

**THE NEW PRIVATE-REGULATION SKEPTICISM:
DUE PROCESS, NON-DELEGATION,
AND ANTITRUST CHALLENGES**

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INTRODUCTION

In recent years, state and federal courts have been ruling against private regulatory organizations on a number of theories. This Article explores this new private-regulation skepticism and the theories that underpin it.

This Article focuses on three main sources of law: the Due Process Clause, non-delegation doctrine, and antitrust law. To illustrate the doctrines, it follows five examples from recent cases and recent news of regulation by Amtrak, the North Carolina Board of Dental Examiners, the Mississippi Board of

Pharmacy, the Texas Boll Weevil Eradication Foundation, and landowners in Texas water quality protection zones.

The Due Process Clause is a potential limit on the private exercise of regulatory power, especially if the regulators and the regulated parties compete with each other. Federal non-delegation doctrine, by contrast, is unlikely to be much help in these challenges, though some states, like Texas, have vibrant non-delegation doctrines that not only are stricter than the federal one but also strongly distinguish between public and private delegates. Some courts don't clearly distinguish between non-delegation and due process. I argue that they should, as the two doctrines serve very different purposes.

Finally, federal antitrust law is available to guard against the anticompetitive dangers of "industry regulating itself." Excessive conflicts of interest decrease the chance that a court will find state action immunity from antitrust law, and increase the chance that a court will find a substantive antitrust violation because of structural anticompetitive factors. Additionally, regulators that are sufficiently independent from state government are less likely to be insulated from liability by sovereign immunity. This new regulation skepticism thus provides several useful tools to challenge private regulation.

I. THE PROBLEM OF PRIVATE REGULATION

A. *Private Regulation and Its Discontents*

Using private entities to achieve regulatory goals has been a long-standing American practice. The most salient examples for lawyers are our own professional accreditors—state bars and the American Bar Association—but examples can be found across the entire economy,¹ and the growth of the regulatory

1. Harold Abramson, writing a quarter century ago, distinguished three categories of "private regulators." Harold I. Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 HASTINGS CONST. L.Q. 165, 169 (1989). First, there are private actors who are "formally deputized by government as private regulators" (not counting actual public officials). *Id.* These include, for instance, professional licensing boards, such as the Louisiana State Board of Embalmers and Funeral Directors. *See, e.g., St. Joseph Abbey v. Castille*, 700 F.3d 154, 158 (5th Cir. 2012) (noting that the FTC had raised concerns about state funeral boards' being "dominated by funeral directors"). At the other extreme, there are private adjudicatory and standard-setting organizations with no formal connection to government, like the Better Business Bureau or Consumers Union. Abram-

state, combined with resource constraints for governments, suggests that the phenomenon will continue.²

On the one hand, relying on the private sector to regulate its own ranks seems to offer an advantage because lawyers, doctors, and the like know more about their own professions than the government does. It's a strategy that has appealed to both New Deal corporatists and modern-day pro-business advocates.

On the other hand, "industry regulating itself" has its disadvantages from both an external and an internal perspective. From the outside, this sort of "self-regulation" seems to detract from the regulatory power of government. Perhaps more interestingly, from the inside, it's apparent that "industry" isn't a monolith. "Industry regulating itself" really means "some people in industry regulating other people in industry," "people regulating their own competitors," or perhaps even "incumbents regulating potential entrants." This perspective invites one to fear self-interested bias and anticompetitive behavior.

In recent years, courts seem to have grown increasingly skeptical of these private regulatory delegations. Interesting cases have come out of Germany,³ India,⁴ and Israel,⁵ but this Article will focus on what U.S. state and federal law has to say

son, *supra*, at 170–71. In between, there are organizations with some formal connection with government, though one that's less definite than in the first category. These include standard-setting organizations whose standards are incorporated by reference into law, like the American National Standards Institute, or private court-ordered arbitrators. *Id.* at 172–74.

2. See, e.g., Michael J. Astrue, Health Care Reform and the Constitutional Limits on Private Accreditation as an Alternative to Direct Government Regulation, *LAW & CONTEMP. PROBS.*, Autumn 1994, at 75, 81.

3. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 18, 2012, 2 BvR 133/10, available at http://www.bverfg.de/entscheidungen/rs20120118_2bvr013310.html, [<http://perma.cc/G7A5-TBZ9>]; see also Maximilian Steinbeis, *Outsourcing als Mittel der Haushaltssanierung ist verfassungswidrig*, VERFASSUNGSBLOG (Jan. 18, 2012), <http://verfassungsblog.de/outsourcing-als-mittelder-haushaltssanierung-ist-verfassungswidrig/>, [<http://perma.cc/YZ55-75MR>].

4. See Judith Resnik, *Globalization(s), privatization(s), constitutionalization, and statization: Icons and experiences of sovereignty in the 21st century*, 11 INT'L J. CONST. L. 162 (2013).

5. See HCJ 2605/05 Academic Ctr. of Law & Bus., Human Rights Div. v. Minister of Finance [2009] (Isr.) ¶ 18, available at http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.htm, [<http://perma.cc/42AY-XV2F>]; Barak Medina, *Constitutional limits to privatization: The Israeli Supreme Court decision to invalidate prison privatization*, 8 INT'L J. CONST. L. 690 (2010); Resnik, *supra* note 4; Alexander Volokh, *Privatization and the Elusive Employee-Contractor Distinction*, 46 U.C. DAVIS L. REV. 133, 180–85, 198–200 (2012).

on the matter. The most relevant doctrines that recently have been used to question private regulatory delegations have been (state or federal) non-delegation doctrine, the Due Process Clause, and federal antitrust law.⁶

The doctrines are mostly old, but their recent use against private delegations of all sorts is striking: The cases cutting the other way, chiefly in the context of the civil rights liability of private prisons, get more press.⁷ The Texas Supreme Court has developed its own theory of private delegation. The D.C. Circuit did the same—just in 2013. Also in 2013, the Fourth Circuit tightened up on antitrust immunity for a state licensing board. Moreover, these courts have characterized the relevant regulators as “private,” even when one might have thought they were public.

This Article explains the contours of these emerging doctrines and their roots in past case law. The rest of this Part outlines five examples that I will follow throughout the Article, and briefly shows the complexity of the public-private distinction. Part II discusses challenges under the Due Process Clause.

6. These aren't the only doctrines used today to support the accountability of private entities doing government-like tasks: another example is the narrow scope that has recently been given to government contractor immunity. Government contractor immunity was first recognized in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), and extended in *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992), *Bentzlin v. Hughes Aircraft Co.*, 833 F. Supp. 1486 (C.D. Cal. 1993), and *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009). But recent cases have taken a narrower view, including *McMahon v. General Dynamics Corp.*, 933 F. Supp. 2d 682 (D.N.J. 2013), and at least four other cases since 2005. *See id.* at 692–94 (collecting cases); Alexander Volokh, *Are Federal Contractors Immune from Tort Suits Just Because the Government Is?*, REASON.ORG, May 9, 2013, <http://reason.org/news/show/government-contractor-immunity>, [http://perma.cc/4YS3-FH8M].

7. Private prison liability—and civil rights liability generally—is a mixed bag that resists easy characterization. Although the Supreme Court did restrict qualified immunity in civil rights suits against private prisons in *Richardson v. McKnight*, 521 U.S. 399 (1997), it established in *Filarsky v. Delia*, 132 S. Ct. 1657 (2012), that qualified immunity for private parties was still available in other contexts. Moreover, in *Minneci v. Pollard*, 132 S. Ct. 617 (2012), it cut back on the availability of civil rights suits for money damages against federal private prisons, though this was on a theory that state tort law already provided an adequate remedy. *Id.* at 620. *See generally* Alexander Volokh, *The Modest Effect of Minneci v. Pollard on Inmate Litigants*, 46 AKRON L. REV. 287 (2013); Alexander Volokh, *Recent Developments in the Federal Civil-Rights Liability of Federal Private Prisons*, REASON.ORG, May 6, 2013, <http://reason.org/news/show/apr-2013-federal-liability-prisons>, [http://perma.cc/77KJ-XSHM]; Alexander Volokh, *Supreme Court Clarifies Standards for Qualified Immunity in Civil Rights Cases—Or Does It?*, REASON.ORG, Apr. 5, 2013, <http://reason.org/news/show/privatization-qualified-immunity>, [http://perma.cc/ZKF4-ECJC].

Part III discusses non-delegation doctrine. The Article also will explain how not all courts are clear on the difference between due process and non-delegation theories. I argue that this commingling is unfortunate, and that non-delegation and due process reasoning are very different animals that ought to be kept analytically separate.

