Of Lumpers, Splitters, and Private Nondelegation: A Response to Professor Hill

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ABSTRACT: Professor B. Jessie Hill's Article, Due Process, Delegation, and Private Veto Power*, revisits that perennial target of legal scholarship: the nondelegation doctrine. Bringing a fresh perspective to this well-worn topic, Hill argues that public and private delegations, normally lumped together, are better analyzed separately. Her remedy is to split up these concepts, identifying delegations that allow private individuals to exercise power over others—which she calls "private vetoes"—as its own conceptual category. This Response evaluates Hill's decision to treat private vetoes separately. It concludes that Hill's act of splitting up nondelegation helpfully illuminates characteristics of private vetoes. But, it also conceals as well as reveals, making it harder to notice valuable connections between private vetoes and closely related doctrinal categories.*

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INTRODUCTION

It is hard to read old cases with fresh eyes. The gloss of secondary literature, conventional wisdom, and casebook organization can cover old cases with a patina of familiarity that makes it hard to reconsider their meaning and import. For this reason, scholarship that identifies new themes in old cases can be quite valuable. Professor B. Jessie Hill's thought-provoking Article, *Due Process, Delegation, and Private Veto Power*,[1] falls within the long and salutary tradition of legal scholarship that identifies doctrinal threads that are "hidden in plain sight."[2] The target of Hill's reanalysis is nondelegation, a concept that has received more than its share of scholarly treatment over the last century. In her view, the copious scholarship on nondelegation misses a point that has been hiding in plain sight—that standard nondelegation doctrine lumps together two things that are better analyzed separately. In her words, lumping together public nondelegation with delegations to private groups has led courts and scholars to misunderstand "what is unique and important" about private delegation.[3] The result, she concludes, is that courts fail "to analyze legal questions properly."[4] Her remedy is to split up these concepts, identifying delegations that allow private individuals to exercise power over the liberty or property of others—which she calls "private vetoes"—as a distinct conceptual category.

This Response evaluates Hill's decision to split up nondelegation for the purpose of classifying private vetoes as a separate conceptual category. It first describes the analytical tools of lumping and splitting, showing the power of each to reveal and conceal connections among concepts. It then shows how Hill's act of splitting up nondelegation reveals characteristics of private vetoes that are obscured when they are lumped into a single category. Finally, this Response shows that Hill's act of splitting conceals as well as reveals, making it harder to notice valuable connections among private vetoes and closely related doctrinal categories.

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1. *See generally* B. Jessie Hill, *Due Process, Delegation, and Private Veto Power*, 108 IOWA L. REV. 1199 (2023) (introducing the concept of "private vetoes").

2. *E.g.*, Mark A. Geistfeld, *Hidden in Plain Sight: The Normative Source of Modern Tort Law*, 91 N.Y.U. L. REV. 1517, 1522 (2016) (identifying the idea of reciprocity in the law as a principle "hidden in plain sight").

3. Hill, *supra* note 1, at 1203.

4. *Id.*

I. LUMPING, SPLITTING, AND PRIVATE VETOES

A. LUMPING AND SPLITTING

"Lumping" is the aggregation of things or concepts together based on their similarities.[5] "Splitting," by contrast, is the division of things or concepts based on their differences.[6] We make sense out of the things we experience in our world by lumping them into more general categories and splitting them into more specific ones.[7] When we lump or split things into categories, the purpose of the classification dictates the breadth of the categories we create. Accordingly, two or more things may be lumped together for one purpose but split for another. The importance of lumping and splitting lies in how doing so lets us see how things or concepts are related to one another. Indeed, each time a thing or concept is split into two categories, or two things or concepts are lumped into a single category, some connections among the things or concepts are brought into focus while others are obscured.[8]

Consider the group of things we sometimes call "celestial bodies."[9] For some purposes, it makes eminent sense to lump together the Sun, Moon, stars, and planets like Venus and Mars. After all, these are the things that we, here on Earth, see in our sky. Lumping them together into a single category allows us to see clearly the characteristics that they share—they appear to us to glow or shine, they appear to move through the sky, and their positions relative to each other and to the Earth can be used to mark the passage of days, months, seasons, and years.[10] And whatever their celestial trajectories, they travel together in our collective imagination, too, often appearing together in literature.[11] Accordingly, lumping the Sun, Moon, stars, and

5. Eviatar Zerubavel, *Lumping and Splitting: Notes on Social Classification*, 11 SOCIO. F. 421, 422 (1996) ("As we lump those things together in our minds, we allow their perceived similarity to outweigh any difference.")

6. *Id.* at 424 ("Whereas lumping involves overlooking differences within mental clusters, splitting entails widening the perceived gaps between them, thereby reinforcing their mental separateness." (emphasis omitted)).

7. *Id.* at 427–28 ("It is the availability of the category 'pre-Columbian,' for example, that enables us to lump together the Olmec and Aztec civilizations, which actually flourished some 2000 years apart from one another.").

8. *Id.* at 427–29.

9. ASTRONOMY: UNDERSTANDING CELESTIAL BODIES 12 (Samuel Kazlow ed., 1st ed. 2015) (grouping together the Sun, Moon, stars, and planets).

10. *Time Determination by Stars, Sun, and Moon*, ENCYC. BRITTANICA, https://www.britannica.com/science/calendar/Time-determination-by-stars-Sun-and-Moon [https://perma.cc/WP8D-NCPL].

