

Religious Nondelegation

*B. Jessie Hill**

The problem of religious exemptions has given rise to a rich body of scholarly literature, as well as a flood of litigation. One recent set of cases involved challenges to the Affordable Care Act’s (ACA) health care mandates—Section 1557 and the contraceptive mandate—and the religious exemptions thereto. Some scholars have argued that religious exemptions violate the Establishment Clause when they confer a benefit on religious individuals, the costs of which are largely borne by those who do not share the religious individuals’ beliefs—a notion that is sometimes expressed in terms of “third-party harms.” The third-party harms approach to Establishment Clause violations has garnered substantial scholarly acceptance—and some criticism. It does not seem to be keeping a foothold in the courts, however.

In this Article, I suggest an alternative way to articulate the problem with certain religious exemptions, grounded not in the Establishment Clause but in the nondelegation doctrine. The nondelegation approach suggests that one subset of exemptions—those that delegate arbitrary authority over a person’s property or liberty to another private individual—are unconstitutional under longstanding due process principles. This Article also argues that exemptions that make individuals’ access to government benefits subject to another party’s religious values and beliefs are unconstitutional, because they allow individuals to exercise coercive and final authority over others based on reasons that cannot normally form the basis of government action—specifically, religious reasons.

I. THE AFFORDABLE CARE ACT AND RELIGIOUS EXEMPTIONS	104
A. <i>Two issues at the intersection of religious freedom and the ACA</i>	104
B. <i>Religious exemptions from health-care mandates and third-party harms</i>	110

* Associate Dean for Research and Faculty Development and Judge Ben C. Green Professor of Law, Case Western Reserve University. Thanks to Alan Brownstein, Michael Helfand, Chris Lund, Phillip Muñoz, Amy Sepinwall, Lael Weinberger, and other participants in the Nootbaar Fellows Conference and the Loyola University Law Review Symposium.

II. NONDELEGATION DOCTRINE.....	112
III. RELIGIOUS EXEMPTIONS AS PRIVATE VETOES	120
CONCLUSION.....	125

INTRODUCTION

The problem of religious exemptions has given rise to a rich body of scholarly literature, as well as a flood of litigation.¹ One recent set of cases involves challenges to the Affordable Care Act’s (ACA) health care mandates and the religious exemptions thereto.² Specifically, there have been challenges to the scope of the religious exemption to the ACA’s contraceptive mandate—both for being too narrow and too broad—as well as to Section 1557 of the ACA, which forbids discrimination in federally funded health care on various bases, including sex.³ The ACA cases have largely been decided under the Religious Freedom Restoration Act (RFRA), which forbids the federal government from substantially burdening religious exercise unless the government action is the least restrictive means to advance a compelling government interest.⁴

Some scholars have argued that religious exemptions violate the Establishment Clause, when they confer a benefit on religious individuals, the costs of which are largely borne by those who do not share the

1. In 2020 and 2021, for example, the Supreme Court decided a number of cases addressing whether communal religious exercise must be permitted during the COVID-19 pandemic, despite the restriction of other communal activities in the name of public health. *See generally* Stephen I. Vladeck, *The Most-Favored Right: COVID, the Supreme Court, and the (New) Free Exercise Clause*, 15 N.Y.U. J.L. & LIBERTY 699, 709–33 (2022). Those cases largely arose under the Free Exercise Clause, which has been held to require exemptions for religious activities to take place when similar secular activities are permitted.

2. *See generally* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2374 (2020); *Zubik v. Burwell*, 578 U.S. 403, 405–07 (2016); *Burwell v. Hobby Lobby*, 573 U.S. 682, 683 (2014).

3. *See generally* *Whitman-Walker Clinic, Inc. v. U.S. Dep’t of Health & Hum. Servs.*, 485 F. Supp. 3d 1 (D.D.C. 2020), *appeal dismissed*, No. 20-5331, 2021 WL 5537747 (D.C. Cir. Nov. 19, 2021); *Boston All. of Gay, Lesbian, Bisexual & Transgender Youth v. U.S. Dep’t of Health & Hum. Servs.*, 557 F. Supp. 3d 224, 229 (D. Mass. 2021); *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014); *see also* *Walker v. Azar*, 480 F. Supp. 3d 417, 420 (E.D.N.Y. 2020), *appeal withdrawn sub nom*, *Walker v. Becerra*, No. 20-3580, 2021 WL 5548357 (2d Cir. Nov. 22, 2021) (enjoining a 2020 rule promulgated by the Department of Health and Human Services which failed to include sexual orientation and gender identify within the “plain meaning of sex” under Title XI and Section 1557); *Little Sisters of the Poor*, 140 S. Ct. at 2380–81 (“Under a plain reading of the statute, then, we conclude that the ACA gives HRSA broad discretion to define preventive care and screenings and to create the religious and moral exemptions.”).

4. *See, e.g., Burwell*, 573 U.S. 682, 688 (2014) (holding that RFRA does not permit the Department of Health and Human Services to demand that closely held corporations provide health-insurance coverage for healthcare that violates its owner’s “sincerely held religious beliefs”); *See also* Religious Freedom Restoration Act 42 U.S.C. § 2000bb-1.

religious individuals' beliefs.⁵ For example, if a religious employee is granted a day off for religious worship, whereas secular employees have no similar benefit, those secular employees are both denied the benefit of the exemption from work and required to work more to make up for the religious employee's absence. If a religious employer is exempted from providing and paying for a benefit that secular employers must provide, the employer receives a financial benefit, the price of which is paid by the employees. This concern is sometimes expressed in terms of "third-party harms."⁶ The notion that excessive third-party harms may be a basis for finding an Establishment Clause violation has garnered substantial scholarly acceptance—and some criticism.⁷ It does not seem to be keeping a foothold in the courts, however.⁸

In this Article, I suggest that there might be an alternative way to articulate the problem with certain religious exemptions, grounded not in the Establishment Clause but in the nondelegation doctrine.⁹ This

5. See, e.g., Micah Schwartzman, Nelson Tebbe & Richard Schragger, *The Costs of Conscience*, 106 KY. L.J. 781, 788 (2018) (discussing the Supreme Court cases which identify the Establishment Clause limits on statutory religious accommodations that impose burdens on third parties); see also *Estate 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).

6. 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 generally 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 & 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); Douglas NeJaime & Reva B. Siegel, *Religious Accommodation, and Its Limits, in a Pluralist Society*, in RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND 69, 74 (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., 2019).

7. See, e.g., Lund, *supra* note 6, at 1376 ("The general principle here—that burdens on third parties matter—is well established. . . . [And] fits with well-established Establishment Clause precedent."); Gene Schaerr & Michael Worley, *The "Third Party Harm Rule": Law or Wishful Thinking?*, 17 GEO. J.L. & PUB. POL'Y 629, 646 (2019) (debating the efficacy of religious exemptions and their role in producing third party harms); see generally Kathleen Brady, *Religious Accommodations and Third-Party Harms: Constitutional Values and Limits*, 106 KY. L.J. 717 (2018); Carl H. Esbeck, *When Religious Exemptions Cause Third-Party Harms: Is the Establishment Clause Violated?*, 59 J. CHURCH & ST. 357 (2016).

8. See, e.g., *Reframing the Harm: Religious Exemptions and Third-Party Harm After Little Sisters*, 134 HARV. L. REV. 2186, 2187 (2021) ("In its most recent religious exemption case, *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, the Court seemed to shrug off the third-party harm analysis altogether."); Schaerr & Worley, *supra* note 7, at 646 ("[T]he third-party harm 'rule' is not 'law' under any reasonable understanding of the word."); 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").

9. See [infra note 57](#) (discussion the nondelegation doctrine jurisprudence).

alternative theory is not intended to supplant third-party harm theories altogether. It will apply to fewer kinds of religious exemptions than the third-party harm theory. As such, it is meant to provide a complementary approach to grounding objections (and legal challenges) to some particularly problematic kinds of exemptions. Specifically, the nondelegation approach suggests that one subset of exemptions—those that delegate arbitrary authority over a person’s property or liberty to another private individual—are unconstitutional under longstanding due process principles. Additionally, this Article argues that exemptions that make an individual’s access to government benefits subject to another party’s religious values and beliefs are unconstitutional because they allow individuals to exercise coercive and final authority over others based on reasons that cannot normally form the basis of government action—specifically, religious reasons.

This Article proceeds as follows. Part I describes in more detail the legal conflicts that have arisen under two of the ACA’s more controversial provisions. Part II provides a broad overview of the branch of nondelegation doctrine, sometimes referred to as “private nondelegation,” that is relevant to the problem of religious exemptions. Finally, Part III explains how a subset of religious exemptions—those that allow private individuals to deprive others of their liberty or property based on religious motivations—violate the nondelegation principle.

