

Faculty Publications

---

2022

## Due Process, Delegation, and Private Veto Power

B. Jessie Hill  
jessie.hill@case.edu

Follow this and additional works at: [https://scholarlycommons.law.case.edu/faculty\\_publications](https://scholarlycommons.law.case.edu/faculty_publications)

 Part of the [Health Law and Policy Commons](#)

---

### Repository Citation

Hill, B. Jessie, "Due Process, Delegation, and Private Veto Power" (2022). *Faculty Publications*. 2135.  
[https://scholarlycommons.law.case.edu/faculty\\_publications/2135](https://scholarlycommons.law.case.edu/faculty_publications/2135)

This Article is brought to you for free and open access by Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

## Due Process, Delegation, and Private Veto Power

B. Jessie Hill<sup>1</sup>

### **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. A recent decision involving Amtrak's entitlement to exercise regulatory authority 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 private-veto doctrine, this Article suggests that the doctrine may be relevant to current constitutional controversies in ways that have not be previously recognized. In particular, it may provide a stronger basis for litigating certain kinds of abortion restrictions, as well as a new route for challenging statutes that empower religious individuals to deprive third parties of access to contraception and other forms of health care.*

---

<sup>1</sup> Associate Dean for Research and Faculty Development and Judge Ben C. Green Professor of Law, Case Western Reserve University School of Law. Many thanks to Jonathan Adler, Jonathan Entin, Alex Tseis, and Evan Zoldan for extremely useful comments and suggestions. An early version of this paper was presented at the Loyola University Chicago Constitutional Law Colloquium in November 2020. Many thanks to the participants in that colloquium who also provided helpful, constructive feedback. All errors are mine.

**Table of Contents**

I. Delegations and Private Vetoes ..... 5

    A. A History of Private Veto Doctrine ..... 6

        1. *The Original Trio: Eubank, Cusak, and Roberge (plus Yick Wo)*..... 6

        2. *Modern occupational licensing cases* ..... 8

        3. *Prejudgment seizure* ..... 11

        4. *Other constitutional contexts* ..... 12

    B. The Other Nondelegation Doctrine..... 15

II. Doubling Down on Due Process ..... 19

    A. Procedural Due Process ..... 20

        1. *Framework for analysis* ..... 20

        2. *Application to the private-veto doctrine*..... 21

    B. Substantive Due Process ..... 24

        1. *Framework for analysis* ..... 24

        2. *Differentiating Substantive Due Process Claims from Procedural Due Process Claims* ..... 26

    C. State Action ..... 28

III. Implications ..... 30

    A. Abortion Clinic Regulations ..... 30

    B. Religious Sovereignty ..... 33

Conclusion..... 37

## Due Process, Delegation, and Private Veto Power

### Introduction

The Due Process Clause<sup>2</sup> 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 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.<sup>3</sup>

This due-process principle is both longstanding and deeply entrenched. In the 1912 case *Eubank v. City of Richmond*,<sup>4</sup> 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.<sup>5</sup> 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 a private parties.<sup>6</sup> 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*,<sup>7</sup> striking down a delegation of authority over a bar's liquor license to a nearby church, to *Palmore v. Sidoti*,<sup>8</sup> holding that the racial prejudices of unrelated individuals may not dictate a child custody decision. This principle has an affiliation, too, to cases striking down standardless delegations of authority to public officials, such as *Yick Wo v. Hopkins*,<sup>9</sup> which invalidated the use of administrative licensing discretion to discriminate against Chinese laundry operators, and *Freedman v. Maryland*,<sup>10</sup> which struck down a state film licensing scheme lacking in standards and procedural safeguards.

Finally, this Article argues that current controversies over some abortion clinic licensing regulations and over statutes granting exemptions to religious individuals from generally applicable

---

<sup>2</sup> U.S. CONST. amd. V (“No person shall be ... deprived of life, liberty, or property, without due process of law...”); U.S. CONST. amd. XIV (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law...”).

<sup>3</sup> Jacqueline Y. Ma, “Undue” Delegation: Private Delegation and Other Strategies to Challenge Admitting-Privileges Laws, 30 COLUM. J. GENDER & L. 549, 576 (2016) (noting that the due-process and delegation doctrines have become “muddled”); 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).

<sup>4</sup> 226 U.S. 137 (1912).

<sup>5</sup> *Id.* at 143-44.

<sup>6</sup> See *infra* text accompanying notes 43-64.

<sup>7</sup> 495 F. Supp. 761, 764 (D. Mass. 1980), *aff'd*, 662 F.2d 102 (1st Cir. 1981), *aff'd* 459 U.S. 116 (1982).

<sup>8</sup> 466 U.S. 429 (1984). As explained in Part 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. 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.

<sup>9</sup> 118 U.S. 356 (1886).

<sup>10</sup> 380 U.S. 51 (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.”)

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 hospitals are empowered to shut down abortion clinics and when religious individuals are given the power to deny others access to contraception 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."<sup>11</sup> 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*.<sup>12</sup> 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.<sup>13</sup> And in fact, both kinds of nondelegation doctrines 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.<sup>14</sup>

This Article argues, however, that joining this particular due-process 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 will refer to in this Article 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.

---

<sup>11</sup> See, e.g., Jacqueline Y. Ma, "Undue" Delegation: Private Delegation and Other Strategies to Challenge Admitting-Privileges Laws, 30 COLUM. J. GENDER & L. 549, 576 (2016) ("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. \_\_ (forthcoming 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).

<sup>12</sup> 139 S. Ct. 2116 (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 (2020); Richard A. Epstein, *Delegation of Powers: A Historical and Functional Analysis*, 24 CHAP. L. REV. 659 (2021); Paul J. Larkin, Jr., *The Private Delegation Doctrine*, 73 FLA. L. REV. 31 (2021); Gary Lawson, "I'm Leavin' It (All) Up to You": *Gundy* and the (Sort-of) Resurrection of the Subdelegation Doctrine, CATO SUP. CT. REV., 2018-2019, AT 31; Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021).

<sup>13</sup> *Gundy*, 139 S. Ct. at 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) (statement of Kavanaugh, J., respecting the denial of certiorari) (suggesting that the nondelegation doctrine "may warrant further consideration in future cases").

<sup>14</sup> 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).

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.<sup>15</sup> 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.<sup>16</sup> But commentators have largely failed to ask an equally important question: *Over what* is the power being exercised? In order to invoke review under the Due Process Clause in its procedural dimension, a delegation usually must affect an individual's protected, fundamental interest in life, liberty, or property. Similarly, heightened scrutiny applies under the substantive due process doctrines to arbitrary deprivations of constitutionally protected liberty or property interests. 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 this doctrine from the parallel doctrine of private nondelegation. 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 branch<sup>17</sup> and maybe even to private entities—thus promising to radically constrain, if not entirely decimate, the modern administrative state. This Article is focused on one line of cases—often treated together with other nondelegation cases—that involves a somewhat distinct

---

<sup>15</sup> See generally Gillian Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003); *infra* \_\_\_\_.

<sup>16</sup> See Lawrence, *supra* note 14, at 682-83; *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 445 (1915).

<sup>17</sup> See, e.g., *supra* note 13 (citing the various opinions in *Gundy* urging revitalization of the nondelegation doctrine); *Dep't of Transp. v. Ass'n of Am. Railroads*, 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. Railroads v. U.S. Dep't of Transp.*, 721 F.3d 666, 670 (D.C. Cir. 2013), *vacated and remanded*, 575 U.S. 43 (2015))).

problem: private vetoes. 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. As discussed below, these cases demonstrate courts' concern with harm to others through arbitrary decisionmaking 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 demonstrates how the private veto doctrine differs from the "other" nondelegation doctrine.

