

# Chapter 1

## Introduction

### 1.1 Delegation: Doctrinal, Metaphorical, and Constitutional-Philosophical Implications

Delegation and its conceptual concomitants (mandate, agency, representation, proxy, etc.) are constitutive of the legal mind. It is the typical trade of the lawyer to inquire into and question the authority by virtue of which a certain power is asserted, whether the title is valid, to what purpose it was conveyed, and how far it extends. This conceptual lens is all the more relevant to modern constitutionalism, whose theoretical justifications presuppose regarding government as a concatenation of confined lines of attribution, and whose practices reside in a systematic probing of the title, purpose, scope, and outer legal limits of each exercise of power. These concerns apply with even more force to the constitutional limitations on legislation. If constitutionalism is the theory and practice of limited government by delegation, then the foremost public power, that of legislating, is limited and derived (i.e., delegated) law-making under the fundamental law.

As the theoretical notion has positive law correspondents, we do not have to remain for long in the realm of purely abstract musings and speculations. With few exceptions, most conspicuously the English constitution, whose descriptive, essentially medieval structure resists normative limitations on the legislature, modern constitutional systems have dealt with this matter expressly. The various relevant provisions either allow the delegation of legislative power under restrictive terms (Germany under the Basic Law), allow delegation by way of exception and within a confined normative domain (the current French and Romanian constitutions, for instance) or even forbid it altogether in express terms (the constitution of the Fourth French Republic). It is indicative for the relevance of this constraint that in the constitutional law of the US, even though a specific limitation was not provided for in the text, the theoretical requirement that the law-making power cannot be delegated became judicially enforceable constitutional law indirectly. At a very early stage, the Supreme Court derived nondelegation as a necessary doctrinal

corollary from both the economy of the text and the assumptions of limited government behind the textual provisions.<sup>1</sup>

In order to identify the existence of the limitation as a matter of positive fundamental law and thus restrict our object of inquiry, it is of lesser relevance how the legal rule is precisely phrased and whether, for instance, a certain system prohibits “the delegation of legislative power” (the US) or allows it, provided it is sufficiently constrained by a legislative specification of the “content, purpose, and scope” of the delegation (Germany). Where and how the stress falls is, of course, not irrelevant but, for comparative legal purposes and *prima facie*, it is important only to determine that a constitutional restriction on parliamentary enactments is found in a given system and that the limitation is of a substantive nature or, rather, it is not purely formal.<sup>2</sup> Purely procedural constitutional arrangements, by virtue of which any grant of authority based on a statute, no matter how broad in its terms, is not considered a questionable delegation, are of little practical consequence as constitutional limitations (and will therefore be of no direct interest to this argument). This reservation applies with like force to practically irrelevant principles to the effect, for instance, that parliament can “delegate” but not expressly “abdicate” its power.<sup>3</sup> Furthermore and related to these two observations, the delegation as such by parliaments of the power to make subordinate rules of legislative force and the procedures and checks which apply to it (i.e., the merely technical problematic of delegated legislation) is highly relevant but analytically secondary and incidental to the primary constitutional concern. To restate the issue, a normative limitation on how much law-making the parliament can leave to the decision of other organs or branches of government is a prohibition on or restriction of legislative delegation. Based on such a limitation, judicial review will be expected to curb parliamentary practices exceeding the boundaries of constitutionally permissible statutory authorization.

Consequently, one can now surmise that academic commentary (including the current endeavor) can proceed as a matter of course to the more or less routine task of analyzing, classifying, and comparing terms of validity, tests, and standards of review within and across jurisdictions. This is however the point where the flow of self-evidence must end abruptly. As will be later shown, delegation-related judicial decisions, across constitutional systems, are notoriously hard to reconcile, inconsistent, and erratic. More nebulous yet are the relevant theoretical debates.

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<sup>1</sup> *The Cargo of the Brig Aurora, Burn Side, Claimant, v. The United States*, 11 U.S. (7 Cranch) 382 (1813).

<sup>2</sup> See, for instance, *Whitman v. American Trucking Assns.*, 531 U.S. 457 (2001), Stevens (Concurring), arguing that, insofar as safeguards and limitations are provided, the power devolved upon a Congressional agent should be recognized as legislative in nature. This lexical change (from “no delegation permissible” to “some delegation acceptable”), however, will be in itself of little legal import. The stress will simply move from the inquiry into what is not legislative power proper and thus not delegation to an attempt to devise tests distinguishing “good” from “bad delegation.” In substance, the difference is minimal to non-existent.

<sup>3</sup> *In Re Gray*, 57 S.C.R. 150 [1918].

