquiries (the "Franks Committee") in November 1955 to examine the question of administrative justice, which led directly to the passage of the Tribunals and Inquiries Act, 1958, 6 *Eliz. 2*, c. 66. The act established a "Council on Tribunals" with broad consultative and review functions over the procedures and the formation of tribunals in the administrative sphere. The work of the Council over the subsequent decade established "a much clearer standard" of what was minimally necessarily consistent with administrative fairness. Bernard Schwartz and H.W.R. Wade, *Legal Control of Government: Administrative Law in Britain and the United States* 153 (1972). Importantly, the act itself provided for extended rights of appeal to judicial courts (reflective of the fundamentally subordinate character of these tribunals on questions of law), as well as a requirement that tribunals publicly provide reasons for their decisions (essential to effective judicial review).

²⁰ From a principal-agent perspective, judicial review initiated by private litigants can be understood as a form of "fire-alarm oversight" – that is, as a way in which legislatures enlist private litigants and the courts in the broader project that reducing agency costs. Fire-alarm oversight operates in conjunction with the legislature's own direct supervision ("police patrols"). See McCubbins and Schwartz, *Congressional Oversight Overlooked: Police Patrols*

often inspired by the longer-standing American example of independent administrative agencies. This *de jure* shift toward administrative independence within the state has necessarily lead to the diminution of the chief executive's political control over the technocratic sphere. The political science literature in Germany captures this change in an interesting way: The complexity of modern administrative governance has overwhelmed the old notion of a hierarchically-controlled "chancellor democracy" as established by Adenauer in the 1950s. Now commentators speak merely of a "coordination democracy," in which the chancellor serves only as a policy manager at the center of a highly pluralist institutional network.²¹

The second aspect of the accelerating diffusion and fragmentation of normative power over the last several decades has been external to the state, although this dimension can itself be divided into at least two different sub-aspects. On the one hand, there has been a shift in normative power away from national constitutional bodies to supranational and/or international regulatory institutions, generally operating under the auspices of trade agreements and the legislative or adjudicative mechanisms that they create. The EU is, of course, the most advanced example of this phenomenon, encompassing legislative, executive and judicial functions beyond the confines of national institutions.²² In its initial (and arguably continuing) form, the process of European integration depended critically on the constitutional settlement of administrative governance on the national level after 1945.²³ Supranational decision making procedures in Europe built directly on the constitutional predominance of the national executive in the postwar administrative state, not merely as a "legislator" in its own right, but also as the first line of democratic legitimation over policy-making in the administrative sphere, whether national or supranational. European integration further depended on the political and institutional ascendance within the administrative sphere of the technocrat, whose primary bases for legitimacy were a combination of expertise, ministerial oversight, as well as a (judicially-enforced) respect for the tenets of administrative legality.²⁴ Moreover, in the last several decades of the

versus Fire Alarms, in M. McCubbins and T. Sullivan (eds), *Congress: Structure and Policy* (1987), 426.

²¹ See generally Stephan Padgett, Introduction: Chancellors and the Chancellorship, in Adenauer to Kohl: The Development of the German Chancellorship (Stephan Padgett ed. 1994), in particular at 18-19 and the sources cited at n.19.

²² See generally Peter L. Lindseth, Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community, 99 *Colum. L. Rev.* 628 (1999).

²³ See Lindseth, The Contradictions of Supranationalism, above n.14, Chapter Three.

²⁴ As explained in greater detail in *id.*, Chapter Four, however, European integration did not merely build upon, but it also seriously disrupted the institutional patterns of administrative governance on the national level. The European Court of Justice can be viewed as an attempt to transfer the judicial component of the postwar constitutional settlement of administrative governance to the supranational level – with one overarching deviation.

twentieth century, governance in the European Union involved a shift toward even greater supranational normative autonomy, in particular with the move to qualified-majority voting in the Council of Ministers and the concomitant expansion of the comitology system after 1986. These developments arguably paralleled the shift toward greater administrative autonomy on the national level during the same period.

The second dimension of the diffusion and fragmentation of normative power external to the state has been in the direction of self-regulation and privatization. This dimension, too, can be understood as an extension of the development of administrative governance in the late-twentieth century, although the picture here, both descriptively and normatively, may be somewhat more muddled. In contrast with the delegation of regulatory power to supranational or international bodies, recourse to self-regulation or privatization does not unambiguously involve the transfer of “public” power (in fact, the shift to private means is often born of a dissatisfaction with public mechanisms of achieving desired regulatory goals). This recourse to seemingly non-public means to achieve public-regulatory ends, however, raises a difficult issue. Even in those societies where “social-market” conceptions of the public order prevail, public law retains important elements derived from a more liberal past (for example in such matters as property rights and freedom of enterprise). The persistence of these rights and freedoms may suggest to more liberally-inclined observers that the phenomena of self-regulation and privatization should enjoy a degree of “prior” legitimacy; thus, whereas supranational and international regulatory institutions build upon – indeed, in many ways are creatures of – the modern administrative state, the shift toward self-regulation or privatization can be viewed from a strictly liberal perspective as a kind of *restoration* of a prior, “pre-public” system of governance.²⁵ As such, one might claim that any legal interpretation that views self-regulation/privatization as principally a delegation of “public” power is misplaced because the historical baseline for comparison is in fact a pre-existing system of private-ordering that predates the welfare state.