I. THE AFFORDABLE CARE ACT AND RELIGIOUS EXEMPTIONS

Two provisions of the Affordable Care Act—the contraceptive mandate and the Section 1557 nondiscrimination requirement—have spurred numerous claims of religious freedom violations. This Part briefly describes those two provisions and the litigation they have produced. It then briefly discusses how these issues are analyzed under the third-party harms framework.

A. Two Issues at the Intersection of Religious Freedom and the ACA

The history of religious-exemption litigation over contraceptive mandates begins even before the ACA itself. In the early 2000s, two states adopted statutes requiring that employers include coverage for prescription contraceptives as part of the prescription insurance coverage for their employees.¹⁰ Although the laws included exemptions, the exemptions were written so narrowly that they did not cover many employers other

10. See CAL. HEALTH & SAFETY CODE § 1367.25 (2016) (“A health care service plan contract . . . shall provide coverage for all of the following services and contraceptive methods for women”); CAL. INS. CODE §10123.196 (2016) (extending California insurance coverage code for prescription contraceptives); N.Y. INS. LAW §§ 3221(16)(A) & 4303[cc] (2022) (requiring group health policies and contracts to provide contraceptive services and methods).

than houses of worship.¹¹ The Catholic social services organization Catholic Charities, which opposed contraception and did not wish to include it in its employer-sponsored health plans, brought suit in two of those states—California and New York—claiming, among other things, that the mandates violated the organization’s religious free exercise rights.¹² The courts ruled against Catholic Charities in both cases, reasoning that the Free Exercise Clause did not require religious exemptions from generally applicable rules.¹³

When the ACA was adopted, it did not have an explicit contraceptive coverage requirement, but when it delegated authority to the Department of Health and Human Services to decide what forms of health care had to be covered as essential health benefits, the agency decided to include prescription contraception.¹⁴ When the agency first adopted this rule, the agency also adopted a religious exemption that was basically identical to the narrow exemption at issue in the *Catholic Charities* cases.¹⁵ After complaints from religious employers but before the requirement went into effect, the Obama administration adopted a broader accommodation

11. Specifically, to take advantage of the exemption, an employer had to meet all of the following requirements:

- (A) The inculcation of religious values is the purpose of the entity. (B) The entity primarily employs persons who share the religious tenets of the entity. (C) The entity serves primarily persons who share the religious tenets of the entity. (D) The entity is a non-profit organization as described in” a portion of the Internal Revenue Code that refers to “churches, their integrated auxiliaries, and conventions or associations of churches” and “the exclusively religious activities of any religious order.

Cath. Charities of Sacramento, Inc. v. Superior Ct., 32 Cal. 4th 527, 539 (2004) (internal citations omitted).

12. *See id.* at 540; *see also* *Cath. Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510, 521 (2006). The religious organizations also claimed that the mandates violated their religious autonomy and lacked a rational basis, *Cath. Charities of Sacramento*, 32 Cal. 4th at 540–41, as well as that the contraceptive mandate violated the Establishment Clause of the First Amendment, *Cath. Charities of Diocese of Albany*, 7 N.Y.3d at 528.

13. *See Cath. Charities of Sacramento*, 32 Cal. 4th at 548–49 (concluding that the state statute requiring contraception coverage was “facially neutral towards religion”); *see also Cath. Charities of Diocese of Albany*, 7 N.Y.3d at 522 (“The burden on plaintiffs’ religious exercise is the incidental result of a ‘neutral law of general applicability”). In *Employment Div. v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that neutral and generally applicable laws that only incidentally burden religious exercise did not violate a religious claimant’s free exercise rights. Therefore, no religious exemption was required unless the claimant could show that the challenged law singled out religion or discriminated on the basis of religion.

14. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2373–74 (2020) (noting that Congress delegated authority to the HRSA to create guidelines for coverage of preventative care).

15. *See id.* at 2374 (citing 76 Fed. Reg. 46621–23 (Aug. 3, 2011)) (referencing the four-part test set out by to identify which employers qualified for a religious exemption to the contraceptive coverage requirements). The ACA exemption applied to any organization that: “(1) Has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a nonprofit organization described in [the tax code].” Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39870–01 (July 2, 2013).

that allowed most nonprofit employers to opt out of the requirement.¹⁶ This accommodation was then challenged by for-profit employers, including Hobby Lobby, due to its failure to extend the same benefit to for-profit employers who opposed providing contraception for religious reasons.¹⁷ Because the ACA is a federal law, the plaintiffs could look to the RFRA, a federal law that is more protective of religious exercise than the Free Exercise Clause and that binds the federal (but not state) government.¹⁸

The Supreme Court held that the federal government violated RFRA when it failed to accommodate the religious exercise of the for-profit employers.¹⁹ In upholding the employer's right to an exemption, the Court emphasized that "[u]nder the accommodation, the plaintiffs' female employees would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives"²⁰

The *Hobby Lobby* decision did not end the litigation over the ACA's contraceptive mandate, however. Nonprofit employers challenged the requirement of opting out by filing a governmental form, which would then result in uncovered employees being able to access contraception by other means, because they felt this would still constitute the sinful act of facilitating access to contraception.²¹ While this litigation was playing out, the Trump administration adopted a new rule that was significantly more generous to employees. The Trump administration's rule, adopted in 2017, provided an exemption from the contraceptive mandate for any employer with a religious or "moral" objection.²² Moreover, and importantly, no employer was required to avail itself of the optional

16. See *Little Sisters of the Poor*, 140 S. Ct. at 2375 (noting the 2013 rules "simplified" and "clarified" the definition of a religious employer while broadening eligible religious accommodations).

17. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 689–91 (2014) (challenging the failure to accommodate the religious beliefs of for-profit corporations brought by Hobby Lobby Stores, Inc. and Conestoga Wood Specialties Corp.); see also *Annex Med., Inc. v. Burwell*, 769 F.3d 578, 581 (8th Cir. 2014) (considering a challenge brought by a for-profit corporation for religious accommodations to the ACA contraceptive mandate in light of *Burwell v. Hobby Lobby*).

18. See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding that RFRA is not a proper exercise of Congress's enforcement authority under the Fourteenth Amendment because its protection sweeps more broadly than the Free Exercise Clause); see also *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423–24 (2006) (noting that RFRA prohibits the government from substantially burdening an individual's religious exercise and contrasting RFRA with the Free Exercise Clause).

19. See *Burwell*, 573 U.S. at 736 (finding the contraceptive mandate as applied to for-profit corporations violated RFRA and thus making no determination on the First Amendment claim).

20. *Id.* at 732.

21. See *Zubik v. Burwell*, 578 U.S. 403, 405–07 (2016) ("Petitioners allege that submitting this notice substantially burdens the exercise of their religion, in violation of [RFRA].").

22. See *Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act*, 82 Fed. Reg. 47792-01, (Oct. 13, 2017) (noting that the U.S. has a "long history" of protecting religious conscience in regulating health care and expanding accommodations for "religious beliefs and moral convictions").

“accommodation” that would provide an alternate path for employees to obtain contraceptive coverage.²³ Thus, some employers could completely deny their employees access to this form of free, ACA-mandated health care under the Trump administration rule, simply by not choosing the accommodation option.

The Trump administration rule was challenged on various Administrative Procedure Act grounds in *Little Sisters of the Poor v. Pennsylvania*, and the Supreme Court rejected those challenges.²⁴ Although no RFRA claim was involved, Justice Alito’s concurring opinion and Justice Ginsburg’s dissenting opinion addressed the religious freedom implications of the Trump administration’s rule because the Trump administration had claimed the rule was designed to comply with RFRA.²⁵ They approached the matter from diametrically opposed perspectives: Justice Ginsburg argued that the sweeping exemption was problematic under the Court’s Establishment Clause precedent because it “benefit[s] religious adherents at the expense of the rights of third parties”—thus invoking the third-party harms theory.²⁶ Justice Alito, by contrast, suggested that the exemption for employers with religious objections was not just permitted but required by RFRA.²⁷ While the litigation over the Trump administration’s rule remains pending in the federal trial court, the Biden administration has publicly promised to take action to revise the sweeping exemption it contains, and rulemaking has since been initiated.²⁸

Another, separate controversy has arisen at the intersection of religious

23. See *id.* (“These rules also leave the ‘accommodation’ process in place as an optional process for certain exempt entities that wish to use it voluntarily.”).

