Due Process, Delegation, and Private Veto Power

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ABSTRACT: Nondelegation doctrine is enjoying a scholarly revival. Some commentators have read the U.S. Supreme Court's 2019 decision in Gundy v. United States *to portend new limitations on Congress's ability to give away its authority to the executive branch. Other recent Supreme Court opinions have raised similar questions about delegation to private entities. Together, these cases may suggest imminent new constraints on the administrative state, generating urgent reconsideration of the purpose and application of the nondelegation doctrine.*

This Article is focused on one particular line of nondelegation cases that has received less attention in the nondelegation debate: those involving private vetoes. The private-veto doctrine holds that the government cannot, consistent with the Due Process Clause, grant standardless control to private individuals or entities over the property or liberty of others. Rather than waxing and waning like other forms of nondelegation, the private-veto doctrine has retained vitality for over a century. In fact, it is woven into a variety of constitutional doctrines, and it helps to explain cases like Larkin v. Grendel's Den *and* City of Cleburne v. Cleburne Living Center, *which embody the principle that due process is infringed when the government enables private individuals to exercise sovereignty over others based on illicit motives.*

Yet, joining the private-veto doctrine with other nondelegation doctrines has resulted in courts and scholars both misunderstanding what is unique and important about this line of cases and failing to analyze legal questions properly. This particular delegation doctrine is primarily concerned not with separation of powers, but with arbitrary uses of power, including those motivated by pecuniary bias and by personal prejudices against unpopular groups. Thus, in addition to urging a more clear-eyed reconsideration of the

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private-veto doctrine, this Article suggests that the doctrine may be relevant to current constitutional controversies in ways that have not previously been recognized. In particular, it may provide a stronger basis for litigation challenging statutes that empower religious individuals to deprive third parties of access to contraception and other forms of health care.

INTRODUCTION

The Due Process Clause[1] forbids the government to grant standardless, unreviewable control to private individuals or entities over the property or liberty of others. This proposition has long been an uncontroversial one in constitutional law. Indeed, it is self-evidently inconsistent with fundamental fairness, individual liberty, and equal citizenship to allow some private individuals to exercise sovereignty over other private individuals, empowering them to make decisions about another person's financial or fundamental personal

1. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."); U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

interests, based on personal motives. Yet, this basic axiom of constitutional law—often referred to as a principle of "private nondelegation"—has become doctrinally entangled with other forms of delegation and, as a result, has seemingly lost its distinctiveness.[2]

This due-process principle is both longstanding and deeply entrenched. In the 1912 case *Eubank v. City of Richmond*,[3] the Supreme Court held unconstitutional a city ordinance that allowed two-thirds of property owners on a street to demand a particular setback for future building, noting that it allowed one set of private individuals to exert control over another's property without any legal constraints on their exercise of discretion.[4] More recently, this principle has been used to strike down occupational licensing schemes that make the ability to do business depend on the discretion of private parties.[5] But the principle that the government cannot enable arbitrary exercises of coercive authority by private individuals can be identified in a wide swath of constitutional cases, from *Larkin v. Grendel's Den, Inc.*, striking down a delegation of authority over a bar's liquor license to a nearby church,[6] to *Palmore v. Sidoti*, holding that the racial prejudices of unrelated individuals may not dictate a child custody decision.[7] This principle has an affiliation, too, to cases striking down standardless delegations of authority to *public* officials, such as *Yick Wo v. Hopkins*, which invalidated the use of administrative licensing discretion to discriminate against Chinese laundry operators,[8] and *Freedman v. Maryland*, which struck down a state film licensing scheme lacking in standards and procedural safeguards.[9]

Drawing upon this lengthy and diverse array of cases, this Article argues that current controversies over statutes granting exemptions to religious

2. Jacqueline Y. Ma, Note, *"Undue" Delegation: Private Delegation and Other Strategies to Challenge Admitting-Privileges Laws*, 30 COLUM. J. GENDER & L. 549, 576–77 (2015) (noting that the due process and non-delegation doctrines have "become muddled") (footnote omitted); *cf.* Paul J. Larkin, Jr., *The Lost Due Process Doctrines*, 66 CATH. U. L. REV. 293, 354–55 (2016) (situating this doctrine within a lost history derived from the Magna Carta's prohibition against arbitrary laws).

3. *See generally* Eubank v. City of Richmond, 226 U.S. 137 (1912) (discussing the validity of a city zoning ordinance).

4. *Id.* at 143–44.

5. *See infra* text accompanying notes 47–71.

6. Grendel's Den, Inc. v. Goodwin, 495 F. Supp. 761, 764–65 (D. Mass. 1980), *aff'd*, 662 F.2d 102 (1st Cir. 1981), *aff'd sub nom.* Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982).

7. Palmore v. Sidoti, 466 U.S. 429, 431–34 (1984). As explained in Section I.A.4, no actual private party exercised a veto over the child custody decision in *Palmore*. Instead, the family court judge in *Palmore* based the custody decision on the potential hostility of unidentified third parties who were not involved in the case. *See infra* Section I.A.4. But *Palmore* is discussed in this Article as a manifestation of the broader, bedrock constitutional principle that individuals' fundamental liberty and property interests may not be legally subordinate to the irrational prejudices of others.

8. Yick Wo v. Hopkins, 118 U.S. 356, 367–70 (1886).

9. Freedman v. Maryland, 380 U.S. 51, 57–59 (1965); *see id.* at 57 ("[T]he Maryland statute lacks sufficient safeguards for confining the censor's action to judicially determined constitutional limits, and therefore contains the same vice as a statute delegating excessive administrative discretion.").

individuals from generally applicable laws may also involve improper delegation of private veto power over third parties' rights. Arguably, the private-veto doctrine better captures the harm that occurs when religious individuals are given the power to deny others access to contraception and other public entitlements than the legal theories that are currently applied to such cases. The private-veto doctrine is thus an under-explored avenue for challenging those laws, as well as an under-recognized aspect of Due Process doctrine that is nonetheless fundamental to the concept of the rule of law.

Because laws that convey this sort of authority to private parties involve a delegation of governmental authority, courts and commentators often lump this doctrine together analytically with other forms of "delegation."[10] In particular, the due process private-delegation doctrine is often treated as a subset of the doctrine forbidding delegation of legislative power outside the legislative branch. That doctrine, long considered a dead letter, is now experiencing a renaissance of scholarly attention in light of the Supreme Court's recent decision in *Gundy v. United States*.[11] In *Gundy*, the Court upheld a federal law against a challenge that it impermissibly delegated legislative authority to the executive branch, but the conservative justices all indicated a willingness to consider reviving that long-dormant doctrine.[12] In addition, the Supreme Court's 2022 decision in *West Virginia v. Environmental Protection Agency*,[13] which held that the "major questions" doctrine foreclosed the

10. *See, e.g.*, Ma, *supra* note 2, at 576 ("Courts have tackled the problem of improper delegation through two doctrines: non-delegation and due process. Frequently these two analyses become muddled."); Benjamin Silver, *Nondelegation in the States*, 75 VAND. L. REV. 1211, 1213–14 (2022) (describing private nondelegation as simply one branch of nondelegation doctrine); Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 977–78 (2014) (demonstrating how courts confuse the due-process doctrine with other delegation doctrines grounded primarily in separation-of-powers concerns and arguing that they should be kept analytically distinct).

11. Gundy v. United States, 139 S. Ct. 2116, 2121 (2019). Delegation doctrine is all the rage these days. For a sampling of post-*Gundy* scholarship on the delegation doctrine, see, e.g., Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1931–94 (2020); Richard A. Epstein, *Delegation of Powers: A Historical and Functional Analysis*, 24 CHAP. L. REV. 659, 659–64 (2021); Paul J. Larkin, Jr., *The Private Delegation Doctrine*, 73 FLA. L. REV. 31, 40 –45 (2021); Gary Lawson, *"I'm Leavin' It (All) Up to You":* Gundy *and the (Sort-of) Resurrection of the Subdelegation Doctrine*, 2018 CATO SUP. CT. REV. 31, 32–64; and Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 279–82 (2021).

12. *Gundy*, 139 S. Ct. at 2121, 2124 (stating that the challenged "delegation falls well within permissible bounds"); *id.* at 2131 (Alito, J., concurring) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."); *id.* (Gorsuch, J., dissenting) (urging immediate reconsideration of the Court's lax approach to delegation). Justice Kavanaugh, who was not on the Court when *Gundy* was argued and therefore did not participate in the decision, also has expressed sympathy for reviving the nondelegation doctrine. *See* Paul v. United States, 140 S. Ct. 342, 342 (2019) (mem.) (statement of Kavanaugh, J., respecting the denial of certiorari) (suggesting that the nondelegation doctrine "may warrant further consideration in future cases").

13. *See generally* West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587 (2022) (reviewing the Affordable Clean Energy Rule).

Environmental Protection Agency's exercise of authority to regulate greenhouse gasses as it had done in the Clean Power Plan, arguably represented a revival of the nondelegation doctrine, because the "major questions" doctrine is similarly aimed at limiting massive, insufficiently specified grants of authority to administrative agencies.[14]

Both kinds of nondelegation doctrines—the doctrine forbidding certain delegations from Congress to administrative agencies and the doctrine forbidding certain governmental delegations to private parties—share similar characteristics and at times advance similar interests. For example, both doctrines, insofar as they address delegations of legal authority to private actors, are at least partially concerned about the possibility of self-dealing by the private actor, who has an incentive to exercise that authority for her own financial gain.[15]

This Article argues, however, that joining the private-veto doctrine with other delegation doctrines has resulted in courts and scholars both misunderstanding what is unique and important about this line of cases and failing to analyze legal questions properly. The due process doctrine forbidding private control over others' liberty or property interests—what I refer to as the "private-veto doctrine"—is concerned primarily with arbitrary uses of power, including those motivated not only by pecuniary bias but also by prejudices against unpopular groups—over legally recognized property or liberty interests. As such, it implicates both procedural and substantive due process and may be analyzed separately under each framework.

The siren song of nondelegation doctrine has also led courts and commentators to largely ask the wrong set, or at least an incomplete set, of questions in private-veto cases. There is good reason to consider, as some scholars have, whether the delegate is a private or public entity, since this inquiry will determine whether particular constitutional protections apply, and against whom.[16] In addition, as they have been doing, courts may have reason to ask what *kind* of power is being delegated—legislative or adjudicative—because the nature of the power exercised by the private delegate determines whether procedural due process protections apply.[17] But commentators have largely failed to ask an equally important question: *Over what* is the power being exercised? In order to invoke procedural due process

14. *Id.* at 2608–09. Justice Alito's concurrence, joined by Justice Gorsuch, made an explicit connection between the "major questions" doctrine and the nondelegation doctrine. *Id.* at 2618–19 (Alito, J., concurring).

15. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936); Evan C. Zoldan, *Delegation to Nonexperts*, 169 U. PA. L. REV. ONLINE 100, 109 (2020); David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 659 (1986).

16. *See generally* Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369–70 (2003) (noting that private delegations generally do not invoke constitutional constraints); *infra* text accompanying notes 186–87 (same).

17. *See* Lawrence, *supra* note 15, at 682–83; Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915).

review, a delegation usually must affect an individual's protected, fundamental interest in life, liberty, or property.[18] Similarly, heightened scrutiny applies under the substantive due process doctrines to arbitrary deprivations of constitutionally protected liberty or property interests.[19] Yet most analyses of the private-veto doctrine have missed this crucial point, often leading to the erroneous conclusion that the private-veto doctrine is far too sprawling and unmanageable to be judicially enforced.

This Article is thus unique, not in its focus on the problem of delegation to private actors, but in its particular focus on the problems associated with governmentally granted private vetoes over the property or liberty interests of another. Its approach is novel in situating this doctrine in the context of the well-established line of cases, including *Grendel's Den* and *Palmore*, imposing limits on governmental grants of power to private entities to regulate third parties based on their own prejudices and non-pecuniary biases. And it is the first to propose a manageable doctrinal test for judging the constitutionality of private vetoes. Finally, having made these contributions, this Article proposes some important implications of this new framing of the private-veto doctrine for contemporary legal and policy debates, particularly in the context of claims by religious individuals and institutions to exemptions from generally applicable laws.

This Article proceeds as follows. Part I presents a history of the private-veto doctrine and its development. Part I also compares and distinguishes the private-veto doctrine from the parallel nondelegation doctrine. Part II then identifies the specific interests served by the private-veto doctrine and outlines the appropriate doctrinal tests for courts to apply in determining whether a private veto is constitutionally permissible. Finally, Part III considers the implications of a properly understood private-veto doctrine for a number of legal problems, including the highly salient problem of laws granting control to religious institutions and individuals over the property and liberty interests of third parties.

I. DELEGATIONS AND PRIVATE VETOES

Nondelegation doctrine is enjoying a revival. Some see signs from the most conservative wing of the U.S. Supreme Court that it may be ready to reinstate limits on how much authority Congress can give away to the executive

18. RONALD D. ROTUNDA & JOHN E. NOWAK, 3 ROTUNDA & NOWAK'S TREATISE ON CONSTITUTIONAL LAW-SUBSTANCE AND PROCEDURE § 17.2 (2022) ("The due process clauses apply only if a government action will constitute the impairment of some individual's life, liberty or property." (footnote omitted)).

19. *Id.* § 15.5 ("Laws regulating property or liberty that do not restrict the exercise of a fundamental right should be upheld unless the person attacking the law can overcome the presumption of constitutionality and demonstrate that the law is not rationally related to a legitimate interest.").

branch and maybe even to private entities[20]—thus promising to radically constrain, if not entirely decimate, the modern administrative state. The private-veto line of cases has diverged from the nondelegation line of cases, and rather than waxing and waning like nondelegation, the private-veto doctrine has retained vitality and in fact made an appearance in a variety of constitutional doctrines.[21] As discussed below, these cases demonstrate courts' concern with harm to others through arbitrary decision-making motivated by self-interest or illicit bias. This concern overlaps with, but is not completely subsumed by, the concerns that motivate other aspects of nondelegation doctrine. It is a concern that resonates with a discourse of individual rights, equality, and equal citizenship, rather than more abstract, second-order concerns about separation of powers and political accountability. Part A, below, traces the private-veto doctrine through its various manifestations over time, whereas Part B describes in detail how the private-veto doctrine differs from the "other" nondelegation doctrine.

A. A HISTORY OF THE PRIVATE-VETO DOCTRINE

1. The Original Trio: *Eubank*, *Cusak*, and *Roberge* (plus *Yick Wo*)

A trio of cases decided in the early twentieth century laid the foundation for the private-veto doctrine: *Eubank v. City of Richmond*,[22] *Thomas Cusak Co. v. City of Chicago*,[23] and *Washington ex rel. Seattle Title Trust Co. v. Roberge*.[24] These cases vindicate the fundamental legal principle that the government may not grant arbitrary, standardless control to private individuals over the property of others. Although the Supreme Court struggled in the wake of these cases to delimit the doctrine they identified, often confusing it with other forms of "delegation," the principle has remained a steadfast and influential bedrock that has pollinated additional doctrinal offshoots.