11. Walt Whitman, *On the Beach at Night Alone*, POETRY FOUND., https://www.poetryfoundation.org/poems/48856/on-the-beach-at-night-alone [https://perma.cc/Q2VW-CJZU] (writing together of the planets, Sun, Moon, and stars); Percy Bysshe Shelley, *The Triumph of Life*, POETRY FOUND., https://www.poetryfoundation.org/poems/45143/the-triumph-of-life [https://perma.cc/8MFD-PRV6] (same); Frederick Goddard Tuckerman, *Sonnet XVII: "Roll on, Sad World! Not Mercury or Mars,"* POETRY FOUND., https://www.poetryfoundation.org/poems/51971/roll-on-sad-world-not-mercury-or-mars [https://perma.cc/4ZRV-YMB4] (same).

planets together into a single category—celestial bodies—reveals connections that aid our understanding of each of that category's members.[12]

But just as lumping aids our understanding of the characteristics of members of a category, we can also learn things about each of a category's members by splitting general categories into more specific ones. Consider again the celestial bodies. Despite the similarities connecting the Sun, Moon, stars, and planets, the category "celestial bodies" obscures significant differences among its members. While they all appear bright to us, only the stars and Sun produce the light we see, shining as they burn continually. The moon and planets appear to glow, too, but they are visible only because they reflect light produced elsewhere. And even lumping the Sun and stars together obscures the fact that the Sun is a mere ninety-three million miles away, making it the source of light and heat, and ultimately life, on Earth.[13] The other stars, while also producing light and heat, are unimportant to life on Earth because of their vastly greater distance. And the Moon and planets, too, differ from one another in their relationship to the Earth. While the Moon orbits the Earth, the planets (like the Earth itself) orbit the Sun. Accordingly, splitting the category of celestial bodies into smaller units allows us to focus on the differences between them that are obscured by lumping them together into a single category.

As this example suggests, lumping and splitting are both powerful analytical tools with the power to reveal and obscure the connections that exist among things and concepts. Accordingly, while the choice to lump or split is often uncontroversial, even subconscious, it remains a choice with real analytical consequences.[14] As a result, it is valuable to recognize what connections are revealed and obscured when we choose to lump or split. With

12. Consider also the gradation of similarities and differences among Romance languages, which can fruitfully be categorized together because of similarities in their grammar, vocabulary, and even idiomatic expressions. *Linguistic Characteristics of the Romance Languages*, ENCYC. BRITTANICA, https://www.britannica.com/topic/Romance-languages/Vocabulary [https://perma.cc/3X3D-4ZQZ] (discussing differences and similarities among Romance languages). For example, Spanish, Portuguese, and Italian all use a similar idiom to express the English aphorism "there is no use crying over spilled milk," translated roughly as "waters that have passed don't run the mill." Spanish uses "agua pasada no mueve molino." Portuguese uses "Águas passadas, não movem moinhos." And Italian uses the similar "Acqua passata non macina più" (waters that have passed no longer grind). Because of these similarities, knowing what the expression means in any of these languages provides information about what it means in the others. To take another example, because of the similarities between Galician and Portuguese, it is possible to consider Galician a mere dialect of Portuguese and lump the two together simply as a single language. This lumping reveals the common origin and high degree of similarity between Portuguese and Galician—a similarity that is obscured by designating them as separate languages. Benigno F. Salgado & Henrique Monteagudo, *The Standardization of Galician: The State of the Art*, PORTUGESE STUD., 1993, at 200, 200–01.

13. *Sun,* NAT'L GEOGRAPHIC, https://education.nationalgeographic.org/resource/sun [https://perma.cc/MK4K-H7N9].

14. *See* Zerubavel, *supra* note 5, at 428 ("And only the concept 'alcoholic' makes wine seem closer to whiskey than to grape juice.").

this background on lumping and splitting in mind, we turn to Hill's work splitting up the nondelegation doctrine.

B. SPLITTING UP NONDELEGATION

In her thought-provoking Article, *Due Process, Delegation, and Private Veto Power*,[15] Professor Hill revisits that perennial target of scholarly inquiry: nondelegation. Hill argues that scholars make an infelicitous classification error when lumping together public nondelegation with its less-famous sibling, private delegation.[16] In her view, these concepts are often described together as types of delegation despite their significant conceptual differences, underlying assumptions, and doctrinal origins.[17] In her words, lumping these concepts together has led courts and scholars to misunderstand "what is unique and important" about private delegation.[18] The result, she concludes, is that courts fail "to analyze legal questions properly."[19] In order to avoid this mistake, she isolates one concern of many expressed in the nondelegation context: the concern "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."[20] In order to distinguish this strain of nondelegation from standard nondelegation, she renames the doctrine addressing this concern the "private-veto doctrine."[21] As she defines it, the private-veto doctrine "forbids the government to grant standardless, unreviewable control to private individuals or entities over the property or liberty of others."[22] This principle, in Hill's view, is longstanding: it can be found sprinkled throughout the Supreme Court's case law over a long period of time, often arising in the context of due process challenges, but also sometimes arising in other doctrinal contexts, like equal protection[23] or first amendment cases.[24]

In Hill's view, there are analytical and practical benefits to splitting private vetoes from nondelegation. As an analytical matter, she argues, the private-veto doctrine bears little resemblance to the *public* nondelegation

15. *See generally* Hill, *supra* note 1 (arguing private and public delegation should be analyzed separately).

16. *Id.* at 1203–04.

17. *See id.* at 1202–03, 1223.

18. *Id.* at 1203.

19. *Id.*

20. *Id.*

21. *Id.* at 1202–03.

22. *Id.* at 1200.

23. *See, e.g.*, City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 447–50 (1985); Yick Wo v. Hopkins, 118 U.S. 356, 366–68 (1886).