Beginning at the semantic level, one encounters, often with respect to the pertinent literature within the same constitutional jurisdiction, a bewildering terminological diversity. For instance, albeit referring to the same rules, practices, phenomena, and conceptual frameworks, various authors employ indifferently and sometimes interchangeably the terms nondelegation of the legislative “power(s)”, “function(s)” or “authority.”<sup>4</sup> These words (“power”, “function”, “authority”), even when used with respect to the same referent, are not fully synonymous, and neither is the plural or singular form of the nouns semantically inconsequential. Since the words we use and the ways in which we use them structure and reveal our thought, this lexical laxity may reflect, already at first sight, a degree of analytical imprecision and epistemological uncertainty. And things appear yet more intractable in strictly substantive terms. Thus, the Danish legal realist scholar Alf Ross observed in a 1958 comparative survey of the extensive literature on the topic that, even though this had been “a subject that has greatly exercised many minds and kept both law and political science occupied,” the analytical cacophony was by then already so confusing that one was inclined to think of delegation as a “mystical” and “magical”, rather than legal, notion. Ross proposed a thorough advance pruning of the metaphysical–mystical offshoots, in order to give the notion of delegation a workable, narrowing definition, confined by clear, discernable jurisprudential criteria, so that it could be rendered practically serviceable as a legal–technical concept and enforceable rule of public law.<sup>5</sup> Closer to us in time, two American jurists have gone even further in this vein, to argue that the polysemy of delegation reaches the point of conceptual vacuity. Once the metaphysical, rhetorical, and historical layers are peeled off it and progressively discarded as inapposite, redundant, or inconsequential, what remains would be mere “metaphor.” Since empty stylistic flamboyance has no practical use in constitutional adjudication and confounds sound theoretical analysis, Eric Posner and Adrian Vermeule have suggested simply discarding the “delegation metaphor” altogether.<sup>6</sup>

One can certainly dismiss most foundational concepts of constitutional theory and law (separation of powers, representation, the rule of law, state neutrality, etc.) in this pragmatic–commonsensical way. Looked at from a “realist” standpoint or read in a dogmatic positivistic key, such concepts may seem ambivalent and ambiguous, surrounded and obfuscated by baroque historical context and philosophical glosses. From a “no-nonsense,” “matter-of-fact” perspective, these notions

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<sup>4</sup> Providing specific examples would be unnecessary. A text search performed on 02.09.2010 in HeinOnline, restricted to the “Law Journal Library” database, yielded hundreds of relevant hits for each of the mentioned variants (for instance, 164 matches for “delegation of legislative functions”); a LexisNexis or Westlaw search including caselaw would result in additional matches. The uses refer to the same legal issue, the US “nondelegation doctrine” (also referred to as the “delegation doctrine”).

<sup>5</sup> Alf Ross, “Delegation of Power-Meaning and Validity of the maxim *delegata potestas non potest delegari*” 7 *Am. J. Comp. L.* 1 (1958).

<sup>6</sup> Eric A. Posner and Adrian Vermeule, “Interring the Nondelegation Doctrine,” 69 *U. Chi. L. Rev.* 1721 (2002).

could be therefore regarded to be not properly “legal” and duly done away with. If pushed too far, such clarity would be most likely purchased at a taxing price, trading simplicity of viewpoint and reference order for a simplistic view of the legal world. Nonetheless and caveat aside, this line of critique contains a kernel of highly pertinent truth and its insight applies with particular strength to our topic. Legislative delegation has an inevitably irreducible conceptual structure, insofar as the term can only be explained by means of related constitutional presuppositions and notions attaching to legislation and law-making, whose meanings are assumed and anticipated by the word “delegation.” In this respect, the metaphorical connotations are undeniable and inextricable. The term ‘carries’ or transfers understandings from germane legal concepts, which have to be clarified and whose premises have to be in turn correspondingly stated, before an informed discussion of delegation can occur. Unless one untangles the presuppositional threads, a debate regarding delegation is bound to be carried out at cross purposes. An introductory taxonomical exercise will be useful at this point.

First, the argument that the power to legislate should not be delegated anticipates a rule of law-derived limitation. In this sense, an impermissible delegation is the formal law that, due to its vagueness, gives the individual no or little anticipation with respect to the conduct actually required of him. A vague law deflects the actual normative decision as to the requisite conduct and projects it to the level of enforcement, so that those subject to it are in effect exposed to unfettered executive, administrative, or judicial discretion. What is delegated is discretionary power over people. The concern animating the nondelegation argument, namely the possibility of abuse in the absence of a clear posited rule, resonates with a long line of commentary in political and legal philosophy, ranging from Aristotle to Fuller, about the demands and prerequisites of “a government of laws and not of men.” However, the argument for antecedent rules is qualified by the account, of equally venerable lineage, regarding the inflexibility of general rules and the need for equity as a countervailing component of justice. Second, a legislature could be said, from a separation of powers standpoint, to be delegating the power to make laws when and since the vacuity of the legislative prescription aggrandizes the power of another branch. In this context, the concern informing the notion of delegation and delegation-related debates is with the resulting imbalance in the power structure. In a more purist, analytically-oriented form of the separation of powers-related argument, the legislature could be said to be divesting itself of its constitutionally assigned function. This latter formulation of the separation of powers-related delegation argument requires substantive distinctions among the core functions deemed constitutionally proper to the respective branches (legislation, executive action, administration, adjudication). What is being delegated in the logic of this line of arguments is a branch-specific constitutional function; but how the legislative duty is defined in relation to the various provinces of other branches will depend on the particular separation of powers theory one embraces, which will further rest on other assumptions, such as the professed vision of law and of the