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20. *See, e.g.*, *supra* note 12 (citing the various opinions in *Gundy* urging revitalization of the nondelegation doctrine); Texas v. Comm'r, 142 S. Ct. 1308, 1308 (2022) (mem.) (statement respecting the denial of certiorari (highlighting "the need [for the Court] to clarify the private non-delegation doctrine in an appropriate future case")); Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 56 (2015) (rejecting a private nondelegation challenge with respect to Amtrak based on the Court's finding that Amtrak is a public, not private entity); *id.* at 61 (Alito, J., concurring) (asserting "that Congress 'cannot [constitutionally] delegate regulatory authority to a private entity'" (quoting Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 721 F.3d 666, 670 (D.C. Cir. 2013), *vacated*, 575 U.S. 43 (2015), *remanded to* 821 F.3d 19 (2016))).

21. *See, e.g.*, Rice v. Vill. of Johnstown, 30 F.4th 584, 588 (6th Cir. 2022) (describing the private nondelegation doctrine).

22. *See generally* Eubank v. City of Richmond, 226 U.S. 137 (1912) (holding unconstitutional a city ordinance that delegated power over a homeowner's property to private individuals).

23. *See generally* Thomas Cusak Co. v. City of Chi., 242 U.S. 526 (1917) (upholding an ordinance regulating billboards in residential areas).

24. *See generally* Wash. *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928) (holding unconstitutional a zoning ordinance delegating power over zoning to private individuals).

In *Eubank*, the Supreme Court struck down a city ordinance that allowed two-thirds of property owners on a street to designate a setback for a lot on that street.[25] The challenger in that case had wanted to build a house with an octagonal bay window; the bay window would have jutted three feet into the required setback of fourteen feet, which was determined by the group of nearby property owners while the building plans were being created.[26] The Court found this delegation to private property owners unconstitutional, explaining that it took sovereignty from the state and handed it to private parties without any official oversight.[27] Moreover, the Court pointed to the lack of standards to govern the property owners' decisions, noting that the law, "while conferring the power on some property holders to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be exercised," such that "the property holders who desire and have the authority to establish the line may do so solely for their own interest, or even capriciously."[28] In other words, the standardless nature of the delegation opened up an invitation to arbitrary or self-interested decision-making.

Only five years after *Eubank* was decided, the Court appeared ready to walk its holding back. In *Thomas Cusak Co. v. City of Chicago*, the Court upheld a city ordinance that seemed to be plagued with all the same problems it found in *Eubank*. The City of Chicago had given the power to a majority of adjoining property owners to waive the city's general prohibition on erecting billboards within residential neighborhoods.[29] An outdoor advertising company sued, claiming that the law denied it due process.[30] The Court nonetheless upheld that law, reasoning that "billboards [belonged] in a class by themselves" in terms of the nuisance they created, and therefore they could properly be outlawed across the board by cities.[31] Somewhat unconvincingly, the Court reasoned that the advertising company actually benefited from the law, since it allowed the property owners to *waive* a general nuisance prohibition, rather than impose a new restriction, as in *Eubank*.[32] Characterizing the law as a waiver of a prohibition on billboards, instead of as conditioning permission

25. *Eubank*, 226 U.S. at 144.

26. *Id.* at 141–42.

27. *Id.* at 143–44 (noting the lack of "discretion" given the official body to ignore the property owners' wishes).

28. *Id.*

29. Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 527–28 (1917).

30. *Id.* at 527.

31. *Id.* at 529. The Court noted the evidence at trial indicated "that fires had been started in the accumulation of combustible material which gathered about such billboards; that offensive and insanitary accumulations are habitually found about them, and that they afford a convenient concealment and shield for immoral practices, and for loiterers and criminals." *Id.*

32. *Id.* at 531 ("The one ordinance permits two[-]thirds of the lot owners to impose restrictions upon the other property in the block, while the other permits one[-]half of the lot owners to remove a restriction from the other property owners.").

to erect a billboard on the vote of private property owners, looks like an act of legal formalism designed purely to evade *Eubank*.

But if the Court's questionable reasoning in *Cusak* raised doubts about the continuing vitality of the private-veto doctrine, the Court's 1928 decision in *Roberge* laid them to rest. Similar to the ordinance challenged in *Eubank*, the zoning ordinance at issue in *Roberge* provided a private veto to nearby landowners over another landowner's proposed land use.[33] Similarly to *Cusak*, however, the ordinance was written as a waiver provision—saying the property in question could only be used for residential and certain other purposes unless the owners of two-thirds of the property within four hundred feet of the proposed building consented to its use as "[a] philanthropic home for children or for old people," which was the precise use that the plaintiff desired.[34] Striking down this aspect of the city zoning ordinance, the Court distinguished *Cusak* as pertaining only to nuisances and revived *Eubank*'s holding that giving nearby landowners "authority—uncontrolled by any standard or rule prescribed by legislative action" over another's property, without supervision by any public body, violated the Due Process Clause.[35]

Interestingly, the *Roberge* Court cited *Yick Wo v. Hopkins* in highlighting its concern about arbitrary use of power under the challenged ordinance.[36] *Yick Wo* was a seminal case involving a nineteenth-century San Francisco ordinance forbidding laundries to operate in buildings not made of brick or stone, unless the operator obtained the consent of an official body, the board of supervisors.[37] All of the petitions filed by Chinese laundry owners were denied, whereas all petitions by non-Chinese owners except one were granted.[38] Many of those Chinese operators had been in business at the same location for years, even decades.[39] While the Court's ultimate holding was grounded in the Equal Protection Clause due to the law's blatantly selective administration, the Court spent several paragraphs highlighting the problem of laws that give wide and unbridled enforcement discretion to public officials.[40] For example, the Court observed that the laundry provision "seem[ed] intended to confer, and actually to confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or

33. Washington *ex rel.* Seattle Title Tr. Co. v. Roberge, 278 U.S. 116, 118 (1928).

34. *Id.*

35. *Id.* at 121–22.

36. *Id.* at 122 ("They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice." (citing Yick Wo v. Hopkins, 118 U.S. 356, 366, 368 (1886))).

37. *Yick Wo*, 118 U.S. at 368.

38. *Id.* at 359.

39. *Id.*

40. *Id.* at 373–74 (holding that the law was "administered . . . with an evil eye and an unequal hand"). Of course, in this passage the Court was focusing on equal protection concerns rather than delegation concerns, but it was the law's broad delegation that created the possibility of discriminatory enforcement.

withhold consent, not only as to places, but as to persons."[41] The Court then suggested, in a lengthy passage, that the principle at issue in *Yick Wo* was fundamental to the very nature of American democracy and the rule of law:

> When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. . . . [I]n our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. . . . For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.[42]

Thus, beyond the concern about the racial discrimination that the Court clearly perceived to be at work in this specific case, it emphasized that it was incompatible with the rule of law and individual liberty to grant unconstrained sovereignty, capable of being exercised discriminatorily or arbitrarily, over people's "life, liberty, and . . . pursuit of happiness," "or . . . means of living."[43] It did not appear to matter to the Court in *Yick Wo* and *Roberge* whether the one exercising arbitrary power was a public official or another private citizen.[44]

2. Modern Occupational Licensing Cases

Although the Supreme Court seemingly receded from the nondelegation doctrine, never again to hold a private delegation unconstitutional after its 1935 decision in *Carter Coal*, discussed below,[45] the private-veto principle has in fact retained vitality—though it has often been couched in other, more

41. *Id.* at 366. In this way, the Court noted, it differed from other licensing laws in which a public official is to determine the fitness of a particular applicant to run a particular business, "because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature" rather than leaving it to the officer's arbitrary will. *Id.* at 368.

42. *Id.* at 369–70.

43. *Id.* at 370.

44. *But see* Silver, *supra* note 10, at 1241–42 (describing "[t]he [s]overeignty theory" of nondelegation doctrine "as the view that certain governmental functions must be exercised by public officials acting in their official capacities" and extending this principle to interbranch and intergovernmental delegations by adding the qualifier that the sovereignty "must be exercised . . . by officials of the *correct* government").

45. *See, e.g.*, James M. Rice, *The Private Nondelegation Doctrine: Preventing the Delegation of Regulatory Authority to Private Parties and International Organizations*, 105 CALIF. L. REV. 539, 548 (2017).

recognizable doctrines.[46] For example, the doctrine has made inconsistent appearances in cases challenging occupational licensing regimes.[47] In *Gibson v. Berryhill*, the Supreme Court held that the Alabama Board of Optometry, which was comprised exclusively of independent optometrists in private practice, could not adjudicate the licenses of a corporation that employed competitor optometrists, due to the intolerable likelihood that the independent optometrists' financial interests would come into play in their decision-making.[48] On the other hand, in cases such as *Withrow v. Larkin* and *Friedman v. Rogers*, the Court rejected similar claims that one group of professionals could not be permitted to sit in judgment over the ability of other professionals in the same field to continue to practice.[49]

Courts have applied the doctrine directly in the context of abortion clinic regulations that delegate to private institutions decisions upon which a clinic's ability to operate depends. In 1974, in *Hallmark Clinic v. North Carolina Department of Human Resources*,[50] a federal district court struck down a licensing law for abortion facilities that required them to have a formal written agreement with a local hospital and ambulance service to ensure, in the case of a complication requiring immediate attention, the patient could access the hospital within fifteen minutes, or to certify that all physicians providing abortions at the clinic have admitting privileges at a hospital within fifteen minutes travel time.[51] Because hospitals could control the clinics' ability to stay open by granting or denying the required agreement or admitting privileges, the North Carolina law created a delegation problem. Citing *Yick Wo*, the court explained "that due process cannot tolerate a licensing system that makes the privilege of doing business dependent on official whim."[52] In this case, the

46. *See, e.g.*, Rice v. Vill. of Johnstown, 30 F.4th 584, 589–90 (6th Cir. 2022) ("The Court has never overruled *Eubank* or *Roberge*. And these cases have made occasional appearances in the Court's later opinions." (footnote omitted)).

47. There is an extensive literature critiquing the federal courts' approach to reviewing occupational licensing schemes, usually on the ground that the review is too deferential. *See, e.g.*, Evan Bernick, *Towards a Consistent Economic Liberty Jurisprudence*, 23 GEO. MASON L. REV. 479, 480 (2016); Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 6 (1976); Clark Neily, *Beating Rubber-Stamps into Gavels: A Fresh Look at Occupational Freedom*, 126 YALE L.J.F. 304, 305 (2016).

48. Gibson v. Berryhill, 411 U.S. 564, 579 (1973).

49. Withrow v. Larkin, 421 U.S. 35, 54–55 (1975); Friedman v. Rogers, 440 U.S. 1, 17–18 (1979). In *Friedman*, "commercial optometrists" challenged the composition of the state optometry board, which was composed only of "professional optometrists" hostile to "the commercial" approach. *Id.* at 17–18. The Court rejected the notion that commercial practitioners had to be included on the board in order to avoid bias, but it emphasized at the same time that "the commercial . . . optometr[ists] . . . ha[d] a constitutional right to a fair and impartial hearing in any disciplinary proceeding . . . by the [b]oard." *Id.* at 18.

50. *See generally* Hallmark Clinic v. N.C. Dep't of Hum. Res., 380 F. Supp. 1153 (E.D.N.C. 1974) (striking down certain state regulations of abortion clinics), *aff'd on other grounds*, 519 F.2d 1315 (4th Cir. 1975).

51. *Id.* at 1155–58.

52. *Id.* at 1158 (citing Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

delegation was to a private rather than a governmental actor; however, state action led to the due process violation, in that the government had granted this authority to private hospitals without providing standards for "the hospital's decision to grant or withhold a transfer agreement, or even to ignore a request for one."[53] Moreover, analogizing to a case in which the court had struck down a law requiring spousal consent for an abortion, the court highlighted both the fact that this case involved arbitrary power affecting individuals' constitutional rights and the fact that the state purported to "grant hospitals power it does not have itself"—namely, an "arbitrary power to veto the performance of abortions for any reason or no reason at all."[54] On much the same grounds, a Michigan district court struck down a similar state law requiring written agreements concerning emergency hospital admissions.[55]

More recent cases in the abortion context have also relied upon the private-veto doctrine to strike similar licensing requirements on abortion facilities.[56] For example, a Wisconsin district court struck down as an impermissible delegation a state law requiring abortion providers to have admitting privileges at a hospital within thirty miles of their practice.[57] And in *Women's Medical Professional Corporation v. Baird,* citing both *Yick Wo* and *Roberge,* the Sixth Circuit rejected an abortion clinic's claim that the requirement to obtain a written transfer agreement with a local hospital in order to continue operating "was [an] impermissible delegation of authority to a third party."[58] However, the claim failed only because the purported private veto could be overridden by the state health director if the director found that it caused undue hardship and that the health and safety goals could be met through alternate means—thus introducing both standards and governmental

53. *Id.* Moreover, some courts have found, in a related context, that hospitals sometimes deny admitting privileges for anticompetitive reasons. *See, e.g.*, Weiss v. York Hosp., 745 F.2d 786, 819–20 (3d Cir. 1984).

54. *Hallmark Clinic*, 380 F. Supp. at 1158–59.

55. Birth Control Ctrs., Inc. v. Reizen, 508 F. Supp. 1366, 1375 (E.D. Mich. 1981), *aff'd on other grounds*, 743 F.2d 352 (6th Cir. 1984). Though both decisions were appealed, neither resulted in an appellate court decision upholding the private veto holding, because in neither case was that particular aspect of the court's holding appealed. Hallmark Clinic v. N.C. Dep't of Hum. Res., 519 F.2d 1315, 1316 (4th Cir. 1975) (noting that the defendants had not appealed—only the plaintiffs had appealed the denial of attorney fees, which the defendants claimed was proper because they "vigorously resist[ed] any attempt to impute to them the conduct of the hospital authorities"); *Birth Control Ctrs., Inc.*, 743 F.2d at 356 n.2.

56. *See generally* B. Jessie Hill, *The Geography of Abortion Rights*, 109 GEO. L.J. 1081, 1132–36 (2021) (listing several cases that use the private-veto doctrine to oppose the government infringing upon a person's constitutional rights); Ma, *supra* note 2, at 581–89 (cataloging additional cases where the private-veto doctrine has been used).

57. Planned Parenthood of Wis., Inc. v. Van Hollen, 94 F. Supp. 3d 949, 997 (W.D. Wis. 2015) ("[T]he State cannot impose this requirement through third parties, at least in the admitted absence of a waiver or some other mechanism to ensure due process." (footnote omitted)), *aff'd on other grounds sub nom.*, Planned Parenthood of Wis., Inc. v. Schimel, 806 F.3d 908 (7th Cir. 2015).

58. Women's Med. Pro. Corp. v. Baird, 438 F.3d 595, 609–10 (6th Cir. 2006).

oversight to the licensing decision.[59] Similarly, because hospitals were required by law to provide due process protections, including notice and a hearing, when denying admitting privileges, an Arizona law requiring admitting privileges for abortion providers was similarly upheld by the Ninth Circuit against a nondelegation challenge.[60] But the basic principle—that the state may not grant a private veto over another's business license, without providing standards or official review—remained unquestioned.

Admittedly, in other cases, courts have appeared more reluctant to apply this doctrine to abortion clinic licensing regulations. For example, courts have rejected challenges to admitting privileges requirements imposed directly on physicians who perform abortions rather than as a condition of licensing for abortion clinics, asserting simply that the law "involve[d] state regulation of the qualifications of persons who perform abortions rather than standards for licensure of abortion clinics."[61] In other cases, courts have either cursorily rejected such claims or simply avoided them, or plaintiffs have declined to press them.[62]

State courts, similarly, have sometimes struck down occupational licensing requirements as delegating excessive authority to private individuals or to public officials, though the actual constitutional grounds for those decisions dthe state constitutional clause vesting legislative power only in the state legislature, and also because of its "lack of guides and proper standards" for the Jockey Club's exercise of discretion.[63] Thus, the court noted, the law

59. *Id.* at 610; *cf. id.* at 609 ("Hospitals have the unfettered power to decide whether or not to enter into an agreement. Director Baird admitted that Ohio has no power over hospitals to direct them as to how to respond to requests for written transfer agreements and that hospitals could deny such a request for business, religious, personal, or political reasons.").