## A. A History of Private Veto Doctrine

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

A trio of cases decided in the early decades of the twentieth century laid the foundation for the private-veto doctrine: *Eubank v. City of Richmond*, *Thomas Cusak Co. v. City of Chicago*,<sup>18</sup> and *Washington ex rel. Seattle Title Trust Co. v. Roberge*.<sup>19</sup> 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.

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.<sup>20</sup> The challenger in that case had wanted to build a house with an octagonal bay window; the bay window would have jutted 3 feet into the required setback of 14 feet, which was determined by the group of nearby property owners while the building plans were being created.<sup>21</sup> 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.<sup>22</sup> 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 is thus to be exercised," such that "the property holders who desire and have the authority to establish the line may do so for their own interest, or even capriciously."<sup>23</sup> In other words, the standardless nature of the delegation opened up an invitation to arbitrary or self-interested decisionmaking.

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.<sup>24</sup> An outdoor advertising company sued, claiming that the law denied it

---

<sup>18</sup> 242 U.S. 526 (1917).

<sup>19</sup> 278 U.S. 116 (1928).

<sup>20</sup> 226 U.S. at 144.

<sup>21</sup> *Id.* at 141-42.

<sup>22</sup> *Id.* at 143-44 (noting the lack of "discretion" given the official body to ignore the property owners' wishes).

<sup>23</sup> *Id.*

<sup>24</sup> 242 U.S. at 527-28.

due process.<sup>25</sup> 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.<sup>26</sup> 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*.<sup>27</sup> Characterizing the law as a waiver of a prohibition on billboards, instead of as conditioning permission to erect a billboard on the vote of private property owners, looks like an act of legal formalism seemingly 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.<sup>28</sup> 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 400 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.<sup>29</sup> 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.<sup>30</sup>

Interestingly, the *Roberge* Court cited *Yick Wo v. Hopkins* in highlighting its concern about arbitrary use of power under the challenged ordinance.<sup>31</sup> *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.<sup>32</sup> All of the petitions to that board by Chinese laundry owners were denied, whereas all petitions by non-Chinese owners except one were granted.<sup>33</sup> Many of those Chinese operators had been in business at the same location for years, even decades.<sup>34</sup> 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.<sup>35</sup> For example, the Court observed that the laundry provision “seem 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 withhold consent, not only as

---

<sup>25</sup> *Id.* at 527.

<sup>26</sup> *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.*

<sup>27</sup> *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.”).

<sup>28</sup> 278 U.S. at 117-18.

<sup>29</sup> *Id.* at 118.

<sup>30</sup> *Id.*

<sup>31</sup> *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 (1886)).

<sup>32</sup> *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 373-74 (holding that the law was administered with “an evil eye and unequal hand”).



to places, but as to persons.”<sup>36</sup> The Court then suggested, in a lengthy passage, that the principle at issue in *Yick Wo*’s case 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.<sup>37</sup>

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.” 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.<sup>38</sup>

## 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 the *Carter Coal* case, discussed below,<sup>39</sup> the private-veto principle has in fact retained vitality—though it has often been couched in other, more recognizable doctrines. For example, the doctrine has made inconsistent appearances in cases challenging occupational licensing regimes.<sup>40</sup> 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 decisionmaking.<sup>41</sup> On the other hand, in cases such as *Witbrow v. Larkin* and *Friedman v. Rogers*, the Court rejected similar claims that one group of professionals could not be

---

<sup>36</sup> *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.

<sup>37</sup> *Id.* at 369-70.

<sup>38</sup> *Cf.* Benjamin Silver, *Nondelegation in the States*, *supra* note 11, at 34 (describing the “sovereignty 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”).

<sup>39</sup> *See, e.g.*, James M. Rice, *The Private Nondelegation Doctrine: Preventing the Delegation of Regulatory Authority to Private Parties and International Organizations*, 105 CAL. L. REV. 539, 548 (2017).

<sup>40</sup> 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 (1976); Clark Neily, *Beating Rubber-Stamps into Gavels: A Fresh Look at Occupational Freedom*, 126 YALE L.J. FORUM 304, 305 (2016).

<sup>41</sup> 411 U.S. 564, 579 (1973).

permitted to sit in judgment over the ability of other professionals in the same field to continue to practice.<sup>42</sup>

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*,<sup>43</sup> 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.<sup>44</sup> 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."<sup>45</sup> Though in this case the delegation was to a private rather than a governmental actor, the court faulted the government's failure to limit or provide standards for "the hospital's decision to grant or withhold a transfer agreement, or even to ignore a request for one."<sup>46</sup> 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."<sup>47</sup> On much the same grounds, a Michigan district court struck down a similar state law requiring written agreements concerning emergency hospital admissions.<sup>48</sup>

More recent cases in the abortion context have also relied up the private-veto doctrine to strike similar licensing requirements on abortion facilities.<sup>49</sup> 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.<sup>50</sup> And in *Women's Medical Professional*

---

<sup>42</sup> *Withrow v. Larkin*, 421 U.S. 35, 54-55 (1975); *Friedman v. Rogers*, 440 U.S. 1,17-18 (1975). In *Friedman*, "commercial" optometrists challenged the composition of the state optometry board, which was composed only of "professional" optometrists hostile to the "commercial" approach. 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 optometrists had "a constitutional right to a fair and impartial hearing in any disciplinary proceeding" by the board. *Friedman*, 440 U.S. at 18.

<sup>43</sup> 380 F. Supp. 1153 (E.D. N. Car. 1974), *aff'd on other grounds*, 519 F.2d 1315 (4<sup>th</sup> Cir. 1975).

<sup>44</sup> *Id.* at 1156-57.

<sup>45</sup> *Id.* at 1158.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1158-59.

<sup>48</sup> *Birth Control Centers, Inc. v. Reizen*, 580 F. Supp. 1366, 1375 (E.D. Mich. 1981), *aff'd on other grounds*, 743 F.2d 352 (6<sup>th</sup> 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. Car. Dep't of Hum. Res.*, 519 F.2d 1315, 1316 (4<sup>th</sup> 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 Centers, Inc. v. Reizen*, 743 F.2d 352, 356 n.2 (6<sup>th</sup> Cir. 1984).

<sup>49</sup> See generally Jessie Hill, *The Geography of Abortion Rights*, 109 GEO. L.J. 1081, 1132-36 (2021); Jacqueline Y. Ma, "Undue" Delegation: Private Delegation and Other Strategies to Challenge Admitting-Privileges Laws, 30 COLUM. J. GENDER & L. 549, 581-89 (2016).

<sup>50</sup> *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 997 (W.D. Wis.) ("[T]he State cannot impose this requirement through third parties, at least in the admitted absence of a waiver or some other mechanism to

*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.”<sup>51</sup> 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 oversight to the licensing decision.<sup>52</sup> Similarly, because hospitals were required by law to provide due process protections, include 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.<sup>53</sup> 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.”<sup>54</sup> In other cases, courts have either cursorily rejected such claims or simply avoided them.<sup>55</sup>

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 has varied widely.<sup>56</sup> For example, in *Fink v. Cole*, the New York Court of Appeals held that a state law delegating final licensing power to a private corporation, the Jockey Club, was unconstitutional both because it violated the state constitutional clause vesting legislative power only in the state legislature, and also because of its “lack of guides and proper

---

ensure due process.”), *aff’d on other grounds sub nom.* *Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908 (7th Cir. 2015).

