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Delegata Potestas Non Potest Delegari A Maxim of American Constitutional Law

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"DELEGATA POTESTAS NON POTEST DELEGARI," A MAXIM OF AMERICAN CONSTITUTIONAL LAW

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Although the authority of the *Schechter* case[1] is not very persuasive these days, the case may not be entirely dead. The principle that legislative power should not be delegated without limitation has still received lip service in decisions in which the Supreme Court has found that Congress had set out a sufficient "standard" to control its delegation. Even now there are probably limits on the delegability of legislative power. For example, a wholesale delegation of the legislative power, or a delegation of the power to create crimes, or to establish tax duties, or to appropriate money would hardly be constitutional. There is in fact a good reason why the principle of nondelegability is still alive, a reason which has evolved out of a long history of constitutional government. Unfortunately, in recent years this reason has been obscured to some degree by an article published in 1929, in which it was contended that the whole doctrine stemmed from a dubious copy of a medieval legal manuscript. It is with this contention that I take issue here.

Thirty years ago, Duff and Whiteside published their well-known article in which they traced the Latin legal maxim "Delegata potestas non potest delegari" from its Roman origins to its present place in the American law of delegation of legislative power.[2] They tried to show that the maxim, which appears in the form "delegatus delegare non potest" in the Gloss,[3] came into the English law by way of a questionable transcription of Henry de Bracton's "De Legibus et Consuetudinibus Angliae."[4] This error was then supposed to have misled Coke,[5]

† See Contributors' Section, Masthead, p. 69, for biographical data.

1 Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

2 Duff & Whiteside, "Delegata potestas nono potest delegari; a maxim of American Constitutional Law," 14 Cornell L.Q. 168 (1929), reprinted in 4 Selected Essays on Constitutional Law 291 (1938).

3 Digest 2.1.5, Digest 1.21.5, Code 3.1.5.

4 The manuscript came out of the middle of the Thirteenth Century and was first reproduced in printed form in 1569. Bracton, who served the King as judge, died in 1268. Duff & Whiteside rely on a passage from f. 55b. The rendering of this passage in the new edition assembled by G. E. Woodbine, Yale Historical Publication, Manuscripts and Edited Texts III, 4 vols. 1915-1942 [hereinafter cited as Bracton] differs from the rendering in the old edition by Twiss, Rolls Series, 6 vols. 1878-1883. The passage now reads: "Est enim corona facere iustitiam et iudicium, et tenere pacem, et sine quibus corona consistere non poterit nec tenere. Huiusmodi autem iura sive iurisdictiones ad personas vel tenementa transferri non poterunt, neque a privata persona possideri, neque usus, neque executio iuris, nisi hoc datum esset ei desuper, sicut iurisdictio delegata, nec delegari poterit, quin ordinaria remaneat cum ipso rege." 2 Bracton, at 167. The "old" rendering of the passage in question reads: "nisi hoc datum fuerit ei de super, sicut jurisdictio delegata non delegari poterit, quin . . . ," Twiss, supra, vol. 1, at 442. Thus while the "old" version contains the "maxim" that iurisdictio delegata may not be further delegated, the corrected version states that private persons could have iurisdictio only as iurisdictio delegated by the King, and only in such a way that the iurisdictio ordinaria remained in the hands of the King.

5 2 Coke, Institutes 597 (1st ed. 1642). Coke wrote that a particular proceeding

and thence to have acquired general circulation in Branch's "Maxims"[6] (where it first appeared in the form "delegata potestas non potest delegari"), eventually leading Kent[7] and Story[8] astray and becoming part of American constitutional law. Duff and Whiteside came to the conclusion that "the whole doctrine, insofar as it is asserted to be a principle of constitutional law, is built upon the thinnest of implication."[9] Although their evidence is very interesting with regard to the specific wording of the maxim now current, their conclusion as to the strength, or rather weakness, of its substantive foundations is highly dubious.[10]

If Duff and Whiteside's chain of evidence is examined in reverse, it is immediately apparent that this so-called constitutional maxim was applied by Kent and Story not to *constitutional* questions, but rather found its place in their discussion of the law of *agency*.[11] The state courts, which first cited the maxim in dealing with the problem of delegation of law-making power, treated it quite explicitly as a doctrine of the law of agency.[12] So did the Supreme Court.[13] Thus the doctrine appears as a new formulation of the common-law rule that (in contradistinction to Roman law) an agent may not appoint a subagent.