60. Tucson Woman's Clinic v. Eden, 379 F.3d 531, 556 (9th Cir. 2004); *cf.* Greenville Women's Clinic v. Comm'r, 317 F.3d 357, 363 (4th Cir. 2002) (rejecting a nondelegation challenge to a state's admitting privileges requirement on the ground that it was "so obviously beneficial to patients, . . . and the possibility that the requirements will amount to a third-party veto power is so remote," as well as the fact that the requirement could be waived by a public official (citation omitted)).

61. Women's Health Ctr. of W. Cnty., Inc. v. Webster, 871 F.2d 1377, 1382 (8th Cir. 1989) (citation omitted); *see also* Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 748 F.3d 583, 600 (5th Cir. 2014) (rejecting a nondelegation claim on the same grounds as *Webster*).

62. *See* EMW Women's Surgical Ctr., P.S.C. v. Glisson, No. 17-cv-00189, 2018 WL 6444391, at *28 n.29 (W.D. Ky. Sept. 28, 2018), *rev'd in part, vacated in part sub nom.* EMW Women's Surgical Ctr., P.S.C. v. Friedlander, 978 F.3d 418 (6th Cir. 2020) (declining to reach the nondelegation claim); Jackson Women's Health Org. v. Currier, 940 F. Supp. 2d 416, 420 n.2 (S.D. Miss. 2013) (noting that the plaintiffs "reserved" their nondelegation claim and "advis[ing] Plaintiffs to assert their arguments if they deem them worthy"), *aff'd as modified*, 760 F.3d 448 (5th Cir. 2014); *Schimel*, 806 F.3d at 922 (affirming the Wisconsin district court's decision without reaching the nondelegation claim).

63. Fink v. Cole, 302 N.Y. 216, 225 (1951); *see also* Packer Collegiate Inst. v. Univ. of State of N.Y., 298 N.Y. 184, 192 (1948) ("[I]t would be intolerable for the Legislature to hand over to any official or group of officials, an unlimited, unrestrained, undefined power to make such regulations as he or they should desire, and to grant or refuse licenses to such schools, depending on their compliance with such regulations.").

would be unconstitutional even if this form of discretion were exercised by a government official.[64] Indeed, the Arkansas Supreme Court even held unconstitutional a hospital admitting privileges process itself, when it required the approval of a private group before privileges would be granted. In *Ware v. Benedikt*, a duly licensed German-born physician challenged a public hospital's denial of admitting privileges to him, which was ostensibly based on his failure to attain membership in or the recommendation of the county medical society (a private association).[65] The association denied the physician's membership application, without providing a reason, a dozen times during the 1940s and 1950s.[66] Noting that "[a] medical society is a private organization whose membership conceivably may bestow or withhold approval of a fellow physician's application for a valid reason, or for no reason at all," the court held that the denial of access to the public hospital for reasons that are "unreasonable, arbitrary, capricious or discriminatory" was invalid, without specifying a constitutional basis for its holding.[67] Similarly, the California Supreme Court struck down as denying equal protection a law requiring opticians, in order to become licensed, to practice under the supervision of another licensed optician for at least five years, as "confer[ring] upon presently licensed dispensing opticians the unlimited and unguided power to exclude from their profession any or all persons" without any review by a public official or agency.[68]

Of course, it is easy to see how this private-veto principle might spiral out of control, drawing into question nearly all professional licensing schemes. For example, the requirement to attend an ABA-accredited law school in order to receive a license to practice law in some sense delegates veto power to those law schools, without legal standards to guide their admissions or graduation decisions.[69] Thus, courts have not always adhered strictly to the

64. *Fink*, 302 N.Y. at 225.

65. Ware v. Benedikt, 280 S.W.2d 234, 235 (Ark. 1955).

66. *Id.* One could certainly speculate that anti-German bias, related to the recent World War, played a role in the group's decision.

67. *Id.* at 187–89.

68. Blumenthal v. Bd. of Med. Exam'rs, 368 P.2d 101, 104 (Cal. 1962) (en banc); *see also id.* at 105 (citing cases from other state courts reaching similar conclusions in analogous cases involving occupational licensing laws); Gibson v. Berryhill, 411 U.S. 564, 579 (1973) (holding that an association of optometrists with a financial interest in the matter could not judge a disciplinary case involving another group of optometrists).

69. *See In re* Hansen, 275 N.W.2d 790, 796–97 (Minn. 1978) (upholding such a requirement against a nondelegation challenge). However, the American Bar Association provides extensive guidance and extremely detailed requirements from accreditation of law schools. *See* AMERICAN BAR ASSOCIATION, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2021–2022, at 1–45 (2021), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2021-2022/2021-2022-aba-standards-and-rules-of-procedure.pdf [https://perma.cc/Q4SC-7545]. Moreover, if a law school is denied accreditation, it can appeal this decision. *Id.* at 70–74. In fact, access to an appellate process is

private-veto principle even in the licensing context.[70] As discussed below in Part II, however, many of these cases rejecting nondelegation challenges in the licensing context can be explained using a proper understanding of private-veto principle.

3. Prejudgment Seizure

In their concern about private control over another's property interests, the licensing cases resemble cases involving prejudgment seizure by private parties. In a series of cases decided in the 1960s and 1970s, the U.S. Supreme Court struck down state laws allowing individuals or companies to seize, or order the seizure of, another person's property—for example, to cover an unpaid debt or missed payments on an installment plan—without first getting a judgment from a court and with very little in the way of procedural safeguards to ensure the seizure was warranted.[71] These statutes thus involved a delegation of coercive power—a private veto over another's use of her property—without standards and without substantive government oversight.[72]

In one of those cases, *Fuentes v. Shevin*, the Court noted its concern that the challenged statutory procedures—which allowed a private person or company to enlist the sheriff to repossess goods purchased on an installment contract after filing paperwork with the court clerk but without any actual judicial oversight—ran a high risk of error or abuse because the seizing party's own "private gain" was at stake.[73] Indeed, though the Court did not highlight it, the facts in one case suggested that the private veto may have been used not just for financial gain but to further a personal grudge: One victim of a seizure had been in a custody dispute with her ex-husband, who also happened

required by the U.S. Department of Education, which regulates such accrediting agencies. *See* Student Assistance General Provisions, 84 Fed. Reg. 58,834, 58,834 (Nov. 1, 2019); *see also* Nat'l Ass'n of Forensic Couns. v. Fleming, 759 N.E.2d 389, 392–93 (Ohio Ct. App. 2001) (upholding a delegation of authority to a private accrediting agency in part because the private agency applied clear standards and review by a government official was available).

70. *See generally* DANIEL R. MANDELKER, JUDITH WELCH WEGNER, JANICE C. GRIFFITH, EVAN C. ZOLDAN & CYNTHIA BAKER, STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM (9th ed. 2021) (collecting cases on both sides).

71. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 96 (1972); Sniadach v. Fam. Fin. Corp. of Bay View, 395 U.S. 337, 342 (1969); *cf.* Mitchell v. W. T. Grant Co., 416 U.S. 600, 616–19 (1974) (upholding Louisiana's prejudgment sequestration procedure and distinguishing *Fuentes* on the ground that greater safeguards against error or abuse, including judicial involvement, were provided by the Louisiana law).

72. *Cf.* Metzger, *supra* note 16, at 1444 (suggesting that some of the Supreme Court's prejudgment seizure cases can be understood as implying "that the power to resolve disputes on a nonconsensual basis, even subject to later state court review, is one that government cannot delegate to private actors without preserving some opportunity for prior review" (footnote omitted)).

73. *Fuentes*, 407 U.S. at 83 ("Since his private gain is at stake, the danger is all too great that his confidence in his cause will be misplaced.").

to be the local deputy sheriff. Being familiar with the seizure procedure, he used it to seize their child's toys, clothes, and furniture.[74]

4. Other Constitutional Contexts

Outside the occupational licensing context, the private-veto doctrine can be seen most clearly in another line of cases dealing with licensing decisions. Going back almost as far as the first decisions incorporating the First Amendment against the states, the Supreme Court has recognized that individual speakers may "challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office."[75] Thus, laws providing for censorship boards or licensing of speech must provide procedural safeguards including prompt access to judicial review, during which the speech must be allowed to take place until adjudicated impermissible.[76] Of course, unlike the abortion clinic and other occupational licensing cases, this line of cases is decided under the Free Speech Clause—the theory being that in the absence of procedural safeguards, speech licensing laws confer "a species of unbridled discretion" on administrators and therefore create an unacceptable risk of suppressing speech protected by the First Amendment.[77] And, like *Yick Wo*, they involved arbitrary vetoes by government officials rather than by private actors. But the key principle in these cases is ultimately the same as in the cases based on the Due Process Clause: that it is unconstitutional for a law to provide an arbitrary veto over others' exercise of their property or liberty rights (which, as discussed below, includes their rights to free speech).[78]

The private-veto principle likewise makes an appearance in other constitutional cases that may not initially appear to involve nondelegation claims. For example, in *Larkin v. Grendel's Den*, the Court struck down a city ordinance that allowed a church to veto the liquor license of any establishment located "within a five hundred foot radius of" it.[79] The *Grendel's Den* decision was based on the Constitution's Establishment Clause: The Court found that the law "substitutes the unilateral and absolute power of a church for the reasoned decision making of a public legislative body acting on evidence and guided by standards, on issues with significant economic and political

74. *Id.* at 72.

75. Freedman v. Maryland, 380 U.S. 51, 56 (1965). The court went on to cite Lovell v. City of Griffin, 303 U.S. 444, 451 (1938) and other cases involving licensing of speech. *Freedman*, 380 U.S. at 56.

76. *Freedman*, 380 U.S. at 59–60; FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 223 (1990) (plurality opinion).

77. *FW/PBS, Inc.*, 493 U.S. at 223 (citation omitted).

78. *Infra* Section II.A.2; *cf.* City of Littleton v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774, 781, 783 (2004) (finding no First Amendment violation where the licensing decision is governed by "reasonably objective, nondiscretionary criteria unrelated to the content of the expressive materials," even in the absence of special statutory provisions ensuring a prompt judicial decision if the license is denied).

79. Larkin v. Grendel's Den, Inc., 459 U.S. 116, 117, 120 (1982).

implications."[80] But the Court's language drew on many of the same themes as the private-veto cases. For example, the Court noted that the law "delegate[d] to private, nongovernmental entities power to veto certain liquor license applications," explicitly reserving the question of whether such a delegation to private *secular* entities would ever be constitutional.[81] The Court also emphasized the "standardless" nature of the power exercised by churches, noting there was no bulwark against the church using that governmentally delegated power to advance religious aims.[82] In fact, given that the ordinance actually delegated power over liquor licenses not only to churches but also to schools (whether secular or religious), the restaurant challenging the law had also raised a nondelegation claim, which it had won in the trial court.[83] Citing *Eubank* and *Roberge* and distinguishing *Cusak*, the lower court had pointed to the standardless, unreviewable "veto" provided to private parties in concluding that the law violated due process principles.[84]

Similarly, in *Palmore v. Sidoti*,[85] the Supreme Court rejected the notion that private prejudices should play a role in official decisions regarding child custody. In *Palmore*, a state court judge had awarded custody to a child's father due solely to the mother's remarriage to a Black man—not because that marriage affected the mother's fitness but because, in the state court's view, the best interests of the child would be served by avoiding the societal discrimination and stigma she would face as the child of an interracial couple.[86] The Court described the question before it as "whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother" and quickly concluded that they were not.[87] The Court decided the case on equal protection rather than due process grounds; but in so doing, the Court essentially held that the Constitution does not permit individuals to exercise a private veto over another person's liberty or property interest.[88]

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80. *Id.* at 127.

81. *Id.* at 122 (citation omitted).

82. *Id.* at 125–26. As an example, the Court suggests "favoring liquor licenses for members of that congregation or adherents of that faith." *Id.* at 125. In a related vein, the Fourth Circuit held that the denial of a permit to an individual seeking to operate a palmistry business was arbitrary and therefore violated the individual's due process rights, in part because it was motivated by religious objections to the nature of the business. *See* Marks v. City of Chesapeake, 883 F.2d 308, 312 (4th Cir. 1989).

83. Grendel's Den, Inc. v. Goodwin, 495 F. Supp. 761, 766 (D. Mass. 1980).

84. *Id.* at 765–66. The First Circuit Court of Appeals reversed the district court's decision on the nondelegation claim, however, determining that the facts were more "analogous to *Cusack* . . . than to *Eubank* [and] *Roberge*." Grendel's Den, Inc. v. Goodwin, 662 F.2d 88, 90–95 (1st Cir. 1981) (emphasis added) (footnote omitted).

85. *See generally* Palmore v. Sidoti, 466 U.S. 429 (1984) (applying the Equal Protection Clause in a child custody dispute).

86. *Id.* at 431–32.

87. *Id.* at 433.

88. *See id.* at 433–34.

The case of *City of Cleburne v. Cleburne Living Center* is not generally thought of as a nondelegation case; yet, *Cleburne*'s facts are strikingly similar to those of *Roberge*. In both cases, a private person wished to construct a group home that was considered undesirable to the neighbors and was initially blocked from doing so due to the resistance of those neighbors. In *Roberge*, the proposed land use was a "home for aged poor," and in *Cleburne*, it was a group home for intellectually disabled individuals.[89] In *Roberge*, the private veto power was provided to nearby property owners by city ordinance, whereas in *Cleburne*, the veto arose in part from members of the community who exhibited or would likely exhibit prejudice toward the group home's residents.[90] The City explicitly referenced those community members' concerns as a basis for denying the permit.[91] Although the Court disapproved Cleburne's decision to block the establishment of the group home based on the Equal Protection Clause, applying rational basis review, it spoke in terms that resonate with the private-veto cases when it dismissed the City's "concern[] that the facility was across the street from a junior high school, and it feared that the students might harass the occupants of the [group] home."[92] "[D]enying a permit based on such vague, undifferentiated fears," the Court said, referencing *Palmore v. Sidoti*, "is again permitting some portion of the community to validate what would otherwise be an equal protection violation."[93]

In other words, the City of Cleburne had failed to come up with a rational basis for its zoning decision; essentially, providing a private veto over this land use to individual members of the community, acting on their private prejudices, is irrational and constitutionally unacceptable.[94] Indeed, the group home operators had raised a nondelegation claim in the lower courts, but subsequently abandoned it.[95] Nonetheless, in their Supreme Court brief, in the context of arguing that the Cleburne decision lacked a rational basis, the Cleburne Living Center again gestured toward the private-veto principle. Citing *Eubank* and *Roberge*, the brief asserted,

> Although there has been no formal delegation, the City nonetheless is precluded from claiming a legitimate governmental interest in simply

89. Washington *ex rel.* Seattle Title Tr. Co. v. Roberge, 278 U.S. 116, 117 (1928); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 435 (1985).

90. *Roberge*, 278 U.S. at 117–18; *Cleburne Living Ctr.*, 473 U.S. at 448–50.