<sup>51</sup> *Women’s Med. Pro. Corp. v. Baird*, 438 F.3d 595, 610 (6th Cir. 2006).

<sup>52</sup> *Id.*; *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.”).

<sup>53</sup> *Tucson Woman’s Clinic v. Eden*, 379 F.3d 531, 556 (9th Cir. 2004); *cf. Greenville Women’s Clinic v. Comm’r, S.C. Dep’t of Health & Env’t Control*, 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).

<sup>54</sup> *Women’s Health Ctr. of W. Cty., Inc. v. Webster*, 871 F.2d 1377, 1382 (8th Cir. 1989); *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*).

<sup>55</sup> In other recent cases, courts have declined to reach such claims, or plaintiffs have declined to press them. *See* *EMW Women’s Surgical Ctr., P.S.C. v. Glisson*, No. 3:17-CV-00189-GNS, 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); *Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908, 922 (7th Cir. 2015) (affirming the Wisconsin district court’s decision without reaching the nondelegation claim).

<sup>56</sup> *See* George W. Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 *IND. L.J.* 650, 695 (1975) (noting courts’ “fairly consistent hostility toward statute vesting licensing power in private groups when these groups are not clothed in the raiment of a public board and no review is provided,” and predominantly citing state court cases); *id.* at 653 (noting that “*Carter [Coal]* is still enthusiastically cited by state courts”).

standards” for the Jockey Club’s exercise of discretion.<sup>57</sup> Thus, the court noted, the law would be unconstitutional even if this form of discretion were exercised by a government official.<sup>58</sup> 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).<sup>59</sup> The association denied the physician’s membership application, without providing a reason, a dozen times during the 1940s and 1950s.<sup>60</sup> 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.<sup>61</sup> 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 5 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.<sup>62</sup>

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 any meaningful legal standards to guide their admissions or graduation decisions.<sup>63</sup> Thus, courts have not always adhered strictly to the private-veto principle even in the licensing context.<sup>64</sup> 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 bear a resemblance to 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

---

<sup>57</sup> *Fink v. Cole*, 302 N.Y. 216, 225 (1951) (citing *Packer Collegiate Inst. v. Univ. of State of New York*, 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.”)).

<sup>58</sup> *Id.*

<sup>59</sup> *Ware v. Benedikt*, 225 Ark. 185, 186 (1955).

<sup>60</sup> *Id.* One could certainly speculate that anti-German bias, related to the recent World War, played a role in the group’s decision.

<sup>61</sup> *Id.* at 187-89.

<sup>62</sup> *Blumenthal v. Bd. of Med. Examiners*, 57 Cal. 2d 228, 235 (1962); *see also id.* at 236-37 (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).

<sup>63</sup> *In re Hansen*, 275 N.W.2d 790, 796-97 (Minn. 1978) (upholding such a requirement against a nondelegation challenge).

<sup>64</sup> *See generally* DANIEL R. MANDELKER, JUDITH WELCH WEGNER, JANICE C. GRIFFITH, EVAN C. ZOLDAN & CYNTHIA BAKER, *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM* 697-98 (9<sup>th</sup> ed. 2020) (collecting cases on both sides).

and with very little in the way of procedural safeguards to ensure the seizure was warranted.<sup>65</sup> These statutes thus involved a form of delegation of coercive power—a private veto over another’s use of her property—without standards and without substantive government oversight.<sup>66</sup>

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.<sup>67</sup> 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 to be the local deputy sheriff. Being familiar with the seizure procedure, he used it to seize their child’s toys, clothes, and furniture.<sup>68</sup>

#### 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.”<sup>69</sup> 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.<sup>70</sup> 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 to create an unacceptable risk of suppressing speech protected by the First Amendment.<sup>71</sup> 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).<sup>72</sup>

---

<sup>65</sup> *Fuentes v. Shevin*, 407 U.S. 67, 96 (1972); *Sniadach v. Fam. Fin. Corp. of Bay View*, 395 U.S. 337 (1969); *Cf. Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 616 (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).

<sup>66</sup> *Cf. Gillian E. Metzger*, *supra* note 15, 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”).

<sup>67</sup> *Id.* at 83 (“Since his private gain is at stake, the danger is all too great that his confidence in his cause will be misplaced.”).

<sup>68</sup> *Id.* at 72 (noting that this party’s experience “had been more bizarre”).

<sup>69</sup> *Freedman v. State of Md.*, 380 U.S. 51, 56 (1965) (citing *Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 451 (1938) and other cases involving licensing of speech).

<sup>70</sup> *Id.* at 59-60; *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223 (1990) (plurality op.).

<sup>71</sup> *FW/PBS*, 493 U.S. at 223.

<sup>72</sup> *Infra* Part II.A.2; *cf. City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 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).

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 U.S. Supreme 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.<sup>73</sup> The *Grendel's Den* decision was based on the Establishment Clause of the U.S. Constitution: the Court found that the law “substitutes the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body acting on evidence and guided by standards, on issues with significant economic and political implications.”<sup>74</sup> 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 whether such a delegation to private *secular* entities would ever be constitutional.<sup>75</sup> 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.<sup>76</sup> 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 was found meritorious by the trial court.<sup>77</sup> 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.<sup>78</sup>

Similarly, the case of *City of Cleburne v. Cleburne Living Center* is not generally thought of as a nondelegation case, yet, the facts of *Cleburne* 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 the case of *Roberge*, the proposed land use was a home “for aged poor,” and in *Cleburne*, it was a group home for intellectually disabled individuals.<sup>79</sup> 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.<sup>80</sup> The City explicitly referenced those community members’ concerns as a basis for denying the permit.<sup>81</sup> 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]

---

<sup>73</sup> 459 U.S. 116, 117 (1982).

<sup>74</sup> *Id.* at 127.

<sup>75</sup> *Id.* at 122.

<sup>76</sup> *Id.* at 125-26. As an example, the Court suggests “favoring liquor licenses for members of that congregation or adherents of that faith.” *Id.* 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. *Marks v. City of Chesapeake*, 883 F.2d 308, 312 (4<sup>th</sup> Cir. 1989).

<sup>77</sup> *Grendel’s Den, Inc. v. Goodwin*, 495 F. Supp. 761, 766 (D. Mass. 1980).

<sup>78</sup> *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 *Cusak* than to *Eubank* and *Roberge*. *Grendel’s Den v. Goodwin*, 662 F.2d 88, 90-95 (1<sup>st</sup> Cir. 1981).

<sup>79</sup> *State of Washington ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 117 (1928); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 435 (1985).

<sup>80</sup> *Roberge*, 278 U.S. at 117; *Cleburne*, 473 U.S. at 449-50.