24. *See, e.g.*, Larkin v. Grendel's Den., Inc., 459 U.S. 116, 123, 127 (1982).

doctrine[25] described in cases like *Schechter Poultry*[26] and *Gundy*.[27] Public nondelegation cases concern the principle of separation of powers associated with the Constitution's Vesting Clauses. Accordingly, the nondelegation doctrine concerns whether Congress is vesting too much authority, or the wrong kind of authority, in an agency. On this view, the main thrust of nondelegation is political accountability—that is, by shunting decisions from executive agencies to Congress, nondelegation is meant to strengthen "the chain of political accountability that connects the people and their representatives."[28] By contrast, the private-veto doctrine that Hill identifies concerns arbitrary exercises of power by private parties, not by administrative agencies. Accordingly, private vetoes raise (primarily) due process concerns rather than concerns about the Constitution's Vesting Clauses, the separation of powers, or political accountability.[29]

As a practical matter, identifying the private-veto doctrine as something distinct from nondelegation allows Hill to construct a new doctrinal paradigm for evaluating statutes that vest control in individuals over the property and liberty of others. For example, Hill points to the controversial Texas statute known as S.B. 8, which allows private individuals to bring lawsuits to enforce abortion restrictions.[30] This mechanism can be considered a private veto in Hill's terminology because the government has granted a private individual the authority to exercise control over the liberty of another by bringing a punitive lawsuit against her.[31]

In sum, Hill's identification of the private-veto doctrine as something distinct from the nondelegation doctrine is an act of splitting, revealing features of private vetoes that are obscured when they are lumped together with delegation. While public nondelegation is rooted in the Vesting Clauses and the principle of separation of powers, the private veto is rooted (primarily) in the Due Process Clause. While public nondelegation is concerned with political accountability, the private veto is concerned with arbitrary action and animus against vulnerable groups. Accordingly, Hill's act of splitting helps to illuminate the characteristics of one strain of nondelegation that have been hiding in plain sight. But, just as Hill's act of splitting reveals, it also obscures. Part III will consider the ways in which isolating private vetoes as a stand-alone category can obscure important connections—both between private vetoes and public nondelegation and also between private vetoes and closely related doctrinal traditions.

25. Hill, *supra* note 1, at 1203.
26. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537–39 (1935).
27. Gundy v. United States, 139 S. Ct. 2116, 2121 (2019).
28. Evan C. Zoldan, *Delegation to Nonexperts*, 169 U. PA. L. REV. ONLINE 100, 106 (2020).
29. Hill, *supra* note 1, at 1223.
30. *Id.* at 1243.
31. *Id.*

II. TO SPLIT OR NOT TO SPLIT?

As Hill argued, splitting the concept of private vetoes from the concept of nondelegation yields analytical benefits: to wit, it reveals their different animating concerns and doctrinal bases. However, as with all decisions to split or lump, splitting up the nondelegation doctrine also obscures crucial characteristics of the private-veto doctrine. This Part will assess those connections that are obscured by the decision to split private vetoes from nondelegation. A close look at Hill's analysis reveals that splitting the private-veto doctrine into its own conceptual category obscures valuable connections—both to public nondelegation doctrine and also to closely related doctrinal traditions.

A. OBSCURING CONNECTIONS TO STANDARD NONDELEGATION

In Hill's view, a private veto violates procedural due process when "the delegation deprives a private party of a constitutionally recognized liberty or property interest without procedural safeguards."[32] Concomitantly, a private veto violates substantive due process when "the private delegate's actions suggest actual bias or arbitrariness," particularly when meaningful standards to bind the exercise of discretion are lacking.[33] Hill's decision to split private vetoes from nondelegation unchains private vetoes from the weak nondelegation doctrine that prevails under federal law, allowing space for the formulation of these new proposed doctrinal tests.

But Hill's decision to split private vetoes from nondelegation has the unfortunate consequence of obscuring connections with standard nondelegation scholarship and doctrine. Obscuring these connections leads Hill to miss the way that standard nondelegation doctrine could help her formulate a doctrinal test that meets her goals of imposing procedural safeguards and curbing discretion and arbitrariness. The rest of this section will identify the longstanding strain of nondelegation scholarship and doctrine that addresses the same concerns as Hill's private vetoes. Then, it will show how recognizing the connections between standard nondelegation doctrine and private vetoes can help Hill formulate a more robust doctrinal test.

1. Arbitrariness, Discretion, and Safeguards in Standard Nondelegation Scholarship and Doctrine

First, splitting private vetoes from standard nondelegation obscures the fact that arbitrariness, discretion, and procedural safeguards have long been the subject of standard nondelegation scholarship. Even as it was becoming clear that the intelligible principle test applicable to federal delegations failed to constrain Congress and agencies, scholars suggested a shift in focus to procedural safeguards rather than substantive standards. Famously, Kenneth

32. *Id.* at 1224.
33. *Id.*

Culp Davis suggested that the intelligible principle test was "almost a complete failure" a half-century ago.[34] Rather than relying on statutory standards—in his view, an unworkable requirement—Davis suggested focusing also on "procedural safeguards."[35] In his view, the purpose of the nondelegation doctrine should be "one of protecting against unnecessary and uncontrolled discretionary power. The focus should no longer be exclusively on standards; it should be on the totality of protections against arbitrariness, including both safeguards and standards."[36] Accordingly, Davis suggested that when statutes fail to provide standards to apply, agencies themselves should (with prodding by the courts) adopt their own procedural safeguards to constrain their discretion.[37]

Importantly, Davis anticipated Hill's focus on due process. He argued that when courts adopt the safeguards model, the "non-delegation doctrine will merge with the concept of due process."[38] Indeed, Davis relied on due process cases—not nondelegation cases—to illustrate his safeguards method. As Davis noted, the particular doctrinal basis for constraining the offending behavior may not matter much: when the court is concerned with "favoritism, partiality, and arbitrariness," judicial censure might equally be rooted in due process or nondelegation.[39] As a result, Davis reasoned that many nondelegation cases could be better cast as due process cases requiring administrators to develop limits on their exercise of discretion.

Second, splitting private vetoes from nondelegation also obscures the fact that a nondelegation doctrine focused on arbitrariness, discretion, and procedural safeguards is alive and well in the states. Although many states follow something like the Supreme Court's "intelligible principle" test, some states have adopted Davis's safeguards model.[40] The Wisconsin Supreme Court, for example, recently considered a nondelegation challenge to a state law vesting authority in local health officers.[41] The challenger asserted that the breadth of the legislative grant of authority violated the state's nondelegation doctrine. Following Davis's approach, the court disagreed, holding that the statute's constitutionality rested on whether there were "procedural safeguards against arbitrary exercise" of delegated authority rather than on the presence or absence of statutory standards to guide the

34. Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 713 (1969).

35. *Id.* at 729–30 (proposing that the nondelegation doctrine be altered to include an emphasis on "procedural safeguards").