24. See *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2378–79, 2386 (2020) (finding the Departments had “statutory authority” to provide the moral exemption and that the rules were not procedurally defective). The plaintiffs had also raised an Establishment Clause challenge to the rule, but that claim was not before the Supreme Court. See *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 802 (E.D. Pa. 2019), *aff’d sub nom. Pennsylvania v. President United States*, 930 F.3d 543 (3d Cir. 2019), *as amended* (July 18, 2019), *rev’d and remanded sub nom.* (failing to reach the merits of the constitutional claims due to findings under the APA).

25. See *Little Sisters of the Poor*, 140 S. Ct. at 2378 (noting that the rule included a “lengthy analysis” on whether the Department’s position change violated RFRA).

26. *Id.* at 2408 (Ginsburg, J., dissenting).

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

28. The Court had left open the question whether the Trump administration rule was arbitrary and capricious. See *Little Sisters of the Poor*, 140 S. Ct. at 2387 (Alito, J., concurring) (remanding and anticipating a challenge that the rule is arbitrary and capricious and thus violates the APA); see also Shefali Luthra, *The ACA Has a Birth Control Guarantee. Senators Are Pushing for Better Enforcement*, 19TH (Feb. 16, 2022, 5:00 AM), [https://19thnews.org/2022/02/aca-birth-control-out-of-pocket-enforcement/\[https://perma.cc/6RA3-JC54\]](https://19thnews.org/2022/02/aca-birth-control-out-of-pocket-enforcement/[https://perma.cc/6RA3-JC54]) (observing the Biden administration is expected to narrow the “moral or religious exceptions” but calling for a more comprehensive mechanisms to spur compliance with the ACA contraceptive mandate); *Status Rep., Pennsylvania v. Biden, Case 17-cv-04540-WB (E.D. Pa. July 26, 2022)* (asserting that, as of July 26, 2022, the administration had made “meaningful progress toward publishing a Notice of Proposed Rulemaking to amend the 2018 final regulations” and that a draft rule has been submitted to the Office of Information and Regulatory Affairs (OIRA) for review).

exercise and access to health care. Section 1557 of the ACA prohibits discrimination by any health care entity receiving federal funds on a variety of bases that are enumerated by reference to existing civil rights protections, including Title IX of the Education Amendments of 1972.²⁹ The statute's reference to Title IX, which forbids discrimination on the basis of sex, creates the possibility of conflict between religious organizations (such as religiously affiliated hospitals that receive federal funds) and the federal government, because some religious entities are religiously opposed to providing LGBTQ+ and transgender care.³⁰ Although the Obama administration began interpreting Section 1557's prohibition on sex discrimination to include discrimination on the basis of sexual orientation and gender identity well before 2020,³¹ the Supreme Court decision in *Bostock v. Clayton County* increased the likelihood that religiously affiliated health care entities that object to providing certain forms of health care to LGBTQ+ patients would nonetheless be required by Section 1557 to do so.³² *Bostock* held that Title VII's ban on sex discrimination in employment included discrimination on the basis of sexual orientation and gender identity.³³ While *Bostock* did not address Title IX directly, Title VII and Title IX are often understood to be cognate statutes and therefore interpreted alike, so there is every reason to think courts will continue to find that Title IX's language should be interpreted like Title VII's with respect to the meaning of "sex."³⁴

Bostock notwithstanding, the Trump administration issued a final rule just days after the decision came down in June 2020.³⁵ The new final rule interpreted Section 1557 to exclude LGBTQ+ individuals from its

29. See 42 U.S.C. § 18116(a) (2010). The statute also applies the protections of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Rehabilitation Act of 1973, and the Age Discrimination in Employment Act of 1975.

30. See *id.* ("[A]n individual shall not, on the ground prohibited under . . . title IX . . . be excluded from participation in . . . any health program . . . receiving Federal financial assistance . . ."); see also *Religious Sisters of Mercy v. Azar*, 513 F. Supp. 3d 1113, 1132 (D.N.D. 2021) (describing plaintiffs' religious opposition to providing gender-affirming care).

31. See *Nondiscrimination in Health Programs and Activities*, 81 Fed. Reg. 31375 (May 18, 2016) (providing the Obama administration's interpretation of the statute).

32. 140 S. Ct. 1731 (2020).

33. See *id.* at 1754 ("An employer who fires an individual merely for being gay or transgender defies the law.").

34. See *id.* at 1778 (Alito, J., dissenting) (stating that Title VII and Title IX are interpreted similarly with regards to sex); see also *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021) (first citing *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007), then citing *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009)) ("Although *Bostock* interprets Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), it guides our evaluation of claims under Title IX.").

35. See *Nondiscrimination in Health and Health Education Programs or Activities* 85 Fed. Reg. 37160 (June 19, 2020).

protections and created a broad religious exemption.³⁶ That exemption essentially applied to any federally funded entity whose religious tenets conflicted with the rule's requirements.³⁷ 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 has been challenged in part on the basis that it violates the Establishment Clause due to the third-party harms it imposes.³⁸ After several federal courts issued rulings enjoining the rule—albeit on the ground that it was arbitrary and capricious (given the clear requirement of the statute) and therefore violated the Administrative Procedure Act—the Biden administration announced that it would reverse course, just as it had done with the contraception mandate exception.³⁹ Since then, the Biden administration announced that it interprets Section 1557 to forbid discrimination based on sexual orientation and gender identity and, on July 28, 2022, the administration issued a notice of proposed rulemaking.⁴⁰ The new rule incorporates *Bostock*'s understanding of “sex” to include sexual orientation and gender identity, and it retains the possibility of seeking a religious exemption, albeit a narrower one than that provided in the 2020 rule.⁴¹

36. *See id.* at 37161–62 (noting that the 2020 rule removes the language defining sex discrimination to include sexual orientation and gender identity and incorporates Title IX's religious exemption into section 1557).

37. *See Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 485 F. Supp. 3d 1, 14 (D.D.C. 2020) (“The agency made clear that such exemption applied in whole to Section 1557, thereby excepting applicable operations from the statute's prohibition on sex discrimination if inconsistent with the organization's religious tenets.”), *appeal dismissed*, No. 20-5331, 2021 WL 5537747 (D.C. Cir. Nov. 19, 2021).

38. *See Whitman-Walker Clinic*, 485 F. Supp. 3d at 55 (preliminarily enjoining in part the Trump administration rule, Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27846, 27848 (June 14, 2019)), *appeal dismissed*, No. 20-5331, 2021 WL 5537747 (D.C. Nov.). In other cases, the rule was challenged as being arbitrary and capricious under the Administrative Procedure Act and as violating the Equal Protection component of the Due Process Clause of the Fifth Amendment. *See, e.g., Walker v. Azar*, 480 F. Supp. 3d 417, 420 (E.D.N.Y. 2020); *Walker v. Becerra*, No. 20-3580, 2021 WL 5548357 (2d Cir. Nov. 22, 2021); *Boston All. of Gay, Lesbian, Bisexual & Transgender Youth v. U.S. Dep't of Health & Hum. Servs.*, 557 F. Supp. 3d 224, 229 (D. Mass. 2021).

39. *See* MaryBeth Musumeci et al., *Recent and Anticipated Actions to Reverse Trump Administration Section 1557 Non-Discrimination Rules*, KAISER FAM. FOUND. (June 9, 2021), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/recent-and-anticipated-actions-to-reverse-trump-administration-section-1557-non-discrimination-rules/> [https://perma.cc/76UH-Z4JH] (stating that the Biden administration announced in 2021 that gender identity and sexual orientation will be included in interpretation and enforcement of Section 1557's prohibition against sex discrimination).

40. <https://www.reginfo.gov/public/do/eoDetails?rjid=234566>; *see also* Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47824, 47827, 47829–30 (Aug. 4, 2022) (to be codified at 45 C.F.R. § 92) (illustrating that the Biden administration submitted its notice of proposed rulemaking).

41. *See* Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47824, 47827 (Aug. 4, 2022) (to be codified at 45 C.F.R. § 92) (illustrating the Biden administration's new rule). Specifically, the Biden administration rule allows exemptions where RFRA would require them, on a

Given that the Biden administration's earlier policy statements pertaining to Section 1557 already provoked litigation concerning the rights of religious entities, the 2022 rule is likely to incite yet more controversy—and litigation.⁴²

B. Religious Exemptions from Health Care Mandates and Third-Party Harms

The issues raised by both sets of cases involving broad religious exemptions to health care mandates can be analyzed in terms of third-party harm. Indeed, as the plaintiffs in *Whitman-Walker Clinic, Inc. v. U.S. Department of HHS* argued, the exemption “shifts . . . substantial burdens” onto patients and clinics, and the rule makes no exception for special circumstances, “such as if an LGBTQ patient seeks care in a rural area with only one hospital for miles, or if “a high percentage’ of a health care provider’s work force denies care,” resulting in the potential for some patients to lose access to needed care altogether.⁴³ This means that individuals seeking health care will be burdened, and in some cases will be denied care altogether, in order to protect the religious scruples of others. Thus, the plaintiffs asserted, because the exemption shifts excessive burdens of religious exercise from adherents to non-adherent third parties, it violates the Establishment Clause.⁴⁴

The third-party harms theory is thus one important basis for challenging overly broad religious exemptions under the Establishment Clause. Yet, it has been subject to numerous criticisms. One criticism is that there is not a clear “baseline” from which to judge whether a law burdens others.⁴⁵ In the context of the contraception mandate, for example, one

case-by-case basis, whereas the prior rule incorporated Title IX’s broad exemption for religious organizations whose tenets conflict with the rule’s requirements. *Id.* at 47841.