<sup>81</sup> *Cleburne*, 473 U.S. at 448 (“[I]f the 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.”).

home.”<sup>82</sup> “[D]enying a permit based on such vague, undifferentiated fears,” the Court said, “is again permitting some portion of the community to validate what would otherwise be an equal protection violation.”<sup>83</sup>

In other words, the City of Cleburne had failed to come up with a rational basis for its zoning decision, and essentially providing a private veto over this land use to individual members of the community, acting on their private prejudices, is also constitutionally unacceptable.<sup>84</sup> Indeed, the group home operators had raised a nondelegation claim in the lower courts, but subsequently abandoned it.<sup>85</sup> 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 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.”<sup>86</sup>

Similarly, in *Palmore v. Sidoti*, 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.<sup>87</sup> 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.<sup>88</sup> As in *Cleburne*, the Court decided the case on equal protection rather than due process grounds; and as in *Cleburne*, the Court in *Palmore* essentially held that the Constitution does not permit individuals to exercise a private veto over another person’s liberty or property interest.<sup>89</sup> In fact, the Cleburne Living Center’s Supreme Court brief cited *Palmore*, alongside *Eubank* and *Roberge*, for its nondelegation point.<sup>90</sup>

The cases reviewed here, which appear outside the due-process context, demonstrate the bedrock nature of the private-veto principle. 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 equal citizenship is not undermined by the government

---

<sup>82</sup> *Cleburne*, 473 U.S. at 449.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*; see also *Cleburne Living Ctr., Inc. v. City of Cleburne, Texas*, 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).

<sup>85</sup> *Cleburne*, 473 U.S. at 437 n.5 (noting that the “Court of Appeals did not address this [nondelegation] argument, and it has not been raised by the parties in this Court”).

<sup>86</sup> Brief for Respondents, *City of Cleburne, Texas, et al., Petitioners, v. Cleburne Living Center, Inc., et al., Respondents.*, 1985 WL 668980 (U.S.), at 16.

<sup>87</sup> *Palmore v. Sidoti*, 466 U.S. 429, 431-32 (1984).

<sup>88</sup> *Id.* at 433.

<sup>89</sup> *Id.* at 433-34.

<sup>90</sup> Brief for Respondents, *City of Cleburne, Texas, et al., Petitioners, v. Cleburne Living Center, Inc., et al., Respondents.*, 1985 WL 668980 (U.S.), at 16-17.

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.<sup>91</sup> And while both *Panama Refining* and *Schechter* struck down delegations outside the legislative branch to other *public* officials, both *Schechter* and a case decided the following year, *Carter v. Carter Coal Co.*,<sup>92</sup> 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.<sup>93</sup> 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 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. “[W]ould 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?,” the Court asked. “Could 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 the 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.”<sup>94</sup> 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.<sup>95</sup> 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.”<sup>96</sup> In fact, the Court cited *Eubank* and *Roberge*,

---

<sup>91</sup> A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541-42 (1935); *Panama Ref. 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. 1, s.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).

<sup>92</sup> 298 U.S. 238 (1936).

<sup>93</sup> 295 U.S. at 542.

<sup>94</sup> *Id.* at 537.

<sup>95</sup> *Id.* at 310-11.

<sup>96</sup> *Id.* at 311.



along with *Schechter*, in support of its holding.<sup>97</sup> As in *Eubank*, *Yick Wo*, and *Schechter*, the Court worried that the power would be exercised not just arbitrarily, but in the financial self-interest of the delegate.<sup>98</sup>

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 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.<sup>99</sup>

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*.<sup>100</sup> 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.<sup>101</sup> 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.<sup>102</sup> 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 whether clear standards (or “intelligible principles”) exist to constrain the delegate's discretion.<sup>103</sup> The need for such standards is at least partly motivated by a concern about arbitrary action by the delegate, as well as by a concern that the delegate may use the delegated power to advance its own private pecuniary interests.<sup>104</sup>

---

<sup>97</sup> *Id.* at 312.

<sup>98</sup> *Id.* at 311.

<sup>99</sup> See, e.g., Lawrence, *supra* note 14, at 673.

<sup>100</sup> Louis L. Jaffe, *Lawmaking by Private Groups*, 51 HARV. L. REV. 201 (1937); *id.* at 227-29.

<sup>101</sup> 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 11, at 977-79 (similarly pointing out the Court's apparent confusion).

<sup>102</sup> See, e.g., Silver, *supra* note 11, draft at 9 (describing various species of state nondelegation rule as “a single doctrine”); Paul J. Larkin, Jr., *supra* note 12, at 50 (describing *Eubank*, *Roberge*, and *Carter Coal* as private nondelegation cases and suggesting that there is no clear principle that can explain why these delegations were unconstitutional); Larkin, *supra* note 3, at 314-15 (“The problem [in cases like *Eubank* and *Roberge*] 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 15, at 1438 & n.239 (discussing *Eubank*, *Cusak*, and *Roberge* as examples of nondelegation doctrine); Liebmann, *supra* note 56, at 675-80 (same).

<sup>103</sup> See Volokh, *supra* note 11, at 978 (“Entrusting a decision to the unreviewable and unguided discretion of private parties is the opposing of having an ‘intelligible principle.’”).

<sup>104</sup> See *supra*.

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 context of private vetoes. 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.<sup>105</sup> 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.<sup>106</sup> 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 *Sechechter*, 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.<sup>107</sup> 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.<sup>108</sup>

The relative lack of concern with political accountability demonstrates the affiliation between cases involving private vetoes and those involving standardless discretion is vested in a public official. The standardless delegation—effected by an official decision, law, or regulation and allowing arbitrary decisionmaking—is the act that potentially violates due process.<sup>109</sup> Although private groups and individuals—especially those who are competitors, property owners, or others whose interests are affected by the actions of the regulated party—may be more likely to have interests at stake and therefore be more likely act arbitrarily or in their own personal interest—the standardlessness of the delegation, rather than the identity of the delegate, 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. Thus, private vetoes are problematic not because they involve delegations of power that *should* be exercised by public officials,<sup>110</sup> but because they involve delegations of power to private parties that the government itself

---

<sup>105</sup> Zoldan, *supra* note 14, at 105; Harold J. Krent, *The Private Performing the Public: Delimiting Delegations to Private Parties*, 65 U. MIAMI L. REV. 507, 511 (2011).

<sup>106</sup> As Alexander Volokh notes, this logic is somewhat questionable. Volokh, *supra* note 11, 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)).

<sup>107</sup> See also, e.g., *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940); *Curran v. Wallace*, 306 U.S. 1 (1939).

<sup>108</sup> Cf. Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849, 1851 (2019) (arguing that “the 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”).

<sup>109</sup> Cf. *Flagg Bros. 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 [private party] must follow; and it grant[ed] [the private party] the power to convey good title to goods ... to a third party”).

<sup>110</sup> See, e.g., Larkin, *supra* note 3, at 314.

*could not* exercise. The government could not, consistent with due process and equal protection, close abortion clinics or arbitrarily limit the property rights of some property owners but not others.<sup>111</sup>

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 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;<sup>112</sup> 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.<sup>113</sup> 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 that harm from hard-to-detect illicit prejudices.<sup>114</sup> 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

---

<sup>111</sup> *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."); *Planned Parenthood of Cent. Missouri 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. Missouri v. Danforth*, 392 F. Supp. 1362, 1375 (E.D. Mo. 1975))).

<sup>112</sup> *See, e.g., City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 787 (2004) ("[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)).

<sup>113</sup> *See also Planned Parenthood of Kansas v. Lyskowski*, No. 2:15-CV-04273-NKL, 2015 WL 9463198 (W.D. Mo. Dec. 28, 2015) (upholding "class of one" equal protection challenge to occupational licensing requirement based on animus toward abortion providers).

<sup>114</sup> 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).

constitutional doctrines.<sup>115</sup> For this reason, and as demonstrated above in Part I.A., the principle spans multiple constitutional doctrines, including not only due process and equal protection, but also the First Amendment’s Free Speech and Establishment Clauses.<sup>116</sup>

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.<sup>117</sup> 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 the question of 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. Thus, they have explored whether the cases dealing with private delegations involve substantive or procedural due process.<sup>118</sup> 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.<sup>119</sup> 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 decisionmaker, 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 decisionmaking 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

---

<sup>115</sup> See, e.g., Lawrence, *supra* note 14, at 673; Metzger, *supra* note 15, at 1442-43.