state.<sup>7</sup> Third and last, the democratic strain in delegation debates starts from the premise that we elect representatives (as the Lockean phrase goes) “only to make laws, and not to make legislators,” that is, they are elected to take the actual decisions that govern our lives. By not making the controlling choice on a given matter at the level of parliamentary enactments, the legislature shoulders off its representative burdens, at the same time eluding or deflecting responsibility and thus electoral accountability. In this sense, the decision as such is said to be delegated, a decision that, by virtue of its constitutionally validated democratic mandate, the parliament would have to take alone. This latter strain of delegation arguments is also not devoid of tensions, resulting from the way in which one defines representative democracy, accountability, legitimacy, and the proper balance of these concerns within a given constitutional order.<sup>8</sup> As can by now be noticed, taxonomy explains to a certain degree the terminological variety, namely, the presuppositions packed, sometimes unselfconsciously, into the various phrasings (authority, power, function) of nondelegation arguments.

At the same time this brief discussion makes apparent the fact that, although distinct as analytical ideal types, the various delegation-related arguments also overlap, as, for instance, separation of powers theories intersect with representative democracy or rule-of-law related accounts. It could surely be opined that the nondelegation doctrine or constitutional provisions restricting delegation are simply legal devices that functionally serve these various constitutional values (rule of law, separation of powers, and representative democracy-related concerns regarding the legitimacy and accountability of legislative enactments). But such an argument would have things in the wrong order. How specific or general, abstract or concrete, rule-, standard-, or presumption-like a particular legislative provision has to be cannot be determined solely on the basis of the notion of delegation or on the wording of a nondelegation proviso. Obversely, the normative cast of a parliamentary enactment and thus the determination regarding its constitutional permissibility cannot be decided without specifying in advance a relevant concern or informing value. But the requirements deriving from various relevant concerns and values are not fully and not always coextensive, since the definitions of legislation deriving from them cannot be perfectly juxtaposed. Rule of law considerations, to give just one example, do not apply with equal degree of persuasiveness to the specificity level of criminal law and to risk- and technology-

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<sup>7</sup> See Ernst-Wolfgang Böckenförde, *Gesetz und gesetzgebende Gewalt: von den Anfängen der deutschen Staatsrechtslehre bis zur Höhe des staatsrechtlichen Positivismus* (Berlin: Duncker & Humbolt, 1958).

<sup>8</sup> On the tensions between and embedded in the concepts of representation and democracy, see Ernst-Wolfgang Böckenförde, “Mittelbare/repräsentative Demokratie als eigentliche Form der Demokratie-Bemerkungen zu Begriff und Verwirklichungsproblemen der Demokratie als Staats- und Regierungsform,” in Georg Müller et al. (Eds.), *Staatsorganisation und Staatsfunktionen im Wandel-Festschrift für Kurt Eichenberger zum 60. Geburtstag* (Basel/Frankfurt am Main: Helbing & Lichtenhahn, 1982), pp. 301–328.

intensive fields of regulation (environmental legislation, health and safety rules, and the like).

All the assumptions relating to the notion of delegation do converge analytically in the presupposition of a constitutional ideal of legislation; a coherent and consistent constitutional theory of legislation will result in an intelligible theory of delegation. Nonetheless, pursuing further the introductory dissection of the various definitional lines of inquiry (legislation as normative yardstick of conduct, legislation as will, legislation as collective deliberation, legislation as institutional function, legislation as participative act, etc.) would be duplicative at this point, therefore redundant and tediously counterproductive. The exercise above was useful in outlining the conceptual challenges at hand. But it was also of use in laying out the outer explanatory limits of its own pattern: at a certain point in the course of our logical pursuit we seem to be left with a number of notions that, in the abstract, turn to partly diverge and partly feed presuppositions circuitously into each other's definitions. There is no *a priori* reason to reduce the notion of delegation to any of its major assumptions and no way in which the vicious circle can be rationally broken. One can certainly stipulate a definition of legislation and many theoretical possibilities spring to mind. Knowledge-wise, the gains (coherence and consistency, analytical elegance of the conceptual framework) of this solution would come at the usual price of all closed abstract systems, i.e., that of unduly cramming both reality and conceptual order into a procrustean theoretical bed.