42. *See id.* at 47829–30 (“While some post-*Bostock* decisions have placed limits on Section 1557’s application to discrimination against transgender people these decisions have focused on whether RFRA exempts specific entities from potential future enforcement . . . [but which do] not call into question *Bostock*’s application to Section 1557.”); *see also* Kate Keith, *HHS Proposes Revised ACA Anti-Discrimination Rule*, HEALTH AFFS. FOREFRONT (July 27, 2022), <https://www.healthaffairs.org/content/forefront/hhs-proposes-revised-aca-anti-discrimination-rule> [<http://perma.cc/4TRB-E9WD>] (noting litigation challenging the Biden administration’s May 2021 announcement regarding the application of *Bostock* to Section 1557 and its March 2022 guidance regarding health care for transgender youth).

43. Plaintiffs’ Memorandum of Points and Authorities in Support of Their Motion for a Preliminary Injunction at 33, *Whitman-Walker Clinic, Inc. v. U.S. Dep’t of Health & Hum. Servs.*, No. 20-cv-01630-JEB, 2020 WL 5105549 (D.D.C. July 9, 2020) (citations omitted).

44. *See id.* at 33–34 (noting that the district court did not address the Establishment Clause claim, because it held that the entire rule was invalid under the Administrative Procedure Act).

45. *See, e.g.*, Kevin C. Walsh, A Baseline Problem for the “Burden on Employees” Argument against RFRA-Based Exemptions from the Contraceptives Mandate, MIRROR OF JUST. (Jan. 17, 2014), <http://mirrorofjustice.blogspot.com/mirrorofjustice/2014/01/a-baseline-problem-for-the->

might point out that before the ACA, employees did not necessarily have access to employer-funded contraception, so it seems illogical to define the religious exemption—which simply returns some employees to that prior state of lacking subsidized care—as a “burden” on employees.⁴⁶ A related problem is determining how much of a burden is too much under the third-party harm framework. Is the rule essentially a categorical one, forbidding all third-party burdens, or does it require something like a balancing test, weighing the harm to third parties against the benefits to religious individuals?⁴⁷ Finally, Christopher Lund has pointed out that some laws that inflict third-party harms contain both religious and secular exemptions.⁴⁸ In fact, the Trump administration’s contraceptive mandate rule excuses employers who have “moral” qualms and not just religious ones; and even the Obama-era rule exempted grandfathered plans and plans of small employers.⁴⁹ Given that, as Lund explains, “[t]he more secular exceptions there are, the more understandable a religious exemption becomes,” should the existence of secular exemptions be relevant to the constitutionality of the religious exemption?⁵⁰ And if not, does the third-party harm theory undermine religious freedom by privileging secular over religious bases for exemptions? Although supporters of the third-party harm framework have suggested answers to some of these

burden-on-employees-argument-against-rfra-based-exemptions-from-the-contr.html, [http://perma.cc/HP7A-KR67] (positing that exempting employers from the contraceptive mandate compliance imposes a burden on employees only if there is a baseline entitlement to such coverage).

46. See, e.g., Carl H. Esbeck, *Do Discretionary Religious Exemptions Violate the Establishment Clause?*, 106 KY. L.J. 603, 627–28 (2018) (explaining that a benefits program, like an entitlement program, can cause a harm to third parties when withheld). Nelson Tebbe, Richard Schragger, and Micah Schwartzman have argued that the logical place to find the baseline is in the law as it stands after the particular public benefit program has been enacted, because the essence of the third-party harm principle is that religious individuals or organizations “cannot shift costs that they would otherwise bear, because of a religious objection, onto employees.” Nelson Tebbe, Richard Schragger & Micah Schwartzman, *Hobby Lobby and the Establishment Clause, Part II: What Counts as a Burden on Employees?*, BALKINIZATION (Dec. 4, 2013), <https://balkin.blogspot.com/2013/12/hobby-lobby-and-establishment-clause.html>, [http://perma.cc/9QXX-35FM].

47. See Esbeck, *supra* note 46, at 627–28 (noting the Court rejected that the “loss of contraceptive benefits categorically tipped RFRA’s prescribed compelling-interest test against the employers,” where RFRA considers third parties harms “by the balancing test prescribed by the act, not a categorical rule”); see also Lund, *supra* note 6, at 1377 (“The greater the third-party harm, the more problematic the religious exemption becomes. The difficulty here, of course, will be in categorizing the various kinds of harms and in figuring out how much harm is too much.”).

48. See Lund, *supra* note 47, at 1382 (“[T]here is reason to pause, for legislatures distribute and redistribute burdens all the time—that is the very stuff of legislation. We are routinely expected to bear each other’s burdens; remember again Hobby Lobby arises only because of the Green family’s objections to bearing the burden of providing someone else’s contraceptive coverage. But a theory of third-party burdens grounded in the Establishment Clause requires that religious exercise be singled out for disadvantageous treatment.”).

49. See [supra](#) note 24 and accompanying text (referencing litigation in both administrations as to the mandate); see also Lund, *supra* note 47, at 1381–82 (positing that Congress could exempt any business so long as it does not conflict with the Free Exercise Clause).

50. Lund, *supra* note 47, at 1381.

questions,⁵¹ there is sufficient conceptual unclarity in the third-party standing theory that it has not gained widespread acceptance.⁵²

II. NONDELEGATION DOCTRINE

It is apparent from the discussion in Part I that the subject of religious exemptions from health care mandates has been controversial, and that the third-party harms theory has played a role in how some judges and scholars identify the point at which a religious exemption becomes constitutionally problematic.⁵³ Yet, the third-party harms approach is characterized by several conceptual difficulties, the thorniest of which may be the “baseline” problem—identifying the baseline level of government largesse against which the “harm” or “burden” on third parties is to be judged.⁵⁴ The third-party harms approach also raises questions about how much harm is too much for constitutional purposes, and when the burden is spread too widely among too many people to be constitutionally cognizable.⁵⁵ In this Part, I suggest that an alternate approach to religious

51. See generally Schwartzman et al, *supra* note 5, at 781.

52. Cf. Christopher C. Lund, *Religious Exemptions, Third-Party Harms, and the False Analogy to Church Taxes*, 106 KY. L.J. 679, 683 (2018) (arguing that the third-party harms approach embodies a “conceptual mistake”).

53. See *supra* Part I and accompanying text (discussing the ACA contraceptive mandate and the Section 1557 nondiscrimination requirement with respect to third-party harms).

54. See, e.g., Mark Storslee, *Religious Accommodation, the Establishment Clause, and Third-Party Harm*, 86 U. CHI. L. REV. 871, 937 (2019) (“As a general matter, attempts to weigh burdens on religious practice against other kinds of interests suffer from an obvious difficulty—namely, the lack of a shared baseline.”); see also Thomas C. Berg, *Religious Exemptions and Third-Party Harms*, 17 FEDERALIST SOC’Y REV. 50, 58 (2016) (stating a problem arises when an individual’s legal right is contingent on another’s religious exercise); Esbeck, *supra* note 46, 626–28. Esbeck argues that, in the case of the contraceptive mandate, the third-party harm theory assumes that universal access to cost-free contraception is the “baseline” against which benefits and harms should be judged. *Id.* at 626. As he further explains:

Universal coverage, of course, is not the actual state of affairs under the ACA. However, if we are to assume a world where the default position is comprehensive healthcare coverage for all workers, then it is a mere tautology that departure from such a baseline because of a RFRA accommodation for Hobby Lobby Stores is a loss or “burden” for the store’s employees and a windfall or “benefit” for the employer’s religion. But that is a political assumption, not constitutional law. Why not assume a world where RFRA accommodations are universal? Then it is a mere tautology that there is no “burden” on store employees because the status quo ante would be no healthcare benefits. Indeed, one can make all sorts of fantasy assumptions and draw the resulting baseline accordingly.