<sup>116</sup> See Liebmann, *supra* note 56, 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”).

<sup>117</sup> See, e.g., Liebmann, *supra* note 56, 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”).

<sup>118</sup> See, e.g., Craig Konnoth, *Privatization's Preemptive Effects*, 134 HARV. L. REV. 1937, 1979-81 (2021); Lawrence, *supra* note 14, at 678-86; see generally Volokh, *supra* note 11, at 940-54 (considering the *Eubank-Cusak-Roberge* line of cases as procedural due process cases); Abramson, *supra* note 101, at 214-16 (same); Larkin, *supra* note 3, at 315 (“*Eubank, Roberge, and Carter Coal* therefore cannot readily be characterized as examples of either type of due process doctrine.”); cf. Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1677, 1755-59 (2012) (discussing legislation that “takes from A and gives to B” as a violation of procedural due process).

<sup>119</sup> 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 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.”)

may apply. It is therefore important to develop the due process analysis under each rubric in order 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 decisionmaking context. If the private delegation is not subject to a standards-driven official or judicial review, the due-process requirements of a neutral decisionmaker and sufficient procedural safeguards cannot be met. The substantive due process doctrine is involved in cases whether the private delegate's actions suggest actual bias or arbitrariness, not just a risk thereof. A lack of meaningful standards can contribute to, but will 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 deprivations of life, liberty, or property without “due process of law.”<sup>120</sup> Due process of law includes notice and an opportunity to be heard “at a meaningful time and in a meaningful manner” before a neutral decision-maker.<sup>121</sup> These requirements apply only if a constitutionally protected property or liberty interest is at stake. A property interest must be one that is recognized by positive law as an entitlement—not a mere unilateral expectation.<sup>122</sup> 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.<sup>123</sup>

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 requirement of notice and an impartial decisionmaker, the requirement of a meaningful opportunity to be heard may entail specific procedural safeguards.<sup>124</sup> 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.”<sup>125</sup>

---

<sup>120</sup> U.S. CONST. amds. V, XIV; 3 RONALD D. ROTUNDA & JOHN E. NOWAK, ROTUNDA AND NOWAK’S TREATISE ON CONSTITUTIONAL LAW-SUBSTANCE AND PROCEDURE § 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.

<sup>121</sup> *Armstrong v. Manzo*, 380 U.S. 545, 551-52 (1965); see also ROTUNDA & NOWAK, *supra* note 120, at § 17.8(a).

<sup>122</sup> *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); ROTUNDA & NOWAK, *supra* note 120, at § 17.5(a).

<sup>123</sup> ROTUNDA & NOWAK, *supra* note 120, at § 17.4(a).

<sup>124</sup> ROTUNDA & NOWAK, *supra* note 120, at § 17.8(i).

<sup>125</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

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. 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 supporting the legitimacy governmental regulations.<sup>126</sup>

## 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.<sup>127</sup> But it is also clear that a private veto must affect a constitutionally protected interest in order 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.<sup>128</sup> 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.”<sup>129</sup> Thus, the procedural due process analysis would not apply when the licensee is being denied a first-time license.<sup>130</sup>

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 and risk of religiously-motivated bias inherent in the veto power.<sup>131</sup> Similarly, the line of cases dealing with licensing laws for

---

<sup>126</sup> 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).

<sup>127</sup> See generally Aaron J. Reber & Karin Mika, *Democratic Excess in the Use of Zoning Referenda*, 29 URB. LAW. 277 (1997).

<sup>128</sup> See, e.g., Larkin, *supra* note 3, at 355-57.

<sup>129</sup> *Women’s Med. Pro. Corp. v. Baird*, 438 F.3d 595, 611 (6th Cir. 2006) (citing *See Wojcik v. City of Romulus*, 257 F.3d 600, 609–10 (6th Cir.2001)); see also *Bell v. Burdon*, 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.”); *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 temporary suspension of physician’s license to practice medicine); *Bundo v. City of Walled Lake*, 395 Mich. 679, 693 (1976) (holding that the current holder of a liquor license has a property interest in it).

<sup>130</sup> 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.”).

<sup>131</sup> *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.”).

businesses purveying 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.<sup>132</sup>

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 decisionmaker 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 decisionmaker. Indeed, in many of the private-veto cases, courts have noted the danger of pecuniary or other illicit bias affecting the decisionmaker.<sup>133</sup> These include many of the occupational licensing cases discussed above.<sup>134</sup> 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.<sup>135</sup>

If the main problem with private vetoes is the lack of a neutral decisionmaker, however, then the question arises whether a showing of bias, or likelihood of bias, must be made in order 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."<sup>136</sup> 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,<sup>137</sup> or another judge who had received extraordinary amounts of campaign contributions from a company shortly before adjudicating a case involving that company.<sup>138</sup>

Still, a showing of likely rather than actual bias is all that is required.<sup>139</sup> 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.<sup>140</sup> 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.<sup>141</sup> Where the group

---

<sup>132</sup> *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 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.")

<sup>133</sup> *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 decisionmaker with a financial stake in the matter does not afford due process).

<sup>134</sup> *Supra* Part I.A.2.

<sup>135</sup> Lawrence, *supra* note 14, 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 11, 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.")

<sup>136</sup> *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

<sup>137</sup> *Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927).

<sup>138</sup> *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884-86 (2009).

<sup>139</sup> *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.'" (quoting *Tumey*, *supra*, at 532)).

<sup>140</sup> 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.

<sup>141</sup> *But see Women's Med. Pro. Corp. v. Baird*, 438 F.3d 595, 608 (6th Cir. 2006) (noting the political pressure from right-to-life groups surrounding the licensing of an abortion clinic).

of potential decisionmakers 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;<sup>142</sup> similarly, general licensing requirements, such as mandating graduation from any ABA law school in order to practice law, have been found constitutionally untroubling.<sup>143</sup>

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.<sup>144</sup> 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 lie from the private veto.<sup>145</sup> 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. Orr 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.<sup>146</sup> 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.<sup>147</sup>

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,<sup>148</sup> 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

---

<sup>142</sup> *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).

<sup>143</sup> *E.g.*, *In re Hansen*, 275 N.W.2d 790 (Minn. 1978).

<sup>144</sup> Volokh, *supra* note 11, at 944-50.

<sup>145</sup> *Id.* (“In all of 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.”)

<sup>146</sup> *Id.*; *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 439 U.S. 96, 105 (1978).

<sup>147</sup> *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.

<sup>148</sup> *See, e.g.*, Abramson, *supra* note 101, at 203-08; Metzger, *supra* note 15, at 1411-21.



decisionmaker or fair procedures; the challenger does not have to point to specific acts of the delegate to prove a due process violation.<sup>149</sup>

To summarize, then, a private veto granted by state law will violate the procedural due process protections of the Fifth and Fourteenth Amendments<sup>150</sup> 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 official review of the private veto is available and guided by determinate standards, the due process violation may disappear.<sup>151</sup>

## 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.”<sup>152</sup> 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.<sup>153</sup> Yet, even where a fundamental liberty interest is not implicated, substantive due process doctrine still prohibits subjecting persons to arbitrary government action.<sup>154</sup> 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 to a third party.