Besides and related, one does not have to fully embrace Holmes's tart dichotomy that the life of law has been experience not logic, in order to agree that constitutional law is also a living, evolving reality. This leads to the observation that further guidance on the matter can derive from looking at the facts themselves. Even assuming a relatively high measure of functional institutional homogeneity across liberal legal systems—as of necessity a comparatist must<sup>9</sup>—and, consequently, a certain degree of synchronicity among exemplary Western legal orders, constitutionally-presupposed understandings and dominant theories of legislation are historically contingent. Discrete constitutional landscapes will produce specific sets of arguments regarding legislation and the advisability of delegating it. Moreover, and more pertinent to our introductory foray, the adoption of specific constitutional provisions often responds directly to particular changes in context. It can therefore be fully understood only by way of coming to grips with the phenomenon.

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<sup>9</sup> But cf. Mark Tushnet, "The Possibilities of Comparative Constitutional Law," 108 *Yale Law Journal* 1225 (1999), (arguing that the primary use of comparative constitutional law is not a general and objectively epistemological but a reflexive subjective one, namely a means by which we can understand our own system better) and also cf. Susanne Baer, "Verfassungsvergleichung und reflexive Methode: Interkulturelle und intersubjektive Kompetenz," 64 *ZaöRV* 735–758 (2004), arguing that the main use of comparative constitutional law is that of helping students find global corporate village jobs. The study of comparative constitutional law instills "intercultural, inter-subjective competence," namely contemplative aptitudes and particularized knowledge of "the other"; in our globalized economy, this competence is a vital "key qualification" on the market, instrumental in the pursuit of an international legal career.

## 1.2 Delegation as Phenomenon, Slogan, and Constitutional Reaction

Delegation became for the first time a common topic of academic and public debate in all Western political systems as a direct response to the twentieth century crises of the state. As the general story is well-known and many of its strands will be revisited in due detail at a later point, only the contours need to be sketched here.

Starting with the late nineteenth and continuing into the early decades of the twentieth century, the technological, social, and economic pressures of advanced capitalism, together with the increasingly more frequent and urgent demands of concentrating state power in response to emergencies (war, demobilization, economic depression), determined an unprecedented acceleration in the need for government action. This need was met to a large degree by the legal means of formal parliamentary enactments either conferring upon the executive and the administration wider powers of intervention in previously unregulated fields or validating *ex post* preemptive executive measures. Unsurprisingly, the new governmental reality was from the onset met with hostility by a legal theory largely articulated along different constitutional representations.

As early as 1915, Albert Venn Dicey, the Victorian dean of English constitutional law, became worried by the growing powers of government departments and related statutory discretion. He remarked that such changes would imperil the rule of law and that the public law of England had already begun to evince certain features of the French *droit administratif*.<sup>10</sup> In 1929, the Chief Justice of England himself, Lord Hewart of Bury, published an influential tract in which the new practices were castigated as a bureaucratic cabal, a covert ploy by which the civil service undermined the authority of Parliament and the liberty of the subject. He warned against the tendency of this “new despotism” “to subordinate Parliament, to evade the courts, and to render the will, or the caprice, of the Executive unfettered and supreme.”<sup>11</sup> But the Donoughmore Committee, appointed by the Lord Chancellor in the wake of the controversy stirred by the book, to inquire into the merits of Hewart’s anti-bureaucratic jeremiad, did not validate his findings. The final report of its investigation concluded with the somewhat offhanded observation that the practice of delegation as such was inevitable: “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.”<sup>12</sup> Delegated legislation needed only, like all public powers and, indeed, all things human, to be kept in check and under ongoing scrutiny.

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<sup>10</sup> Albert V. Dicey, “The Development of Administrative Law in England”, 31 *Law Quarterly Review* 148 (1915).

<sup>11</sup> Lord Hewart of Bury, *The New Despotism* (London: Ernest Benn, Ltd., 1929), p. 17.

<sup>12</sup> *Committee on Ministers’ Powers Report*, H.M.S.O. (Cmd. 4060) (1932), at p. 23.