Without going further into the old English law on the point, two aspects deserve mention. First, in declaring delegated jurisdiction not to be further delegable, Bracton referred to the restriction (in Roman law) on the power of the *procurator* to create another *procurator*. And in doing so, he extended this limited rule, previously used as an example by Azo, into a general principle.[14] Thus, a cross-fertilization of agency

should be heard by the court of Exchequer, "who cannot make a commission to others concerning the matter, but ought to proceed legally themselves, because they have but delegatam potestatem, quae non potest delegari. . . ."

6 Branch, Principia Legis et Aequitatis 19 (1st ed. 1753). Branch referred only to Coke.

7 2 Kent, Commentaries On American Law 495 (1st ed. 1827). The passage concerns the law of agency. Kent, who cited neither Coke nor Branch, gave the maxim as "delegatus non potest delegare."

8 Story, Commentaries on the Law of Agency §§ 13, 14 (1st ed. 1839). Story cited Coke, Branch and Kent.

9 Duff & Whiteside, supra note 2, at 196.

10 This conelusion has, however, been very uncritically accepted in the American literature. For a recent example see 1 Davis, Administrative Law 79, n.15 (1958). I am indebted to Professor Stefan A. Riesenfeld for the suggestion that I investigate the point more thoroughly.

11 See notes 7 and 8 supra. The maxim appears also in agency law in a Supreme Court decision handed down 4 years after Kent's book: "for the general rule is, that a delegated authority cannot be delegated." Shankland v. Washington, 30 U.S. (5 Pet.) 389, 395 (1831).

12 Cf. Locke's Appeal, 72 Pa. 491, 496 (1873), a landmark state court decision on the point.

13 Hampton Jr. & Co. v. United States, 276 U.S. 394, 405 (1928).

14 Bracton, f. 411: "non magis quam si procurator faceret procuratorem." Cf. f. 333 b. See also f. 364 where he lays down the rule for the attorney with a decision from the year 1225 involving a failure to appear in court. Cf. Summa Azonis (ed. Henricus Draesius, Basel 1572), Code, book III, tit. IV, 2 (col. 163), and tit. XIII, 12 (col. 176).

and constitutional law on this point is not exactly new. Secondly, in the common law it is the "confidence" reposed in the agent, the "trust" given to him, which forms the basis of the rule against subdelegation.[15] As will be demonstrated, it is this "trust" idea which ties our *agency* maxim to the American constitutional principle that legislative power may not be subdelegated.

Although they were undoubtedly familiar with the problem,[16] neither Kent nor Story discussed the question of nondelegability of delegated authority in connection with governmental institutions. The reasons may have been, that the question of delegated power, which was no longer a major issue in the American court system, had not yet become a major issue in the legislative field.[17] It never occurred to Cooley, writing more than three decades later, to call upon Kent and Story to attest to the nondelegability of legislative power. Instead, he went directly to John Locke, the father of the modern doctrine of nondelegability of legislative power.[18] Locke's "modern" version of the rule, however, may well have one of its oldest roots in the foundation laid by Bracton.

Whatever influence the inaccurate 1569 printing of Bracton's work may have had upon the present formulation of our maxim,[19] Bracton was an almost "revolutionary" proponent of its substance.[20]

See also Gloss Dandi to Code 3.1.5. Cf. Vacarius, Liber Pauperum (ed. F. de Zulueta 1927), book III, tit. 12, Gloss to Digest 2.1.5 (at 77), and book III, tit. 1, Gloss to Digest 2 pr. (at 68). For the relationship between mandatary and procurator see Arangio-Ruiz, Il Mandato In Diritto Romano chs. 2, 5 (1949); Serrao, Il Procurator (1947). See Story, supra note 8, at § 13.

15 Cf. 2 Kent, supra note 7, at 495, 504; Story, supra note 8, at § 13, who relied on Bacon, Abridgement, Authority, D (7th ed. 1832). For the connection between agency and (legal) trust see Fridman, The Law Of Agency 13 (1960); Hanbury, Modern Equity 94, 223 (7th ed. 1957); Hanbury, Principles Of Agency 5, 65, 73, 123 (1952).