---

<sup>149</sup> 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).

<sup>150</sup> 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.

<sup>151</sup> 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.

<sup>152</sup> *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

<sup>153</sup> *ROTUNDA & NOWAK*, *supra* note 120, at § 15.7.

<sup>154</sup> *Daniels*, 474 U.S. at 331 (citing *Hurtado v. California*, 110 U.S. 516, 527 (1884); *Bank of Columbia v. Okely*, 17 U.S. 235, 244 (1819)); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *Dent v. West Virginia*, 129 U.S. 114, 123 (1889); and *Parratt v. Taylor*, 541 U.S. 527, 549 (1981) (Powell, J., concurring in result)); 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.”). Paul Larkin 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 3, at 354-57; cf. Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1677, 1681 (2012) (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 Charta).

Unfortunately, confusion clouds the application of this strand of substantive due process doctrine, particularly in the lower federal courts.<sup>155</sup> Some courts have insisted that a constitutionally protected property or liberty interest be affected for even the substantive due process protection to apply. As numerous scholars have demonstrated, however, this cannot be the correct understanding of the doctrine.<sup>156</sup> 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 non-arbitrariness requirement for all government action, even when ordinary economic and social liberties are affected.<sup>157</sup> 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 veto 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.<sup>158</sup> Thus, in the cases involving prejudgment seizure and occupational licensing, 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.<sup>159</sup> 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 judicial review, could waive the requirement of private approval.<sup>160</sup> 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.<sup>161</sup> 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

---

<sup>155</sup> See, e.g., Levinson, *supra* note \_\_\_, at 346-47 & nn. 178-86.

<sup>156</sup> Levinson, *supra* note \_\_\_, at 348 (“[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.”); 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 (2011).

<sup>157</sup> See, e.g., *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 486-87 (1955).

*cf.* *Larkin*, *supra* note 3, 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. Com. of Pa.*, 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).

<sup>158</sup> See *supra* \_\_.

<sup>159</sup> See *supra* \_\_.

<sup>160</sup> *Women's Med. Pro. Corp. v. Baird*, 438 F.3d 595, 599, 610 (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” (quoting Ohio Admin. Code § 3701–83–14(B)(2)) (alteration in original) and holding that this waiver option was fatal to the plaintiffs’ delegation claim).

<sup>161</sup> *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.”).

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. 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.<sup>162</sup> 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:

[I]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 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.<sup>163</sup>

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*<sup>164</sup> and *United States v. Rock Royal Co-Op*<sup>165</sup> 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 involve the affected parties in the decision-making.<sup>166</sup>

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

---

<sup>162</sup> *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.”).

<sup>163</sup> *Ry. Exp. Agency v. People of State of N.Y.*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

<sup>164</sup> 306 U.S. 1, 15-18 (1939).

<sup>165</sup> 307 U.S. 533, 577-78 (1939) (upholding the authority of the Secretary of Agriculture to adopt rules promulgated by private milk producers).

<sup>166</sup> *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 decisionmaking by the people through the referendum process.”); cf. Jaffe, *supra* note 100, 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.

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.<sup>167</sup> The *Grendel's Den* case thus stands in contrast to *Yick Wo*, in which Chinese laundry operators stood to lose long-established businesses.<sup>168</sup> 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 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.<sup>169</sup> 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.<sup>170</sup>

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 usually effected by a self-interested rather neutral decisionmaker. 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.<sup>171</sup> 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 driven or potentially driven by an illicit motive, such as irrational prejudice, 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

---

<sup>167</sup> *Grendel's Den, Inc. v. Goodwin*, 495 F. Supp. 761, 763 (D. Mass. 1980).

<sup>168</sup> *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

<sup>169</sup> See *supra* note 118.

<sup>170</sup> 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 decisionmaker before the deprivation of property or liberty and not a *per se* invalidation of the deprivation.

<sup>171</sup> 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. Exp. 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), and *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

improper motive (such as a private religious motivation, discriminatory bias, or personal animus) may be made.<sup>172</sup>

### 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.<sup>173</sup> The exercise of private power generally does not raise constitutional concerns, however arbitrary or otherwise troubling that exercise may be.<sup>174</sup>

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, moreover, 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.<sup>175</sup> In addition, it has not just ratified, but instead has created the conditions for a substantively arbitrary deprivation of that constitutionally protected interest.<sup>176</sup>

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).<sup>177</sup> The early private-veto cases all seemed to involve a constitutionally-protected liberty interest of this sort.<sup>178</sup> 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.<sup>179</sup> In the alternative, the plaintiff can make

---

<sup>172</sup> 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 decisionmaker 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"); 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).

<sup>173</sup> *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] amendment."); *United States v. Morrison*, 529 U.S. 598, 621 (2000).

<sup>174</sup> *Id.*

<sup>175</sup> *Cf. Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 622-26 (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).

<sup>176</sup> 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.

<sup>177</sup> *Supra* Part II.A.

<sup>178</sup> *Supra* text accompanying notes 18-38.

<sup>179</sup> *Supra* Part II.A.

out a substantive due process claim by showing that the private delegate's decision was substantively arbitrary, religiously motivated, or motivated by illicit bias.<sup>180</sup>

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 abortion, does the claim fail because she has *no right* to access abortion 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 Cty. Dep't of Soc. Servs.*, 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.<sup>181</sup> The parent had severely beaten the child after the state refused to remove the child, despite multiple reports of child abuse by concerned individuals and government employees.<sup>182</sup> 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 Clause is to “protect the people from the State, not to ensure that the State protect[s] them from each other.”<sup>183</sup> 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.<sup>184</sup> 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.<sup>185</sup> 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” violated the patient's reproductive autonomy; nor could the state grant parents an “absolute, and possibly arbitrary veto” over their pregnant child's abortion decision.<sup>186</sup>

---

<sup>180</sup> *Supra* Part II.B.

<sup>181</sup> 489 U.S. 189, 196 (1989).

<sup>182</sup> *Id.* at 192-93.

<sup>183</sup> *Id.* at 196.

<sup>184</sup> *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.”). 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).

<sup>185</sup> *Id.* at 197 n.3.

<sup>186</sup> 428 U.S. 52, 71 (1976).

Indeed, the Court insisted that the state could not “delegate” to a private party “a power [the state] itself could not exercise.”<sup>187</sup> *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.

### III. Implications

As Louis Jaffe stated, 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.”<sup>188</sup> 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, but 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, there is still room for greater bolstering of the private-veto doctrine. Perhaps due to the perception that its contours are fuzzy or that it lacks currency, the doctrine is likely not invoked as often as it could be. Thus, this Part considers two applications of the private-veto doctrine that could be made further developed. In particular, this Part argues that the doctrine should be robustly applied in the context of abortion clinic regulations that depend on private parties and in the context of delegations that empower religiously motivated individuals or organizations to exercise authority over third parties. In both cases, courts can and should enforce the prohibition on private vetoes.