91. *Cleburne Living Ctr.*, 473 U.S. at 448 ("[T]he Council was concerned with the negative attitude of the majority of property owners located within 200 feet of the Featherston facility, as well as with the fears of elderly residents of the neighborhood.").

92. *Id.* at 448–49.

93. *Id.* at 449 (referring to Palmore v. Sidoti, 466 U.S. 429, 434 (1984)).

94. *Id.*; *see also* Cleburne Living Ctr., Inc. v. City of Cleburne, 726 F.2d 191, 194 (5th Cir. 1984) (noting that the City took into account "the attitude of a majority of owners of property located within two hundred (200) feet of" the proposed group home in reaching its decision), *aff'd in part, vacated in part*, 473 U.S. 432 (1985).

95. *Cleburne Living Ctr.*, 473 U.S. at 437 n.5 ("The Court of Appeals did not address this [nondelegation] argument, and it has not been raised by the parties in this Court.").

> capitulating to those vague, undefined "citizens' interests" by requiring a special use permit for group homes for [intellectually disabled] people, but not for other congregate living situations which result in equally intensive uses of property.[96]

In fact, the Cleburne Living Center's Supreme Court brief cited *Palmore*, alongside *Eubank* and *Roberge*, for a similar nondelegation point.[97]

The cases reviewed here, which appear outside the due-process context, demonstrate the private-veto principle's bedrock nature. Although cases such as *Cleburne* and *Palmore* did not involve actual vetoes exercised by private individuals through a grant of governmental authority, they present striking analogies to the private-veto doctrine. They illustrate a deep-seated and trans-substantive concern with ensuring that equal citizenship is not undermined by the government empowering private individuals to deprive others of their property or liberty based on religious, racial, or other illicit motivations that are off-limits for the government itself to act upon.

B. THE OTHER NONDELEGATION DOCTRINE

Not long after *Roberge*, the Supreme Court introduced another species of nondelegation doctrine. Famously, in a pair of cases decided in 1935—and never again—the Supreme Court found unconstitutional the delegation of federal legislative power to executive agencies because there was no "intelligible principle" to constrain the agencies' exercise of power, in that it ran afoul of the constitutionally prescribed separation of powers.[98] And while both *Panama Refining* and *Schechter* struck down delegations outside the legislative branch to other *public* officials, both *Schechter*[99] and a case decided the following year, *Carter v. Carter Coal Co.*,[100] also discussed delegations of regulatory power to *private* entities.

In *Schechter*, the Court found that the National Industrial Recovery Act delegated insufficiently constrained authority to the executive branch.[101] It also noted, however, that the law conferred power on private industry groups, as well, to draft regulatory rules that would be approved or disapproved by the

96. Brief for Respondents at 16, *Cleburne Living Ctr.*, 473 U.S. 432 (No. 84-468).

97. *Id.* at 16–17.

98. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935); Panama Refin. Co. v. Ryan, 293 U.S. 388, 433 (1935). Specifically, the delegations violated the Vesting Clause in Article I, section 1 of the U.S. Constitution, which provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. CONST. art. I, § 1; *Schechter*, 295 U.S. at 529; *Panama Ref. Co.*, 293 U.S. at 421. While the Court never again found a delegation unconstitutional, it often stated or assumed—both before and after *Schechter*—the maxim that Congress could not delegate legislative its power. *See, e.g.*, Fahey v. Mallonee, 332 U.S. 245, 249 (1947); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406–07 (1928).

99. *Schechter,* 295 U.S. at 542.

100. Carter v. Carter Coal Co., 298 U.S. 238, 311–12 (1936).

101. *Schechter,* 295 U.S. at 542.

President. Though the crux of the case turned on the public delegation (to the President) rather than this private delegation (to the industry groups), because the industry groups did not have the ultimate say on whether their rules would be adopted, the Court was nonetheless troubled by the private delegation. The Court asked "would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries?," and "[c]ould trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises?" The Court thought "[t]he answer [was] obvious": "Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress."[102] Thus, while *Schechter* was a separation-of-powers decision, the Court seemed to invoke the specter of self-dealing, and hence the concern for protecting the rights of regulated individuals, mentioned in the other private-veto cases.

In *Carter Coal*, a federal law had granted authority to a group of coal producers and laborers—companies that produced two-thirds of the total national production, plus one half of the miners—to set maximum hours and minimum wages for the entire industry.[103] The Court agreed with representatives of the objecting producers that this delegation was unconstitutional—citing the Due Process Clause rather than separation of powers—because granting "the majority . . . the power to regulate the affairs of an unwilling minority" constituted "an intolerable and unconstitutional interference with personal liberty and private property."[104] In fact, the Court cited *Eubank* and *Roberge*, along with *Schechter*, in support of its holding.[105] As in *Eubank*, *Yick Wo*, and *Schechter*, the Court worried that the power would be exercised not just arbitrarily, but in the delegate's financial self-interest.[106]

Perhaps because of the multifarious delegations involved in *Schechter* and *Carter Coal*, both courts and scholars have sometimes grouped various sorts of delegations under the broad heading of nondelegation doctrine and then attempted to derive principles that apply to all of them. In light of the distinctiveness of the private-veto doctrine, however, this tendency has often led to incorrect framing of the issues. In particular, it has led commentators to miss two of the most important aspects of the private-veto principle: that it is concerned not just with pecuniary self-interest but also with bias and illicit prejudice; and that it often involves private control over another's

102. *Id.* at 537.

103. *Carter*, 298 U.S. at 310–11.

104. *Id.* at 311.

105. *Id.* at 311–12.

106. *Id.* at 311; *see also* Eubank v. City of Richmond, 226 U.S. 137, 143–44 (1912); Yick Wo v. Hopkins, 118 U.S. 356, 366–67 (1886); *Schechter*, 295 U.S., at 537–38.

constitutionally protected property or liberty interest. The latter point is important because it affects the nature of the due process analysis. The former point is important because it makes the private-veto principle understandable as a doctrine that vindicates and advances important constitutional interests—including an interest in equal protection of the laws—rather than as a revival of long-abandoned economic substantive due process, as some commentators have charged.[107]

Numerous commentators have considered the private veto doctrine to be a subcategory of the nondelegation doctrine—beginning, perhaps, with Louis Jaffe's classic 1937 article, *Lawmaking by Private Groups*.[108] More recently, Harold Abramson observed that the Supreme Court has "commingled" the concepts of "nondelegation of legislative power" in several cases stretching back to the early decades of the twentieth century by using the language of nondelegation in cases involving due process issues, and vice versa.[109] Similarly, scholars surveying the landscape of nondelegation doctrine have included the private-veto cases as a subcategory of delegation of lawmaking power, assuming that the same purposes motivate this doctrine and that the same analytical framework should apply.[110] Thus, the conventional accounts of nondelegation often over-emphasize separation-of-powers and political accountability concerns.

Whether correct or not, this submerging of the private veto cases under the broader topic of delegation has led many to miss key facets of the doctrine. Of course, there are clear similarities between the private-veto doctrine and the other nondelegation doctrine. Both are fundamentally concerned with the question of whether clear standards (or "intelligible principles") exist to constrain the delegate's discretion.[111] The need for such standards is at least partly motivated by a concern about arbitrary action by the delegate, as well

107. *See, e.g.*, Lawrence, *supra* note 15, at 673.

108. Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 227–29 (1937).

109. Harold I. Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 HASTINGS CONST. L.Q. 165, 208–10 (1989); *see also* Volokh, *supra* note 10, at 977–80 (similarly pointing out the Court's apparent confusion).

110. *See, e.g.*, Silver, *supra* note 10, at 1218 (describing various species of state "nondelegation [rule] as a single doctrine"); Larkin, *supra* note 11, at 50 (describing *Eubank*, *Roberge*, and *Carter Coal* as private nondelegation cases and suggesting that there is no clear principle that can "explain[] . . . why those delegations were unconstitutional"); Larkin, *supra* note 2, at 314–15 ("The problem [in cases like *Eubank*, *Roberge*, and *Carter Coal*] is that the delegation evades the constitutional restrictions on the lawmaking process established by Articles I, II, and III of the federal Constitution and the comparable provisions in every state charter."); Metzger, *supra* note 16, at 1438, 1438 n.239 (discussing *Eubank*, *Cusak*, and *Roberge* as examples of nondelegation doctrine); George W. Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650, 675–80 (1975) (same).

111. *See* Volokh, *supra* note 10, at 979 ("Entrusting a decision entirely to the unreviewable and unguided discretion of private parties is the opposite of having an 'intelligible principle.'").

as by a concern that the delegate may use the delegated power to advance its own private pecuniary interests.[112]

Beyond this similarity, however, the doctrines diverge in important respects. One way in which they differ is that the concern about political accountability raised by the nondelegation doctrine is less salient in the private veto context. Some commentators have argued that any delegation of governmental power to a private entity—as opposed to a public official—is potentially problematic because private individuals are not politically accountable in the way that public officials are.[113] If a public official acts irresponsibly, that person can normally be removed through election, or, if an appointed official, the politician who appointed that person can pay an electoral price.[114] But private delegates cannot be removed from any office, since they are by definition not elected officials.

In the context of private vetoes, however, political accountability is not a primary concern. The actions taken by private delegates are generally small-scale, even one-off decisions—such as denying admitting privileges to an individual physician or denying a liquor license to one restaurant. The primary concern in private-veto cases is not with large-scale rulemaking or quasi-legislative acts by private entities, but rather with individual deprivations of property or liberty without due process. For this reason, cases such as *Carter Coal* and *Schechter*, involving delegation of *rulemaking* power to private groups, while often referred to as "private delegation" cases, are excluded from this Article's analysis of private veto power.[115] The problem with private vetoes is not generally how large the delegation is—for large delegations would likely be more visible and thus more likely to attract oversight—but how small-scale, intimate, and likely to escape scrutiny.[116]

The relative lack of concern with political accountability demonstrates the affiliation between cases involving private vetoes and those involving standardless discretion vested in a public official. The standardless delegation—effected by an official decision, law, or regulation and allowing arbitrary

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112. *See supra* text accompanying note 107.

113. *See* Zoldan, *supra* note 15, at 105; Harold J. Krent, *The Private Performing the Public: Delimiting Delegations to Private Parties*, 65 U. MIA. L. REV. 507, 511 (2011).

114. As Alexander Volokh notes, this logic is somewhat questionable. Volokh, *supra* note 10, at 972 ("One purpose is accountability: a private delegation dilutes democratic accountability, because when power is delegated to a private organization, the government is no longer blamed for that organization's decisions. (Perhaps; but if something goes wrong, why can't the voters blame the government for the initial decision to delegate?)" (footnotes omitted)).

115. Carter v. Carter Coal Co., 298 U.S. 238, 310–11 (1936); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935). Other private nondelegation cases fall into this category as well. *See, e.g.*, Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 399 (1940); Currin v. Wallace, 306 U.S. 1, 15–16 (1939).

116. *Cf.* Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849, 1851 (2019) ("[T]he nondelegation doctrine, properly understood, concerns both the degree of *discretion* afforded to the holder of lawmaking power and the extent of the underlying *power* itself.").

decision-making—is the act that potentially violates due process.[117] Of course, private groups and individuals—especially those who are competitors, nearby property owners, or others whose interests are affected by the regulated party's actions—are generally more likely to have interests at stake and therefore may be more likely to act arbitrarily or in their own personal interest. But the delegation's standardlessness, rather than the delegate's identity, is the principal issue. For this reason, it is unsurprising to see cases involving delegations of power to private parties citing *Yick Wo*, which involved the standardless and arbitrary exercise of power by a public official.[118] Private vetoes are problematic not because they involve delegations of power that *should* be exercised by public officials,[119] but because they involve delegations of power to private parties that the government itself *could not* exercise. The government could not, consistent with due process and equal protection, close legally operating abortion clinics or arbitrarily limit the property rights of some property owners but not others.[120]

Understanding that the private-veto doctrine is primarily concerned with arbitrary harm to individuals' interests, with similarities to the "class of one" equal protection doctrine, leads to greater clarity, moreover, about exactly which constitutional values are served by a prohibition on private vetoes, as compared to nondelegation doctrine more generally. The general nondelegation doctrine is primarily grounded in separation-of-powers and rule-of-law values. The abovementioned concern about accountability stems from these values. But the due-process-grounded private-veto doctrine is primarily concerned with actual harm to individuals' property or liberty interests resulting from decisions made by other individuals, entities, or groups, either arbitrarily or—even worse—based on private financial or other biases.

In particular, concerns about irrational prejudices—whether based on attributes specifically recognized as suspect classifications by the Supreme Court's equal protection jurisprudence or not—seem to drive many of the

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117. *Cf.* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 171 (1978) (Stevens, J., dissenting) (rejecting the notion that a private veto did not implicate state action, where the law "specifically authorize[d]" a private party "to sell respondents' possessions; . . . detail[ed] the procedures that [the private party] must follow; and it grant[ed] [the private party] the power to convey good title to goods . . . to a third party" (citing U.C.C. § 7-210 (AM. L. INST. & UNIF. L. COMM'N 1964))).

118. *See supra* text accompanying notes 40–44.

119. *See, e.g.*, Larkin, *supra* note 2, at 314–15.

120. *Cf.* Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) ("Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." (first citing Sioux City Bridge Co. v. Dakota Cnty., 260 U.S. 441 (1923); and then citing Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n of Webster Cnty., 488 U.S. 336 (1989))); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 69 (1976) (striking down a spousal consent requirement for women seeking abortions on the ground "that the State cannot 'delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy'" (quoting Planned Parenthood of Cent. Mo. v. Danforth, 392 F. Supp. 1362, 1375 (E.D. Mo. 1975))).

private-veto cases discussed above. Though not explicitly stated in the cases, we can easily surmise that illicit interests and biases likely motivated the private delegates' vetoes. Irrational disapproval or fear of the "aged poor" was likely a driving force in *Roberge*; disapproval of abortion led hospitals to deny admitting privileges in *Baird* and similar cases; prejudice against a German-born physician after World War II was likely the reason for the denial of medical association membership in *Ware*; the unsavory and unpopular nature of sexually explicit speech may lead regulators to delay issuing a license[121]; religiously based disapproval of drinking establishments likely played a role in the church's veto of a liquor license for Grendel's Den; assumed or actual prejudice against intellectually disabled individuals resulted in the denial of the Cleburne Living Center's zoning variance; and so on.[122]

The private veto doctrine thus exists not only to ensure that individuals are not deprived of their liberty or property arbitrarily, or in the service of others' financial gain, but also, and importantly, to protect unpopular individuals and businesses against harm from hard-to-detect illicit prejudices.[123] In all the ink that has been spilled over "private nondelegation" doctrine, this point has largely gone unnoticed. While commentators have worried that the nondelegation doctrine is in actuality a revival of economic substantive due process under a different name, this unmistakable thread of protection against discriminatory harm shows its clear affiliation to more venerable constitutional doctrines.[124] For this reason, and as demonstrated above in Part I.A., the principle spans multiple constitutional doctrines, including not only

121. *See, e.g.*, City of Littleton v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774, 787 (2004) (Souter, J., concurring) ("[A]lthough Littleton's ordinance is not as suspect as censorship, neither is it as innocuous as common zoning. It is a licensing scheme triggered by the content of expressive materials to be sold. Because the sellers may be unpopular with local authorities, there is a risk of delay in the licensing and review process." (citations omitted)).