On the national level, a principal function of judicial review in the postwar constitutional settlement was to *constrain* the normative autonomy of administrative actors through the enforcement of substantive and procedural requirements derived from legislation and the constitution. On the supranational level, however, the Court, rather than acting to constrain the normative autonomy of Community institutions (most importantly its own), instead actively sought to *promote* that autonomy in the interest of developing a more effective mechanism for policing Member State commitment to the goals of integration. This became the foundation for the Court’s “constitutionalization” of European integration.

²⁵ Cf. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983) (where the petitioner argued that “the rescission of an agency rule should be judged by the same standard a court would use to judge an agency’s refusal to promulgate a rule in the first place,” thus suggesting that decisions to deregulate should be treated more deferentially than decisions to regulate, because the former involves a return to the pre-existing

The shift of regulatory power to the private sphere thus raises a difficult issue of distinguishing between those exercises of private-ordering that should be attributed to the state and those that should not. There are good reasons, I believe, to be hesitant before reaching the second conclusion in any particular circumstance. Even in countries such as the United States, where the strictly liberal interpretation of private-ordering might have more currency, developments over the course of the twentieth century fundamentally transformed understandings of the nature and purpose of the political and legal order so that it is nearly unrecognizable from a classically liberal standpoint.²⁶ Even if that order now relies to some extent on self-regulation and privatization as a *means* of regulation or service provision, the demands placed on the political and legal order – its specifically “public” *ends* – have arguably changed little over the last half-century. These include (aside from more classical concerns for public order and external defense) the promotion of fair competition and equal opportunity; the protection of individuals and social groups from economic and social dislocations over which they have no control; and the regulation of a whole range of modern environmental, occupational, and market risks. In short, while the forms of regulation have shifted toward the private sphere, the substantive duties of the regulatory system (even the private one) remain of intense public concern.²⁷ The pressures for state intervention into economic and social relations that gave rise to the modern administrative state over the middle third of the last century irreversibly altered prevailing understandings of the range of regulatory domains subject to a specifically *political* re-ordering, even if achieved by non-state means.²⁸

regulatory status quo).

²⁶ Consider the Court’s reasoning in its rejection of petitioner’s argument in *State Farm*, *id.* at 41-42 (“Revocation constitutes a reversal of the agency’s former views as to the proper course. A ‘settled course of behavior embodies the agency’s informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.’ *Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-808, 93 S.Ct. 2367, 2374- 2375, 37 L.Ed.2d 350 (1973)”). The Court thus suggests that the true baseline for analysis is not some pre-existing regulatory status quo but rather the revamped regulatory landscape defined in the interventionist legislation and previously-adopted implementing regulations.

²⁷ See Gilles J. Gugliemi and Geneviève Koubi, *Droit du service public* (2000), 2 (“Mais dire que l’Etat et les autres personnes publiques ne peuvent pas tout faire, ce n’est pas pour autant contester la validité intellectuelle de l’idée du service public, ni son efficacité opératoire originelle. Dire que l’Etat ne peut pas tout assumer ne retire pas non plus à la notion de service public sa fonction préservatrice du lien social.”).

²⁸ This is the reason that a radical conservative (and later Nazi) legal theorist like Carl Schmitt objected so vehemently to political developments in the 1920s and early 1930s. The twentieth-century state was quintessentially the “total state,” Schmitt believed, regardless of whether it was a democracy or a dictatorship. The principal characteristic of the total state in the twentieth century was, in Schmitt’s eyes, the interpenetration of state and society:

Heretofore ostensibly neutral domains – religion, culture, education, the economy – then cease to be neutral in the sense that they do not pertain to state and to politics. As a polemical conception against such neutralizations and depoliticizations of important domains appears the total state,

Thus, the emergent governance system, even as it depends on self-regulation and privatization (along with other forms of diffuse and fragmented normative power, like supranationalism), will be judged *publicly*, according to public criteria as to how well it achieves these politically defined ends. This fact need not lead, however, to the conclusion that private regulation in any economic and social domain should invariably be attributed to the state. Such a conclusion would require a strained conception of “implicit” delegation of regulatory power from the legislature that could run afoul of other fundamental legal impediments that distinguish the private from the public sphere. Most obviously, the private character of certain regulatory actors and service providers may give rise to specifically *legal* limits on the sort of constraints the state may lawfully impose (for example, limits reflecting a respect for certain core liberty or property interests that are deemed beyond state control).

What is needed, therefore, is some criterion to determine which forms of private regulation may fairly be attributed to the state and thus rendered subject to legislatively-imposed delegation constraints. Gillian Metzger has recently argued that, where it can be shown that the private regulators genuinely act *on behalf of* the state in pursuit of politically-defined ends, the imposition of delegation constraints becomes distinctly more justified.²⁹ Where the regulatory entity is acting on behalf of the state, the recourse to purportedly private means to achieve indisputably public ends raises obvious issues of democratic legitimacy, not to mention – especially for private service beneficiaries – of natural justice/due process as well. Given the attenuated relationship between private regulatory actors operating on behalf of the state and public institutions of self-government, the imposition of substantive or procedural constraints becomes fully consistent with the traditional goal of administrative law to manage agency autonomy.