16 Kent, for instance, had relied on Bynkershoek in his discussion of the law of expropriation, 2 Kent, supra note 7, at 276. Bynkershoek, in turn, had dedicated an entire chapter to the prohibition against subdelegation: 2 Bynkershoek, Quaestionum Juris Publici Libri Duo, ch. 12 (1737).

17 The problem came up in the 1840's in connection with the so-called "local option" or "state-wide referendum" cases. See Duff & Whiteside, supra note 2; McBain, "The Delegation of Legislative Power to Cities," 32 Pol. Sci. Q. 276, 391 (1917).

18 Cooley, Constitutional Limitations 117 n.1 (1st ed. 1868).

19 Coke and Branch spoke—in contradistinction to Bracton—not of delegated iurisdictio but of delegated potestas.

20 Duff was right in accepting the Woodbine rendering of the passage in question (see supra note 4) as the authentic, or at least the better one. Despite occasional strong criticism, it can hardly be contested that the edition assembled by Woodbine is generally greatly superior to the previous editions; cf. McIlwain, "The Present Status of the Problem of the Bracton Text," 57 Harv. L. Rev. 220 (1943). As far as our passage is concerned, the "new" version gives it a clearer sentence construction and a clearer meaning. In the "old" version, the "maxim" of the non-subdelegability of iurisdictio delegata spoils the sentence structure, and more than that, it makes no sense, since the sentence deals with the iurisdictio of the King, to which, as iurisdictio ordinaria, a prohibition of subdelegation is inapplicable. Corwin infers the correctness of the "old" version from its connection with the problem "pressing in Bracton's day, of subinfeudation," Corwin, The President, Office and Power 395 n.11 (4th ed. 1957). Bracton's problem was not,

Bracton's terminology came from Roman and Canon law.[21] That he did not use the Glossators' maxim (with which he may or may not have been familiar) underscores the conclusion that the specific wording of the maxim is an entirely secondary problem.[22] The actual problem facing Bracton was certainly different from the problems for which the borrowed concepts had provided solutions in the elaborately developed systems of Roman and Canon law. Bracton borrowed these concepts as organizing principles, so to speak, of his treatise on the common law, which, while developing rapidly, had not yet achieved rational organization.[23]

For Bracton the problem of delegation of jurisdiction was, without question, a central one. His treatment of this problem followed from his famous exposition on Kingship, which was the heart of his "constitutional law."[24] It must be remembered that the term "iurisdictio" had an extremely broad connotation in the Middle Ages. The separation of executive, legislative, and judicial branches of government had just

however, the limitation of subinfeudation, but rather the "defeudalization" of the iurisdictio. As will be shown, the "new" version serves this purpose much more directly and concretely than does the old.

21 See Kaempfe, Die Begriffe der Iurisdictio ordinaria, quasiordinaria, mandata und delegata im römischen, Kanonischen und Gemeinen Recht (1876), and Triepel, Delegation und Mandat im Öffentlichen Recht (1942). These writers demonstrate, among other things, that a fusion of these concepts (to which might be added the concept of iudicis datio) occurred quite early. Thus it was certainly not just Bracton's lack of understanding of the Roman and Canon law that led him to assign one and the same meaning to the concepts of delegare, committere, mandare and judicem dare; Bracton, ff. 55 b, 108, 108 b, 333 b, 411. On the subject of Bracton's understanding, or misunderstanding, of Roman and Canon law, see the literature cited note 22 infra.