#### A. Abortion Clinic Regulations

As explained above, the private veto doctrine has been invoked and occasionally enforced in the context of abortion clinic regulations. In particular, as discussed above, courts have sometimes held that laws making an abortion clinic’s license depend on the clinic’s ability to secure an agreement with a hospital, or on its physicians’ ability to secure admitting privileges at a hospital, constitute an

---

<sup>187</sup> *Id.*

<sup>188</sup> Jaffe, *supra* note 100, at 202. Here is the entire quote:

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.*

unconstitutional private delegation.<sup>189</sup> Indeed, even after the Supreme Court twice struck down admitting-privileges requirements for abortion providers, states have found ways to subject abortion clinics' licenses to the whims of private actors such as hospitals.<sup>190</sup>

Yet, some courts and litigants have also shied away from applying the private-veto nondelegation doctrine in this context.<sup>191</sup> One possible reason for the reluctance to apply the private-veto doctrine is that it appears difficult to delimit; it may seem to apply in too many situations and to strike down too many different kinds of regulations. However, this Article argues that, properly understood, the private-veto doctrine is a manageable and limited doctrine that may provide a useful means of challenging some arbitrary and medically unnecessary abortion clinic regulations.

The concern about the overly expansive nature of the private-delegation doctrine may be seen in the numerous forms of regulation to which abortion clinics (and other medical facilities) are subject. For example, abortion clinics may be required to have certain licensed professionals on staff, such as nurses, nurse anesthetists, and physicians.<sup>192</sup> Because those professional licenses require certain credentials—such as a degree from an accredited school—they arguably delegate to private parties (nursing schools, accrediting bodies) control over the liberty of others to practice their occupation and the clinic's property interest in its license. Yet, it borders on the absurd to suggest that any requirement that a licensed health care facility employ certain licensed personnel risks invalidation as a private veto. And indeed, the U.S. Supreme Court has suggested that the performance of abortions may be limited to certain licensed health care personnel and licensed facilities.<sup>193</sup>

To answer this concern, it is important to recall the limitations on the private-veto doctrine described above. First, to be unconstitutional, the delegation must be standardless, with no opportunity for official review of whether the delegate has properly applied those standards. When certain credentials are required for the entry into a particular profession, including accreditation, the credentialing body usually applies clearly delineated, well-publicized standards.<sup>194</sup> Negative accreditation decisions are often subject to a review process by the accrediting body and a route for obtaining pre-deprivation judicial review is usually prescribed.<sup>195</sup> Thus, in cases where they have been found constitutional, private delegations generally could not fairly be described as both mandatory (or final) and standardless.<sup>196</sup> By contrast, when abortion clinics have challenged the requirement of

---

<sup>189</sup> See *supra* Part I.A.2.

<sup>190</sup> *June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103 (2020); *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016), as revised (June 27, 2016).

<sup>191</sup> See *supra* note 55 and accompanying text.

<sup>192</sup> See, e.g., Ohio Admin. Code § 3701-83-18.

<sup>193</sup> *Roe v. Wade*, 410 U.S. 113, 163 (1973) (“Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.”)

<sup>194</sup> For example, the American Bar Association provides extensive guidance and extremely detailed requirements from accreditation of law schools. See Am. Bar Ass'n, Standards and Rules of Procedure for Approval of Law Schools 2021-2022, [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://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).

<sup>195</sup> For example, if a law school is denied accreditation, it can appeal this decision. *Id.* at 70-74. In fact, access to an appellate process is required by the U.S. Department of Education, which regulates such accrediting agencies. See U.S. Dep't of Educ., Student Assistance General Provisions, The Secretary's Recognition of Accrediting Agencies, The Secretary's Recognition Procedures for State Agencies, 84 Fed. Reg. 58834 (July 1, 2020). See also *Natl. Assn. of Forensic Counselors v. Fleming*, 143 Ohio App.3d 811, 815-16 (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).

<sup>196</sup> One could also point out that private law schools are themselves private actors to whom the government arguably delegates the power to decide whether or not a particular individual can become a lawyer. Again, however, the large



employing a physician with admitting privileges at a local hospital, courts have generally noted that those hospitals can choose to deny those privileges for any reason, or no reason whatsoever.<sup>197</sup> Indeed, some courts have recognized that hospitals deny privileges for anticompetitive reasons.<sup>198</sup>

Second, the universe of private delegates usually must be relatively limited for the doctrine to apply. As noted above, the problem with private vetoes is not that the delegation is too sprawling, but that it is small-scale and intimate.<sup>199</sup> The private-veto doctrine is in large part concerned with private actors working in their own financial self-interest to hinder competitors, or acting on biases that the government could not itself espouse. Such troubling motivations often entail a degree of familiarity on the part of the delegate with the party affected by the delegation, as well as perhaps some form of geographic or other proximity. Moreover, the decision of a private individual or group of individuals can only function as a veto if there is no realistic way the private party can continue to operate without the approval of a small number of individuals. If the private party can seek to fulfill the legal requirement in a number of different ways and seek compliance through a large number of possible private partners, the law seems less like a private veto (or like a veto at all). Thus, while the requirement of having a licensed physician working with the clinic may seem like a law granting a private veto to both accrediting bodies and medical schools, it is important to recognize that there exists a large number of medical schools and of licensed physicians. The clinic's recourse is not limited to a small number of individuals or schools. By contrast, there may be only a handful of hospitals that qualify as "local" or within a reasonable driving distance of an abortion clinic. Geographic limitations on where qualifying hospitals may be located may magnify this problem.<sup>200</sup> The property rights at issue in *Roberge* were subjected to the whims of a specific group of neighbors. Of course, line drawing can become an issue with respect to this requirement, especially in terms of what constitutes a sufficiently identifiable or small and discrete group. But such line-drawing is a task that courts are presumably competent to perform—especially given that many cases will not present close questions.

Finally, it is important to recall that clinics with existing licenses will be on firmer doctrinal ground than clinics seeking to apply for a new license. Although substantive due process doctrine forbids private vetoes of either sort of licensing decision, courts may look for a higher showing of arbitrariness or illicit motivation when the latter is involved. A clinic currently in possession of a license can likely show that it has a state-created property interest in that license, however, and may therefore more easily show that the standardless delegation to a private decision-maker violates the clinic's right to procedural due process.<sup>201</sup>

This doctrine may have other applications in the abortion context as well. For example, Laurence Tribe and David Rosenberg have argued, in essence, that a Texas law allowing private

---

number and variety of law schools minimize concerns about individual biases or illicit motivations for exclusion, and the law schools' pecuniary interests cut in favor of admitting, rather than excluding, a given student.

<sup>197</sup> See, e.g., *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 738 F.3d 786, 792 (7th Cir. 2013) (noting "[t]he absence of definite standards for the granting of admitting privileges"); *June Med. Servs. LLC v. Kliebert*, 158 F. Supp. 3d 473, 491 (M.D. La. 2016) ("There is no state or federal statute which governs the rules for the granting or denial of hospital admitting privileges in Louisiana."); *id.* at 533 ("[A] hospital can effectively deny a physician's application without formally doing so and therefore affect a de facto denial without expressing the true reasons (or any reasons) for doing so.").

<sup>198</sup> See, e.g., *Weiss v. York Hosp.*, 745 F.2d 786, 820 (3d Cir. 1984).

<sup>199</sup> *Supra* text accompanying note 108.

<sup>200</sup> See, e.g., *Planned Parenthood of Kansas v. Lyskowski*, No. 2:15-CV-04273-NKL, 2015 WL 9463198, at \*2 (W.D. Mo. Dec. 28, 2015) (requiring abortion clinics to have physicians with admitting privileges at a hospital within 15 minutes' travel time from the clinic or an agreement with such a hospital for treating the clinics' patients in an emergency).

<sup>201</sup> *Women's Med. Pro. Corp. v. Baird*, 438 F.3d 595, 611 (6th Cir. 2006).