Id. at 626–27. One could make a similar argument about whether the “baseline” for judging religious exemptions from section 1557 is access to non-discriminatory care for LGBT individuals or not. If not, then there is no benefit to religious health care providers and no burden on LGBT patients from extending religious exemptions to entities that object to providing such care.

55. Lund, *supra* note 47, at 1377–78 (“The greater the third-party harm, the more problematic the religious exemption becomes.”); see also Lund, *supra* note 52, at 681–82 (analogizing religious exemptions to church taxes and noting the unconstitutionality of church taxes would “invalidate an astounding number of religious exemptions”).

exemptions that burden third parties, grounded in nondelegation doctrine, may allow claimants to avoid these difficulties. At the same time, it may also more accurately describe the harm that these exemptions inflict. Exemptions that place individuals' entitlements at the mercy of another party's religious values are problematic because they allow individuals to exercise coercive and final authority over others based on reasons that cannot normally form the basis of government action. The nondelegation approach thus emphasizes the harm of making people and their rights subject to the whim of quasi-sovereign religious individuals or entities, rather than emphasizing the harm to the nonadherent per se.

Nondelegation doctrine is currently enjoying a revival in legal scholarship.⁵⁶ This revival is likely due in large part to recent hints by the Supreme Court's conservative majority that it may be interested in reconsidering its longstanding hands-off attitude toward sweeping governmental delegations—both delegations from the legislature to the executive branch and delegations from the legislature to private entities.⁵⁷ At base, the nondelegation doctrine relies on the idea that—due to separation-of-powers principles, due process principles, or both—the government cannot grant standardless, coercive authority outside of the legislative branch (to another branch of government or to a private party).⁵⁸ First applied in the *Lochner* era, most famously in the *Schechter Poultry* case, the nondelegation doctrine in the legislative-executive context has mostly lain

56. For just a sampling of the literature on nondelegation doctrine published in the past two years, see generally Benjamin Silver, *Nondelegation in the States*, 75 VAND. L. REV. 1211 (2022); 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*, 23 CATO SUP. CT. REV. 31 (2018–19); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021).

57. See *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring) ("If a majority of this Court were willing to reconsider the approach [to legislative-executive delegation] 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 also *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari) ("Justice Gorsuch's thoughtful *Gundy* opinion raised important points [regarding the nondelegation doctrine] that may warrant further consideration in future cases."); *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 61 (2015) (Alito, J., concurring) ("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)); *Texas v. Comm'r of Internal Revenue*, 142 S. Ct. 1308, 1308 (2022) (statement of Alito, J., respecting the denial of certiorari) (urging the Court to take up the non-delegation doctrine in an "appropriate" case).

58. See, e.g., 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) (noting the commingling of due-process and separation-of-powers rationales in private nondelegation cases).

dormant while the administrative state has expanded.⁵⁹ At the same time, a separate line of cases dealing with delegation of government power to private entities has retained vitality.⁶⁰ This line of cases holds that the government cannot, consistent with the Due Process Clause, delegate coercive power over another person's constitutional rights or constitutionally protected property interest to a private party. Because the courts in this line of cases seem most concerned with the way in which this particular delegation gives private individuals a form of veto power over another private individuals' rights, I refer to the doctrine at issue as the "private veto doctrine."⁶¹

Briefly, the private veto doctrine begins with two cases in the early 1900s: *Eubank v. City of Richmond*⁶² and *Washington ex rel. Seattle Title Trust Co. v. Roberge*.⁶³ These cases vindicate the fundamental legal principle that the government may not grant arbitrary, standardless control over one person's private property to other private individuals or groups. In both *Eubank* and *Roberge*, the Court struck down local ordinances that allowed neighbors to veto a particular land use, without providing any standards for the decision and without subsequent judicial review.⁶⁴ The Court held that vesting such standardless authority over one person's property in another group of private persons violated the Due Process Clause.⁶⁵

In the wake of these cases, the Supreme Court struggled to delimit the doctrine they identified, often confusing private delegations with other forms of "delegation."⁶⁶ Nonetheless, the principle has remained a

59. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935) (holding that regulation-making discretion given to the president was an unconstitutional delegation of power).

60. See generally *Eubank v. City of Richmond*, 226 U.S. 137 (1912); *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928); *Blumenthal v. Bd. of Med. Examiners*, 57 Cal. 2d 228, 236 (1962); *Larkin v. Grendel's Den*, 459 U.S. 116 (1982); cf. *Dep't of Transp.*, 575 U.S. at 61 (Alito, J., concurring) (asserting that Congress may not delegate such authority to a "private entity").

61. See generally cases cited [supra note 60](#). I examine this doctrine at length in another forthcoming article. B. Jessie Hill, *Due Process, Delegation, and Private Veto Power*, 108 IOWA L. REV. (forthcoming 2023).

62. 226 U.S. 137 (1912).

63. 278 U.S. 116 (1928).

64. See *Eubank*, 226 U.S. at 143–44 (holding that vesting power in a committee to determine the extent of use of property was unconstitutional); see also *Roberge*, 278 U.S. at 117–18 (holding that a zoning ordinance that limited the type of building erected in each district to be unconstitutional other than what was permitted by the district itself).

65. See *Eubank*, 226 U.S. at 144–45 (finding the ordinance as an unreasonable exercise of police power); see also *Roberge*, 278 U.S. at 122–23 (concluding that delegation of power runs contrary to the Due Process Clause).

66. In *Thomas Cusak Co. v. City of Chicago*, 242 U.S. 526 (1917), decided in between *Eubank* and *Roberge*, the Court seemed to walk back the private veto principle. In *Cusak*, the Court upheld

steadfast and influential doctrine that has extended tentacles into numerous other doctrines—including the Establishment Clause.⁶⁷ In fact, the 1982 Supreme Court case *Larkin v. Grendel's Den* bears striking similarities to *Eubank* and *Roberge*.⁶⁸ In *Grendel's Den*, the Court struck down a Massachusetts law that allowed churches and schools to veto the issuance of a liquor license to any restaurant or bar located within 500 feet of those establishments.⁶⁹ The Court was troubled by the power provided to churches, specifically, and applied the Establishment Clause test derived from *Lemon v. Kurtzman*.⁷⁰ That test considers whether a law has the purpose or effect of advancing religion, or if it excessively entangles the government with religion.⁷¹ The *Grendel's Den* Court found that the Massachusetts law failed both the “effects” and “entanglement” prongs of that test, because the statute had the primary effect of advancing religion and “enmesh[ed] churches in the exercise of substantial governmental powers”⁷² But the Court’s brief opinion is also replete with references to the standardless nature of the delegation of power to the churches. The Court observed, for example, that “[t]he churches’ power under the statute is standardless, calling for no reasons, findings, or reasoned conclusions,” and complained 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.”⁷³ In fact, the restaurant challenging the law had prevailed on a nondelegation claim at the trial court level; given that the delegates entitled to veto the liquor license included not just religious entities but secular ones as well, this framing of the issue may have seemed even more sensible than the Establishment Clause one.⁷⁴

a law that allowed nearby landowners to waive a general prohibition on billboards, asserting that the case could be distinguished from *Eubank* because it vested private individuals with the right to waive a prohibition, rather than grant a privilege. *Id.* at 529, 531. Any sense that *Cusak* signaled the end of the private nondelegation doctrine was eliminated with the Court’s reinvention of it in *Roberge*, however.

67. Please add citation to your forthcoming article.

68. See *Larkin v. Grendel's Den*, 459 U.S. 116 (1982).

69. See *id.* at 127 (“The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions.”).

70. *Id.* at 123–27 (quoting *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (“The challenged statute enmeshes churches in the processes of government and creates the danger of ‘[p]olitical fragmentation and divisiveness along religious lines.’”) (alteration in original) (citation omitted)).

71. See *Lemon*, 403 U.S. at 612–13 (rooting the *Lemon* test in cumulative Supreme Court precedent and applying the test to Establishment Clause claims).

72. *Grendel's Den*, 459 U.S. at 125–27.

73. *Id.* at 125–27; see also *id.* at 127 (“The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions.”).