36. *Id.* at 713.

37. *Id.* at 728.

38. *Id.* at 730.

39. *Id.* at 731 (quoting Holmes v. N.Y. Hous. Auth., 398 F.2d 262, 264 (2d Cir. 1968)).

40. Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1191 (1999) ("A handful—and only a handful—of states follow the Davis 'procedural safeguards' approach."); Gary J. Greco, Survey, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. AM. U. 567, 600 (1994) (listing states that adopt the safeguards approach).

41. Becker v. Dane County, 977 N.W.2d 390, 401 (Wis. 2022).

agency's substantive decisions.[42] Indeed, the court held that the "greater the procedural safeguards, the less critical we are toward the substantive nature of the granted power."[43] Examining the statutory scheme, the court found ample procedural safeguards, including local health department policies, the possibility that health department officers could be removed, budgetary restraints, and the possibility of legislative override and judicial review.[44] Because of these procedural safeguards, the court concluded that the health officers' discretion was sufficiently cabined to prevent an arbitrary exercise of authority—even in the absence of substantive standards.[45]

As Davis's work and state cases show, there is a long and deep connection between standard nondelegation doctrine and the concepts that Hill highlights in her work. Just as the test Hill proposes focuses on due process, procedural safeguards, and the restraint of arbitrary action,[46] so too does longstanding nondelegation scholarship and case law. These similarities suggest that Hill is in good company by making due process, arbitrariness, and constraint of discretion the focus of her proposed doctrinal test. However, these similarities also reveal the downside of splitting nondelegation from private vetoes. By emphasizing the dissimilarities that divide nondelegation from private vetoes, Hill obscures the fact that nondelegation doctrine scholarship and case law have long identified the same concerns as the private veto doctrine she formulates. As a result, Hill's decision to split private vetoes from nondelegation isolates her proposed test from work that covers much of the same ground.

2. Standard Nondelegation and the Private Veto Problem

Obscuring the connection between private vetoes and standard nondelegation doctrine and scholarship also makes it harder for Hill to identify solutions to tricky doctrinal problems that arise in the private veto context. Perhaps most urgently, Hill contemplates whether the private veto doctrine could have applications for the Texas law, known as S.B. 8,[47] that allows "private claimants to sue anyone who provides or assists with an

42. *Id.*

43. *Id.*

44. *Id.* at 404.

45. *Id.* In a similar vein, other state courts have also adopted the procedural safeguards model, upholding broad delegations when there are procedural controls in place to limit the arbitrary exercise of executive power. *See, e.g.*, Kentucky *ex rel.* Beshear v. Bevin, 575 S.W.3d 673, 683 (Ky. 2019) (holding that the purpose of separation of powers was to "preclude the exercise of arbitrary power"); Associated Gen. Contractors of Wash. v. State, 518 P. 3d 639, 644 (Wash. 2022) ("[P]rocedural safeguards '*exist to control arbitrary administrative action and any administrative abuse of discretionary power.*' This mark[s] a shift away from the more stringent test that required much more specificity.") (internal citation omitted)*; see also* Rossi, *supra* note 41, at 1191; Greco, *supra* note 41, at 600.

46. Hill, *supra* note 1, at 1230–31.

47. TEX. HEALTH & SAFETY CODE ANN. § 171.208(a) (West 2023).

abortion after six weeks of pregnancy."[48] This law gives private parties wide discretion to bring suit against other private parties for money damages—arguably implicating the private veto doctrine. While noting the potential reach of the doctrine to this situation, Hill wisely cautions that a private veto doctrine broad enough to encompass S.B. 8 could be unacceptably potent. Indeed, she notes that if the doctrine were to apply to S.B. 8, "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."[49]

Hill's concern is a valid one. A private-veto doctrine that prohibited all laws enabling private parties to sue other private parties to enforce a law would be implausibly broad. At the very least, a private-veto doctrine this broad would seem to imperil numerous well-accepted state and federal provisions creating private rights of action.[50] But, assessing S.B. 8 in light of the standard nondelegation concept of procedural safeguards points the way toward distinguishing S.B. 8 from more well-accepted citizen suits. Indeed, focusing on the kinds of procedural safeguards that are a standard part of citizen suits provides a promising basis for recognizing what is procedurally wrong with S.B. 8 without creating a doctrine that is implausibly broad.[51]

Consider first S.B. 8. Even leaving aside its substantive goals, the law notably lacks the kinds of procedural safeguards suggested by Davis and employed by some state courts. The lack of procedural safeguards gives an S.B. 8 plaintiff nearly unbridled discretion, raising a serious risk of arbitrary action.[52] For example, the fact that "any person" can bring suit means that an S.B. 8 plaintiff does not need to have knowledge of a particular set of facts in order to bring a claim.[53] The absence of a nexus between the plaintiff and a particular set of facts increases the chances that a suit will be brought based on rumor or conjecture. Moreover, the statute eliminates a host of defenses

48. Hill, *supra* note 1, at 1243.

49. *Id.*

50. Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L. REV. 1483, 1485 (2022) (noting longstanding existence of citizen suit provisions in "employment discrimination, housing discrimination, antitrust, civil rights, labor and employment, [and] healthcare"); *see also* Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 662–66 (2013) (describing private enforcement statutes); Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 CORNELL L. REV. 1187, 1196–97 (2023) (describing private enforcement statutes). More broadly, all statutes that create rights and liabilities could be characterized similarly.

51. Other scholars have identified ways to distinguish S.B. 8 and similar statutes from more typical private citizen provisions. Norris, *supra* note 51, at 1500–02 (describing some ways to distinguish S.B. 8 and similar statutes from traditional private citizens suits). Michaels & Noll, *supra* note 51, at 1194–97, 1207–11 (distinguishing ordinary private enforcement regimes from "private subordination" regimes like S.B. 8). *Cf.* Charles W. "Rocky" Rhodes & Howard M. Wasserman, *Judicial Process and Vigilante Federalism*, 108 CORNELL L. REV. ONLINE 125, 139–46 (2023).