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.<sup>202</sup> 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.<sup>203</sup> 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.<sup>204</sup> Indeed, the application of the private veto doctrine in the particular case of S.B. 8 clearly implicates the constitutional rights of the person subject to the veto—not “just...serving liquor” as in *Grendel’s Den*—and thus may be on even stronger ground. On the other hand, it is a problematic example insofar as it suggests that 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 small number of individuals.

This approach to challenging abortion restrictions may continue to prove useful to advocates. Most notably, it does not depend on the protean “undue burden” standard announced in *Planned Parenthood v. Casey*, which defines when a law violates the Fourteenth Amendment right to access abortion.<sup>205</sup> Instead, it relies on longstanding, trans-substantive principles of constitutional law that protect private property and liberty interests. Thus, if the U.S. Supreme Court replaces the *Casey* standard with a standard that is less protective of abortion rights,<sup>206</sup> the private-veto doctrine may become a particularly useful means of challenging certain kinds of abortion restrictions, such as admitting privileges and written transfer agreement requirements.

Of course, if the Supreme Court eliminates the constitutional right to abortion entirely and a particular state criminalizes abortion entirely, the private-veto doctrine will be of little use: an abortion provider cannot claim a liberty or property interest in something that is illegal under state law. But in many states, abortion may remain legal to some extent, and practitioners acting within the law will be able to invoke the doctrine. Indeed, the nondelegation doctrine is arguably more well-established in state courts and under state constitutions than in federal constitutional jurisprudence; it may therefore provide a particularly useful tool for challenging abortion restrictions in state courts if control over abortion policy is transferred to the states.<sup>207</sup>

## B. Religious Sovereignty

---

<sup>202</sup> Laurence H. Tribe & David Rosenberg, *How a Massachusetts Case Could End the Texas Abortion Law*, BOSTON GLOBE (Sept. 8, 2021), <https://www.bostonglobe.com/2021/09/07/opinion/how-massachusetts-case-could-end-texas-abortion-law/>.

<sup>203</sup> *Id.* The person receiving the abortion is not herself subject to suit under the Texas law. Texas S.B. 8, sec. 171.206(b)(1).

<sup>204</sup> *Id.*

<sup>205</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). Of course, to the extent that the Fourteenth Amendment right to access abortion is implicated by such restrictions, an established, constitutionally-protected liberty interest is being subjected to the private veto, so the clinic’s procedural due process claim may be on stronger ground.

<sup>206</sup> In the 2021 Term, the U.S. Supreme Court is considering a case, *Dobbs v. Jackson Women’s Health Organization*, in which it will decide whether all bans on abortion before viability are unconstitutional. 141 S. Ct. 2619, 2620 (2021). The State of Mississippi has asked the Court to use the case as an opportunity to overturn *Roe v. Wade*. Brief for Petitioners, *Dobbs v. Jackson Women’s Health Org.*, 2021 WL 3145936 (U.S.), at 49. Even if the Court does not accept that invitation, it may cut back considerably on the scope of the abortion right under the federal constitution.

<sup>207</sup> Silver, *supra* note 11, at 4.

Another realm in which the private-veto doctrine may apply—though scholars and courts have not yet widely recognized it—is 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 terms of “religious exemptions” or “religious accommodations.”<sup>208</sup> 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.<sup>209</sup>

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.<sup>210</sup> 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.”<sup>211</sup> The notion that the Constitution prohibits religious accommodations that excessively burden third parties seems to share relatively widespread acceptance in theory.<sup>212</sup> In practice, however, numerous conceptual puzzles have clouded its application, and the Supreme Court has not adopted a robust version of this principle.<sup>213</sup>

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.<sup>214</sup> The scope of the administratively created religious exemption to this requirement for religious employers has changed a number of times.<sup>215</sup> While

---

<sup>208</sup> The literature on the topic of religious accommodations and religious exemptions is vast. *See, e.g.* 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 (2018); Bruce Ledewitz, *Experimenting with Religious Liberty: The Quasi-Constitutional Status of Religious Exemptions*, 6 ELON L. REV. 37 (2014); Developments in the Law, *Chapter Two: 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).

<sup>209</sup> *See generally* GREENAWALT, *supra* note 208, at 2.

<sup>210</sup> *See, e.g.*, *Est. of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (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).

<sup>211</sup> 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, e.g.*, Christopher C. Lund, *Religious Exemptions, Third-Party Harms, and the Establishment Clause*, 91 NOTRE DAME L. REV. 1375 (2016); NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 52-61 (2017); Frederick Mark Gedicks and Rebecca G. Van Tassell, *Of Burdens and Baselines: Hobby Lobby's Puzzling Footnote 37*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY* (Micah Schwartzman, Chad Flanders & Zoë Robinson, eds. 2016).

<sup>212</sup> *See, e.g.*, Lund, *supra* note 211, at 1376 (noting that “[t]he general principle here--that burdens on third parties matter--is well established” and “fits with well-established Establishment Clause precedent”).

<sup>213</sup> *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”).

<sup>214</sup> *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2374, 2377-78 (2020).

<sup>215</sup> This history is summarized in *Little Sisters of the Poor*, 140 S. Ct. at 2373-78.

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.<sup>216</sup> 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.<sup>217</sup> 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.<sup>218</sup> 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.<sup>219</sup> The Trump Administration’s 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 transgender status) has been challenged on the basis that it violates the Establishment Clause due to the third-party burdens it imposes.<sup>220</sup> 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.<sup>221</sup> 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.

---

<sup>216</sup> *Id.* at 2377-78; Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 FR 47792-01, 2017 WL 4551336.

<sup>217</sup> *Little Sisters of the Poor*, 140 S. Ct. at 2386.

<sup>218</sup> See *supra* note 122 and accompanying text; see also 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”).

<sup>219</sup> 42 U.S.C. § 18116(a); see generally *C.P. by & through Pritchard v. Blue Cross Blue Shield of Illinois*, 536 F. Supp. 3d 791, 794 (W.D. Wash. 2021).

<sup>220</sup> *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)).

<sup>221</sup> 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.<sup>222</sup> If any of those services is 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.<sup>223</sup> 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 marriages.<sup>224</sup> 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.<sup>225</sup> 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.<sup>226</sup> 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.”<sup>227</sup>

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 decisionmaking over others’ property or liberty, regardless whether the actual decisionmaker is a government official or private party.

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 same-sex couples to adopt. 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.<sup>228</sup> Ultimately, the Supreme Court held that the Catholic organization was entitled to an exemption under the Free Exercise Clause of the First

---

<sup>222</sup> Ohio Rev. Code § 4743.10.

<sup>223</sup> *Miller v. Davis*, 123 F. Supp. 3d 942, 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).

<sup>224</sup> *Id.*

<sup>225</sup> *Ermold v. Davis*, 936 F.3d 429, 435 (6th Cir. 2019).

<sup>226</sup> *Id.* at 437.

<sup>227</sup> *Id.* at 441 (Bush, J., concurring).

<sup>228</sup> *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021).

Amendment, in large part because the City's rules regarding adoption placements allowed for other, nonreligious exemptions from the nondiscrimination requirement.<sup>229</sup>

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. In some 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 surgical services to choose from.<sup>230</sup> 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 non-delegation line of cases and therefore

---

<sup>229</sup> *Id.* at 1878.

<sup>230</sup> See, e.g., Sabrina Dunlap, *When Views Collide: How Hospital Mergers Restrict Access to Reproductive Health Care*, 2 HEALTH L. & POL'Y (AUWCL) 30, 31-32 (2008).

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 decisionmaker 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 contexts of abortion rights and religious freedom.