74. See *Grendel's Den, Inc. v. Goodwin*, 495 F. Supp. 761, 766 (D. Mass. 1980) (“In making that

The Supreme Court found an even more comprehensive delegation of legislative power to a religious entity constitutionally problematic for similar reasons in *Board of Education of Kiryas Joel Village School District v. Grumet*.⁷⁵ In that case, the State of New York had drawn a school district's boundaries to include only members of one strict traditionalist Jewish sect, in order to accommodate the students with special needs who would otherwise be forced to attend public schools with students who did not share the same culture.⁷⁶ As in *Grendel's Den*, the Court found this arrangement violated the Establishment Clause, but similarly couched its rationale in nondelegation language.⁷⁷ For example, the Court cited *Grendel's Den* in observing that the state's action delegated significant governmental power to a private religious entity, without sufficient safeguards to ensure that the power would be used "exclusively for secular, neutral, and nonideological purposes . . ."⁷⁸ *Kiryas Joel* is distinct from *Grendel's Den* in that *Kiryas Joel* did not explicitly involve the exercise of coercive power by religious individuals over the property of others who did not share their commitments; however, it is not unreasonable to think that creating a school district dominated by one religious community might pose risks to dissenters within that community.⁷⁹ And although the religious community attempted to justify the special school district as merely an "accommodation" of their religious belief, the Court rejected that framing, holding that the New York law constituted an "unconstitutional delegation of political power to a religious group," not an effort to permit "religious communities and institutions to pursue their own interests free from governmental interference . . ."⁸⁰

This line of Supreme Court precedent has continued to be applied by lower courts, particularly in the occupational licensing context. Several courts have struck down legal arrangements by which maintaining a business license is dependent on the approval of a group of private individuals

substantive change, the legislature impermissibly delegated, rather than exercised, its power. It is precisely that delegation which triggers due process concerns delineated by *Eubank* and its progeny.") (citation omitted); see also *id.* at 764 (first citing *Eubank v. Richmond*, 226 U.S. 137 (1912); then citing *Cusak, Co. v. Chi.*, 242 U.S. 526 (1917); and then citing *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928)) (outlining the due process arguments "defining" the authority legislatures can delegate to private entities).

75. *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 702 (1994).

76. See *id.* at 691–94.

77. *Id.* at 697–98.

78. *Id.* at 697.

79. Compare *Kiryas Joel*, 512 U.S. at 691 (delegating civic power to the "vigorously religious" residents of the village of Kiryas Joel), with *Grendel's Den*, 459 U.S. at 117–18 (delegating civic power to the "body of the church or school" who may object to the sale of alcoholic beverages within a radius five hundred feet.); see also *Kiryas Joel*, 512 U.S. at 698 (finding the distinction between the delegation of civic power to "qualified voters of the village of Kiryas Joel" and the "parish council" *Grendel's Den* "turns out to lack constitutional significance").

80. *Id.* at 706 .

or entities—particularly when the private delegates may have a pecuniary interest at stake.⁸¹ In fact, laws requiring abortion clinics to have a contractual arrangement with a nearby private hospital have in some cases been found to violate this principle, since they essentially delegate authority to a limited number of hospitals to decide, without applying any enforceable standards, whether or not the clinic can stay in operation.⁸² Other licensing laws delegating authority over licenses to private groups, such as for opticians and jockeys, have been struck down on similar grounds.⁸³ In each of these cases, the essential concern is that the private delegates are granted sovereignty over others' property and liberty, empowered to grant or deny constitutionally protected interests to other private individuals based on their own private reasons (or no reason whatsoever).

In vindicating the principle that private entities, groups, or individuals may not be granted veto power over another's property, courts have often expressed concern about the potential motives of the private delegate. Because the power is delegated without accompanying standards and without the opportunity for subsequent judicial review, the private entities are empowered to act arbitrarily, based on illicit discriminatory motives;⁸⁴ to serve their own financial interests;⁸⁵ or based on their own private, religious beliefs.⁸⁶ Any one of these motives is, of course, an

81. See, e.g., *Blumenthal v. Bd. of Med. Examiners*, 57 Cal. 2d 228, 236 (1962) (emphasizing that the absence of standards for this delegated authority precludes review or remedy for any refusals determined by the private groups).

82. See *Hallmark Clinic v. N.C. Dep't of Hum. Res.*, 380 F. Supp. 1153, 1156–58 (E.D.N.C. 1974), *aff'd on other grounds*, 519 F.2d 1315 (4th Cir. 1975) (“[D]ue process cannot tolerate a licensing system that makes the privilege of doing business dependent on official whim. . . . [where] the state has placed no limits on the hospital’s decision to grant or withhold a transfer agreement”); see also *Birth Control Ctr., Inc. v. Reizen*, 508 F. Supp. 1366, 1375 (E.D. Mich. 1981), *aff'd on other grounds*, 743 F.2d 352 (6th Cir. 1984) (“The power to prohibit licensure may not constitutionally be placed in the hands of hospitals”).

83. See *Fink v. Cole*, 302 N.Y. 216, 225 (1951) (citing *Packer Collegiate Inst. v. Univ. of State of N.Y.*, 298 N.Y. 184, 192 (1948) (“Even if the Legislature’s power to license had been delegated to a governmental agency, the statute now challenged would have to be stricken down for lack of guides and proper standards.”); *Ware v. Benedikt*, 225 Ark. 185, 186 (1955) (finding invalid a public hospital’s rule conditioning admission to practice medicine in the hospital on a physician’s prior acceptance into a private medical society); *Blumenthal*, 57 Cal. 2d at 235 (striking down licensing authority delegated to presently licensed opticians).

84. Insofar as it is concerned with laws that grant power to private individuals to discriminate against others, the private veto doctrine bears a resemblance to what Nelson Tebbe and Lawrence Sager call “discriminatory permissions,” which they argue violate the Equal Protection Clause. See generally Lawrence G. Sager & Nelson Tebbe, *Discriminatory Permissions and Structural Injustice*, 106 MINN. L. REV. (forthcoming 2022).

85. See *Blumenthal*, 57 Cal. 2d at 236 (“[The private entities were] given absolute economic control over those employees who are required to serve under them in order to attain future professional objectives.”).

86. See *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 127 (1982) (“The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions.”).

inappropriate basis for denying another person of property or liberty—and one that, as discussed in more detail below, would not comport with the requirements of due process.⁸⁷

While some questions remain as to whether the private nondelegation doctrine is rooted in the separation of powers or due process, the due process logic of this line of cases is fairly straightforward.⁸⁸ Generally, a protected property interest of the plaintiff is involved—sometimes real property, as in the early twentieth-century cases,⁸⁹ and sometimes a more abstract property interest, such as a license.⁹⁰ Thus, when a law delegates authority over that constitutionally protected property interest to a private individual or entity, it subjects the owner to potential deprivation of that interest without sufficient process. The essence of due process, of course, is the right to notice and an opportunity to challenge the reasons for the deprivation before a neutral decision-maker.⁹¹ Subjecting a private individual to a deprivation of property by a private individual, without binding standards for the deprivation or the guarantee of judicial or administrative review, can hardly be considered a meaningful opportunity to be

87. See [infra notes 88–97](#) and accompanying text (highlighting the interplay of private nondelegation and the Due Process Clause).

88. Regarding the separation-of-powers basis, see, e.g., Silver, *supra* note 56, at 1244 (“The thought seems to be that, if the state constitution prohibits interbranch delegations . . . then a fortiori delegations to nongovernmental, private parties are prohibited”); Larkin, Jr., *supra* note 56, at 34 (suggesting that federal delegations to private parties violate Article I’s “Vesting” clause, which vests executive power only in the executive branch).

89. See *Eubank v. City of Richmond*, 226 U.S. 137, 144–45 (1912) (noting that a city ordinance allowed for certain property owners to control the property rights of others); *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 122–23 (1928) (invalidating a city ordinance requiring a landowner to procure the consent of adjacent property owners to erect a new structure).

90. Numerous cases have found that private persons and businesses have constitutionally protected property interests in their licenses. See, e.g., *Women’s Med. Pro. Corp. v. Baird*, 438 F.3d 595, 611 (6th Cir. 2006) (citing *Wojcik v. City of Romulus*, 257 F.3d 600, 609–10 (6th Cir. 2001)) (providing that while first-time applicants for liquor and entertainment licenses do not hold protected property interests, “due process protects an interest in the continued operation of an existing business,” where the requirement to obtain a license to operate arose after the business had been in operation); 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.

Id.; *Spinelli v. City of N. Y.*, 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.”).

91. See *Armstrong v. Manzo*, 380 U.S. 545, 551–52 (1965) (“[The opportunity to be heard] must be granted at a meaningful time and in a meaningful manner.”); see also RONALD D. ROTUNDA & JOHN E. NOWAK, *ROTUNDA AND NOWAK’S TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 17.8(a) (1986).

heard and to contest the basis for the deprivation.⁹² In general, then, the key to making out a procedural due process claim in this context is showing that the private delegate is granted standardless discretion, not subject to official review, and that the plaintiff is deprived of a constitutionally protected property interest.⁹³

There may also be an alternative route to finding a due process violation—one that is grounded in substantive due process rather than procedural due process. According to substantive due process, every exercise of governmental power must, at minimum, have a rational basis.⁹⁴ In the case of a denial of a constitutionally protected liberty or property interest, the level of scrutiny is even higher.⁹⁵ Yet, a law granting coercive authority over individuals to a private entity that need not have or articulate any standards or publicly acceptable reasons for exercising that authority amounts to arbitrary governmental action. The fact that the arbitrariness is exercised by a private party rather than a state actor seems irrelevant, moreover, where the authority to act is nonetheless granted directly by the government; the private actor is essentially just implementing the law.