22 With regard to the Roman and Canon law influences in the "Bractonian jungle" (Schulz, "Bracton as a Computist," 3 Traditio 265, 305 (1945), in particular the influence of Azo, Accursius, Gratian, Tancred and Peñafort, see Güterbock, Henricus de Bracton und sein Verhältnis zum Römischen Recht (1862); 2 Holdsworth, A History of English Law part I, ch. 2 (1st ed. 1909); Maitland, Bracton and Azo (1895); Maitland, Bracton's Note Book (1887); Plucknett, A Concise History of the Common Law 258 (5th ed. 1956); Plucknett, Early English Legal Literature chs. 3, 4 (1958); 1 Pollock & Maitland The History of English Law before the Time of Edward I, ch. 7 (2d ed. 1898); Vinogradoff, "The Roman Element in Bracton's Treatise," 1 Collected Papers 237 (1928); Plucknett, "The Relations between Roman Law and English Common Law down to the Sixteenth Century," 3 Toronto L.J. 24 (1939); Post, "A Romano-Canonical Maxim 'Quod omnes tangit' in Bracton," 4 Traditio 197 (1946); Richardson, "Azo, Drogheda, and Bracton," 59 Eng. Hist. Rev. 22 (1944); Richardson, "Tancred, Raymond, and Bracton," 59 Eng. Hist. Rev. 376 (1944); Richardson, "Studies in Bracton," 6 Traditio 61 (1948); Richardson, "Roman Law in the Regiam Maiestatem," 67 Jurid. Rev. 155 (1955); Schulz, "Critical Studies on Bracton's Treatise," 59 L.Q. Rev. 172 (1943); Schulz, "A New Approach to Bracton," 2 Seminar 41 (1944); Schulz, "Bracton on Kingship," 60 Eng. Hist. Rev. 136 (1945); Schulz, "Bracton and Raymond de Peñafort," 61 L.Q. Rev. 286 (1945); Scrutton, "Roman Law in Bracton," 1 L.Q. Rev. 425 (1885); Woodbine, "The Roman Elements in Bracton's 'De Adquirendo Rerum Dominio'," 31 Yale L.J. 827 (1922).

23 See Maitland, The Constitutional History of England 17 (1908); Plucknett, Early English Legal Literature 51, 59, 73 (1958).

24 Bracton, f. 5 b (34), 55 b, 106, 107. For a discussion of the subject and meaning of these passages see Kantorowicz, supra note 22, at 45, 50, 61; McIlwain, Constitutionalism, Ancient and Modern ch. 4 (2d ed. 1958); Lapsley, "Bracton and the Authorship of the 'Addicio de Cartis'," 62 Eng. Hist. Rev. 1 (1947); Schulz, "Bracton on Kingship," supra note 22, and literature cited there.

begun in Bracton's England. To Bracton, the King's "iurisdictio" meant the King's power or at least his "domestic" power.[25] The establishment of a unified governmental organization in England, under the Angevin Kings was accomplished in great part through the establishment of royal courts (complete with juries) and through the continual extension of their jurisdiction by the liberal granting of old and new royal writs. The royal courts took over the administration of practically all of the criminal law as well as a substantial part of the civil law. They gave the country its common law and established the King as the "fountain of justice." In this context Bracton, a royal judge, dealt with the concepts of *iurisdictio ordinaria* and *iurisdictio delegata*.[26]

In the center of Bracton's constitutional system stood the King, whom he equated with the Emperor and the Pope in adapting his Roman and Canon Law sources to English conditions.[27] The King alone administered justice, he wrote, but added, "if he is able to do this by himself."[28] Following some advice to the King as to the type of person whom the King ought to choose to relieve him of the burden of his duties as judge, Bracton discussed the subject of *iurisdictio delegata*, "where someone has authority not in his own right, but committed to him by another."[29] By reserving *iurisdictio ordinaria* exclusively to the King and including not only the royal judges but also the sheriffs (vice-comites) and bailiffs among the King's delegates, Bracton included the jurisdiction of the communal courts in the jurisdiction delegated by the King.[30] He then described in abstract terms the existing royal courts: King's Bench (and Exchequer), Court of Common Pleas, Justices in Eyre, and the other Commissions. Finally, in a passage obviously copied from Tancred, a Canon-law writer, Bracton discussed the grounds for termination of *iurisdictio delegata*. Among them he included the revocation and the death of the delegator. Bracton did not adopt, however, Tancred's next sentence concerning subdelegation.[31] While Tancred stated, in accordance with Roman and Canon

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[25] McIlwain is of the opinion that Bracton sometimes uses the term "iurisdictio" in a broad sense, covering the whole of the King's power, and sometimes in a narrower sense in which it was opposed to the King's "gubernaculum." Bracton would then have the King's iurisdictio subject to the law, but his gubernaculum not. McIlwain, supra note 24, at 74.