Part IV discusses how private regulatory delegation can run afoul of federal antitrust law. Usually, state regulation is immune from federal antitrust law under antitrust's state action immunity, but relying on private entities to do the regulation can make the action just private enough to lose the immunity.

B. Five Examples

Throughout this Article, I will follow a few examples, some pulled from current legislative activity and some pulled from recent cases, to see how they would fare under the various doctrines.⁸

1. Amtrak

Amtrak is a passenger rail corporation created by federal statute in 1970. It's a for-profit corporation⁹ that's run by presidential appointees and in which the federal government holds most of the stock.¹⁰ The Passenger Rail Investment and Improvement Act of 2008 requires the Federal Railroad Administration (FRA) and Amtrak to "jointly . . . develop new or improve existing metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations."¹¹ These performance measures are used, among other things, as a basis for the Surface Transportation Board (STB) to assess damages against railroads if "on-time performance" or "service quality" is substandard for two consecutive quarters.¹²

8. Although the organizations below are described in the present tense, in reality some of them are described as they were before cases, discussed in this Article, striking them down or altering their workings in some way.

9. See *infra* notes 227–29 and accompanying text.

10. See *infra* notes 221–23 and accompanying text.

11. *Ass'n of Am. Railroads v. Dep't of Transp.*, 721 F.3d 666, 669 (D.C. Cir. 2013) (quoting Passenger Rail Investment and Improvement Act of 2008 [hereinafter PRIIA], Pub. L. No. 110-432, § 207(a) (codified at 49 U.S.C. § 24101 note)) (internal quotation marks omitted) (holding PRIIA § 207 to be unconstitutional).

12. *Id.* (citing 49 U.S.C. § 24308(f)(1)–(2)) (internal quotation marks omitted).

If Amtrak and the FRA can't agree on performance measures, they "may petition the [STB] to appoint an arbitrator to assist [them] in resolving their disputes through binding arbitration."¹³ Amtrak thus has equal authority with the FRA on this issue; no metrics or standards can be developed unless they agree, or appoint a binding arbitrator.

2. *The North Carolina Board of Dental Examiners*

The North Carolina Board of Dental Examiners, composed almost entirely of practicing dentists who are elected by practicing dentists, regulates the practice of dentistry.¹⁴ It's illegal to practice "dentistry" in North Carolina—a term that includes teeth-whitening services—without a license from the board.¹⁵ The Board sent dozens of letters to non-dentist providers of teeth-whitening services, asserting that their activities constituted the illegal practice of dentistry and ordering them to cease and desist. As a result, non-dentist teeth whiteners were successfully excluded from North Carolina.¹⁶

3. *The Mississippi Board of Pharmacy*

The Mississippi Board of Pharmacy, composed entirely of practicing pharmacists appointed by the Governor from a list submitted by pharmacy associations,¹⁷ regulates the practice of pharmacy and the distribution of drugs and devices.¹⁸ In 2011, it was given regulatory authority over pharmacy benefit managers. Pharmacy benefit managers administer prescription drug benefits for HMOs and others; they negotiate discounts with pharmacies and manufacturers, and thus are the market adversaries of pharmacists, competing with them for a share of the profits arising out of the prescription drug business.¹⁹

The statute requires that pharmacy benefit managers, as a condition of doing business in the state, disclose their financial

13. *Id.* (citing PRIIA § 207(d) (codified at 49 U.S.C. § 24101 note)).

14. N.C. GEN. STAT. ANN. § 90-22(b) (West 2013).

15. *Id.* § 90-29(a), (b)(2).

16. See text accompanying *infra* notes 355–67.

17. MISS. CODE ANN. § 73-21-75(1) (West 2013).

18. *Id.* § 73-21-83(1).