52. For a thorough description of the procedural attributes of S.B. 8, see Michaels & Noll, *supra* note 51, at 1207–11.

53. TEX. HEALTH & SAFETY CODE ANN. § 171.208(a) (West 2023).

to the action, including the defense of reliance on law that is subsequently overturned.[54] This feature is an uncomfortable fit with traditional notions of due process that value affording notice of the law's requirements before punishing behavior in violation of it.[55] And the statute prohibits courts from awarding attorneys' fees to defendants,[56] incentivizing the initiation of even reckless suits.[57] Perhaps most importantly, S.B. 8 cuts the government out of the enforcement process, ensuring that private parties *alone* are responsible for enforcing the law.[58] Reposing enforcement exclusively in private parties exacerbates the chance of arbitrary enforcement by cutting the law's enforcement off from political accountability—that is, there is no political recourse for overzealous private enforcement like there would be for overreaching government enforcement.

In comparison with S.B. 8, many traditional private citizen suit provisions have robust procedural safeguards, restraining discretion and limiting opportunities for arbitrary action. Consider the False Claims Act, which allows the government to recover damages arising from false claims made on the public fisc.[59] The False Claims Act's *qui tam* provisions allow private parties to bring suit against other private parties to recover damages in return for a share of the recovery.[60] But, the similarities to S.B. 8 are few. As an initial matter, a False Claims Act *qui tam* relator normally may not bring suit unless the relator has nonpublic information about the facts of the case. This requirement limits suits to parties connected to the case—like a defendant's former employees who have received non-public information in their professional capacity.[61] This requirement limits the number of potential plaintiffs and discourages the type of opportunistic claims encouraged by S.B. 8. Moreover, because a *qui tam* relator normally must have information unknown to the government, the *qui tam* relator's participation usually plays a key role in serving the public purpose of the False Claims Act—to recover money for the public fisc.[62] Perhaps most importantly, the United States almost always can take over a claim asserted by a private party or seek the

54. *Id.* at § 171.208(e).

55. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.").

56. TEX. HEALTH & SAFETY CODE ANN. § 171.208(i).

57. Norris, *supra* note 51, at 1497 (noting that it disallows attorneys fees for the "defendants, even where the suit is found to be frivolous").

58. TEX. HEALTH & SAFETY CODE ANN. § 171.207(a).

59. 31 U.S.C. § 3729 (2018) (hereinafter "FCA").

60. *Id.* at § 3730(c)–(d).

61. *E.g.*, United States v. Aseracare, Inc., 938 F.3d 1278, 1284 (2019) (describing that the case originated with former employees of the defendant).

62. U.S. *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 651 (D.C. Cir. 1994) (noting that the 1986 amendments to the False Claims Act were intended to incentivize private citizens to help the government recover wrongfully obtained funds for the public fisc).

dismissal of a private party's claim.[63] These safeguards ensure that the United States is always in control of the policy implications of claims brought under the FCA's *qui tam* provisions. Finally, although the relator's recovery is often colloquially referred to as a "bounty," the Supreme Court has made clear that it is more in the nature of compensation—that is, it serves at least in part to compensate the relator for the time and effort (and risk) involved in bringing the action.[64]

As this comparison shows, the *qui tam* provisions of the FCA contain procedural safeguards—notably absent from S.B. 8—that limit the plaintiff's discretion and decrease the risk of arbitrary action. The procedural differences between these statutes suggest that some of what is objectionable about S.B. 8 can be curtailed by the kinds of procedural safeguards contemplated by standard nondelegation doctrine.[65] Although this analysis does not purport to determine whether S.B. 8 would run afoul of the nondelegation doctrine described by Davis and employed by some states, it suggests that traditional nondelegation principles like due process, arbitrariness, and discretion could be useful in analyzing aggressive new private enforcement provisions in a way that avoids implausibly expansive limitations on legislative power. For this reason, there is much to be gained, analytically and practically, by recognizing the connection between Hill's private veto doctrine and ordinary nondelegation doctrine. Because splitting nondelegation from private vetoes obscures the connections between them, splitting makes it harder to recognize solutions to the kinds of pressing doctrinal problems that are the focus of Hill's private veto doctrine.

B. OBSCURING CONNECTIONS TO CLASS LEGISLATION DOCTRINE

In addition to obscuring key connections between private vetoes and standard nondelegation doctrine, splitting private vetoes into its own conceptual and doctrinal category obscures deep connections between private vetoes and another due process-related doctrine that overlaps significantly with it: the class legislation doctrine. "Class legislation" is legislation that benefits one group, or class, at the expense of another class without linking the special benefits or burdens to the interests of the public.[66] From the middle of the nineteenth century through the beginning of the twentieth century, courts and commentators expressed a deep aversion to class legislation, although identifying it and distinguishing it from

63. 31 U.S.C. § 3730(c).

64. Cook County, Ill. v. United States *ex rel.* Chandler, 538 U.S. 119, 131 (2003) ("The most obvious indication that the treble damages ceiling has a remedial place under this statute is its *qui tam* feature with its possibility of diverting as much as 30 percent of the Government's recovery to a private relator who began the action.").

65. Indeed, there is disagreement about what, if anything, makes S.B. 8 procedurally unique. *Compare* Michaels & Noll, *supra* note 51, at 1207–11, *with* Rhodes & Wasserman, *supra* note 52, at 125, 140–43. *See also* B. Jessie Hill, *Response to Wasserman and Rhodes: The Texas S.B. 8 Litigation and "Our Formalism*," 72 AM. U. L. REV. F. 1, 5–10 (2022).

66. Barbier v. Connolly, 113 U.S. 27, 31–32 (1884).

legitimate legislative classification was far from simple. The class legislation *doctrine*, which was developed during this period, was the mechanism that courts used to curb class legislation.[67] Superficially, class legislation doctrine does not appear connected to the private-veto doctrine described by Hill; after all, class legislation doctrine polices impermissible legislative classifications rather than private exercises of power. Nevertheless, many of the concerns that prompted class legislation doctrine, and the doctrinal mechanisms that courts used to monitor legislative classifications, bear a striking resemblance to the private-veto doctrine that Hill describes. Specifically, both class legislation doctrine and Hill's private-veto doctrine address concerns of singling out, bias, and animus. And both class legislation and Hill's private-veto doctrine are rooted in the same set of well-known Supreme Court cases. Recognizing the similarities between class legislation and private vetoes could help Hill evaluate the viability of her proposal.