And yet further continental events seemed to confirm and vindicate those early warnings, as parliamentary government fell into disrepute and disarray across Europe. Indeed, Hitler would come to full power precisely by the legal means of executive legislation and parliamentary blanket mandates. Weimar Germany was largely ruled through delegations and Art. 48 emergency decrees, before it finally succumbed to one of the most sweeping, certainly the most ominous examples of enabling legislation. According to the controlling provision of the March 1933 *Ermächtigungsgesetz* (Enabling Law): “Federal legislation (*Reichsgesetze*) can be also adopted by the Government, by way of exception from the common procedures set forth by the Constitution.”<sup>13</sup> In 1936, reviewing in a short comparative study the developments up to that date, Carl Schmitt identified three general causes of the phenomenon (planning, emergency, and “the collectivization of international life”) and pointed out, with characteristically fine sense of legal tension and theatrical momentum, that such delegations, insofar as they were constitutional, were “always legal bridges; but these bridges can both lead back to an earlier constitutional legality, as well as forth to a completely new constitutional reality. The practice of enabling laws is therefore a litmus test for the entire constitutional development, and it is fully understandable that the constitutionality of enabling legislation has become in recent years a primary topic of all constitutional conflicts.”<sup>14</sup> Schmitt concluded tersely, with an equally characteristic sense of personal opportunity, that the failure of Western constitutional systems to rein in delegations presaged the end of liberal notions of law-making framed by nineteenth century conceptions of separated powers. This, he reckoned, would inevitably lead back to an “Aristotelian-Thomistic understanding of law as practical reason,” and namely “not that of just any given individual but specifically the practical reason of he who leads and governs the community”<sup>15</sup> The study was to be soon republished in French translation, in a 1938 Festschrift for the famous comparatist Edouard Lambert.<sup>16</sup> It served as a timely omen of the French republican demise. The governments of the French Third Republic had been, particularly after WWI, ever more often mandated to legislate through *décrets-lois*. French liberal democracy fell prey, in July 1940, to the legal means of a “*décret-constituant*,” enabling Marshall Pétain to change the constitution at will.

In the United States alone, the Supreme Court struck down on nondelegation grounds, in a couple of famous 1935 cases, a part of President Roosevelt’s New Deal reforms. But this could hardly be seen in retrospect as a triumph of classical constitutionalism. On the one hand, those cases predated the 1937 retraction of the

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<sup>13</sup> Gesetz zur Behebung der Not von Volk und Reich (Ermächtigungsgesetz) vom 23.3.1933, Reichsgesetzblatt T. I. (1933), Nr. 25, S. 141.

<sup>14</sup> Carl Schmitt, “Vergleichender Überblick über die neueste Entwicklung des Problems der gesetzgeberischen Ermächtigungen (Legislative Delegationen)”, 6 *ZaöRV* 252, at 253 (1936).

<sup>15</sup> *Id.*, at 267–268.

<sup>16</sup> “L’évolution récente du problème des délégations législatives” in *Introduction à l’étude du droit comparé-Recueil d’Études en l’honneur d’Édouard Lambert* (Paris: Sirey, 1938), pp. 200–210.



Supreme Court from its prior systematic interferences with social and economic legislation and the accompanying post-New Deal constitutional transformations. Even though the two rulings were decided by overwhelming majorities (one was rendered unanimously), a certain ambivalence inevitably surrounded the subsequent constitutional relevance of the delegation cases. Times of constitutional upheaval (especially before legal revolutions begin to crystallize into new status quos) breed suspect constitutional adjudication. On the other hand, the impugned practices went ahead unabated, as the needs of military mobilization, war, and demobilization, extended the power of government to an unprecedented sweep. Towards the end of the war, Friedrich von Hayek's best-seller, *The Road to Serfdom*, warned that, given the sway of governmental regulation and administrative discretion and the way in which more recent emergencies reinforced pre-war tendencies, the difference between Western democracies and the totalitarianism of Nazi Germany threatened to become one of degree rather than kind.

All these developments and the fears engendered by them influenced post-war Western constitutionalism to various degrees. In the United Kingdom and (to a lesser extent) in other Westminster systems, after the initial bout of attention and debate occasioned by the fracture between Victorian constitutional understandings and modern style cabinet government, "delegation" remained, from a positive legal standpoint, a mere ideological reaction. The doctrine of parliamentary sovereignty precludes any vision of law or past reality of legislative practices from gaining entrenched constitutional status. Practices as such were realigned to accommodate pragmatic needs of coordination and rule of law requirements (parliamentary control, public debate and transparency, publicity, and so on).<sup>17</sup> But since, in the logic of the Westminster system, practices alone dictate the constitutional concept of legislation, the new arrangements did not impact the constitutional duty of parliament. On the Continent, steps were taken along the post-war realignment of constitutionalism to remedy what was perceived as a major pre-war structural constitutional failure. The constitutional reaction was, as expected, strongest where the past appeared to caution it the most: the first post-war French constitution forbade delegated law-making categorically, whereas the German Basic Law rationalized parliamentarism, barring in explicit terms future resort to open-ended enabling legislation. Paradoxically, in the United States, where the nondelegation doctrine pre-dated by long the emergence of the modern state and where the Supreme Court enforced it vigorously at the peak of the New Deal, no other judicial decision invalidated federal legislation on nondelegation grounds. The doctrine did however become a leading topic of legal debate. It has in fact proven, over time, unmitigated theoretical resilience in spite of judicial neglect. In effect, the radicalism of the Vermeule-Posner realist critique and the impatience of numerous other less pugnacious commentators can be attributed to sheer irritation. A measure of discontent appears legitimate: why would theorists split hairs endlessly discussing