19. Similar bills are pending in Oregon, Hawaii, and Oklahoma. See Joanna Shepherd, *The Fox Guarding the Henhouse: The Regulation of Pharmacy Benefit Managers by a Market Adversary*, 9 NW. J.L. & SOC. POL'Y 1 (2013).

statements to the state Board of Pharmacy.²⁰ These financial statements are to include balance sheets, income statements, and “[a]ny other information relating to the operations of the pharmacy benefit manager required by the board under this section,” though pharmacy benefit managers aren’t required to disclose “proprietary information.”²¹

Also, the Board recently attempted to institute a regulation imposing a fiduciary duty on pharmacy benefit managers, but ultimately backed down.²²

4. *The Texas Boll Weevil Eradication Foundation*

The Texas legislature has created a nonprofit Boll Weevil Eradication Foundation, which operates boll weevil eradication programs and charges growers for the cost.²³ Growers vote to decide whether to establish a boll weevil eradication zone and (if they choose to establish a zone) elect a member to the Foundation board.²⁴ The board determines assessments on growers in each zone, which growers then have to approve by a two-thirds referendum vote.²⁵

The Foundation wields significant power. It determines what programs to conduct.²⁶ It imposes penalties for late payment of assessments: A grower who is sufficiently in arrears is required to destroy his crop or have it destroyed at his cost by the Department of Agriculture, and failing to pay or destroy the crop is a misdemeanor.²⁷ Foundation representatives can enter any private property subject to eradication without the owner’s permission for any purpose under the statute, including “the treatment, monitoring, and destruction of growing cotton or other host plants.”²⁸ The Foundation also has rulemaking authority.²⁹

20. MISS. CODE ANN. § 73-21-157(3).

21. *Id.* (internal quotation marks omitted).

22. See Shepherd, *supra* note 19, at 19–21; Mari Edlin, *PBMs concerned oversight involves conflict of interest*, MANAGED HEALTHCARE EXECUTIVE, June 2013, at 30.

23. *Tex. Boll Weevil Eradication Found. v. Lewellen*, 952 S.W.2d 454, 457 (Tex. 1997) (citing TEX. AGRIC. CODE §§ 74.101–.127 (1995)).

24. *Id.* (citing TEX. AGRIC. CODE §§ 74.105–.106).

25. *Id.* (citing TEX. AGRIC. CODE § 74.113, 4 TEX. ADMIN. CODE § 3.3(c) (1995)).

26. *Id.* at 458 (citing TEX. AGRIC. CODE § 74.108(a)(4)).

27. *Id.* (citing TEX. AGRIC. CODE §§ 74.115(a)–(b), 74.126).

28. *Id.* (quoting TEX. AGRIC. CODE § 74.117) (internal quotation marks omitted).

29. *Id.* (quoting TEX. AGRIC. CODE § 74.120(c)).

The Commissioner of Agriculture retains some authority: For instance, the Board requires Commissioner approval to change the number of board positions or change zone representation on the board, the Commissioner can exempt a grower from excessive penalties, and the Board can only spend money on Commissioner-approved programs.³⁰

5. Texas Water Quality Protection Zones

A provision of the Texas Water Code allows landowners to establish “water quality protection zones” in some cities’ extra-territorial jurisdictions.³¹ By establishing such a zone, landowners exempt themselves from certain regulations and create their own water quality plan.³²

Landowners owning 500 to 1000 contiguous acres can’t designate a zone without approval from the state agency, but owners of more than 1000 contiguous acres can designate a zone without agency approval.³³ As to the water plan, the state agency can’t reject a plan unless it “finds that implementing the plan will not reasonably attain” either of the two listed water quality objectives: “(1) . . . maintain[ing] background levels of water quality in waterways; or (2) . . . captur[ing] and retain[ing] the first [one and a half] inches of rainfall from developed areas.”³⁴ Once the zone is designated, the municipality can’t enforce any ordinances or regulations in the zone that are inconsistent with the land use and water quality plans.³⁵

C. What Is “Private”?

The Texas property owners above are of course private, but not all the other examples seem self-evidently so. Amtrak was created by federal statute, has presidentially appointed board members, is a “state actor” for purposes of constitutional rights, and the federal government holds most of its stock.³⁶ The North Carolina Board of Dental Examiners is labeled pub-

30. *Id.* (quoting TEX. AGRIC. CODE §§ 74.107(b), 74.116, 74.109(h)).

31. *See* FM Props. Operating Co. v. City of Austin, 22 S.W.3d 868, 870 (Tex. 2000) (internal quotation marks omitted).

32. *Id.*

33. *Id.* at 871 (citing TEX. WATER CODE § 26.179(d) (1995)).

34. *Id.* (citing TEX. WATER CODE § 26.179(g)).

35. *Id.* at 872 (citing TEX. WATER CODE § 26.179(i)).