First, many of the concerns that Hill identifies to justify the private-veto doctrine track the concerns that courts identified to justify the class legislation doctrine. For example, Hill identifies singling out as a concern of the private-veto doctrine. In her view, a private veto can violate procedural due process when a "property or liberty interest is placed at the mercy of a *single or small number of private individuals*."[68] Accordingly, Hill's private-veto doctrine requires the identification of "a discrete private actor or group of private actors" to trigger the doctrine.[69] She also connects the private-veto doctrine with the class of one doctrine, a doctrine rooted in the Equal Protection Clause that limits the ability of the government to single out an individual for special treatment.[70]

Similarly, the concern with singling out that Hill identifies in the private-veto context was also a primary concern articulated by courts employing the class legislation doctrine. Drawing on a long tradition in American law that favors generality in law and disfavors statutes that single out individuals for special treatment,[71] the class legislation doctrine was used to invalidate laws that were "partial"—that is, laws that "operate[] on one citizen and not upon others."[72] Indeed, courts steeped in the class legislation tradition often asserted that it was impermissible for the legislature "to

67. *See* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 125 (1993).

68. Hill, *supra* note 1, at 1224 (emphasis added).

69. *Id.* at 1244.

70. *Id.* at 1221, 1235; *see* Village of Willowbrook v. Olech, 528 U.S. 562, 564–65 (2000) (describing the class of one doctrine).

71. Evan C. Zoldan, *Due Process and the Right to an Individualized Hearing*, 13 U.C. IRVINE L. REV. 1399, 1422–23 (2023).

72. Aulanier v. Governor, 1 Tex. 653, 662 (Tex. 1846); *see also* Hurtado v. California, 110 U.S. 516, 535 (1884) ("Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case."). For more on the value of legislative generality, see generally Evan C. Zoldan, *Reviving Legislative Generality*, 98 MARQ. L. REV. 625 (2014).

exempt 'particular individuals,' or special cases, from the operation of 'the general law of the land.'"[73] Accordingly, courts applying class legislation doctrine would invalidate laws singling out individuals or small, identifiable groups for special benefits or burdens.[74]

Hill also identifies animus or bias as a concern of the private-veto doctrine. In her view, a statute creating a private veto violates substantive due process when founded on animus or bias.[75] Conversely, Hill identifies the elimination of special privileges as a goal of the private-veto doctrine. Specifically, Hill connects the private-veto doctrine to Louis Jaffe's statement that the government's power to delegate authority to private groups risks empowering those groups to demand group privileges at the expense of the rest of society.[76]

Just like Hill's private-veto doctrine, class legislation doctrine also resonated with concerns about animus, bias, and favoritism.[77] Indeed, courts attentive to class legislation concerns often criticized legislation that reflected "undue favor and individual or class privilege" on one hand, and "hostile discrimination" on the other.[78] Accordingly, courts applying class legislation principles would strike down legislation that appeared to confer a special benefit on a "favored class."[79] And courts would strike down statutes that appeared to levy unwarranted burdens on groups if they appeared to be rooted in "enmity or prejudice" or "partisan zeal or animosity."[80]

Second, because Hill's private vetoes reflect the same concerns as class legislation, it is unsurprising that many of the key private veto cases that Hill identifies are also class legislation cases. Indeed, the logic and language of the cases Hill identifies resonate with contemporaneous class legislation thinking. For example, Hill cites *Eubank v. Richmond*[81] and *Thomas Cusack Co. v. Chicago*[82] as early cases implicating the private veto.[83] But, these cases can also be seen to fall squarely within the class legislation tradition. Indeed, viewing these cases in light of the class legislation doctrine helps explain the

73. Morgan v. Reed, 39 Tenn. 276, 283 (Tenn. 1858).

74. GILLMAN, *supra* note 68, at 61-62 (describing that class legislation doctrine disfavors special burdens and benefits).

75. Hill, *supra* note 1, at 1234–35.

76. *Id.* at 1238.

77. Zoldan, *supra* note 72, at 1441–42.

78. Truax v. Corrigan, 257 U.S. 312, 332–33 (1921).

79. Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 563 (1902).

80. Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886). Moreover, both the class legislation doctrine and the private-veto doctrine appear to connect substantive and procedural due process. *Compare* Hill, *supra* note 1, at 1224–25 (discussing procedural and substantive due process in relation to the private veto doctrine), *with* Zoldan, *supra* note 72, at 1451 (discussing procedural and substantive due process in relation to the class legislation doctrine).

81. *See generally* Eubank v. City of Richmond, 226 U.S. 137 (1912) (reviewing the constitutionality of an ordinance that delegated power to private individuals).

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

83. Hill, *supra* note 1, at 1205–07.

otherwise hard-to-explain divergence between the results in these two cases. In both *Eubank* and *Cusack*, the Court considered laws that permitted groups of private landowners to determine the extent to which other property owners could use their own property.[84] The *Cusack* Court upheld the challenged law on the ground that the law generally *prohibited* the planned use but gave the private owners the power to lift the restriction.[85] By contrast, *Eubank*'s generally applicable law *permitted* the planned property use unless the private group prohibited it.[86] As Hill and others have noted, this is a fairly weak distinction, making much out of the difference between an action imposing a restriction and one lifting a restriction.[87]

But the difference between *Cusack* and *Eubank* can be explained more elegantly by reference to class legislation thinking, which was often employed by courts at the time that these cases were decided. Under class legislation doctrine, the legislature was permitted to distinguish between categories, but only if there was a "real" or "substantial" difference between them—that is, a legal distinction was lawful so long as it mapped onto a distinction that existed in the real world.[88] When concluding that one thing should be treated differently than all other things, courts sometimes would describe it as being in "a class by itself"—in other words, it was permissible for legislation to categorize a thing separately from all other things because, in the real world, it constituted its own separate class.[89] This is precisely the language and reasoning used by the Supreme Court in *Cusack* to distinguish *Eubank*. According to the *Cusack* Court, the ordinance permitting private parties to approve of an otherwise prohibited land use was lawful because the ordinance

84. *Eubank*, 226 U.S. at 143–44; *Thomas Cusack Co.*, 242 U.S. at 531.