Reflections on “the Private Role in Public Governance” in the American Case

One way of exploring tension between private rights and public control is to consider the American case in greater detail, more particularly by looking at the work of Professor Jody Freeman of UCLA Law School. Scholars who study the American system of regulation owe a tremendous debt of gratitude to Professor Freeman, whose recent articles have refocused attention on the increasingly porous, indeed perhaps even illusory, frontier between

which potentially embraces every domain. This results in the identity of state and society. Carl Schmitt, *The Concept of the Political* 22 (George Schwab trans. 1976) (1932).

²⁹ See Gillian E. Metzger, *Privatization as Delegation*, 103 *Colum. L. Rev.* 1367, 1462 (2003) (“this characteristic of acting on behalf of government is what makes these private delegations particularly threatening to the principle of

the “public” and “private” in the production, implementation, and enforcement of regulatory norms in the United States.³⁰ For Professor Freeman, this phenomenon poses a real challenge to traditional American administrative law:

[A]dministrative law scholarship [in the United States] has organized itself largely around the need to defend the administrative state against accusations of illegitimacy, principally by emphasizing mechanisms that render agencies indirectly accountable to the electorate, such as legislative and executive oversight and judicial review. . . .

The time has come, however, for the discipline of administrative law to grapple with private power. . . . Virtually any example of service provision or regulation reveals a deep interdependence among public and private actors in accomplishing the business of governance. This interdependence shatters the notion of “public” power that animates the legitimacy crisis in administrative law.³¹

This regulatory interdependence, as Professor Freeman describes it, can take multiple forms. First, regarding the production of regulatory norms in the United States, it can entail the simple participation of private entities in the notice-and-comment process under the Administrative Procedure Act (APA).³² More ambitiously, it may entail voluntary self-regulation based on industry standards, audited self-regulation under the supervision of a government agency, or negotiated rulemaking (reg-neg) under the Negotiated Rulemaking Act of 1990.³³ In implementation, it may entail firms simply identifying themselves to agencies for purposes of being included in a regulatory program or for purposes of licensing or permit design. However, it can also involve reliance on independent third parties in filling expertise gaps by helping to provide information, monitoring, and management (the so-called “stakeholder approach” to implementation). In enforcement, at the most basic level it can entail self-monitoring, record-keeping, and reporting by regulated entities. However, the process is rarely so straightforward. Usually what one finds in the process of enforcement is that the agency engages in ““virtually constant negotiations

constitutionally-constrained government.”).

³⁰ Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. Rev. 543 (2000) [Freeman, *Private Role in Public Governance*]; see also Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 Admin. L. Rev. 813 (2000) [Freeman, *Private Parties, Public Functions*]; Jody Freeman, *The Contracting State*, 28 Fla. St. U. L. Rev. 155 (2000) [Freeman, *Contracting State*], and Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 Harv. L. Rev. 1285 (2003) [Freeman, *Extending Public Law Norms*].

³¹ Freeman, *Private Role in Public Governance*, above n.30, at 546-47.

³² Administrative Procedure Act of 1946, Pub. L. No.79-404, 60 Stat. 237-44, codified as 5 U.S.C. §§ 551-559, 701-706 (1994).

³³ Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969, codified as amended at 5 U.S.C. §§ 561-570 (1994).

with a host of recalcitrants.”³⁴ Furthermore, regulatory schemes in numerous contexts in the United States also rely on enforcement by independent third parties acting as “private attorneys general.”

Professor Freeman provocatively concludes from this extensive public-private interdependence that “there is neither a purely private nor a purely public realm [in the United States]. There is, moreover, no center of decision making in administrative law” – i.e., the agency – as American administrative law scholars “tend to suppose. Instead, we find a variety of actors making collections of decisions in a web of [negotiated] relationships.”³⁵

Although Professor Freeman’s analysis is primarily descriptive, she also acknowledges that her findings have clear normative implications, at least insofar as legal scholarship on the regulatory system is concerned. American administrative law scholars should make a decided turn to empirical analysis of the complex realities of modern governance, ending their fixation on agencies as instruments of “public” power or their relationship to the three constitutional branches of government – Congress, the President, and the courts. What is needed, rather, is a “microinstitutional analysis,” one that “investigates the formation of institutions and their capacity for rational and public-oriented problem solving, in light of the multifarious political, ideological, and social influences that act upon them.”³⁶ In Professor Freeman’s estimation, “the normative project of matching institutions to social problems” must break free of what she calls “the hierarchical, agency-centered conception of administration”.³⁷

Always, we seem to fall back on the idea that accountability derives from the imprimatur of government, which assumes that government is – unilaterally, hierarchically, authoritatively – in charge. Perhaps it ought to be so, and perhaps some might wish it were, but the reality of the extensive private role in every dimension of administration and regulation shatters that notion and replaces it with something else. . . . [T]hat something else is a set of negotiated relationships³⁸

Because these relationships are negotiated, Professor Freeman argues that it is essential to move away from a hierarchical conception of administrative law to one rooted in the law of contract. Only through this reorientation of American administrative law toward contract will it be able to “reckon with private power”; otherwise, it will “risk irrelevance as a discipline.”³⁹

Professor Freeman’s cautionary assertions are difficult to ignore, although one might question her

³⁴ Freeman, *Private Role in Public Governance*, above n.30, at 660 (quoting Peter C. Yeager, *The Limits of Law: The Public Regulation of Private Pollution* 251 (1990)).