36. *See infra* notes 225–29 and accompanying text.

lic by statute.³⁷ The Mississippi Board of Pharmacy members are gubernatorial appointees. The Texas Boll Weevil Foundation is labeled a “state agency,” “governmental unit,” and “governmental body” for various purposes.³⁸

And yet, as we’ll see, various courts have held that these entities are private, at least for some purposes. The public-private distinction is fuzzy, and statutory labels aren’t always dispositive:³⁹ For example, federal law states that Amtrak “shall be operated and managed as a for-profit corporation.”⁴⁰ The members of the North Carolina Board of Dental Examiners all have private dental practices and are only accountable to other dentists.⁴¹ The Texas Boll Weevil Foundation board members are likewise “private interested parties.”⁴² The Mississippi Board of Pharmacy could similarly be considered private for some purposes: its members are in private practice, and the governor is restricted to choosing from lists submitted by trade associations.

The bottom line is that private regulators are vulnerable on a number of fronts. Moreover, some regulators might be surprised to find out that they’re “private.” Courts might not invalidate the entire agency, but they might prevent it from regulating in certain ways, and—depending on the doctrine—individual regulators might be held liable for damages. Regulators who aren’t sure that they’re unambiguously public might want to exercise greater caution: one of the new wave of skeptical courts might find them to be private and, as private actors, they might find themselves disempowered or, perhaps worse for them, liable.

II. THE DUE PROCESS CLAUSE

The Due Process Clause is a plausible avenue for challenging certain private delegations. There’s no due process doctrine that’s specific to private parties, but delegation of power plus

37. N.C. GEN. STAT. ANN. § 90-22(b) (West 2013).

38. See *infra* notes 188–91 and accompanying text.

39. See, e.g., Alexander Volokh, *What a Recent Labor-Relations Decision Teaches Us About the Meaning of “Public” and “Private,”* REASON.ORG, Mar. 21, 2013, <http://reason.org/news/show/nlrb-public-private>, [<http://perma.cc/QEX3-N5KN>].

40. 49 U.S.C. § 24301(a) (2006).

41. See *infra* notes 363–67 and accompanying text.

42. *Tex. Boll Weevil Eradication Found. v. Lewellen*, 952 S.W. 2d 545, 471 (Tex. 1997).

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. Thus there are many Supreme Court cases, some fairly recent, that strike down private delegations on due process grounds.

Under current law, Amtrak's exercise of regulatory authority violates due process; the North Carolina Board of Dental Examiners's driving out non-dentist teeth whiteners doesn't, and neither does the Texas homeowners' establishing a water quality zone. As for the Mississippi Board of Pharmacy's regulation of pharmacy benefit managers and the Texas Boll Weevil Foundation's regulation of cotton growers, whether there's a due process violation depends on what actions these boards undertake in the course of their duties.

A. *The "Private Due Process" Doctrine*

1. *The Eubank-Thomas Cusack-Roberge Synthesis*

Delegating coercive power to private parties has long been held to be a potential violation of due process. In *Eubank v. City of Richmond*,⁴³ the Supreme Court examined a city ordinance allowing the owners of two thirds of the property abutting a street to establish a "building line" beyond which construction would be illegal.⁴⁴ The Supreme Court held that this violated due process:⁴⁵

The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the property rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest, or even capriciously

This, as we have said, is the vice of the ordinance, and makes it, we think, an unreasonable exercise of the police power.⁴⁶

In other words, there was no protection against the property holders' using their coercive power arbitrarily or to serve their own purposes.

43. 226 U.S. 137 (1912).

44. *Id.* at 141–42 (internal quotation marks omitted).

45. *Id.* at 143.

46. *Id.* at 143–44.

One shouldn't read *Eubank* too broadly: A few years later, in *Thomas Cusack Co. v. City of Chicago*,⁴⁷ the Supreme Court upheld a city prohibition on billboards, where the prohibition could be waived on any block if the owners of a majority of the property fronting the street consented.⁴⁸ Why didn't this case fall within *Eubank*? Because *Eubank* involved an *unregulated* status quo and property owners *regulating* their fellows, while *Thomas Cusack* involved a *regulated* status quo and property owners *deregulating* their fellows.⁴⁹ This made all the difference:

The [petitioner] cannot be injured, but obviously may be benefited by this provision, for without it the prohibition of the erection of such billboards in such residence sections is absolute. He who is not injured by the operation of a law or ordinance cannot be said to be deprived by it of either constitutional right or of property.⁵⁰

At first glance, *Thomas Cusack* seems to deprive *Eubank* of much of its force. Many ordinances that run afoul of *Eubank* could be salvaged simply by switching the legal baseline around and making them into waivable prohibitions. In *Eubank*, perhaps the city of Richmond could have established an extremely conservative building line (i.e., extremely far from the street), and voting among property owners would have progressively relaxed the requirement.