If private vetoes are understood as a violation of substantive due process, it is likely not even necessary to show that a constitutionally protected property interest is at issue; arbitrary government action is unconstitutional in all cases.⁹⁶ This approach may condemn a much wider array of religious exemptions than the procedural due process approach. Its sweeping implications, however, are precisely what make this substantive due process approach somewhat more problematic. Without a limiting principle, the substantive due process approach threatens to invalidate nearly every government rule or standard that relies on private actors. This is because the substantive due process approach as I have just outlined suggests that private delegations are *inherently* arbitrary and thus automatically fail even the rational-basis test. For example, a law permitting only lawyers who have attended ABA-accredited law schools to

92. Moreover, to the extent that the private delegate may be motivated by its own financial interests or illicit bias, that delegate cannot be considered a neutral decisionmaker. *Cf.* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 877–78 (2009) (requiring recusal for any adjudicator with a financial interest in the outcome of a case rooted in a concern for neutrality).

93. The existence of a privacy interest is determined by reference to positive law. *See* Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972) (providing that a claimant must have a legitimate entitlement to a property interest); *see also* ROTUNDA & NOWAK, *supra* note 91, at § 17.5(a).

94. *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 331 (1986) (noting the minimum level of scrutiny government power must possess to be constitutional).

95. *See* Does v. Munoz, 507 F.3d 961, 964 (6th Cir. 2007) (stating that in this instance, the government action must satisfy strict scrutiny).

96. *See* Daniels, 474 U.S. at 331 (illustrating that the history of due process advances the notion of protecting individuals from arbitrary, oppressive action); *see also* 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.”).

take the state's bar exam, or a law permitting only people who have graduated from medical school to be licensed as physicians, may be vulnerable under this approach. Admission to professional schools is generally decided by actors who are applying nonlegal standards, not subject to judicial review, and there is unquestionably a degree of arbitrariness in such decisions. Chaos would ensue if every such framework were subject to invalidation as a due process violation. Thus, a procedural due process approach to nondelegation is likely the most useful, since—by requiring a property interest and a concrete deprivation of that interest by a private actor empowered by the state—it ensures there are some limits on the doctrine and does not threaten to dismantle the entire range of private delegations upon which the modern state has come to depend.⁹⁷

III. RELIGIOUS EXEMPTIONS AS PRIVATE VETOES

This Part argues that at least some third-party harm scenarios may be reconceptualized as involving an unconstitutional delegation of governmental power to a private party (or a private veto), including those discussed above in Part I.⁹⁸ When the government grants authority to private individuals to veto others' access to statutorily guaranteed health care for religious or moral reasons, it is violating this nondelegation principle. It makes individuals' access to health care subject to another person's veto, which may be exercised for arbitrary reasons—including religious motivations, which are not acceptable bases for the exercise of coercive power.⁹⁹ 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—much like the private veto granted to churches in *Grendel's Den*.¹⁰⁰

As noted above, to make out a claim for a violation of procedural due process, the plaintiff must show that the government has deprived her of a constitutionally protected property interest without sufficient process.¹⁰¹ When the authority to deprive someone of that property interest, pursuant to no legal standards and without judicial review, is granted to a private entity, there is no need to consider whether the process is

97. See Gillian E. Metzger, *Privatization As Delegation*, 103 COLUM. L. REV. 1367, 1369 (2003) (noting the “political and practical ubiquity” of delegations to private actors).

98. See *supra* Part I (referencing the third-party harms created by the ACA contraceptive mandate and Section 1557 anti-discrimination requirement).

99. See *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 (1982) (noting that the *Lemon* court held the ordinance at-issue unconstitutional due to the “danger of ‘political fragmentation and divisiveness on religious lines’”).

100. See *id.* at 125–127 (holding unconstitutional a statute granting state liquor licenses to businesses only if churches do not object to the license).

101. See [supra notes 93–95](#) and accompanying text.

sufficient under the Supreme Court test laid out in *Mathews v. Eldridge*.¹⁰² There has been no process provided at all in this scenario. Thus, the only significant questions in applying the procedural due process test to privately granted vetoes is whether the veto power may be exercised for arbitrary reasons rather than pursuant to legal standards—as it certainly is in the case of religious exemptions—and whether the plaintiff is being deprived of a constitutionally protected property interest.

This requirement—the deprivation of a constitutionally protected property interest—in fact comprises two distinct showings that must be made. The first is that there is a property interest and the second is that it is being taken away. To show a constitutionally protected property interest, when something other than tangible property is involved, the plaintiff needs to show that positive law creates not just an expectation of something, but an actual entitlement to it.¹⁰³ This first hurdle may be a significant one, but there is a strong argument that the ACA does create a constitutionally protected property interest in nondiscriminatory, government subsidized health care.¹⁰⁴ The ACA is an entitlement program rather than a discretionary benefit; the text of the statute’s “essential benefits” mandate—which includes contraception—and its nondiscrimination mandate contain no religious exemptions at all.¹⁰⁵ Thus, individuals who fall under the scope of the statute have been granted a statutory entitlement to health care and have every reason to expect the provision and continuation of that benefit. The religious exemptions, mandated by a separate rule or statute (e.g., RFRA), thus impinge on that constitutionally protected property interest in the health care mandated by the ACA.

With respect to the second showing, the procedural due process claim likely has the most force when the individual is actually deprived of access to the health care service at issue, not merely forced to seek it elsewhere. In this way, the private veto doctrine ensures that the challenged

102. See *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976) (noting the test requires analysis of three factors: the private interest that would be affected by the official action, the risk of an erroneous deprivation of the private interest through the current procedures, and the government’s interest in avoiding fiscal and administrative burdens with additional procedures).

103. See *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (“To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. . . . He must, instead, have a legitimate claim of entitlement to it.”); see also *ROTUNDA & NOWAK*, *supra* note 91, at § 17.5(a).

104. See, e.g., Robin West, *A Tale of Two Rights*, 94 B.U. L. REV. 893, 907 (2014) (“Most recently, our civil rights have come to include, at least arguably, rights to health insurance and to the health care that such insurance facilitates, rights to marry whomever we love, regardless of gender or sexual orientation, and rights to immigrate on fair and humane conditions.”); 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”).

105. 42 U.S.C. §§ 18116, 18022.

government action results in an actual veto, or deprivation of the plaintiff's property interest. Thus, the due process violation will be most apparent when there is no alternative means for the plaintiff to access subsidized contraception or LGBTQ+ health care. In the case of the Trump administration's contraception rule, this is likely to occur. Unlike the religious exemption under the Obama administration, the Trump rule does not require that employees have an alternate route to receiving subsidized contraception; it contains only an optional "accommodation" leading to government-provided contraception that employers can choose to adopt or not.¹⁰⁶ Thus, religious employers are granted the right to veto their employees' access to contraception on the terms guaranteed by the ACA. Indeed, the government's own data indicated that between 70,500 and 126,400 employees would lose access to cost-free contraception under the Trump rule.¹⁰⁷ With respect to LGBTQ+ health care, the ability to block access to care completely is not clearly written into the statute; rather, it may arise as a practical matter if the objecting health care provider is the only available provider.¹⁰⁸ As noted above, the law contains no exceptions for situations in which patients have no other option for accessing appropriate health care, such as those in rural settings or where all suitable health care providers in the area are subject to the objection.¹⁰⁹

If applied strictly, the need to show full deprivation of the protected property interest will limit the cases in which the private veto doctrine applies. Thus, it may not provide a basis for striking down the RFRA-mandated accommodation suggested by the Court in *Burwell v. Hobby Lobby*, insofar as it assumed that employees would continue to be able to

106. See Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. § 47792 (proposed Oct. 13, 2017); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 82 Fed. Reg. § 47838 (proposed Oct. 13, 2017); see also Talia E. Sukol, *A Bitter Pill: The Unconstitutionality of the Trump Administration's Contraceptive Coverage Exemptions*, 10 WM. & MARY POL'Y REV. 11, 39 (2019) (positing that the Trump administration's rules violate the Equal Protection and Establishment Clauses because the rules discriminate against women, fail intermediate scrutiny due to their basis in stereotypes about gender roles, and have an "unacceptably religious purpose").