³⁵ *Id.* at 673.

³⁶ *Id.* at 674. In this, Professor Freeman follows Ed Rubin’s lead. See Edward L. Rubin, *The New Legal Process, The Synthesis of Discourse, and the Microanalysis of Institutions*, 109 *Harv. L. Rev.* 1393 (1996).

³⁷ *Id.* at 675.

³⁸ *Id.* at 672.

normative prescriptions (more on that further below).⁴⁰ In its evident realism, Professor Freeman’s views on the disconnect between the realities of contemporary governance and the normative orientations of many judicial opinions and law review articles (which are heavily rooted in traditional conceptions of constitutional government inherited from the past) are reminiscent of the stance taken by certain realist American public law scholars during the New Deal in the 1930s. The sociological reality then was not, as today, the diffusion of power away from agencies to a complex system of public-private governance; rather, it was the diffusion away from the constitutional branches of government themselves – especially the legislature – into a highly complex and differentiated technocratic sphere dominated by administrative agencies (even if the latter were still, formally speaking, within the confines of the state). The discrepancy between socio-institutional reality and the normative ideal of a legitimate government “in charge,” as Professor Freeman puts it, was arguably of a similar quality in the 1930s, even as it differed in particulars. As James Landis famously argued in *The Administrative Process* in 1937, the fusion of legislative, executive, and judicial functions in administrative agencies in the United States had emerged over the prior half-century “from the inadequacy of a simple tripartite form of government to deal with modern problems.”⁴¹ As a supporter of the New Deal expansion of the federal regulatory apparatus, Landis welcomed this effort “to adapt governmental technique,” but he also recognized that the emergent forms of administrative governance had to “preserve those elements of responsibility and those conditions of balance that have distinguished Anglo-American government.”⁴² A kind of legal-cultural reconciliation was thus required, Landis seemed to suggest, between the constitutional values inherited from the past and the “exigencies of governance” in the present.⁴³

The challenge for American administrative law in the twentieth century would indeed be to develop constitutional doctrines – such as a relaxed but not wholly ineffective nondelegation principle⁴⁴ – as well as other legal and political mechanisms – such as those found in the APA and numerous other statutes and executive orders – that might help to reconcile the concentration of authority in the executive and administrative spheres with the

³⁹ Id. at 545.

⁴⁰ See below nn. 49-50, 60-61 and accompanying text.

⁴¹ James Landis, *The Administrative Process* (1938), 1.

⁴² Id.

⁴³ Id., 2.

⁴⁴ Since the late 1930s, the nondelegation doctrine in the United States has largely served as a background constraint and an interpretive principle, allowing courts to read enabling legislation narrowly in order to avoid nondelegation concerns. See, e.g., *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980).

constitutional vision of balanced and separated powers. In the decades after 1945, the development of American public law suggests a compromise: The disruption of traditional conceptions of separation of powers would be tolerated as a constitutional matter but only on the condition that, at the sub-constitutional level, delegated authority would be subject to a range of political and legal controls that would act as a substitute for the formal-structural protections of separation of powers. The existence of sub-constitutional constraints allowed the courts to eschew strictly formalist notions of separation of powers,⁴⁵ focusing rather on “finding a way of *maintaining the connection* between each of the generalist institutions and the paradigmatic function which it alone is empowered to serve, while also retaining a grasp on government as a whole that respects our commitments to the control of law.”⁴⁶ As long as the three branches of government could exercise their “paradigmatic function” – legislative, executive, or judicial – American public law generally found that the structural demands of the Constitution would be satisfied, even if, formally speaking, the three governmental powers might, on a subordinate level and in particular regulatory domains, be fused in single administrative agencies to meet the demands of “modern governance,” as Landis put it.

Professor Freeman’s work on the diffusion of power to the private sphere, at best, only indirectly suggests that any similar process of constitutional reconciliation is necessary.⁴⁷ In her emphasis on the need for “microinstitutional analysis” Professor Freeman greatly discounts law’s traditional commitment to what might be called “macroconstitutional norms,” and in doing so, she arguably misapprehends law’s historical function, as well as its relative autonomy (emphasis on the “relative”) in the face of social and political change. In the administrative state, the legal and political formula for the legitimation of delegated public power was through a combination of executive responsibility, direct legislative oversight of administrative action, corporatist participation in regulatory decision making, as well as judicial review of executive and administrative actors exercising delegated power. Historically-grounded notions of democratic and constitutional government were, after a period of significant

⁴⁵ This is not to say that Supreme Court decisions has never taken a formalist tact. Since the mid-1970s the Court’s approach has been, at times, both formalist (see, e.g., *Buckley v. Valeo*, 424 U.S. 1, 120-21 (1976); and *INS v. Chadha*, 462 U.S. 919 (1983)), and functionalist (see, e.g., *Nixon v. Administrator of General Services*, 433 U.S. 425, 441, 443 (1977); *CFTC v. Schor*, 478 U.S. 833, 847-48 (1986); *Morrison v. Olson*, 487 U.S. 654 (1988); and *Mistretta v. United States*, 488 U.S. 361, 382 (1989)).

⁴⁶ Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions – A Foolish Inconsistency?*, 72 *Cornell L. Rev.* 488, 493 (1987) (emphasis added).