122. *See* Planned Parenthood of Kan. v. Lyskowski, No. 15-cv-04273, 2015 WL 9463198, at *1–2, *4, *10–11 (W.D. Mo. Dec. 28, 2015) (upholding "class-of-one" equal protection challenge to occupational licensing requirement based on animus toward abortion providers); Larkin v. Grendel's Den, Inc., 459 U.S. 116, 117 (1982); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 437 (1985).

123. It is much more difficult to demonstrate that an individual decision is arbitrary or based on individual self-interest than it is to show arbitrariness based upon a pattern across multiple decisions; think of peremptory challenges to jurors, which generally survive scrutiny so long as the attorney comes up with a barely plausible rationale, as compared to a statistical study showing exclusion of jurors based on race. *See, e.g.*, *Jury—Challenges and Objections—Challenging Peremptorily All Negroes on Jury Panel by Federal Prosecutor Held Not Improper*, 61 HARV. L. REV. 1455, 1456–57 (1948).

124. *See, e.g.*, Lawrence, *supra* note 15, at 673; Metzger, *supra* note 16, at 1442–43. Indeed, insofar as it is concerned with laws giving private individuals the power to discriminate against others, the private-veto doctrine resembles what Nelson Tebbe and Lawrence Sager call "discriminatory permissions," which they argue violate the Equal Protection Clause. *See* Lawrence G. Sager & Nelson Tebbe, *Discriminatory Permissions and Structural Injustice*, 106 MINN. L. REV. 803, 826, 875–76 (2021).

due process and equal protection, but also the First Amendment's Free Speech and Establishment Clauses.[125]

Finally, unlike nondelegation doctrines, the private-veto doctrine is concerned less with *what kind* of power is being exercised—for example, determining whether the power is uniquely "governmental" and if so, whether it is legislative or adjudicative in nature—and more concerned with the *object* of that power.[126] As discussed below, because the private-veto doctrine grows out of due-process concerns, it is most relevant when a private veto is exercised over the property or liberty interests of another person or entity. Yet, again, even when recognizing the due-process origins of the doctrine, commentators have not generally even considered what the object of the delegated power is.

II. DOUBLING DOWN ON DUE PROCESS

Several scholars have recognized that some types of private delegations—including those that I have called "private vetoes"—primarily raise due process problems, rather than Vesting Clause or other separation-of-powers issues.[127] Thus, they have explored whether the cases dealing with private delegations involve substantive or procedural due process.[128] They have not pushed the analysis further, however, such as by describing the proper due-process analysis to apply to private delegations. In some instances, commentators have essentially assumed that the prohibition on delegations of government power to private individuals is categorical, rather than subject to a doctrinal test.[129]

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125. *See* Liebmann, *supra* note 110, at 660 (observing that "many of the vices . . . inherent in delegation to private groups constitute violations of express constitutional mandates—particularly the requirements of due process and equal protection" and noting "the proximity of the nondelegation principle to other constitutional safeguards").

126. *See, e.g.*, *id.* at 718 (arguing that the distinction between exercises of legislative and judicial powers "is more relevant in resolving these problems of delegation than many have been prone to assume").

127. *See, e.g.*, Craig Konnoth, *Privatization's Preemptive Effects*, 134 HARV. L. REV. 1937, 1979–81 (2021); Lawrence, *supra* note 15, at 678–86.; Abramson, *supra* note 109, at 214–16; Larkin, *supra* note 2, at 315 ("*Eubank*, *Roberge*, and *Carter Coal* therefore cannot readily be characterized as examples of either type of due process doctrine."); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1677, 1755–59 (2012) (discussing legislation "[t]hat [t]akes from A and [g]ives to B" as a violation of procedural due process) (emphasis removed). *See generally* Volokh, *supra* note 10, at 940–54 (considering the *Eubank-Cusak-Roberge* line of cases as procedural due process cases).

128. *See, e.g.*, Konnoth, *supra* note 127, at 1979–81; Lawrence, *supra* note 15, at 678–86; Abramson, *supra* note 109, at 214–16; Larkin, *supra* note 2, at 315 ("*Eubank*, *Roberge*, and *Carter Coal* therefore cannot readily be characterized as examples of either type of due process doctrine."); Chapman & McConnell, *supra* note 127, at 1677, 1755–59 (2012) (discussing legislation "[t]hat [t]akes from A and [g]ives to B" as a violation of procedural due process) (emphasis removed). *See generally* Volokh, *supra* note 10, at 940–54 (considering the *Eubank-Cusak-Roberge* line of cases as procedural due process cases).

129. *See e.g.*, Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 359 (2016) ("*Schechter* did more than just construe the intelligible-principle

This Article therefore fills this gap with respect to the private-veto doctrine by situating those cases squarely within traditional due-process case law and analysis.

This Article assumes that both procedural due process and substantive due process may be violated by a law granting a private veto. Procedural due process applies in an adjudicative context when the delegation results in a non-neutral decision-maker, or when the delegation deprives a private party of a constitutionally recognized liberty or property interest without procedural safeguards. Substantive due process, on the other hand, applies when the decision-making is substantively arbitrary. While some showing of arbitrariness thus must be made, it is not clear that a protected property or liberty interest must be identified in order for substantive due process to invalidate a private veto. Thus, in private-veto cases, depending on the facts, one or the other or both due process doctrines may apply. It is therefore important to develop the due process analysis under each rubric to identify both the scope of the private-veto doctrine and its limits.

Briefly stated, the procedural due process strain of private-veto doctrine is invoked when a constitutionally recognized property or liberty interest is placed at the mercy of a single or small number of private individuals or entities in an adjudicative or other individualized decision-making context. If the private delegation is not subject to a standards-driven official or judicial review, the due-process requirements of a neutral decision-maker and sufficient procedural safeguards cannot be met. The substantive due process doctrine is involved in cases where the private delegate's actions suggest actual bias or arbitrariness, not just a risk thereof. A lack of meaningful standards can contribute to, but may not necessarily be enough for, such a showing. Though a protected liberty or property interest is not required in the substantive due process paradigm, heightened judicial scrutiny will apply if such an interest is at stake.

A. PROCEDURAL DUE PROCESS

1. Framework for Analysis

As it is traditionally understood, the procedural dimension of due process protects against governmental "depriv[ations] of life, liberty, or property, without due process of law."[130] Due process of law includes notice and an "'opportunity to be heard[]' . . . at a meaningful time and in a meaningful

imperative as a rule. It also layered on an additional, equally categorical rule barring delegations of state authority to private parties. This 'private delegation' carve-out barred *all* delegations of rulemaking authority to private parties.").

130. U.S. CONST. amend. V; U.S. CONST. amend. XIV; 3 ROTUNDA & NOWAK, *supra* note 18, § 17.1. While the Due Process Clause's protection for "life" is obviously important, it is not discussed here because I have not identified any instances of private vetoes being provided by government over another's life; thus, this Article (and the existing doctrine) focus on the liberty and property aspects of the Due Process Clause.

manner" before a neutral decision-maker.[131] These requirements apply only if a constitutionally protected property or liberty interest is at stake.[132] A property interest must be one that is recognized by positive law as an entitlement—not a mere unilateral expectation.[133] A liberty interest can include freedom from physical constraint (such as incarceration), but it can also include the fundamental constitutional interests that are encompassed within the Fourteenth Amendment's protection of "liberty"—i.e., all of the rights protected by the Bill of Rights, as well as the fundamental rights to family privacy and decision-making autonomy protected by the doctrine of substantive due process.[134]

Once it has been established that a person is threatened with governmental deprivation of a life, liberty, or property interest, the question becomes, "What process is due?" In addition to the notice and impartial decision-maker requirements, the requirement of a meaningful opportunity to be heard may entail specific procedural safeguards.[135] In deciding whether the opportunity to be heard is sufficient, the Supreme Court has prescribed a three-part balancing test in *Mathews v. Eldridge* that weighs (1) the importance of the individual's private property or liberty interest against (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards[,] and" (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[136]

As the balancing test indicates, one of the key purposes of the constitutional protection for procedural due process is to avoid erroneous or otherwise improper deprivations of important personal interests in property and in constitutional rights.[137] Of course, as a "Bill of Rights protection[] meant to insure individual liberty in the face of contrary collective action," it also serves other interests as well, such as dignitary interests, basic fairness, and ensuring citizens of the legitimacy of governmental regulations.[138]

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131. Armstrong v. Manzo, 380 U.S. 545, 551–52 (1965) (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)); *see also* 3 ROTUNDA & NOWAK, *supra* note 18, § 17.8(a).

132. 3 ROTUNDA & NOWAK, *supra* note 18, § 17.2.

133. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972); 3 ROTUNDA & NOWAK, *supra* note 18, § 17.5(a).

134. 3 ROTUNDA & NOVAK, *supra* note 18, § 17.4(a).

135. *Id.* § 17.8(i).

136. Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (citation omitted).

137. *See* Goldberg v. Kelly, 397 U.S. 254, 266 (1970).

138. *See* Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49–57 (1976).

2. Application to the Private-Veto Doctrine

The private-veto doctrine implicates procedural due process. Indeed, it is often applied in adjudicative contexts that clearly involve property interests, such as the land use, prejudgment seizure, and occupational licensing contexts.[139] But it is also clear that a private veto must affect a constitutionally protected interest for procedural due process to apply; if no such protected property or liberty interest is involved, the analysis must stop there. Yet, many commentators have simply glossed over this fact—a fact that can significantly limit the doctrine's otherwise potentially boundless application—even when arguing that the procedural due process framework is the correct one.[140] As the Sixth Circuit Court of Appeals explained in *Baird*, while "first-time applicants for liquor or entertainment licenses do not have a protected property interest," owners of existing businesses do have a property interest in their "continued operation."[141] Thus, the procedural due process analysis would not apply when the licensee is being denied a first-time license.[142]

When a constitutional liberty is involved, such as the freedom of speech, courts tend to analyze the delegation under the substantive constitutional provision implicated—as in the line of cases dealing with licensing of sexually explicit or other objectionable speech. Although these cases also involve licensing decisions, they may or may not involve existing licenses; the existence of a constitutional right (and thus a liberty interest protected by the Fourteenth Amendment) is sufficient to call forth the procedural protections of the Due Process Clause. Thus *Grendel's Den*, involving a church's power to veto a restaurant's liquor license, was decided under the First Amendment, even though the key problem in these cases was arguably the standardlessness

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139. *See generally* Aaron J. Reber & Karin Mika, *Democratic Excess in the Use of Zoning Referenda*, 29 URB. LAW. 277 (1997) (arguing that mandatory referendum is against the best interests of zoning legislation).

140. *See, e.g.*, Larkin, *supra* note 2, at 355–57.

141. Women's Med. Pro. Corp. v. Baird, 438 F.3d 595, 611 (6th Cir. 2006) (citing Wojcik v. City of Romulus, 257 F.3d 600, 609–10 (6th Cir. 2001)); *see also* Bell v. Burson, 402 U.S. 535, 539 (1971) ("Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." (citations omitted)); Spinelli v. City of New York, 579 F.3d 160, 169 (2d Cir. 2009) (holding that existing gun dealers have a property interest in their business license); Richardson v. Town of Eastover, 922 F.2d 1152, 1157 (4th Cir. 1991) ("[A] state-issued license for the continued pursuit of the licensee's livelihood, renewable periodically on the payment of a fee and revocable only for cause, creates a property interest in the licensee."); *cf.* Withrow v. Larkin, 421 U.S. 35, 46 (1975) (applying procedural due process principles to the temporary suspension of a physician's license to practice medicine); Bundo v. City of Walled Lake, 238 N.W.2d 154, 160 (Mich. 1976) (holding that the current holder of a liquor license has a property interest in it).

142. *See, e.g.*, Sanitation & Recycling Indus., Inc. v. City of New York, 107 F.3d 985, 995 (2d Cir. 1997) ("Nor have plaintiffs a property right in a possible future license.").

and risk of religiously motivated bias inherent in the veto power.[143] Similarly, the line of cases dealing with licensing laws for sexually explicit speech (which involve official rather than private discretion) rely on the First Amendment, though they are structurally similar to the other licensing veto cases.[144]

Once it has been determined that a protected liberty or property interest is at stake, the question is whether sufficient procedural safeguards have been provided. Generally, the requirement of a neutral decision-maker is lacking in private-veto cases. When a law allows a private party to make decisions that eliminate or restrict another private party's property or liberty interest, without standards or government oversight, it has likely exposed the party to a potential deprivation without assuring a neutral decision-maker. Indeed, in many of the private-veto cases, courts have noted the danger of pecuniary or other illicit bias affecting the decision-maker.[145] These include many of the occupational licensing cases discussed above.[146] Other commentators discussing private delegations have likewise noted that the financial interests of the delegate could undermine this aspect of due process in certain cases.[147]

If the main problem with private vetoes is the lack of a neutral decision-maker, however, then the question arises whether a showing of bias, or likelihood of bias, must be made for the veto scheme to be invalid. As the Supreme Court has explained, a plaintiff must show "that the probability of actual bias on the part of the judge or decisionmaker," in the form of "a pecuniary interest in the outcome" or some other reason to expect personal prejudice on the part of the adjudicator, "is too high to be constitutionally tolerable."[148] In cases of financial self-dealing, the Court has generally required the showing of corruption to be fairly direct and overwhelming, as in the case of a judge who received a supplemental payment for each fine imposed under a particular law,[149] or another judge who had received extraordinary amounts of

143. Larkin v. Grendel's Den, Inc., 459 U.S. 116, 125 (1982) ("The churches' power under the statute is standardless, calling for no reasons, findings, or reasoned conclusions.").

144. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 217, 226–27 (1990) ("Like a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of the license . . . . Where the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion.").

145. *Cf.* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 876 (2009) (citing Tumey v. Ohio, 273 U.S. 510, 523 (1927)) (holding that a decision-maker with a financial stake in the matter does not afford due process).

146. *See supra* Section I.A.2.

147. Lawrence, *supra* note 15, at 685 ("[T]he possibility of private interest is often inherent in the private delegation; recognition of that interest may even have been the reason for the delegation."); Volokh, *supra* note 10, at 940–41 ("[D]elegation of power plus pecuniary bias is a due process faux-pas, and it is easy to imagine (or presume) that such bias will be more likely if the delegate is private.").

148. Withrow v. Larkin, 421 U.S. 35, 47 (1975) (footnote omitted).

149. *Tumey*, 273 U.S. at 532.

campaign contributions from a company shortly before adjudicating a case involving that company.[150]

Still, a showing of likely rather than actual bias is all that is required.[151] This showing would likely be satisfied where a private veto is given to a business licensee's competitors, who have an obvious interest in minimizing the competition. It would be less obvious in the case of adjoining property owners given the power to block a particular land use, however.[152] Moreover, nonpecuniary bias or potential bias may be harder to identify, and it is rarely called out in cases that appear to raise its prospect, such as those involving admitting privileges for abortion providers.[153] Where the group of potential decision-makers is broader and more diffuse, moreover, the likelihood of individuals' biases playing a role may be somewhat lessened. Thus, voter referenda over zoning decisions have been upheld as constitutional;[154] similarly, general licensing requirements, such as mandating graduation from any ABA law school in order to practice law, have been found constitutionally untroubling.[155]

Yet another procedural due process problem arises to the extent that a law affords no procedural safeguards in connection with the deprivation of property or liberty. If the private veto power is final, with no opportunity for official review of the decision, then in most cases the *Mathews v. Eldridge* balancing test should favor the party challenging the veto, since the deprivation of a constitutionally protected interest occurs without any process at all. This insight tracks what Alexander Volokh calls the "mandatory-discretionary distinction," whereby the private delegation is unconstitutional only if the private veto is mandatory and coercive, rather than simply provoking review by a court or other governmental body, which would then apply legally defined standards.[156] Thus, as Volokh points out, in cases such as *Roberge*, *Fuentes v. Shevin*, and *Gibson v. Berryhill* (in which a group of optometrists sat in final judgment over the delicensing of competitor optometrists), no appeal would

150. *Caperton*, 556 U.S. at 884–86.