[26] Cf. 3 Wilkinson, Constitutional History Of Modern England ch. 3 (1958). In the conflict between King and barons Bracton was not a partisan; cf. 1 Holdsworth, supra note 22, at 187; Plucknett, A Concise History Of The Common Law 259 (5th ed. 1956). As King's judge, Bracton's loyalty was to his royal office.

[27] Bracton, f. 5 b. See Richardson, "Studies in Bracton," 6 Traditio 61, 66 (1948).

[28] Bracton, f. 107.

[29] Id. at f. 108.

[30] Id. at f. 108.

[31] See Richardson, supra note 27, at 62, 67.

law, that the judge with the delegated jurisdiction of the Pope or the Emperor (in contradistinction to the delegatee of a lower judge) may subdelegate the power delegated to him,[32] Bracton said simply that "no delegated judge with powers by the King may subdelegate this power to another."[33] The King's allocation of judicial power was to be strictly adhered to; the prohibition on subdelegation was absolute.

The biggest difficulty with Bracton's thesis of the exclusive *iurisdictio (ordinaria)* of the King was, however, the existence of the feudal courts.[34] This problem was the subject of the disputed passage, on which Duff relied.[35] In the section "De Adquirendo Rerum Dominio" Bracton's discussion of the acquisition of incorporeal property led him to the subject of "libertates" which only the King could grant, since he had *iurisdictio ordinaria* over all persons in his realm.[36] Bracton then distinguished between royal privileges and royal rights "quae jurisdictionis sunt et pacis" (which are jurisdictional or are related to the maintenance of the public peace).[37] Whereas the "privilegia" could be separated from the crown and bestowed upon private persons, rights of the other sort the King could not "grant" (which is to say, sell) to private persons or feudal estates since these rights themselves constituted the crown. Not only could the King not convey them, but also they could not be *possessed* by private persons, unless they were given to them from "above," by the King, "sicut iurisdictio delegata." They could be delegated, however, only in such a way that the "iurisdictio ordinaria" remained with the King. Thus, Bracton placed the entire jurisdiction of the feudal courts (including the feudalized communal courts) within "iurisdictio" delegated by the King.[38]

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32 Tancred, Ordo Judiciarius, tit. 2, § 4; see also Pillii, Tancredi, Gratiae Libri De Judiciorum Ordine 101 (Bergmann ed. 1842). Cf. 3 Peñafort, Summa De Poenitentia, ch. 32, § 3 (with the Gloss of Johannes von Freiburg, Rome 1603). Cf. Code 3.1.5. For a warning example of the practice of subdelegation of papal iurisdictio delegata in England at the end of the 13th Century, see Brentano, "An Endorsed Subdelegation: 1284," 13 Traditio 452 (1957).

33 Bracton, f. 108 b; so also in connection with the summons (f. 333 b) and with the exceptiones which may be raised to refute jurisdiction (f. 411). For the equation of the King with the Emperor see text accompanying note 27 supra.

34 Bracton dismissed the question of the proper jurisdiction of the ecclesiastical courts, which had been so hotly disputed in the reign of Henry II, as not within the scope of his theme, id. at f. 107. However, in the section on exceptiones he discussed the jurisdictional conflict in detail, f. 400 b.

35 See notes 4, 20 supra.

36 Bracton, f. 55 b.

37 Ibid. Among the "privilegia" Bracton enumerated treasure trove, flotsam and jetsam, fish and game; cf. his treatment of the res nullius, ff. 8, 8b.

38 The treatment of these iurisdictiones as "liberates," id. at f. 56 (34), shows then, of course, that they are very different from the iurisdictio delegata of the King's judges, particularly with regard to grounds for termination. But it is important that Bracton did not recognize any original jurisdiction of either communal or feudal courts. In connection with his treatment of the jurisdiction of greater and lesser judges, he does speak, however, of the "iurisdictio ordinaria" which people beneath the King have, "but

Bracton's reasons for concluding that the crown rights, "quae iurisdictionis sunt et pacis," were not to be conveyed, followed directly from his concept of Kingship; the King possessed these rights in order to give—"sicut dei minister et vicarius" (as servant and representative of God)—each his due, and to insure "that the people entrusted to his care live in peace and tranquillity."[39] Not only the "trust" from God, but also that "trust" placed in him by his subjects bound him: "Ad hoc autem creatus est rex et electus," Bracton said, adverting to the King's oath, "ut iustitiam faciat universis, et ut in eo dominus sedeat, et per ipsum sua iudicia discernat, et quod iuste iudicaverit sustineat et defendat. . . ."[40] The King is "created and elected" in order to do, to sustain and to defend justice. He could not convey the rights which constitute the crown, since he did not "own" them, but held them as trustee.[41]