⁴⁷ Her recent inquiries into the extension of public-law norms to private regulators speak in terms of expediency rather than constitutional mandate, designed to “mollify adherents of the public law perspective” on self-regulation/privatization. Freeman, *Extending Public Law Norms*, above n.30, at 1314; see also the discussion, below n.61 and accompanying text.

historical struggle, maintained through a separation of the *mechanisms of legitimation* – legislative, executive, and judicial. In this way, administrative actors never attained – and have not attained – a kind of autonomous legitimacy as a system of governance, but rather their legitimacy remained *mediated* through the traditional branches of government that are themselves historically endowed with constitutional authority.

Professor Freeman does not like to think in terms of the “legitimacy” of modern governance, at least as that term is used by administrative law scholars in the United States. “The concept of legitimacy has remained usefully vague in administrative law theory,” she has written, “serving as a vessel into which scholars could pour their most pressing concerns about administrative power.”⁴⁸ However, even to Professor Freeman, the term does reflect certain core concerns – “the absence of direct political accountability and incompatibility with separation of powers principles” – but she then shifts her ground rather quickly, to an entirely more anodyne terrain, in which, “[a]t its core, the quest for legitimacy might be understood as the pursuit of public acceptance of administrative authority.”⁴⁹ She has taken a similar tact in her definition of the normative project of law. She defines that project simply as one “of matching institutions to social problems,” in which “institutional analysis and design [become] central to the administrative law mission.”⁵⁰

Legitimacy is not the empty vessel that Professor Freeman has suggested, nor is the normative project of law so narrowly instrumental. Rather, both relate directly to the fundamental democratic and constitutional concerns to which she alludes only in passing – “the absence of direct political accountability and incompatibility with separation of powers principles.” The quest for legitimacy should be understood as the pursuit of a reconciliation between the new realities of governance and the macroconstitutional norms of representative democracy and separation of powers that we have inherited from the past. Despite the obvious evolution in the prevailing modes of governance, the aim of any such reconciliation is to force the system to conform to such norms to the greatest extent possible. Only after such a reconciliation can we understand ourselves as living in a constitutional democracy in a historically recognizable sense, in which “public” authority emanates from the “people” and is exercised through institutions of “government” that have been “constituted” for that purpose. The idea of a government “in charge” of the public’s business, to borrow Professor Freeman’s phrase, may seem distant from socio-institutional reality, but it

⁴⁸ Freeman, *Private Role in Public Governance*, above n.30, at 557.

⁴⁹ *Id.*

⁵⁰ *Id.* at 674.

is not distant from socio-cultural reality; that is, for better or worse, prevailing understandings of what makes a system “democratic” are still wedded in important respects to the hierarchical governmental institutions of the nation-state.

It is for this reason that I find Professor Freeman’s decision to forego “an explicit discussion of legitimacy in favor of a focus on the more manageable category of accountability” to be problematic. In view of the extensive public/private interdependence in administrative governance, Professor Freeman argues that our focus should be on “aggregate accountability”; that is, on the “mix of formal and informal mechanisms, emanating not just from government supervision, but from independent third parties and regulated entities themselves,” which together might allay any concerns that regulatory processes are somehow out of control. This assertion is hardly objectionable in itself. Nor is her call for “highly contextual, specific analyses of both the benefits and the dangers of different administrative arrangements, together with a willingness to look for informal, nontraditional, and nongovernmental mechanisms for ensuring accountability.”⁵¹ This, too, is difficult to argue with. Rather, it is in Professor Freeman’s discussion of these “informal, nontraditional, and nongovernmental mechanisms” that we gain an appreciation of how far we have traveled – or potentially will travel – from notions of mediated legitimacy that provided the foundation of the reconciliation of administrative governance and constitutional democracy:

Private actors might be somewhat constrained, for example, by measures that emanate not from formal government supervision but from other sources: a private decision maker's internal procedural rules, its responsiveness to market pressures, its agreements or bargains with other actors, informal norms of compliance, and third-party oversight, for example. Sometimes the legitimacy of a regulatory initiative depends in part on trust or shared norms. Although these forms of accountability may not fully satisfy the traditional administrative law demand for accountability to the three branches of government, they nonetheless could play an important role in legitimizing, or rendering publicly acceptable, a particular decision-making regime.⁵²

From this depiction of aggregate accountability, it is conceivable that a particular decision-making regime could be found legitimate without any mediating oversight by constitutional bodies whatsoever. If legitimacy only involves making a particular governance system “publicly acceptable,” we should have little to fear from the absence of traditionally legitimate mediating oversight. But the problem here is that the diffusion and fragmentation of normative power implicates historically-embedded constitutional values which extend well beyond identifying the merely “publicly acceptable.” In Professor Freeman’s depiction, the historical realms of public law and politics

⁵¹ Id. at 665.

⁵² Id.

– and the institutions publicly constituted to preside over them – would greatly diminish in importance. The resulting system would be largely one of technocratic interaction among public and private actors rooted in “negotiated relationships” and contract. This strikes me as potentially a kind of Weberian nightmare, in which technocratic governance, both public and private, could be rendered impenetrable to any meaningful outside oversight by democratically legitimated representatives.