151. *Id.* at 885 ("Due process requires an objective inquiry into whether the contributor's influence on the election under all the circumstances 'would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'" (alteration in original) (quoting *Tumey*, 556 U.S. at 532)).

152. Of course, it is possible that those property owners could be acting on their own financial interests by rejecting uses of property that they perceive as likely to reduce their own property values. But increasing or maintaining property value would also presumably benefit the party who is subject to the veto.

153. *But see* Women's Med. Pro. Corp. v. Baird, 438 F.3d 595, 608–09 (6th Cir. 2006) (noting the political pressure from right-to-life groups surrounding the licensing of an abortion clinic).

154. City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668, 677–78 (1976) (distinguishing referenda over individual zoning changes from cases like *Eubank* and *Roberge*, in which a more limited group of people exercised a veto over another person's property).

155. *E.g.*, *In re* Hansen, 275 N.W.2d 790, 791 (Minn. 1978).

156. Volokh, *supra* note 10, at 944–50.

lie from the private veto.[157] This is likely necessary for the private veto to be found unconstitutional. On the other hand, in some cases, such as *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, the grant of authority to a private group of car manufacturers to require review by the state New Motor Vehicle Board before an entity could "terminate, open, or relocate a dealership" was not unconstitutional, because the private group did not make a final determination—a state agency did.[158] Similarly, the abortion clinic's challenge to the requirement of a transfer agreement with a hospital failed in *Baird* because the state offered a waiver process, guided by clearly stated substantive standards, for clinics that were unable to meet the requirement.[159]

One final point is needed to clarify the procedural due process analysis. Unlike with other private delegations, and contrary to the concerns raised by some commentators,[160] there is no difficulty in identifying state action when the government grants a private veto of this kind, regardless of whether the private delegate is considered a state actor. The law or regulation that provides dominion over a person's property or liberty without standards or safeguards is the driving force behind the deprivation of due process. The government has violated due process when it fails to provide a neutral decision-maker or fair procedures.[161]

To summarize, then, a private veto granted by state law will violate the procedural due process protections of the Fifth and Fourteenth Amendments[162] if it grants standardless and unreviewable power over the constitutionally protected property or liberty of another to a person, group, or entity that is likely to exhibit financial or other forms of bias. However, if pre-deprivation

157. *Id.* at 946 ("In all these cases, the due process problem was that they were able to force an alteration in the legal regime without any discretion remaining in government and without any protection against their personal biases." (footnote omitted)).

158. *Id.*; New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96, 105 (1978).

159. Women's Med. Pro. Corp. v. Baird, 438 F.3d 595, 610 (6th Cir. 2006) (holding that the Health Director's "ability to grant a waiver of this requirement means that the area hospitals do not necessarily have the final veto on whether an abortion clinic is licensed"). Kenneth Culp Davis has argued that procedural safeguards and administrative standards are more important than statutory standards for ensuring that a delegation meets the requirements of procedural due process. Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 713 (1969). Of course, standards are still necessary; judicial or administrative review is meaningful only if there are known and sufficiently definite standards to be applied in that review.

160. *See, e.g.*, Abramson, *supra* note 109, at 203–08; Metzger, *supra* note 16, at 1411–21.

161. Thus, the challenger need only name as a defendant the state official who has the duty to enforce the delegate's decision—such as the director of the health department in *Baird* (who denies the abortion clinic's license based on the failure to secure an agreement with a hospital) or the municipal liquor commission in *Grendel's Den*. Alternately, the constitutional claim could presumably be enforced in the context of a civil suit between two private parties. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964).

162. Of course, the same analysis would apply with respect to federal action under the Fifth Amendment's Due Process Clause as to state action under the Fourteenth Amendment's Due Process Clause.

official review of the private veto is available and guided by determinate standards, the due process violation may disappear.[163]

B. SUBSTANTIVE DUE PROCESS

1. Framework for Analysis

Private vetoes may also violate principles of substantive due process. While substantive due process is a somewhat protean doctrine, one basic and longstanding principle is that it protects individuals against arbitrary government action. Substantive due process can be distinguished from procedural due process in that it may bar certain deprivations "regardless of the fairness of the procedures used to implement them."[164] When the government seeks to deprive a person of a constitutionally recognized fundamental liberty interest, the Due Process Clause generally requires a heightened form of scrutiny of the purpose served by the deprivation and the means used to advance that purpose.[165] Yet, even where a fundamental liberty interest is not implicated, substantive due process doctrine still prohibits subjecting persons to arbitrary government action.[166] Indeed, an arbitrary law by definition lacks a rational basis and therefore fails even the lowest tier of scrutiny under the Due Process and Equal Protection Clauses. Thus, a substantive due process challenge to a law affording a private veto should proceed fairly straightforwardly: The court would ask simply whether the law grants standardless discretion over a person's actual or potential property or liberty interest (whether fundamental or not) to a third party.

Unfortunately, confusion clouds the application of this strand of substantive due process doctrine, particularly in the lower federal courts.[167] Some courts have insisted that a constitutionally protected property or liberty interest be

163. Whether the official review process is sufficient and whether it must be available before or after the deprivation occurs are questions to be determined through application of the *Mathews v. Eldridge* balancing test.

164. Daniels v. Williams, 474 U.S. 327, 331 (1986).

165. 3 ROTUNDA & NOWAK, *supra* note 18, § 15.7.

166. *Daniels*, 474 U.S. at 331 (citing Hurtado v. California, 110 U.S. 516, 527 (1884) (quoting Bank of Columbia v. Okely, 17 U.S. 235, 244 (1819))); Wolff v. McDonnell, 418 U.S. 539, 558 (1974) (citing Dent v. West Virginia, 129 U.S. 114, 123 (1889)); Parratt v. Taylor, 451 U.S. 527, 549 (1981) (Powell, J., concurring in result), *overruled by* Daniels v. Williams, 474 U.S. 327 (1986); Rosalie Berger Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process*, 16 U. DAYTON L. REV. 313, 314 (1991) ("[E]ven where fundamental rights are not implicated the due process clause substantively protects against arbitrary government action." (footnote omitted)). Paul Larkin, Jr. locates this longstanding prohibition on arbitrary government action in the private delegation context to the Magna Carta (which is also referenced by the Supreme Court in *Daniels*). Larkin, *supra* note 2, at 354–57; *cf.* Chapman & McConnell, *supra* note 127, at 1677, 1681 (arguing that procedural due process protects against arbitrary decision-making, in the sense of decision-making that is not in accordance with legal standards, and that this protection is derived from the Magna Carta).

167. *See, e.g.*, Levinson, *supra* note 166, at 345–48, 346–48 nn.178–86.

affected for the substantive due process protection to apply.[168] However, this cannot be the correct understanding of the doctrine.[169] All, or nearly all, government regulation affects individual "liberty." Where the liberty affected is a fundamental one, a higher level of scrutiny applies; there is still, however, a baseline rationality and nonarbitrariness requirement for all government action, even when ordinary economic and social liberties are affected.[170] Thus, while private veto laws will generally grant arbitrary authority over another's liberty or property in a generic sense, it is not necessary to demonstrate that such an interest is an established one in order to state a substantive due process claim.

Yet, lest the doctrine become unwieldy, it is important to recognize that this insight does not entail that all private delegations of governmental power are inherently arbitrary and therefore unconstitutional. First, as noted above, the delegation must be both lacking standards and lacking an opportunity for official review that is itself guided by standards.[171] Thus, in the prejudgment seizure and occupational licensing cases, the private delegations have generally been found unconstitutional because, even if there is some level of involvement by a public official in the process, the private delegates possess ultimate authority. The public official is powerless to deny the seizure or grant the license when a private hospital has denied admitting privileges or when a private individual has sworn out the required affidavit.[172] By contrast, the Sixth Circuit upheld the private delegation in *Baird* precisely because the possibility remained that a public official, applying defined standards and subject to

168. *See, e.g.*, Lee v. Hutson, 810 F.2d 1030, 1032 (11th Cir. 1987); Buhr v. Buffalo Pub. Sch. Dist. No. 38, 509 F.2d 1196, 1202 (8th Cir. 1974).

169. As one scholar explained:

> [T]hose courts which have required initial identification of a fundamental right to trigger substantive due process have confused the concept that substantive due process protects certain nontextual interests from government interference absent compelling justification with the generic doctrine that substantive due process shields individuals from arbitrary, capricious government misconduct. . . . [T]he basic principle that substantive due process may be used to protect against fundamentally unfair government action remains intact.

Levinson, *supra* note 166, at 348 (footnotes omitted). *See generally* Jeffrey D. Jackson, *Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. RICH. L. REV. 491, 500–03 (2011) (tracing the long history of constitutional protection against arbitrary laws).

170. *See, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 486–87 (1955); *cf.* Larkin, *supra* note 2, at 360 (arguing that a requirement of nonarbitrariness, derived from the Magna Carta, is a central principle of American law). Note, however, that some courts have found that "[t]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference" is a constitutionally protected liberty interest. Piecknick v. Pennsylvania, 36 F.3d 1250, 1259 (3d Cir. 1994); *see also* Bernard v. United Twp. High Sch. Dist. No. 30, 5 F.3d 1090, 1092 (7th Cir. 1993).

171. *See supra* text accompanying notes 112–13 and 118–20.

172. *See supra* Sections I.A.2–.3.

judicial review, could waive the requirement of private approval.[173] Similarly, the Ninth Circuit rejected an unconstitutional-delegation challenge to an Arizona law that made abortion clinics' licenses dependent on the ability of their physicians to secure admitting privileges at an Arizona hospital because hospitals were forbidden by Arizona law to deny those privileges arbitrarily.[174] The presence of legally enforceable and reviewable standards for the private delegate's exercise of power thus defeats a substantive due process claim grounded in the arbitrariness of the delegation, both because such standards mean that the private entity's power may not be exercised arbitrarily and, similarly, because it ensures that the government is not granting to a private entity a power that the government itself could not exercise (i.e., the power to deny or withhold property or liberty arbitrarily).

In addition, it is important to keep in mind the narrow applicability of the private-veto doctrine. The private-veto doctrine has application only where the power is exercised over particular individuals or entities by other discrete individuals or entities. It thus applies only in contexts that might be considered adjudicative or quasi-adjudicative and does not necessarily apply to broad legislative or rulemaking powers. I say "not necessarily" here to indicate that such delegations are simply not within the scope of the doctrine I am identifying as the "private-veto doctrine," and not to say that delegations of legislative or rulemaking powers are always or inherently unproblematic from a constitutional perspective. In fact, when the creation of legislative rules is delegated to a private group, the concern often arises that that group will act to benefit itself, since the members of that group usually form part of the regulated entity. For example, in *Carter Coal*, a subset of coal producers and laborers were empowered to set rules that bound others—but those rules would also bind the privileged subset making the rules.[175] While I do not take the position that this scenario is perfectly untroubling, it is less troubling from a constitutional perspective when a group sets rules that the group itself must also obey. Indeed, as Justice Jackson long ago explained:

> [T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed

173. Women's Med. Pro. Corp. v. Baird, 438 F.3d 595, 599 (6th Cir. 2006) (noting that the law allowed a waiver by the director of the Ohio Department of Health "if 'the director determines that the strict application of the license requirement would cause an undue hardship to the [health care facility] and that granting the waiver would not jeopardize the health and safety of any patient'" and holding that this waiver option was fatal to the plaintiffs' delegation claim (alteration in original) (quoting OHIO ADMIN. CODE § 3701–83–14(B)(2))).

174. Tucson Woman's Clinic v. Eden, 379 F.3d 531, 555 (9th Cir. 2004) ("Arizona law requires hospitals to refrain from arbitrary provision of admitting privileges and requires them to exercise their discretion based on reasons related to the hospital's interests." (citation omitted)).

175. Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) (noting that "[t]he power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority").

> generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.[176]

The private-veto doctrine is concerned with scenarios in which private entities exercise dominion over the particular property or liberty interests *of another*. This adjudicative-rulemaking distinction explains why the delegations challenged in cases such as *Currin v. Wallace*[177] and *United States v. Rock Royal Co-Op., Inc.*[178] were not struck down under the private-veto doctrine. Indeed, even public referenda over *individual zoning decisions* are constitutional—although they arguably involve the exercise of adjudicative rather than legislative powers—because they do not delegate the decision to a discrete, identifiable delegate or group of private delegates, but rather to the people as a whole, and by definition they involve the affected parties in the decision-making.[179]

2. Differentiating Substantive Due Process Claims from Procedural Due Process Claims

Some cases discussed in this Article can only be understood as substantive due process cases because the plaintiffs lacked an established property or liberty interest. To the extent that it raises delegation issues separate from the Establishment Clause issues, *Grendel's Den* could only involve a nondelegation claim based on the arbitrary nature of the private veto, for example, since the bar had not yet received a liquor license.[180] The *Grendel's Den* case thus stands in contrast to *Yick Wo*, in which Chinese laundry operators stood to lose long-established businesses.[181] Yet, it is reasonable to ask whether the procedural due process approach—which includes the requirement of a constitutionally protected property or liberty interest—adds anything to the analysis. It seems that all private vetoes that violate procedural due process would also violate

176. Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring).

177. Currin v. Wallace, 306 U.S. 1, 15–18 (1939).

178. United States v. Rock Royal Co-op., 307 U.S. 533, 577–78 (1939) (upholding the authority of the Secretary of Agriculture to adopt rules promulgated by private milk producers).

179. City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668, 678 (1976) ("[T]he standardless delegation of power to a limited group of property owners condemned by the Court in *Eubank* and *Roberge* is not to be equated with decision[-]making by the people through the referendum process."); *cf.* Jaffe, *supra* note 108, at 248 (noting the possibility that the constitutionality of a private delegation depends "on the existence of a standard upon which judicial control may be premised, except in situations where all the persons to be affected take part, as in the local option cases"). Admittedly, the decision in *Eastlake* is not entirely easy to justify, given that the overwhelming majority of those making the zoning decision are unaffected by it.

180. Grendel's Den, Inc. v. Goodwin, 495 F. Supp. 761, 763 (D. Mass. 1980), *rev'd*, 662 F.2d 88 (1st Cir. 1981), *aff'd en banc*, 662 F.2d 102 (1st Cir. 1981).

181. Yick Wo v. Hopkins, 118 U.S. 356, 359 (1886).

substantive due process due to their inherent arbitrariness, so there is no need for a procedural due process claim at all.