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<sup>17</sup> See, generally, Hermann Pünder, "Democratic Legitimation of Delegated Legislation—A Comparative View on the American, British and German Law," 58 *ICLQ* 353 (2009).

an antiquated doctrine that was judicially acknowledged in 1813, only occasionally mentioned afterwards, suddenly enforced in 1935, and then forgotten anew by the Court and never again used to invalidate one federal statute ever since? Surely, there must be more urgent practical matters to busy oneself with.

This historical incursion, far from bringing forth any clarifications or answers, raises only additional lines of questions. How can the temporal discontinuities between US and European constitutionalism be explained? Were the two New Deal decisions an accident? If so, what could explain the ongoing and intense subsequent theoretical debate on a legal topic with no practical stakes? And what accounts for the prior, long-lasting recognition of delegation as a valid but unenforced doctrine under the US constitution? Was the European inclusion of nondelegation limitations a belated, perhaps misguided constitutional reaction to a new reality or was it a conscious and well-directed attempt to grapple with a genuine contemporary problem? What purpose do these limitations serve nowadays and what is their place in the structure of contemporary constitutionalism? If content-based constraints on legislation are constitutionally useful, what are the optimal levels of judicial enforcement applicable? Obversely, what constitutional story does the lack of enforcement tell? Is there any purpose to a constitutional rule, if courts cannot seem to give it substance? Does a theoretical concept whose positive legal avatar is neglected by practice fulfill any useful role, hermeneutical or otherwise?

In sum, what is the present explanatory and constitutional-legal value of the delegation concept and rule?

### 1.3 Problem and Method

This work seeks the answers by means of an inquiry into the conceptual, historical, and legal genealogy of legislative delegation limitations. The book will locate the intellectual conditions of the possibility of the delegation concept in constitutionalism and the historical intersection of these justifications with constitutional law, before approaching the contemporary use of delegation-related constitutional law rules.

Thus, it is argued that “purely legal” (where “legally pure” equals strictly judicially enforceable positive law) discussions about these matters would yield scant conclusions at the cost of significant reductions in epistemological value. To wit, whether a purely positivist approach is at all possible in constitutional law is a larger question, worth posing in its own right. In this particular case, the answer must be trenchantly negative; there are, as we have seen, simply too many presuppositions and implications entwined around the legal rules regarding delegation. Furthermore, if unilateral methodological benchmarks are to be avoided for reasons that have to do with the essentials of legal knowledge, the instrumentalism of limited perspectives is to be averted for less foundational but equally sound epistemological and prudential considerations. Namely, most

usually, arguments “against” delegation based on a specific assumption risk reducing the notion unduly to one of its facets and thus fall prey to its reductive metaphorical traps. Obversely, arguments “for” delegation are constantly exposed to the risk of reproducing endlessly supposedly pragmatic stereotypes about modernity, the speed of life in technological advanced societies, the limited time of parliament, the fall of the diletanti and the social need for experts who run things well and smoothly. Consequently, lest we run into the same perils, we will seek to understand first what place did and does this notion and its patterns of conceptual affinities occupy in the architecture of constitutionalism (what does delegation mean), prior to asking whether it would be good for us today to have a nondelegation doctrine or provision more vigorously applied by constitutional judges and what implications would be entailed by that judicial posture.

The first chapter traces the historical evolution of constitutional concepts of legislation. A particular historical timeframe will be inevitably accompanied by a dominant, coherent, and consistent ideal of law and law-making. The assertion is not meant in a vulgar deterministic sense. The argument is made, rather, that legal practices characteristic of a particular historic period are fused at the hip with an archetypal idea of law and legislation that at the same time explains and justifies the phenomena. True, there is always a distance between justificatory ideals of law and the justified actuality of legal practice. When, however, the distance and dissonance become unbridgeable, when the normative structures of justification are too remote from phenomena, the time of both concepts and institutions is close at hand; we are then in the presence of an emerging shift of paradigm (new legal concepts, mirroring new realities). This morphing of conceptual paradigms in relative lock-step with practices is a constantly evolving, indeed an ongoing process. One can observe for instance in contemporary literature how patterns of institutional change unaccounted for by the extant vocabulary strive for new words to express their distinctiveness. The ever-increasing recurrence of the “governance” concept is an apposite example, inasmuch as its users seek to showcase a growing detachment or emancipation of administrative and regulatory structures from the reign of politics and traditional lines of accountability. The frequent use of the term “societal constitutionalism” is another such currently ubiquitous conceptual newcomer, which competes with and seeks to partly displace the classical, hierarchical understanding of politics and law.<sup>18</sup> This is certainly a two-way road. New patterns of justification can be adopted for primarily ideological and polemical reasons, in which case, often enough, the mark may be overstated. By the same token, strong theoretical undercurrents are often halcyons of new emerging practices, albeit their grasp on new legal facts will be properly assessed only in retrospect. Be that as it may, the concept of legislative delegation becomes comprehensible if located in its proper intellectual environment. It is germane, as we will see, to a particular