The Drawbacks of Contract, the Advantages of Delegation: Toward a Robust Conception of Public Agency in an Era of Self-Regulation and Privatization

Such public-private technocratic autonomy would move us far from a system in which the notion of delegation, and the principal agent relationship it implies, should apply – that is, truly toward a system of “agents without principals.” And yet there is much in Professor Freeman’s own work that, to her credit, suggests serious normative concerns. The “connective tissue” among these free agents should be, in Professor Freeman’s view, “enforceable contracts,”⁵³ thus suggesting a measure of parity among the regulatory actors, whether public or private. As she has also recognized, however, “the use of contract in [self-regulation/privatization] raises significant technical, conceptual, and doctrinal problems,” not the least of which are “[f]amiliar problems of contract design and monitoring”.⁵⁴

How will members of the public monitor public/private agreements? Perhaps interested individuals, or representative groups should be entitled to participate in contract negotiation. If so, how should they be chosen? Perhaps beneficiaries should be entitled to sue as third parties, or afforded a private right of action to seek enforcement of a statutory scheme of which the contract is a crucial part. If so, what guarantee is there that private enforcement will not frustrate the government’s objectives? In addition, public/private contracts inevitably raise such thorny questions about the application of private law contract principles to government as a contracting party. . . .

Finally, in both the service provision and regulatory settings, the use of contract prompts questions about the agency’s role. How might an agency reconcile its potentially competing obligations to be a decisive and independent authority while also holding up its obligations as a negotiating partner?⁵⁵

As Professor Freeman describes it, the overarching concern here is that “any move toward formal contract in regulation [may] amount to private deals that ‘oust’ the public interest.”⁵⁶ The challenge thus is to reconcile

⁵³ Id. at 667.

⁵⁴ Id. at 667-68.

⁵⁵ Id. at 668-69.

⁵⁶ Id. at 669.

Professor Freeman’s insistence that “there is neither a purely private nor a purely public realm,”⁵⁷ or that public-private interdependence “shatters the notion of ‘public’ power,”⁵⁸ with the acknowledgment that agencies of the state (including, presumably, formally “private” ones) are ultimately obligated to defend something called the “public interest” in a “decisive and independent” fashion.

In addressing this challenge, we must not confuse the sociological reality of the state with the normative project of law. As a sociological matter, it is certainly true that “agencies cannot claim to be the sole, or even the central, source of governance,” and yet, as Professor Freeman also acknowledges, they nevertheless remain “vital” because of “their legal authority, historical legitimacy, and monopoly on state-sanctioned force”⁵⁹ Indeed, Professor Freeman further states:

Because I believe that they are meaningful signifiers, I continue to use the terms “public” and “private.” They connote ideas that we all understand: Private firms and public agencies tend to have different capacities, cultures, and priorities, for example, and respond to different incentives. “Public” and “private” are helpful ways of referring to areas of life that we experience as more or less under our control, more or less coercive, more or less alienating. As a symbolic matter, the imprimatur of the state might matter to us.⁶⁰

The significance of the terms “public” and “private” are not merely symbolic, however, precisely because they have an impact on how we “experience” social and political life. These “meaningful signifiers” in fact help people to “refract” (to use Thompson’s term) the changing structures of governance and “argue” those changes “through their actions, their choices and their beliefs.”⁶¹ Law must take cognizance of socio-institutional realities, of course, but it can never abandon its fundamentally normative function as an instrument of cultural-historical “refraction” and “argument” in light of ideals of legitimacy inherited from the past. In short, American administrative law must, as a sociological matter, “reckon with private power,” as Professor Freeman has shown us, but it will only truly “risk irrelevance as a discipline”⁶² *not* when it excessively concerns itself with the empty “vessel” of legitimacy but, rather, when it chooses to abandon its fundamentally normative project rooted in principles of delegation.

There is, in fact, much in Professor Freeman’s own normative prescriptions that underscores this normative

⁵⁷ Id. at 673.

⁵⁸ Id. at 547.

⁵⁹ Id. at 671.

⁶⁰ Id. at 550-51.

⁶¹ See above n.8 and accompanying text.

⁶² Freeman, *Private Role in Public Governance*, above n.30, at 545.

function of law. Despite her emphasis on “aggregate accountability” (as well as her implication that legitimacy may be possible in the absence of hierarchical political oversight), Professor Freeman’s real concern seems to be that, in the United States at least, there is *too little* legal or political control of private regulatory actors and service providers. Her discussion of nursing homes in the United States provides a good example.⁶³ American nursing homes are supported in large measure by Medicaid, the federal-state entitlement program that provides health care to low-income families with dependent children, the elderly, as well as the blind and disabled. As Professor Freeman points out, “Medicaid funding overwhelmingly supports the private nursing home industry, subsidizing capital and operating expenditures and reimbursing more than ninety percent of eligible patient care.”⁶⁴ Such nursing homes are, perhaps unsurprisingly, heavily regulated by both state and federal governments; nevertheless, despite this extensive regulation, “private nursing homes retain significant discretionary authority over patient care. The private administrator is the authoritative decision maker within the nursing home environment, interpreting statutory, regulatory, and contractual obligations and operationalizing them into decisions about care.”⁶⁵