There are several responses to this concern. First, as noted above, one goal of this Article is to provide analytical clarity around the private-veto doctrine and its constitutional grounding. This Article has demonstrated that the doctrine is longstanding, implicating both procedural and substantive due process insofar as it prevents arbitrary governmental deprivations of property and liberty. This analysis remedies a degree of uncertainty in the scholarly literature discussing private delegation.[182] Second, given the evident confusion and discomfort of courts in applying substantive due process analysis to protect against arbitrary government action, it must be acknowledged that the procedural due process line of cases is somewhat more firmly rooted. Thus, another implication of this Article's analysis is that the protection against private vetoes is particularly powerful where an established, constitutionally protected liberty or property interest is involved. This is especially true because, as noted below, the standard for arbitrariness under a substantive due process analysis may be particularly difficult to meet. Litigants who can claim a procedural due process violation should therefore be particularly inclined to do so.[183]

Third and perhaps most importantly, it is possible that substantive due process challenges to private vetoes require a higher showing of arbitrariness than procedural due process challenges. When a party claims that a private veto is being exercised over its constitutionally protected property or liberty interest, the violation arises from the fact that the deprivation of property or liberty occurs without notice or a hearing, and it is usually effected by a self-interested rather than neutral decision-maker. Thus, the arbitrariness of the decision itself is not the focus of the analysis. When a substantive due process claim is raised, however, the claimant must show that the deprivation lacks a rational basis, and this requirement is generally understood to be a difficult one to meet.[184] Moreover, the facts of the cases in which the Supreme Court has struck down a private veto often raise an inference that the private veto was at least potentially driven by an illicit motive, such as irrational prejudice,

182. *See* discussion *supra* notes 129–30.

It is possible, however, that the remedy for a procedural due process violation is simply to provide access to notice and an opportunity to be heard before a neutral decision-maker before the deprivation of property or liberty and not a per se invalidation of the deprivation. In some cases this kind of process may not be possible, however—as in the religious exemption situations described below in Part III—in which case the delegation itself would presumably be invalid on its face.

183. *See* discussion *supra* notes 129–30

184. *See e.g.*, Pearson v. City of Grand Blanc, 961 F.2d 1211, 1221 & n.61 (6th Cir. 1992) (noting that an administrative action will not violate substantive due process except if it lacks rational basis or is entirely "willful and unreasoning" and citing cases); Am. Express Travel Related Servs., Inc. v. Sidamon-Eristoff, 669 F.3d 359, 366 (3d Cir. 2012) (citing FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993) (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973))).

financial self-interest, or a desire to advance the private delegate's religious interests. It is therefore possible that courts will be most likely to find a substantive due process violation only when a similar inference of improper motive (such as a private religious motivation, discriminatory bias, or personal animus) may be made.[185]

C. *State Action*

The mix of private and public actors in private-veto cases may appear to raise the question whether, and how, state action is actually at issue. Of course, it is important to locate state action in private-veto cases, because the U.S. Constitution's guarantees of due process are binding only against the government and not against private individuals.[186] The exercise of private power generally does not raise constitutional concerns, however arbitrary or otherwise troubling that exercise may be.[187]

The difficulty of this question is largely illusory, however. There is no question that the government acts when, through legislation or regulation, it provides standardless authority to a private party. It is the government's grant of authority that is the source of the due process violation. By designating a private party as the arbiter of another person's liberty or property interests, without guidelines for the exercise of authority, and by abdicating authority to substantively review the private sovereign's decision, the government has authorized a deprivation of property or liberty without an opportunity for review by a neutral decision-maker.[188] In addition, it has not just ratified, but instead has created the conditions for, a substantively arbitrary deprivation of that constitutionally protected interest.[189]

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185. In the context of "class-of-one" equal protection claims—which bear a resemblance to private-veto claims in that they challenge small-scale arbitrary government actions, often involving individual property interests—one Supreme Court case has raised the possibility that a showing of malice or ill-will on the part of the decision-maker is required. *See* Vill. of Willowbrook v. Olech, 528 U.S. 562, 566 (2000) (Breyer, J., concurring) (noting that the lower court had found the challenged decision was motivated by "'vindictive action,' 'illegitimate animus,' or 'ill will'" (citation omitted)); Alex M. Hagen, *Mixed Motives Speak in Different Tongues: Doctrine, Discourse, and Judicial Function in Class-of-One Equal Protection Theory*, 58 S.D. L. REV. 197, 206 (2013) (stating that several circuits have required a showing of evil motive for class-of-one equal protection claims).

186. The Civil Rights Cases, 109 U.S. 3, 11 (1883) ("It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the [Fourteenth] [A]mendment."); United States v. Morrison, 529 U.S. 598, 621 (2000).

187. *Civil Rights Cases*, 109 U.S. at 11; *Morrison*, 529 U.S. at 621.

188. *Cf.* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 622–28 (1991) (holding that private parties may not use race-based peremptory challenges in civil litigation and emphasizing that, although the challenge might be exercised by a private party, the government delegated coercive authority to the private party).

189. It may be a separate question whether there is a governmental official charged with overseeing and enforcing the delegate's decision who may be sued and enjoined from enforcement. If there is no such official, then it is possible the claim of unconstitutional private veto may only be raised defensively in a civil suit between private parties.

When a protected property interest is involved, as explained above, the analysis is fairly straightforward: The key question is likely whether state law creates an entitlement to the property (such as by recognizing a reasonable expectation in the continuation of an existing business license).[190] The early private-veto cases all seemed to involve a constitutionally protected liberty interest of this sort.[191] In order to make out a due-process violation, the plaintiff would then only need to show the lack of neutral decision-maker or a lack of standards and judicial review over the deprivation arising from the state's delegation of power to a private authority.[192] In the alternative, the plaintiff can make out a substantive due process claim by showing that the private delegate's decision was substantively arbitrary, religiously motivated, or motivated by illicit bias.[193]

A somewhat trickier state-action question arises, however, when an individual claims a deprivation of a constitutionally protected liberty interest. In this case, it would seem that state action is required in two separate parts of the analysis. First, state action must be shown in the delegation—a showing which, as noted above, is easy enough to make when the delegation is prescribed by a statute or regulation. This is the state action necessary for the procedural or substantive due process violation. But does the plaintiff also need to make a separate showing of state action in connection with the underlying liberty interest? In other words, if a plaintiff is claiming that the government has granted a private party a veto over her reproductive liberty by authorizing that person to decide whether she can access contraception, does the claim fail because she has *no right* to access contraception as against that private party?

It is not possible to answer this question with absolute certainty, but the better answer seems to be that no separate showing of state action is required. Some cases in analogous contexts have seemingly reached a contrary conclusion. For example, in *DeShaney v. Winnebago County Department of Social Services*, the Supreme Court found no constitutional violation where a custodial parent arguably exercised a private veto over a child's constitutional rights to bodily integrity—an aspect of the constitutional liberty interest under the Fourteenth Amendment.[194] The parent had severely beaten the child after the state failed to remove the child from the home, despite multiple reports of child abuse by concerned individuals and government employees.[195] In fact, the Court found that no constitutional liberty interest was involved in the case at all, reasoning that the point of the Due Process

190. *See supra* Section II.A.
191. *See supra* text accompanying notes 23–35.
192. *See supra* Section II.A.
193. *See supra* Section II.B.
194. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195–97 (1989).
195. *Id.* at 192–93.

Clause is "to protect the people from the State, not to ensure that the State protect[s] them from each other."[196] Yet *DeShaney* could be read to make a different point. Indeed, the Court explicitly noted that the claimed violation of the child's right to bodily integrity—the state's failure to protect him from harm at the hands of his father—could not exist against the father, because it did not even exist against the state: There is simply no due-process right to the protection of the state.[197] Interestingly, the Court then cited *Yick Wo* for the proposition that the state could not deny that protection selectively to a particular group of people, suggesting that the lack of state action was not the problem.[198]

Moreover, in another case that is perhaps more directly on point, the Court has found that a minor's right to reproductive autonomy may be infringed by granting a private veto over a patient's abortion decision to the patient's parent or spouse. In *Planned Parenthood of Central Missouri v. Danforth*, the Court rejected a state's effort to require spousal consent for abortion, finding that this grant of "veto power exercisable for any reason whatsoever or for no reason at all"[199] violated the patient's reproductive autonomy; nor could the state grant parents "an absolute, and possibly arbitrary, veto over the[ir] [pregnant child's abortion] decision."[200] While there is no longer a federal constitutional right to abortion, in an analogous context, it would be unthinkable today that the state could grant a spouse veto power over a woman's right to use contraception. Indeed, the Court insisted that the state could not "delegate to" a private party "a power [the state] itself could not exercise."[201] *Danforth* thus implies that the relevant question, in determining whether a constitutional liberty is implicated in a private veto scenario, is whether the government, if standing in the shoes of the private party, would be violating the plaintiff's constitutional rights.

196. *Id.* at 196.

197. *Id.* at 196–97 ("If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them." (footnote omitted)). In addition, it is not entirely surprising that the Court did not see the state's refusal to remove the child from an abusive parent's custody as a delegation of state authority over the child's bodily integrity. The questions of whether state action exists when the state authorizes parents to make certain decisions on behalf of their children and of whether children have a right to bodily integrity against their parents are enormously complex, and the law does not offer clear guidance. *See generally* B. Jessie Hill, *Constituting Children's Bodily Integrity*, 64 DUKE L.J. 1295 (2015) (discussing difficulties with identifying both state actors and actions, as well as the potential for rights violations under facially neutral laws granting parents medical decision-making authority over their children).

198. *DeShaney*, 489 U.S. at 197 n.3 (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)).

199. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 71 (1976).

200. *Id.* at 74.

201. *Id.* at 71.

III. IMPLICATIONS: RELIGIOUS VETOES

As Louis Jaffe explained, delegation of sovereign power to a private group does more than allow "the group to maintain a certain minimum position with respect to other groups"; "it is . . . a demand for group privileges over against the rest of society."[202] The private-veto doctrine thus addresses equal-citizenship concerns central to any democratic society committed to the rule of law. The private-veto doctrine prevents the government from using private actors to implement biases on which the government itself is forbidden to act, and it forbids private parties to exercise arbitrary sovereignty over the property or liberty of others. In this way, it shields unpopular individuals or groups from arbitrary mistreatment—at least when the government bears some responsibility for that mistreatment. It also supports value pluralism by allowing individuals to act on their own personal values and beliefs, while at the same time limiting their ability to adversely affect or burden others based on those beliefs.

One goal of this Article has been to demonstrate the continuing vitality of the private-veto doctrine in American constitutional law. Although not generally recognized as a robust and vital doctrine of constitutional law, it is hardly moribund; to the contrary, it has been woven into case law touching on numerous areas of doctrine. Yet, perhaps due to the perception that its contours are fuzzy or that it lacks currency due to its association with the other nondelegation doctrines, the private-veto doctrine is likely not invoked as often as it could be. Thus, this Part considers applications of the private-veto doctrine that could be further developed. In particular, this Part argues that the doctrine should be robustly applied in the context of delegations that empower religiously motivated individuals or organizations to exercise authority over third parties.

Scholars and courts have not yet widely recognized the private-veto problem in cases where an entity or individual acting on a religious motivation exercises authority over the liberty or property interest of another. In the case law and scholarship discussing religious liberty, this subject is discussed in

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202. Jaffe, *supra* note 108, at 202. Jaffe explained:

> Becoming more explicitly self-interested and bolder in its extremity, each group demands the aid of government. What is asked is power of self-government and power for the group to maintain a certain minimum position with respect to other groups. These demands are, of course, but one aspect of the incessant pressure upon government to supply that co-ordination of economic forces which our traditional structure has failed to provide. This general phenomenon has been continually observed and is well known to the reader. In its sum total it is more than the demand of any one group; the regulation of the railroads, for example, expresses a merger of many interests. But here, we are examining one of the significant forms in which these demands are pressed; it is in part a demand for group privileges over against the rest of society; in part a demand by the more explicit elements in a group that the group as a corporate body be given power to coerce under the sanction of law dissentient members of the group.

Id.

terms of "religious exemptions" or "religious accommodations."[203] Religious exemptions or accommodations are laws, regulations, or court rulings that grant individuals or organizations exemptions from laws that apply to the public generally, but that violate the religious tenets of the individual or organization seeking the exemption.[204]

Such accommodations are sometimes challenged on the ground that they violate the Establishment Clause, on the theory that they cross the line from accommodating religious exercise to actually providing valuable governmental support to religion, while harming or disadvantaging nonreligious third parties.[205] In the scholarly literature, the concern about harming nonreligious parties in order to facilitate or accommodate religious exercise is often referred to as a concern about "third-party harms."[206] The notion that the Constitution prohibits religious accommodations that excessively burden third parties seems to share relatively widespread acceptance in theory.[207] In practice, however, numerous conceptual puzzles have clouded its application, and the Supreme Court has not adopted a robust version of this principle.[208]

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203. The literature on the topic of religious accommodations and religious exemptions is vast. For additional discussion of the topic, see generally KENT GREENAWALT, EXEMPTIONS: NECESSARY, JUSTIFIED, OR MISGUIDED? (2016); Netta Barak-Corren, *A License to Discriminate? The Market Response to* Masterpiece Cakeshop, 56 HARV. C.R.-C.L. L. REV. 315 (2021); Christopher C. Lund, *Religious Exemptions, Third-Party Harms, and the False Analogy to Church Taxes*, 106 KY. L.J. 679 (2017–2018); Bruce Ledewitz, *Experimenting with Religious Liberty: The Quasi-Constitutional Status of Religious Exemptions*, 6 ELON L. REV. 37 (2014); *Developments in the Law: Reframing the Harm: Religious Exemptions and Third-Party Harm After* Little Sisters, 134 HARV. L. REV. 2186 (2021); Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015).

204. *See* GREENAWALT, *supra* note 203, at 2.

205. *See, e.g.*, Est. of Thornton v. Caldor, Inc., 472 U.S. 703, 709–11 (1985) (holding that a law giving employees an unconditional right not to work on their Sabbath involved "unyielding weighting in favor of Sabbath observers over all other interests," including those of employers and other employees who would have to work on those days, and therefore violated the Establishment Clause because its primary effect was to benefit religious practice).

206. The first explicit articulation of this concern was likely in Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 363 (2014). For additional sources, see Christopher C. Lund, *Religious Exemptions, Third-Party Harms, and the Establishment Clause*, 91 NOTRE DAME L. REV. 1375, 1376–77 (2016) [hereinafter Lund, *Establishment Clause*]; NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 52–61 (2017); Frederick Mark Gedicks & Rebecca G. Van Tassell, *Of Burdens and Baselines:* Hobby Lobby*'s Puzzling Footnote 37*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 323, 323–24 (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016).

207. *See, e.g.*, Lund, *Establishment Clause*, *supra* note 206, at 1376 ("The general principle here—that burdens on third parties matter—is well established. . . . It also fits with well-established Establishment Clause precedent.").

208. *See, e.g.*, Gene Schaerr & Michael Worley, *The "Third Party Harm Rule": Law or Wishful Thinking?*, 17 GEO. J.L. & PUB. POL'Y 629, 646 (2019); Frederick Mark Gedicks, *One Cheer for* Hobby Lobby*: Improbable Alternatives, Truly Strict Scrutiny, and Third-Party Employee Burdens*, 38 HARV. J. L. & GENDER 153, 171 (2015) (suggesting that the Court in *Hobby Lobby* "read[] third-party burden analysis completely out of RFRA").