107. See *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2400–01 (2020) (Ginsburg, J., dissenting) ("[T]his Court leaves women workers to fend for themselves, to seek contraceptive coverage from sources other than their employer's insurer, and . . . to pay for contraceptive services out of their own pockets. The Constitution's Free Exercise Clause, all agree, does not call for that imbalanced result. Nor does [RFRA] condone harm to third parties occasioned by entire disregard of their needs.") (citation omitted).

108. 42 U.S.C. § 18116(a).

109. See [supra note 43](#) and accompanying text. Note that it is often the institution rather than the individual provider that asserts a religious objection to a particular form of health care. Thus, LGBTQ+ individuals may find clinicians who are willing to provide the care they require but who are blocked by institutional policies from doing so. See generally LORI FREDMAN, WILLING AND UNABLE: DOCTORS' CONSTRAINTS IN ABORTION CARE 118 (2010).

access free contraception.¹¹⁰ Similarly, the nondelegation approach might not prevent application of a broad religious exemption from providing LGBTQ+ health care if other providers are readily available. However, there may be a gray area where the existence of deprivation is debatable. Consider a scenario in which individuals are not completely deprived of access to health care under the ACA but they are required to travel long distances to access it, imposing additional financial hardships and increasing health risks due to delays in care. Arguably, a full deprivation of the property interest has not occurred, yet this scenario seems to be a deprivation for all intents and purposes. Thus, a nondelegation approach would have to take into account circumstances such as these and include a method or standard for determining when the property right has been sufficiently burdened to constitute a deprivation.

Despite its shortcomings, however, this procedural due process approach has numerous advantages. First, it avoids some of the conceptual problems of the third-party harms approach, such as defining the baseline from which to judge “burden” and determining how much burden is too much.¹¹¹ By focusing the inquiry on whether there is a constitutionally protected property interest in the form of a statutorily created entitlement, the private veto approach avoids the need to answer difficult questions concerning the appropriate baseline for judging burdens. In addition, by focusing on whether there is an actual deprivation, or veto, the test avoids the question of how much burden is too much. Any deprivation of a protected property interest, regardless of how significant that interest is, violates the Due Process Clause when it is caused by the grant of authority over the plaintiff’s property to a private party.

Admittedly, the need to identify a property interest could re-introduce the baseline problem in another form. Property interests are determined by reference to positive law: if a statute or other source of law creates an entitlement to something, such that individuals have an expectation of receiving that benefit as long as they meet the eligibility requirements that are codified in that positive law, it will generally constitute a property interest.¹¹² Thus, to a large extent, the government itself defines the scope and limits of that interest. As such, where a statute both grants and limits an entitlement, the scope of the property right must be understood to be

110. *See* *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014) (finding that contraceptive mandate is not the “least restrictive means of furthering that compelling governmental interest” because the government did not identify the “cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health insurance policies due to their employers’ religious objections”).

111. *See supra* (illustrating advantages of the procedural due process approach).

112. *See* *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (noting that property interests are created by “rules or understandings” securing benefits which supports the claim of “entitlement to those benefits”).

limited as well.¹¹³ One might argue, then, that the ACA was enacted against the backdrop of RFRA, which is a sort of “super-statute” that limits the reach of all other statutes.¹¹⁴ At the same time, it seems unwarranted and extreme to suggest that one needs to look beyond the statutory language creating the entitlement itself to identify additional limits on the entitlement derived from more general statutory enactments.¹¹⁵ This would suggest that every individual’s property rights—including not just real property but also business licenses, health care benefits, and other forms of “new property”¹¹⁶—exist only to the extent that they are not later found to substantially burden another’s religious exercise—a proposition that seems extraordinary under current doctrine.

Of course, this line of argument suggests that, if the ACA had contained a religious exemption within its own statutory text, the statutory health care right might be understood to be limited by that religious accommodation. But no such exemption was contained within the ACA, perhaps because no agreement could be reached regarding the proper balance between religious liberty and the right to nondiscriminatory health care provided by the ACA.¹¹⁷ If this is the case, then perhaps it is fitting that the government be required, on the back end, to accommodate both interests by ensuring an alternate means for individuals to access the health care of which they would otherwise be deprived due to others’ religious scruples.

Finally, the private veto approach arguably captures what is most troubling about some religious exemptions. Religious exemptions are not problematic merely because they shift costs and burdens onto third parties; many constitutional rights require precisely that.¹¹⁸ Rather, they are

113. See, e.g., *Arnett v. Kennedy*, 416 U.S. 134, 153–54 (1974) (plurality opinion) (“[W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet.”).

114. See, e.g., *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020) (“Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII’s commands in appropriate cases.”); see also Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 166 n.84 (2014) (providing definition of “super statute”) (citing William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1230 (2001)).

115. In *Arnett*, for example, the plurality focused on the limitations on the property right contained within the statute creating the entitlement. *Arnett*, 416 U.S. at 153–54.

116. See generally Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

117. Cf. Kathleen Sebelius & Nancy-Ann DeParle, *Present at the Creation: Launching the ACA—2010 to 2014*, HEALTH AFFS. BLOG (Feb. 28, 2020) <https://www.healthaffairs.org/doi/10.1377/forefront.20200226.368621>, [<https://perma.cc/99RH-XHAU>] (“We struggled to find a policy that would balance the religious liberty of employers with the health needs of their female employees and dependents.”).

118. See, e.g., Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 CASE W. RES. L. REV. 55, 81 n.65 (2006) (explaining that when courts protect rights, they impose “uncompensated burdens on third parties”).

problematic because of how they grant sovereignty to a private individual or entity over another individual's entitlement, which the private delegate is free to exercise arbitrarily, including by imposing its religious beliefs on someone who does not share those beliefs. This is a concern about the arbitrary exercise of coercive power, a form of private dominion granted to some individuals, who can use it to act in a regulatory fashion based on motives, including religious motives, that the Constitution forbids the government itself to rely upon.¹¹⁹ It is thus worth considering the private veto approach as an additional basis for challenging religious exemptions. Although the ground it covers is not as extensive as the theory of third-party harms, it may be firmer ground, historically and doctrinally.¹²⁰

CONCLUSION

The problem of religious exemptions that harm others is a thorny one for constitutional doctrine. While many constitutional rights require some burden on others, there must be limits on the extent to which religious persons can shift burdens onto third parties through exceptions from generally applicable laws. Yet it has proven conceptually difficult to define the Establishment Clause limits on religious exemptions by reference to those third-party burdens, and courts have not always found this approach persuasive.

This Article argues in favor of a complementary approach to challenging at least some such exemptions, grounded in due process and nondelegation doctrine. According to this approach—which enjoys a long legal pedigree,¹²¹ is relatively straightforward to apply, and speaks to the most troubling aspect of certain religious exemptions—the government cannot delegate private veto power to religious entities or individuals over another's constitutionally protected privacy interest. To the extent that administrative rules and even RFRA require otherwise, they are unconstitutional. As this Article has demonstrated, however, not all religious exemptions—even those that burden third parties—will be unconstitutional under this approach. In some cases, the plaintiff will not be able to show the existence of a property right, or that that property right was sufficiently infringed. But in those cases where the religious exemption would result in a significant or total deprivation of a legally-granted

119. *Cf. Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 69 (1976) (“[T]he State cannot ‘delegate to a spouse a veto power [over the other spouse’s abortion decision] which the state itself is absolutely and totally prohibited from exercising’”).

120. Indeed, in a forthcoming book, Phillip Muñoz argues that the delegation of coercive authority to churches over private individuals, including church members, was one important definition of the kind of religious “establishment” the Establishment Clause was meant to prohibit. *See VINCENT PHILLIP MUÑOZ* (forthcoming) (manuscript at 273–82). Thus, the private-veto doctrine ultimately vindicates both due-process and Establishment Clause interests when it is applied in the context of religious exemptions.

121. *See supra* notes 62–83 and accompanying text (summarizing the argument).

entitlement to the plaintiff, the government must provide an alternative. For example, the government must ensure that individuals have an alternate means to access health care benefits, such as contraception or transgender health care, guaranteed by the Affordable Care Act. In other words, the government—in accommodating religious individuals—has a duty to mitigate the harm to its non-religious citizens.¹²²

Thus, the religious nondelegation theory may serve as a complement to other theories for critiquing religious exemptions. While not a comprehensive test for determining the legality of religious accommodations, the religious nondelegation framework may provide a particularly promising approach to the constitutional controversy over religious exemptions to contraceptive coverage and LGBTQ+ health care under the ACA.

122. Cf. Brownstein, *supra* note 118, at 145 (arguing that the government should mitigate any excess secular benefit to religious believers that religious exemptions may confer).