85. *Thomas Cusack Co.*, 242 U.S. at 531.

86. *Id.* (describing *Eubank*, 226 U.S. at 143–44).

87. Frederick Schauer explains that rules and exceptions to those rules are not conceptually distinct. Indeed, whether a law confers a general power A but excepts conduct B or whether the general power A is defined to exclude B makes no conceptual difference. Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871, 872 (1991) ("[T]here is no logical distinction between exceptions and what they are exceptions to, their occurrence resulting from the often fortuitous circumstance that the language available to circumscribe a legal rule or principle is broader than the regulatory goals the rule or principle is designed to further.").

88. Zoldan, *Due Process*, *supra* note 72, at 1436.

89. Consumers' League of Colo. v. Colo. & S. Ry. Co., 125 P. 577, 579 (Colo. 1912) (upholding statute after finding that there is a "real and substantial difference" between different kinds of roads, making one set of roads a "distinct and real class by themselves"); Muller v. Oregon, 208 U.S. 412, 422 (1908) ("Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained."); New York *ex rel.* Metro. St. Ry. Co. v. N.Y. State Bd. of Tax Comm'rs, 199 U.S. 1, 46–47 (1905) (upholding legislation after determining that its subject was in a class by itself); *cf.* Hammond Packing Co. v. Montana, 233 U.S. 331, 333 (1914) (rejecting the argument that margarine should be put in "a class by itself" for purposes of taxation)*; see also* 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 163 (5th ed.1911) (noting that a statute that "places only one [municipality] in a class by itself by reason of its population does not necessarily contravene the constitutional prohibition" against special legislation (emphasis omitted)).

applied specifically to *billboards* as opposed to other uses, like fences or buildings.[90] And billboards could be categorized differently than other uses because, in the Court's estimation, billboards (but not fences and buildings) are associated with fires, unsanitary conditions, and other undesirable behavior.[91] Because the Court discerned real-world differences between billboards and other uses, the Court concluded that billboards are "*in a class by themselves*."[92] This language and reasoning suggests that the key cases that Hill identifies as private veto cases could also be described accurately as cases in the class legislation tradition.

Perhaps not surprisingly, many of the other key cases that Hill relies on to support the private veto doctrine are also core class legislation cases, including *Yick Wo v. Hopkins*,[93] *City of Cleburne v. Cleburne Living Center*,[94] and *Village of Willowbrook v. Olech*.[95] Each of these cases relies on concepts that are central to class legislation thinking, like arbitrariness, animus, favoritism, and singling out. In *Yick Wo*, an ordinance required laundries to obtain a license to operate in wooden buildings.[96] The Court criticized the fact that the ordinance made an unjustified classification, distinguishing among wooden buildings rather than distinguishing between wooden and nonwooden buildings.[97] That is, the ordinance allowed some, but not all, launderers to operate in wooden buildings, dependent on nothing other than the discretion of the administrators empowered to grant licenses.[98] This discretion allowed government officials to administer the program in a racially discriminatory way, evidenced by the fact that the government consistently denied licenses to Chinese launderers.[99] Ultimately, the Court invalidated the legislation with reasoning that resonates with class legislation doctrine, holding that legislation is prohibited if it proceeds from "enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives."[100]

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90. *Thomas Cusack Co.*, 242 U.S. at 529–31.

91. *Id.* at 529.

92. *Id.* at 529–30 (emphasis added). The connection between Hill's core cases and class legislation is further suggested by the *Roberge* case. *Roberge*, which is similar to *Eubank* and *Thomas Cusack Co.*, also cites *Yick Wo v. Hopkins*, a classic class legislation case that is about the arbitrary exercise of discretion by the government rather than by a private group. Washington *ex rel.* Seattle Title Tr. Co. v. Roberge, 278 U.S. 116, 122 (1928). This citation suggests that the operative rule in *Roberge* was not limited to action by private groups.

93. Yick Wo v. Hopkins, 118 U.S. 356, 366–67 (1886).

94. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 447–50 (1985).

95. Village of Willowbrook v. Olech, 528 U.S. 562, 564–65 (2000).

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

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* Other scholars, too, have concluded that *Yick Wo* is rooted in class legislation principles. GILLMAN, *supra* note 68, at 14, 71–72 (arguing that *Yick Wo* was a class legislation case); Earl M. Maltz, *The Federal Government and the Problem of Chinese Rights in the Era of the Fourteenth Amendment*, 17 HARV. J.L. & PUB. POL'Y 223, 246–48 (1994) (same); Richard S. Kay, *The Equal Protection Clause in the Supreme Court 1873–1903*, 29 BUFF. L. REV. 667, 695–98 (1980) (same).