Yet, at least some third-party harm scenarios may be reconceptualized as involving a private veto. For example, religious exemptions to the Affordable Care Act's ("ACA") contraceptive mandate may be best understood as private vetoes, rather than as examples of third-party harms. The ACA's contraceptive mandate requires employers who provide health insurance to their employees to include coverage for prescription contraceptives.[209] The scope of the administratively created religious exemption to this requirement for religious employers has changed a number of times.[210] While lawsuits were pending over the scope of the Obama Administration's exemption, which religious employers saw as too narrow, the Trump Administration adopted a new regulation that broadly licensed employers with any religious or even "moral" qualms to opt out of providing coverage to their employees, without any concomitant requirement that employees be able to access that coverage through other means.[211] Although the Supreme Court upheld this regulation against a challenge under the Administrative Procedure Act in *Little Sisters of the Poor v. Pennsylvania*, it did not consider the private-veto problem.[212] In his concurring opinion in *Little Sisters of the Poor*, Justice Alito went so far as to suggest that the broad religious exemption is not just permitted, it is actually required by the federal Religious Freedom Restoration Act ("RFRA"), which invalidates federal laws that impose a substantial burden on religious exercise, unless they can satisfy strict scrutiny.[213]

Arguably, however, the Trump regulation violates the private-veto doctrine and is therefore unconstitutional. It delegates to private parties (employers) the authority to control their employees' access to a statutorily guaranteed benefit based on the employer's own religious beliefs—not unlike the private veto granted to churches in *Grendel's Den*. Moreover, while it is unlikely that any court would find a constitutionally protected liberty right to access government-funded contraception, plaintiffs would be on firm footing in arguing that the ACA creates a statutory entitlement to—and thus a governmentally created property interest in—particular health benefits.[214]

209. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2374, 2377–78 (2020).

210. This history is summarized in *id.* at 2373–78.

211. *Id.* at 2377–78; Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed Reg. 47,792, 47,792 (Oct. 13, 2017) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. 2590, 45 C.F.R. pt. 147). The Biden Administration subsequently promised to rescind this religious-exemption rule, and in 2022, it undertook the formal rulemaking process to do so. Status Rept. at 2–4, Pennsylvania v. Biden, Case 17-cv-4540 (E.D. Pa. July 26, 2022), ECF No. 269.

212. *Little Sisters of the Poor*, 140 S. Ct. at 2386.

213. *Id.* at 2387 (Alito, J., concurring).

214. *See supra* note 134 and accompanying text; Dayna Bowen Matthew, *Defeating Health Disparities—A Property Interest Under the Patient Protection and Affordable Care Act of 2010*, 113 W. VA. L. REV. 31, 40–46 (2010) (arguing that the ACA creates a property interest in "non-disparate health care").

And since the private-veto doctrine is grounded in the Constitution, it would trump any claims for the exemption arising under a statute such as the Religious Freedom Restoration Act.

The constitutional bar on third parties exercising religiously motivated veto power over another's access to health care guaranteed by statute would bring into question the constitutionality of other religious opt-out laws as well. For instance, Section 1557 of the ACA arguably grants individuals an enforceable entitlement to nondiscriminatory access to health care in facilities that receive federal funds.[215] However, the Trump Administration adopted a rule granting a broad religious exemption to this nondiscrimination requirement with respect to health care services on the basis of sex (which has been interpreted to include both sexual orientation and gender identity).[216] The Trump rule was challenged on the basis that it violates the Establishment Clause due to the third-party burdens it imposes.[217]

Arguably, however, the private-veto doctrine is again a better way of explaining what is constitutionally problematic about that rule. This religious exemption, like the contraceptive coverage exemption, grants a broad private veto power that individuals may exercise over others' statutorily guaranteed health care, based on their private religious beliefs.[218] And as cases such as *Grendel's Den* illustrate, this religious motivation qualifies as an arbitrary or illicit one, insofar as it is a motivation that government officials could not rely upon in depriving private individuals of their liberty or property. For this reason, the government cannot provide that authority to private delegates.

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215. 42 U.S.C. § 18116(a) (2018); *see* C.P. *ex rel.* Pritchard v. Blue Cross Blue Shield of Ill., 536 F. Supp. 3d 791, 794 (W.D. Wash. 2021); Matthew, *supra* note 214, at 40–46.

216. Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160, 37,161–62 (June 19, 2020) (to be codified at 42 C.F.R pts. 438, 440 & 460, 45 C.F.R. pts. 86, 92, 147, 155 & 156 (noting that the 2020 rule incorporates Title IX's religious exemption into section 1557)). As with the religious exemption to the contraception mandate, the Biden Administration has undertaken to revise this rule substantially. Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47,824, 47,824 (Aug. 4, 2022) (to be codified at 42 C.F.R. pts. 438, 440, 457 & 460, 45 C.F.R. pts. 80, 84, 86, 91, 147, 155 & 156) (notice of proposed rulemaking).

217. Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs., 485 F. Supp. 3d 1, 55 (D.D.C. 2020), *appeal dismissed*, No. 20-5331, 2021 WL 5537747 (D.C. Cir. Nov. 19, 2021) (preliminarily enjoining in part the Trump rule, Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27,846, 27,848 (June 14, 2019) (to be codified at 42 C.F.R. pts. 438, 440 & 460, 45 C.F.R. pts. 86, 92, 147, 155 & 156)).

218. Indeed, if the exemption creates a situation in which individuals are unable to access a constitutionally protected health care service at all, it may even raise the question whether the exemption law amounts to an effective ban on the service and therefore infringes the patient's constitutionally protected liberty interest in reproductive autonomy as well. *Cf.* B. Jessie Hill, *What Is the Meaning of Health? Constitutional Implications of Defining "Medical Necessity" and "Essential Health Benefits" Under the Affordable Care Act*, 38 AM. J.L. & MED. 445, 469 (2012) (arguing that "[i]f governmental regulations end up making [certain] safe and legal medical services unavailable for all intents and purposes, courts may one day decide that women's rights to procreative autonomy and bodily integrity are implicated").

Some states have similarly problematic exemption laws. For example, Ohio's health-care "conscience" law broadly empowers numerous individuals—including clinicians, pharmacists, laboratory technicians, and even insurance companies—to decline to provide or pay for any health care service on moral or religious grounds, regardless of whether the patient can access the service elsewhere.[219] If any of those services are protected by a statutory entitlement—such as the ACA—then those state laws should be struck down, much like the Trump Administration rule, under the private-veto doctrine.

These examples also bear similarities to the case of Kim Davis, a Kentucky clerk of courts who, in the wake of the Supreme Court's legalization of same-sex marriage, not only personally refused to approve marriage licenses for any couples, but also attempted to prevent any other employee of the clerk's office that she oversaw from doing so.[220] Davis claimed that she had a religious right to opt her entire county office out of providing marriage licenses at all, because her name would appear on the licenses and thus imply her personal "endorsement of [the] marriage[s]."[221] When her actions were challenged by same-sex couples seeking marriage licenses in Davis's county, the Sixth Circuit Court of Appeals held that Davis's actions violated their fundamental right to marry.[222] Indeed, the court held that Davis's actions deprived the plaintiffs of their constitutional right even though they had the option to travel to another county to obtain marriage licenses; the constitutional violation was complete when the clerk's office denied the license based on Davis's personal religious convictions.[223] As the concurring opinion explained, Davis's actions would fail even rational-basis scrutiny because Davis's morality-based objection does not constitute a "'legitimate state interest' justifying interference with homosexual relationships."[224]

Davis's case could also be seen as raising concerns similar to those addressed by the private-veto doctrine, however. Of course, Davis was acting as a government official, not a private citizen, in denying the licenses. But as in *Yick Wo*, the concern at the heart of the private-veto doctrine—subjecting constitutional and property rights to the arbitrary whims of an individual or group of individuals—is present whether the person exercising the veto is acting in an official or private capacity. Thus, the private-veto doctrine is applicable to arbitrary, government-enabled decision-making over others'

219. OHIO REV. CODE ANN. § 4743.10 (West 2021).

220. Miller v. Davis, 123 F. Supp. 3d 924, 932 (E.D. Ky. 2015) (noting that while there was a deputy clerk in Davis's office who was willing to issue marriage licenses to same-sex couples, Davis would not permit the clerk to do so because Davis's name and title still appeared on the licenses), *vacated by* No. 15-44, 2016 WL 11695944 (E.D. Ky. Aug. 18, 2016).

221. *Id.* (citation omitted).

222. Ermold v. Davis, 936 F.3d 429, 435 (6th Cir. 2019).

223. *Id.* at 437.

224. *Id.* at 441 (Bush, J., concurring) (quoting Lawrence v. Texas, 539 U.S. 558, 578 (2003)).

property or liberty, regardless of whether the actual decision-maker is a government official or private party.

This doctrine may have applications in the abortion context as well. For example, Laurence Tribe and David Rosenberg have argued, in essence, that a Texas law ("S.B. 8") allowing private claimants to sue anyone who provides or assists with an abortion after six weeks of pregnancy may violate the private veto principle described here, although they do not identify the private-veto doctrine as such.[225] Because the law allows enforcement of its provisions by private lawsuits, Tribe and Rosenberg argue that the "law delegates quintessentially governmental power to private parties—in Texas, to literally anyone on earth with an objection to abortion, giving that individual or organization the unilateral and unfettered power to . . . punish[]" individuals for assisting in patients' exercise of their constitutional abortion rights.[226] Indeed, analogizing specifically to *Grendel's Den*, Tribe and Rosenberg note it is likely that private plaintiffs may be motivated primarily by religious scruples in using this private veto power.[227] Although the application of the private-veto doctrine to S.B. 8 particularly no longer implicates the fundamental liberty interest of the person subject to the veto after the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*,[228] it nonetheless implicates the individual's property interest because it results in a deprivation of money—a very concrete and well-recognized form of property. On the other hand, it is a problematic example insofar as it suggests than nearly any law creating a civil suit enforcement mechanism could violate the private-veto doctrine. Numerous laws enable private parties to sue other private parties for their enforcement; they should not be considered unconstitutional unless they delegate standardless, unreviewable authority to a relatively small, identifiable group of individuals.[229]

Finally, in the 2021 Supreme Court case *Fulton v. City of Philadelphia*, Catholic Social Services ("CSS")—a Catholic social service agency that placed children with adoptive parents—exercised a private veto over the right of

225. Laurence H. Tribe & David Rosenberg, *How a Massachusetts Case Could End the Texas Abortion Law*, BOS. GLOBE (Sept. 8, 2021, 5:32 AM), https://www.bostonglobe.com/2021/09/07/opinion/how-massachusetts-case-could-end-texas-abortion-law [https://perma.cc/P2JJ-HJYU].

226. *Id.* The person receiving the abortion is not herself subject to suit under the Texas law. TEX. HEALTH & SAFETY CODE ANN. § 171.206(b)(1).

227. *Id.*

228. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (holding that there is no federal constitutional right to abortion).

229. Howard Wasserman and Rocky Rhodes have argued that the power delegated by the Texas law is uniquely governmental, unlike other laws creating civil causes of action, because it puts the enforcer plaintiff—who does not have to have been injured by the abortion—in the shoes of the government. Howard M. Wasserman & Charles W. "Rocky" Rhodes, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: The Limits and Opportunities of Offensive Litigation*, 71 AM. U. L. REV. 1029, 1079–84 (2022).

same-sex couples to adopt. [230] CSS had sought an exemption from Philadelphia's prohibition on discrimination against gay and lesbian couples by agencies providing adoption services under a contract with the city.[231] Ultimately, the Supreme Court held that the Catholic organization was entitled to an exemption under the Free Exercise Clause of the First Amendment, in large part because the City's rules regarding adoption placements allowed for other, nonreligious exemptions from the nondiscrimination requirement.[232]

But in authorizing Catholic Social Services to deny certification as adoptive parents to same-sex couples based on the agency's religious commitments, the Court's ruling granted Catholic Social Services a private veto over the ability of same-sex couples to adopt. A motive that must be considered "arbitrary" in a legal sense—the agency's private religious beliefs—unquestionably played a role in the adoption agency's decision-making. It appears, then, that the grant of an exemption by the city might have violated the couples' due process rights under the private-veto doctrine (assuming, at least, they could prove that state law grants an entitlement to parents who meet particular qualifications to adopt). Yet, this scenario poses a particularly thorny problem for the private-veto doctrine, since the Court held that CSS had an opposing constitutional right to that precise exemption. It sets up a potential direct conflict between the right of religious individuals and organizations to an exemption from generally applicable laws that violate their beliefs, and the right of individuals not to have the government empower private parties to act on their own biases, including religious beliefs, when they are wielding governmental authority.

One last point: The ability to identify a discrete private actor or group of private actors to whom the power over the plaintiff's liberty and property interests remains key in the private-veto cases. This element not only demonstrates the existence of the delegation, but it supports the required showing of an actual deprivation of the plaintiff's property or liberty interest. If the plaintiff has ample alternate options for accessing the benefit or service, or for exercising her rights, then the plaintiff likely has not been deprived of a property or liberty interest.

In many of the examples above, the plaintiffs were beholden to a relatively limited number of private individuals who were empowered to exercise sovereignty over the plaintiffs' liberty or property. For example, people generally have limited health insurance options, whether through one's employer or through public insurance. Hospital consolidation, too, has meant that people in many geographic locales have few if any providers of

230. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1874–76 (2021).

231. *Id.* at 1876.

232. *Id.* at 1878.

surgical services to choose from.[233] This situation contrasts with other scenarios in which there is a much larger or unlimited number of service providers. For example, in the case of Kim Davis, the plaintiffs in that case could have traveled to one of Kentucky's other 119 counties to seek marriage licenses. Because the court found that the denial of a marriage license by a government official constituted a per se violation of the fundamental right to marry, it concluded that the availability of other venues for the exercise of the right did not undermine the plaintiffs' claim. If the claim were framed as a private-veto claim, however, it might be necessary to consider the availability of marriage licenses in other counties. Similarly, there may be an argument that there was no private veto power exercised against the same-sex couples in *Fulton*, because there were numerous other providers of adoption services. While fact-intensive, the need to determine whether an identifiable group of people is exercising the veto power is an important limiting principle for the private-veto doctrine.

CONCLUSION

This Article unearths a long-standing and well-established but little-utilized doctrine of constitutional law: the private-veto doctrine. With its emphasis on prohibiting private exercise of sovereignty over other private individuals and its bar on arbitrary exercises of coercive power, the private-veto doctrine resonates with some of the most fundamental values underlying the U.S. constitutional order. Yet it has long been conflated with the non-delegation line of cases and therefore treated as a moribund species of doctrine, which is both unmanageable and unmoored from any recognizable line of modern constitutional jurisprudence.

The private-veto principle is not only deep-rooted—it is also entirely manageable and rationalizable as a legal doctrine. Grounded in both substantive due process principles forbidding arbitrary governmental decision-making and procedural due process principles requiring a pre-deprivation opportunity to be heard before a neutral decision-maker for governmental deprivations of liberty or property, the private-veto doctrine partakes of both established lines of jurisprudence. Plaintiffs who can demonstrate that a legal rule deprives them (or threatens to deprive them) of constitutionally protected liberty or privacy interests based on the arbitrary decision-making of a private individual or entity, or group of private individuals or entities, can make out an infringement of their due-process rights. A reconsideration of the private-veto doctrine thus provides a new avenue for challenging particularly sticky problems of constitutional law. In particular, it sheds new light on pressing contemporary issues in the context of religious exemptions and related legal conundrums.

233. *See, e.g.*, Sabrina Dunlap, *When Views Collide: How Hospital Mergers Restrict Access to Reproductive Health Care*, 2 HEALTH L. & POL'Y 30, 31–32 (2008).