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<sup>18</sup> Dieter Grimm, “Gesellschaftlicher Konstitutionalismus-Eine Kompensation für den Bedeutungsschwund der Staatsverfassung?” in *Festschrift für Roman Herzog zum 75. Geburtstag* (München: C.H. Beck, 2009), pp. 68–81.

juncture of Enlightenment-derived models of legal rationality and pertains to specific structures of legal and political authority. The notion expresses a limited understanding of legislation, which presupposed, in turn, a set of clear delineations between the state and the individual and among distinct fields of state action and specific exercises of state power. Such divisions rested upon clear delineations between the relative domains of politics and law, and therefore also between distinct kinds of rationality. This particular cluster of justifications and justified practices vied for supremacy, successfully insofar as constitutionalism struck roots in the Western legal world, with other Enlightenment-derived legal ideals.

This leads us to the intersection of normative account and constitutional phenomenon. The second chapter will follow the metamorphosis of legislative practices from the beginnings of normative constitutionalism till the beginning of the twentieth century major transformations of the law and state.<sup>19</sup> It is argued that modern constitutionalism incorporated the particular set of presuppositions and justifications and the ideal-typical concept of legislation showcased by the delegation notion. The story supporting this argument builds on a series of historical patterns of development deemed representative of the Western legal tradition. While occasional reference to British and Canadian law and parliamentary history will also be made, constitutional evolutions within three legal systems considered paradigmatic (the US, Germany, and France) will be subjected to more thorough scrutiny. The history of US federal constitutional law receives disproportionate attention throughout the book and a justification for this preferential treatment must be advanced. For our analytical needs, American transformations offer a perfectly controlled constitutional environment, since: (1) the country adopted a constitution in the wake of the “century of the Enlightenment” and consciously built its constitutional law on the fundament of a thorough understanding of natural law dictates; (2) the constitutional limitations were, from very early on, considered valid positive law, subject to enforcement by way of judicial review; (3) the Supreme Court readily recognized the validity of a nondelegation limitation, as implicit in text and structure and subject to judicial enforcement against a trespassing legislature. Thus, what can be observed elsewhere only piece-meal and occurring fragmentarily, in patchworks of justifications unequally met by practices or legislative and judicial practices unsupported by constitutional imperatives, constitutes in America a clear, uninterrupted continuum of the three parallel narrative threads running through our delegation tale: normative account, historical changeover, and contemporary constitutional law.

Positive, contemporary constitutional (and to a certain extent administrative) law forms the exclusive object of the third, and last, chapter of this book. This

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<sup>19</sup> See, for an elaboration on the distinction between modern “normative” and pre-modern “descriptive” constitutionalism, the discussion in the introduction to Dieter Grimm, *Deutsche Verfassungsgeschichte 1776–1866: Vom Beginn des modernen Verfassungsstaats bis zur Auflösung des Deutschen Bundes* (Frankfurt a.M.: Suhrkamp, 1988), pp 10–42.

sequence has an argumentative purpose, related to the choice of jurisdictions. Even though academic lawyers are predisposed, by virtue of an intellectual occupational hazard of sorts, to overstate the efficiency and effectiveness of legal rules, few would push such propensities to the point of denying the relevance of context to the emergence and application of law. It should be stressed again that the countries under scrutiny trod partly dissimilar social, political, and legal-constitutional paths. The United States constitutes the paragon of constitutional stability and modernity: its constitutional structure rested from the very onset upon auspicious social circumstances, most notably a relatively free and homogenous social system and a modern private law system (i.e., to a large degree unencumbered by feudal restrictions).<sup>20</sup> The 1787 document is still in force, in textually unaltered form, and the quasi-sacralization of its original legal form testifies to its centrality in constituting the political and social life of the country. France, whose initial constitutional emancipation was achieved at roughly the same time, had to simultaneously secure a measure of social and legal modernization which in America could be more or less taken for granted, namely, the social preconditions of political freedom and the private law preconditions of autonomy.<sup>21</sup> The syncopated French constitutional evolution, evidenced by the plethora of constitutions and *lois constitutionnelles* which kept replacing each other with great frequency since 1791, reflects the difficulties of achieving these mutually reinforcing goals at different paces. Germany, until late “the most medieval state of the continent,”<sup>22</sup> is the stereotypical modernization laggard. Indeed, for a good stretch into the course of our future story, one cannot actually speak of “Germany” as a political unit in the modern sense. Its state evolved fragmentarily from the Holy Roman Empire of German Nation into a hybrid and partly pre-modern type of federal constitutionalism towards the end of the nineteenth century, then proceeded to undergo break-neck speed, short-lived, and unequal constitutional modernization during the Weimar Republic. German constitutional evolution was truly completed only after WWII, under the Basic Law. The significance of these evolutionary differences accounts for the place of contemporary legal issues in the general economy of the book: it is of relevance if different roads reach the same destination in the end. Hence, if, in spite of the distinct historical conditions and irrespective of how the delegation-relevant constitutional provisions are formulated, the judicial treatment of delegation-related provisions can be shown to be very similar