The transition from medieval to modern thinking on this point, and the connection between the two, is particularly clear in the work of Richard Hooker, who played such an important role in reconciling Anglican theology and natural law. According to Hooker

> the lawful power of making laws to command whole politic societies of men belongeth so properly unto the same entire societies, that for any prince or potentate of what kind soever upon earth to exercise the same of himself, *and not either by express commission immediately or personally received from God, or else by authority derived at the first from their consent upon whose persons they impose laws,* it is not better than mere tyranny.[42] (Emphasis added.)

On the "judicious Hooker" John Locke relied for his "consent" doctrine, on which he based in turn the principle, that legislative power may not be delegated.[43]

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in a form less pure than that of the Pope or the King," f. 412. The perfection of the doctrine that all iurisdictio comes from the King, that he is the sole "fountain of justice," by Fleta, Seu Commentarius Juris Anglicani (ca. 1290; Selden ed. 1647) will not be pursued here. On the distinction between the doctrine and reality, see 1 Pollock & Maitland, supra note 22, ch. 3, §§ 1, 2, 5. See also Hurnard, "The Anglo-Norman Franchises," 64 Eng. Hist. Rev. 289, 433 (1949).

[39] Bracton, f. 55 b.

[40] Id. at f. 107. Cf. E. H. Kantorowicz, The King's Two Bodies, chs. IV 3, VII 2 (1957).

[41] For the central role which this principle played in the development of constitutional thinking in medieval England, see Sehramm, Geschichte des englischen Königtums im Lichte der Krönung chs. 6, 7 (1937). For the development of the medieval teaching in general, see 3 Von Gierke, Das Deutsche Genossenschaftsrecht § 11, at 566 (1881).

[42] 1 Hooker, Of the Laws of Ecclesiastical Polity 194 (Everyman's Library ed. 1954). Hooker continues "in Parliaments, councils, and the like assemblies, although we be not personally ourselves present, . . . our assent is by reason of others agents there in our behalf." Ibid.

[43] Locke, Two Treatises of Government §§ 5, 15, 60, 61, 74, 90, 91, 94, 111, 134, 135, 136, 239 (Laslett ed. 1960) (hereinafter cited as Locke). In a cursory search of the relevant literature I have been unable to find any direct source for Locke's exposition on nondelegability. While Locke does mention Bracton once (§ 239), Laslett's recent researches indicate that Locke never owned Bracton's work, and that there is no reason

John Locke, who referred to the legislative power both as "the supreme power" and "a fiduciary power,"[44] was the first modern author to raise the prohibition of subdelegation of legislative power to the status of a central constitutional law problem. He was modern in the sense that the transcendental basis for the concept of entrusted power has been replaced by a more temporal one. The law-making power, split off from the "iurisdictio" and made "supreme," is deemed to be "delegated power from the people."[45] On this basis it becomes possible to apply to the legislature not only the old "trust" idea, which Bracton had applied to the King, but also the rule against subdelegation of delegated power, which Bracton had not applied to the King but only to his delegates:

> This *Legislative* is not only *the supream power* of the Common-wealth, but sacred and unalterable in the hands where the Community have once placed it; nor can any Edict of any Body else, in what Form soever conceived, or by what Power soever backed, have the force and obligation of a *Law*, which has not its *Sanction from that Legislative*, which the publick has chosen and appointed. For without this the Law could not have that, which is absolutely necessary to its being a *Law, the consent of the Society*, over whom no Body can have a power to make Laws, but by their own consent, and by Authority received from them; and therefore all the Obedience, which by the most solemn Ties any one can be obliged to pay, ultimately terminates in this *Supream Power*, and is directed by those Laws which it enacts.[46] The *Legislative cannot transfer the Power of Making Laws* to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it on to others.[47]