If the nursing home were understood to be an “agency” within the meaning of the Administrative Procedure Act, it would be subject to all the procedural and substantive requirements of that statute. Moreover, decisions as to individual patient care, to the extent that they implicated a patient’s constitutional liberty or property interests, would be subject to the requirements of due process (for example, a decision terminating or lowering the level of a patient’s care). However, under America’s relatively impoverished legal doctrines on the topic, nursing homes, if privately-owned and operated, are not considered “state actors” for purposes of due process because they do not serve a traditional governmental “function,” narrowly defined. Moreover, any legislative-type rules that the nursing homes adopt to make these sorts of care decisions, despite their obvious public-regulatory import, are not subject to the procedural and substantive requirements that would normally apply to public agencies under the APA because nursing homes are not “agencies” under that statute. Additionally, the enabling legislation that empowers the government to enter into contracts with nursing home operators would not be struck down as an unconstitutional delegation of normative power to a private actor because such statutes are generally “specific, even rigorous – certainly more so than many federal statutes that have withstood nondelegation challenges. [Moreover, t]he impulse

⁶³ Id. at 599-610.

⁶⁴ Id. at 600.

⁶⁵ Id. at 600-01.

to invalidate the contractual arrangement as a private delegation has no traction here, since there is no formal private delegation to invalidate.”⁶⁶ Instead, there is simply a contract with a private service provider, albeit one which necessarily also enjoys significant rulemaking and adjudicative discretion in the provision of patient care.

In this context, as in others where private service provision and regulation are prevalent, Professor Freeman places a great deal of faith in contract as a basis of more rigorous imposition of public-law norms. This reliance is paradoxical, however, because she openly admits that contract law is the source of much of the difficulty in achieving higher levels of accountability from private service providers in the exercise of their regulatory functions.

As she elaborates:

A contractual system of administration relies on judicial enforcement of private contract law at the behest of the supervising agency rather than judicial enforcement of administrative law principles at the behest of private citizens. The difference is more than semantic. Constitutional constraints and elaborate procedural rules govern agency decision making, as we have learned, but do not govern private decision making undertaken pursuant to contract. These rules normally provide points of entry for members of the public affected by the regulation and grounds to challenge ensuing policy choices. Although courts might imply third-party beneficiary rights into contracts, the documents themselves almost never explicitly afford consumers the right to sue. Public/private contractual agreements thus raise a version of the principal/agent problem that characterizes the delegation of authority from legislatures to public bureaucracies, raising the coincident and familiar tension between providing the delegate adequate flexibility and ensuring oversight over an agent. To make matters worse, private providers are even further insulated from direct accountability to the electorate.⁶⁷

Professor Freeman’s slippage in this passage from a contractual to a principal-agent conceptual vocabulary is telling. The contractual mode of analysis suggests expediency: legislatures, executives, administrative officials should have discretion in the negotiation of the contract in order to strike the balance between, on the one hand, the promotion of public values and, on the other hand, gaining the benefits of the privatization itself, which include harnessing economic incentives without saddling private actors with too many bureaucratic requirements. Introducing the notion of “delegation,” however, arguably shifts the normative dimensions of the discussion significantly, or at least more so than Professor Freeman acknowledges. In relationships between constitutional principals and administrative agents (even private ones), the promotion of public values becomes not simply a matter of expediency but also, in some sense, of constitutional mandate. From this perspective, legislatures, executives or subordinate administrative officials should not have unfettered discretion to structure public-private regulatory decision making in ways they deem expedient. Rather, the constitutional demands of democratic

⁶⁶ Id. at 607.

legitimation of delegated normative power should prevail.

The context of private service provision, where due process concerns are often implicated, presents the easier case for imposing these kinds of constitutional mandates. Increasingly, in fact, courts appear inclined to extend to private service providers the constitutional requirements of due process normally applicable to “state actors,” despite the historical limitations of the case-law.⁶⁸ The real difficulties arise with regard to private *regulatory* actors, where the American jurisprudence reflects significantly greater reluctance to interfere. Here, in order to mandate that private regulators must follow certain constitutionally-required procedures (say, transparency and participation rights), Americans must overcome one the most well-settled principles in our public law – the so-called *Londoner–Bi-Metallic* distinction – which holds that, outside the adjudicative context, the due process clause does not impose any procedural requirements for the benefit of the public apart from hierarchical political control. Where the production of rules of general application are concerned (whether in the legislative or administrative context), Justice Holmes made clear in 1915 that citizens “are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.”⁶⁹

This anachronistic rule, of course, makes a highly questionable assumption about the possibilities of hierarchical political control of regulatory actors, public *and* private. Even within the strict confines of the state, organizational complexity in the administrative sphere makes it difficult for democratically-legitimate representatives to exercise effective hierarchical control.⁷⁰ When one introduces the further complications of administrative independence (often established specifically to insulate regulators from political control) – along with federalism, self-regulation, private service provision, and supranational and/or international delegation – the task becomes seemingly impossible, at least without the aid of judicially-enforceable transparency and participation rights for regulatory and service beneficiaries. The problem is that, despite the socio-institutional reality of diffuse governance and the clear need for such procedures, the *Londoner–Bi-Metallic* distinction in the United States forecloses recourse to due process principles as a constitutional basis to impose transparency and participation rights

⁶⁷ Id. at 606.

⁶⁸ See Freeman, Extending Public Law Norms, above n.30, at 1334 (suggesting that there is some evidence that the lower federal courts are prepared to move in this direction).