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<sup>20</sup> James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison, etc.: The University of Wisconsin Press, 1967), *passim*. Albeit feudal tenures were only abolished in New York in 1846, *Id.*, at p. 13.

<sup>21</sup> Hanna Arendt, *On Revolution* (New York: Viking Press, 1965).

<sup>22</sup> Karl Bosl, cited by Hans Maier, *Die ältere deutsche Staats- und Verwaltungslehre (Polizeiwissenschaft) – Ein Beitrag zur Geschichte der politischen Wissenschaft in Deutschland* (Neuwied am Rhein und Berlin: Luchterhand, 1966), at p. 56.

nowadays across jurisdictions (in terms of both causes and effects), the finding will reflect tellingly on the current state of Western constitutionalism as such.

The methodology, informed by the conviction that normative accounts, historical transformations, and positive law cannot be separated, at least not without losing sight of the full scope of law, can be ascribed to the school of “integrative jurisprudence.”<sup>23</sup> This belief that the virtues of all these dimensions of law (legal philosophy, legal history, legal practice) and of the three major schools of legal thought (natural law theory, positivism, the historical school) can be welded into a more complex, single theory, is a profession of legal-scientific faith at the same time combative and bold in its quest. It is daring inasmuch as narrow methodological specialization passes for properly scientific nowadays. It is combative, insofar as it rejects outright such one-sided perspectives as misguided and impoverished. Namely, the juridical study of positive constitutional limitations that neglects their philosophical underpinnings and their historically situated and changing meanings makes a false promise of legal objectivity and fulfills it by delivering most usually stale verbiage, words about words. Philosophical presuppositions, if they are immediately applied to actual legal problems without being anchored in and filtered through history, run the usual risk of counterfactuals or dystopic/utopian imagination. Constitutional history, if it purports to extract from the past no sense of the (dis)continuity of concepts and institutions and thus no answers to our current queries, is a dry collection of data and insofar a pointless antiquarian exercise; the world is full to the brim with facts, a receding infinity of them. Otto von Gierke once defined legal concepts as “living historical-intellectual structures” (*lebendige geschichtliche Geistesgebilde*) and his insight is particularly apposite in the case of constitutionalism.<sup>24</sup> We can only understand fundamental legal practices (and also changes in them) if attention remains focused both on the normative stakes implicated by such practices and on the way in which normativity responds to phenomenal transformations. Consequently, constitutional law will be treated here as “a process, in which rules and values and facts—all three—coalesce and are actualized.”<sup>25</sup>

Since the *dramatis personae* and the plot have now been outlined, it is proper form to give out the crux of the argument to follow. It will be contended that the concept of delegation is a legal-philosophical corollary, which rests on substantive, systemic implications about law and law-making. It was constitutionalized in early American constitutional practice as a necessary incident of those systemic assumptions. By the same token, the legal limitation was not actually enforced, because its claims are metaphysically too taxing, too incommensurable for judges to give them legal effect and due to the fact that, while the underlying premises held

<sup>23</sup> Harold J. Berman, “Toward an Integrative Jurisprudence: Politics, Morality, History,” 76 *Cal. L. Rev.* 779 (1988).

<sup>24</sup> Otto von Gierke, “Labands Staatsrecht und die deutsche Rechtswissenschaft,” 7 *Schmollers Jahrbuch* 1097 (1883), at p. 1111.

<sup>25</sup> Jerome Hall, cited by Berman, at p. 782.

out, there was no need for such a judicial corrective. As the underpinnings on which the concept rested changed, the use of delegation provisions appeared as a reaction to those changes, in the attempt to find a purely positive law remedy to the problem of dissolving normative foundations. But, since legal reasoning cannot function in the absence of concrete reference points, positive legal limitations alone could not offer a suitable substitute for systemic changes of such magnitude. The constitutional control of delegation, as a legal rule, is therefore a symptom and an epiphenomenal, instinctive legal reaction to a deeper problem: the erosion of normative limits in constitutional law.



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Iancu, B.

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