Thus, "delegated power" meant to Locke "entrusted" or "fiduciary" power.[48] It can hardly be doubted that Locke provided the inspiration for the authors of *The Federalist*. To them, "delegation," "confidence and fidelity," as well as "public," "legislative," or "representative trust" meant one and the same thing. "The institution of delegated power

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to believe, that he ever read it. Laslett reaches the same conclusion regarding Locke's knowledge of Coke's Institutes (Laslett in Locke, at 77, 130, 444). Laslett points out that besides Locke's few citations to other writers—for instance, Hooker—it is generally almost impossible to find any direct sources. Id. at 130. An even less likely source of Locke's exposition is the Roman Law. The material connecting link between Locke and the medieval tradition is the "trust" idea, which is for Locke a political rather than a legal concept. See Laslett, Id. at 112.

[44] Locke, §§ 134, 149.

[45] Id. § 141. It is obvious, however, that the establishment of the legislature by the constituent power of the people does not involve a "delegation" in the exact technical sense; cf. Triepel, supra note 21, at 68, 76.

[46] Locke, § 134.

[47] Id. § 141.

[48] Id. §§ 139, 142, 149, 155, 156, 221, 222, 226, 240. On the subject of "political trusteeship" in Locke and in 17th and 18th century England generally see Gough, John Locke's Political Philosophy ch. 7 (1950); Laslett in Locke, at 112; see further Maitland, "Trust und Korporation," 32 Grünhuts Zeitschrift 1 (1905).

implies that there is a portion of virtue and honour among mankind which may be a reasonable foundation of confidence; and experience justifies the theory."[49] The Constitution speaks of "granted," "vested" or "delegated" powers, and the Supreme Court uses the term "confided powers."[50]

It is Locke, therefore, on whom American courts really rely when they apply the prohibition against subdelegation of legislative power. The decisive reason for the prohibition is that it is the participation of the people (through their representatives) that validates legislation and the burdens which the legislature may place upon the citizenry. Thus, it first becomes fully clear why the Supreme Court has not applied the prohibition to the legislative power of Congress with regard to the territories;[51] there is no consent-trust-relation between the people of the territories and Congress.

That the courts have cited the "maxim" of the law of agency, rather than Locke, may have two explanations. For one thing, the problem of delegation of law-making power first arose in the "local option" and "state-wide referendum" cases,[52] in which the legislative power—if it was delegated at all—was "redelegated" to the people themselves. Whereas Locke's theory could hardly be said to have opposed such a redelegation, the courts were unwilling to approve any such trend toward "direct" democracy.[53] Neither could the principle of separation of powers in these cases provide convincing grounds for requiring legislatures to do their jobs themselves. Therefore, the courts fell back on the agency "maxim" for the rule that the law-maker himself must exericse the power entrusted to him.[54]

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[49] Hamilton in No. 76 (Everyman's Library Edition, 1929, p. 389).

[50] U.S. Const. arts. I, II and III; amend. X. See also Kilbourn v. Thompson, 103 U.S. 168, 188 (1881). Story maintained that power delegated by the people at an election returned to them at the end of the term; 2 Story, Commentaries on the Constitution of the United States § 517 (1st ed. 1833). In this respect, Story was in conflict with Locke, who said: "[T]he People when the Legislative is once Constituted, having in such a Government as we have been speaking of no Power to act as long as the Government stands. . . ." Locke, § 157 in connection with §§ 149, 150, 154.

[51] See United States v. Heinszen, 206 U.S. 370, 384 (1907); Dorr v. United States, 195 U.S. 138, 146, 153 (1904); De Lima v. Bidwell, 182 U.S. 1, 196 (1901).

[52] See note 17 supra.

[53] In the end, the "local option" statutes were generally upheld, "state-wide referendum" statutes struck down. See literature cited in note 17 supra.

[54] Even the reliance on this maxim was not very impressive. Holmes, J., in a dissenting opinion delivered from the Massachusetts bench, said of the legislature making such delegation:

> "I agree that confidence is put in it as an agent. But I think that so much confidence is put in it that it is allowed to exercise its discretion by taking the opinion of its principal. . . ."