Similarly, in *Cleburne*, the Court invoked the class legislation principle of animus when holding that it is not permissible for city government to deny a permit for a group home for the intellectually disabled out of a "bare . . . desire to harm" them.[101] *Cleburne* and other modern animus cases (including, famously, *United States v. Windsor*)[102] appear to be direct descendants of class legislation cases rejecting legislation based on spite.[103] As in these previous class legislation cases, animus is enough in *Cleburne*: even without showing that the injured person is classified according to a suspect trait, it is impermissible to classify for the purpose of imposing unequal burdens when these burdens are driven by aversion, fear, or distaste.[104]

Finally, in *Olech*, the Court invoked the most fundamental principle of class legislation doctrine: sometimes it is impermissible for the government to single out an individual for unique treatment without a showing that the person singled out is part of a protected class. In *Olech*, homeowners claimed that the local government demanded an abnormally large easement compared with the demand made on other homeowners.[105] Although the homeowners claimed no membership in a protected class, the Court held that their claim implicated "traditional equal protection analysis."[106] The Supreme Court held that a person may not be singled out as a "class of one" by government action if the differential treatment is "irrational and wholly arbitrary."[107] The "class of one" theory bears a strong resemblance to the class legislation tradition. Just like the long line of cases disfavoring or invalidating special legislation, the class of one theory of equal protection recognizes that there can be something illegitimate about legislative targeting, even if a person is not targeted because of a suspect trait.[108]

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101. *City of Cleburne*, 473 U.S. at 446–47 (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

102. United States v. Windsor, 570 U.S. 744, 752, 770 (2013).

103. *E.g.*, Truax v. Corrigan, 257 U.S. 312, 332–33 (1921); *see also* Kay, *supra* note 101, at 696.

104. *City of Cleburne*, 473 U.S. at 448. Arguably, the continued vitality of the animus doctrine is in doubt. In *Department of Homeland Security v. Regents of the University of California*, the Court rejected animus arguments despite significant evidence of governmental hostility. Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915–16 (2020). *But see* William D. Araiza, Regents*: Resurrecting Animus/Renewing Discriminatory Intent*, 51 SETON HALL L. REV. 983, 985–88, 1030–32 (2021) (arguing that animus might still be available after *Department of Homeland Security v. Regents of the University of California*).

105. Village of Willowbrook v. Olech, 528 U.S. 562, 565 (2000).

106. *Id.*

107. *Id.* at 564–65.

108. Aulanier v. Governor, 1 Tex. 653, 662 (Tex. 1846) (using the class legislation doctrine to invalidate laws that were "partial"—that is, laws that "operate[] on one citizen and not upon others"); Morgan v. Reed, 39 Tenn. 276, 283 (Tenn. 1858) (stating it is impermissible for the legislature "to exempt 'particular individuals,' or special cases, from the operation of 'the general law of the land'"). For more on class legislation doctrine and legislative targeting, see GILLMAN, *supra* note 68, at 61-62 (noting that the class legislation doctrine disfavored specificity) and Evan C. Zoldan, *The Equal Protection Component of Legislative Generality*, 51 U. RICH. L. REV. 489, 525–531 (2017).

Considering these cases together suggests strong conceptual and doctrinal similarities between the private-veto doctrine and the class legislation doctrine. Accordingly, splitting private vetoes into its own conceptual category obscures the connections between these two traditions. By losing sight of this connection, Hill loses access to important knowledge about the viability and desirability of a doctrine based on the same considerations as those she proposes. Put otherwise, because Hill attempts to construct a doctrinal regime that resembles class legislation so closely, it would be valuable for her to consider the fate of the class legislation doctrine. As it happens, class legislation has had a vicissitudinous career. Once a central feature of federal constitutional law, it has long been disfavored because of associations with *Lochnerism*—that is, critics charge that class legislation doctrine invites judicial overreach by permitting judges to wade too deeply into the persuasiveness of legislative classifications.[109] Although there are remnants of class legislation doctrine extant in state constitutional law and in the federal animus and class of one doctrines, most of the strategies used by courts enforcing the class legislation doctrine have been abandoned.[110] None of this is to say that class legislation is without its merits, however. Indeed, scholars have argued that class legislation principles can be powerful tools for courts to provide substantive rights and foster good governance.[111] And class legislation principles resonate strongly with rule of law values.[112] Nevertheless, the revival of class legislation principles—or a private-veto doctrine that closely resembles it—carries the risk of an unacceptable level of judicial discretion. Because of the similarities between class legislation and the private veto doctrine, recognizing the connection between them would help Hill evaluate the desirability and viability of the private-veto doctrine. Because splitting the private-veto doctrine into its own conceptual category makes it harder to recognize these connections, splitting frustrates the ability to evaluate the desirability and viability of the private-veto doctrine.

CONCLUSION

By splitting up the category of nondelegation into two distinct parts, Hill attempts to bring precision and clarity to an area of law that can be amorphous and murky. And indeed, by conceptualizing private vetoes as their own category, Hill reveals insights that can be obscured by lumping together private vetoes with public delegations. After all, public delegations are more common, more famous, and better theorized than private vetoes and, therefore, command most of the attention paid to nondelegation. This Response recognizes the value of splitting as an analytical tool, both in general

109. Zoldan, *supra* note 72, at 1455–57.
110. *Id.* at 1433–34.
111. *Id.* at 1455.
112. *Id.* at 1403, 1444–55.

and as applied to Hill's decision to split the private-veto doctrine from the nondelegation doctrine. Nevertheless, it also recognizes that splitting can obscure meaningful connections that are easier to recognize when two things or concepts are lumped together into one category.

Hill's project includes formulating an administrable doctrinal test for evaluating private vetoes. As a result, it would be particularly valuable for her to recognize the connections between private vetoes and closely related doctrines. Most obviously, the private veto doctrine can be lumped together with standard nondelegation doctrine. Doing so reveals that many of the concerns that animate the private veto doctrine also animate one longstanding strain of standard nondelegation doctrine. Accordingly, viewing private vetoes as part of nondelegation would allow Hill to evaluate whether doctrinal strategies that already have been theorized and implemented can address her concerns.[113]

Less obviously, the private-veto doctrine closely resembles another due process-affiliated doctrine, the class legislation doctrine. Recognizing the connections between class legislation and private vetoes would allow Hill to evaluate the viability and desirability of the private veto doctrine. Indeed, class legislation is a powerful conceptual tool but also a controversial one with a somewhat checkered past. By recognizing the similarities between class legislation doctrine and the private veto doctrine, Hill could better evaluate whether her proposed private veto doctrine—if it were realized—would be worth the challenges it would create.

113. Similarly, viewing private vetoes as part of nondelegation makes sense of Hill's reliance on examples of public delegation—like the example of Kim Davis, a public official—to explain what is wrong with certain kinds of delegations.