⁶⁹ *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 445 (1915).

⁷⁰ Consider the efforts of U.S. presidents stretching back two decades to impose greater hierarchical control over executive agencies. See, e.g., Exec. Order No. 12,291, 3 C.F.R. 127 (1982), reprinted in 5 U.S.C. § 601 (1988) (revoked by Executive Order No. 12,866 (1994)); Exec. Order No. 12,866, 3 C.F.R. (1994), reprinted in 5 U.S.C. §

on private regulatory actors.

So what is left? One must look, I suggest, to a more fundamental level, to the notion of delegation and the principal-agent relationship that it implies, as well as to the historical means by which modern societies have reconciled constitutional democracy with the reality of regulatory autonomy in the modern administrative state.⁷¹ It is time for the law to recognize *de jure* – as it long has *de facto* – that the transparency and participation rights embodied in statutes like the Administrative Procedure Act in the United States are not simply a matter of political expediency but rather are an integral part of the constitutional settlement of administrative governance over the last half century. The establishment of this sort of procedural regime is born of a specifically *constitutional* obligation on the part of the legislature to structure technocratic governance, public and private, to ensure that there will be democratically-legitimate oversight and control – what I call “mediated legitimacy” – of all agents who exercise delegated normative power.⁷²

The increasing importance of transparency and participation rights may well signify, after decades of diffusion and fragmentation of normative power away from constitutional bodies in the nation-state, the emergence of a novel conception of “democratic” legitimation in a non-hierarchical sense. However, I am not arguing that we should try to make the polyarchical regulatory system “directly deliberative” as an end in itself, as some have argued, in the sense of formulating an alternative, “non-hierarchical” means of democratic legitimation.⁷³ Rather, I am talking about reinforcing democratic-control mechanisms traditionally conceived. “For better or worse,

601 (1994).

⁷¹ I developed my thinking in this regard before I read Gillian Metzger’s excellent article, Privatization as Delegation, above n.29, which explores in detail the types of situations in which an agency relationship exists between the private actor and the state, thus justifying the imposition of administrative law-type controls. The position I am articulating is broadly sympathetic to Metzger’s views.

⁷² There are traces of this obligation in the nondelegation jurisprudence of the Supreme Court. See *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495, 533 (1935) (striking down the provisions of the National Industrial Recovery Act (NIRA) on the promulgation of “codes of fair competition” as an unconstitutional delegation of legislative power to the President, noting that the NIRA “dispenses with . . . any administrative procedure of an analogous character,” referring to the provisions of the Federal Trade Commission Act that provided for “formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review to give assurance that the action of the commission is taken within its statutory authority.”). Interestingly, *Schechter Poultry* involved an instance of public-private regulation, with industrial associations drafting the codes and then submitting them to the President for approval. For a recent contribution that suggests a heightened obligation to impose discretion-constraining procedures in the context of private delegations, see Metzger, Privatization as Delegation, above n.29.

⁷³ See Lindseth, Delegation is Dead, above n.3, at 141, 158-59, criticizing the thesis advanced in Oliver Gerstenberg and Charles F. Sabel, *Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?*, in Joerges and Dehousse, above n.3, 289.

prevailing understandings of what makes a system ‘democratic’ are still wedded in important respects to the hierarchical governmental institutions of the nation state.”⁷⁴ In view of this cultural reality, transparency and participation rights required because they force the national legislature to enlist litigants and the courts in the task of ensuring that private service providers and/or regulators remain within the bounds of their delegated authority and that they use their authority reasonably rather than arbitrarily and capriciously.

Conclusion

The constitutional settlement of administrative governance in the twentieth century is a testament to the need for robust procedures to control the exercise of delegated regulatory powers. This necessity is as pressing today for formally “private” agents as it has been for traditionally “public” ones. Both operate under a similar kind of “delegation” of authority while also enjoying significant amounts of discretion (autonomy) in the exercise of that authority. In fact, private actors almost certainly enjoy even great regulatory autonomy than their public-administrative counterparts because, by operating outside the confines of the state, the costs and difficulties of monitoring and supervision become that much greater. Thus, in the context of private delegation, the disconnect between the socio-institutional reality of governance and the normative ideal of constitutional government becomes that much more profound.

There is certainly room for developing supplemental modes of controlling private regulatory actors – what Professor Freeman has termed “aggregate accountability” – but these informal mechanisms cannot substitute for oversight by the institutions of self-government “constituted” for that purpose, at least from a democratic legitimacy standpoint. I am not asserting that such oversight will place the government “in charge.” Rather, I seek merely some measure of continuing responsibility – legislative, executive, and judicial – for regulatory outcomes in order to make it difficult for anyone to claim that government should not be held responsible because the system is simply too complex to govern in democratic terms. We must maintain the connection, to the greatest extent possible, between the diffuse and fragmented system of governance and the institutions of constitutional government that we have inherited from the past. In the process, of course, our understandings of the nature of constitutional democracy will need to adjust in the face of the new socio-institutional realities of governance -- public and private, as well as local, regional, national, and supranational. But we must also strive to preserve an effective role for government in

⁷⁴ Lindseth, *Delegation is Dead*, above n.3, at 141.

mediating the legitimacy of governance, so that we may continue to “experience” political life as democratic in a historically recognizable sense.