Matter of Municipal Suffrage to Women, 160 Mass. 586, 36 N.E. 488, 492 (1894). He continued that, as the language in the important case of Rice v. Foster, 4 Del. (4 Harr.) 479, 488 (1847) showed, the doctrine of the illegality of such methods of law-making is but "an echo of Hobbes' theory, that the surrender of sovereignty by the people was final." But cf. Locke in the passage quoted supra note 50.

The second and more important reason for reliance on the maxim instead of on Locke may have been that Locke lost his status as properly citeable authority. With the growth of the anti-slavery movement American courts tended to transform into constitutional doctrines the extra-constitutional limitations which they had imposed on the state legislatures in fighting radical doctrines of legislative sovereignty.[55] For instance, in the *Wynehamer* case[56]—well-known for its contribution to the development of substantive due process—Judge Comstock explained that the dangers inherent in relying on "the nature and form of our government," "fundamental principles of liberty," "common reason" and "natural rights" had not been so clear previously[57] as they had become at a time "when theories alleged to be founded in natural reason or inalienable rights, but subversive of the just and necessary powers of government, attract the belief of considerable classes of men." He therefore rejected extra-constitutional, "political" doctrines—or rather presented them as constitutional arguments, couched in the language of substantive due process.[58] In one of the decisions involving local option and state-wide referendum statutes, two years prior to this New York case, a Tennessee court had already said that the "genius or general principles of republicanism, democracy or liberty" provided no proper standard for judicial review.[59] Thus the Lockian *political* principle of the nondelegability of legislative power was replaced by the *legal* principle of the law of agency—connected with the former by the "trust" concept—"that a power conferred upon an agent because of his fitness and the confidence reposed in him cannot be delegated by him to another. . . ."[60]

To the cases which dealt with the delegation of law-making functions to administrative agencies, the courts applied in addition the principle of separation of powers, combining the doctrine that the three branches of government must be kept separate with the agency maxim. For example, in one of the few cases in which the Supreme Court made specific references to the doctrine of separation of powers as well as to the maxim it said:

The well-known maxim *'Delegata potestas no potest delegari,' applicable*

[55] For this development see ten Broek, the Anti-Slavery Origins of the Fourteenth Amendment (1951); Graham, "The Early Antislavery Background of the Fourteenth Amendment," 1950 Wis. L. Rev. 479, 610.

[56] Wynehamer v. New York, 13 N.Y. 378, 391-2 (1856). See also Cooley, supra note 18, at 164, 174.

[57] With reference to the opinion of Chase, J., in Calder v. Bull, 3 U.S. (3 Dall.) 386, 387 (1798).

[58] 13 N.Y. 378, 391, 392; cf. Gunn v. Barry 82 U.S. (15 Wall), 610, 623 (1873).

[59] Louisville & N.R. Co. v. Davidson, 33 Tenn. (1 Sneed) 637, 668 (1854).

[60] Locke's Appeal, 72 Pa. 491, 494 (1873).

> to the law of agency in the general and common law, is well understood and has had wider application in the construction of our Federal and state Constitutions than it has in private law. Our Federal Constitution and state Constitutions of this country divide the governmental power into three branches. . . . [I]t is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch. . . ."[61]

In the end, however, both legal principles, in so far as they deal with the delegation of legislative power, are merely judicial props for the old political "trust" concept. Thus Duff and Whiteside's statement that the maxim is "often thinly disguised as the 'sacred trust' imposed on the legislature,"[62] turns the actual relationship of the two ideas inside out.

Conclusion

The conclusion must not be that law-making power may not be generally delegated.[63] To the contrary, one of the tasks of the legislature is to allocate it. However, as was suggested in the opening sentences of this article, some legislative powers may be nondelegable. The point to be made is that at the bottom of the maxim is the "political trust" concept, which has deep roots in Anglo-American constitutional thinking.[64] The maxim cannot be dismissed on the ground that it was derived from a medieval transcriptional error, for in substance—as has been shown—it was not. Neither can the basic concept of political trust be abandoned as long as constitutional government is to be kept alive.

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61 Hampton Jr. & Co. v. United States, 276 U.S. 394, 405-06 (1928).

62 Duff & Whiteside, supra note 2, at 195, compare note 9.

63 I have dealt with the more practical problems in the portion of my book following the section here selected for translation.

64 Its importance for the American system of government has recently been stressed by Fraenkel, Das Amerikanische Regierungssystem 180-186 (1960).