But perhaps, in reality, it's *Thomas Cusack* that should be read narrowly. In *Washington ex rel. Seattle Title Trust Co. v. Roberge*,⁵¹ a city ordinance allowed the construction of a "philanthropic home for children or for old people" in a particular residential district with the written consent of the owners of two thirds of the property within 400 feet.⁵² In language reminiscent of *Eubank*, the Court wrote that it violated due process to give coercive power over the property owner to a minority of property owners who could dissent or abstain "for selfish reasons or arbitrarily," "uncontrolled by any standard or rule prescribed by legislative action" and without any "provision for review."⁵³

47. 242 U.S. 526 (1917).

48. *Id.* at 530–31.

49. *Id.* at 531.

50. *Id.* at 530.

51. 278 U.S. 116 (1928).

52. *Id.* at 118 (internal quotation marks omitted).

53. *Id.* at 122.

What distinguished this from *Thomas Cusack*, which looks similar on its face? As the Court saw it, the billboards had been found to be a nuisance,⁵⁴ while there was no such showing for this “home for the aged poor.”⁵⁵

What emerges thus looks like a general rule that property owners can’t regulate other property owners—with an exception if, as in *Thomas Cusack*, they’re actually *deregulating* against the baseline of a general prohibition of a nuisance. This general principle was also on display in *Carter v. Carter Coal Co.*⁵⁶ In *Carter*, the Supreme Court examined the Bituminous Coal Conservation Act of 1935. The Act allowed the producers of two thirds of the coal in any “coal district,” negotiating with unions representing a majority of mine workers, to set wages and hours for all coal producers in the district.⁵⁷ The Supreme Court’s decision, against the background of the preceding cases, shouldn’t be surprising:

The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question [such as *A.L.A. Schechter Poultry Corp. v. United States*,⁵⁸ *Eubank*, and *Roberge*.]⁵⁹

54. *Thomas Cusack*, 242 U.S. at 529.

55. *Roberge*, 278 U.S. at 122.

56. 298 U.S. 238 (1936).

57. *Id.* at 283–84.

58. 295 U.S. 495 (1935). I discuss *Schechter Poultry* in the section on non-delegation doctrine, see text accompanying *infra* note 130.

2. The Mandatory-Discretionary Distinction

Several constitutional law doctrines didn't survive the 1930s, but the due process rationale for striking down delegations of regulatory authority to private parties—in particular competitors—remained alive and well. *Eubank* was cited as good law in Supreme Court opinions three times (though twice in dissent) in the 1970s,⁶⁰ and *Roberge* was cited as good law in a concurring opinion as recently as 2010.⁶¹ The Supreme Court has cited *Thomas Cusack* (which went against the claimant) as good law only once recently.⁶² The case citing *Thomas Cusack* is an important case, as discussed below,⁶³ but *Eubank* and *Roberge* remain viable.⁶⁴ The newer cases are essentially consistent with the older *Eubank-Thomas Cusack-Roberge* synthesis.

A generation after the early cases, in 1972, the Supreme Court decided *Fuentes v. Shevin*.⁶⁵ *Fuentes* concerned state statutes “ordering state agents to seize a person’s possessions, simply upon the *ex parte* application of any other person who claims a right to them and posts a security bond.”⁶⁶ The Court established that the possessor’s interest was a property interest protected by procedural due process,⁶⁷ and that due process was violated because of the lack of a predeprivation hearing for

59. *Carter Coal*, 298 U.S. at 311; *cf.* *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 614 (1937) (dodging the issue).

60. *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 677–78 (1976); *McGautha v. California*, 402 U.S. 183, 253 n.3 (1971) (Brennan, J., dissenting); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 126 n.30 (1978) (Stevens, J., dissenting).

61. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl Protection*, 130 S. Ct. 2592, 2614 (2010) (Kennedy, J., concurring in part and concurring in the judgment).

62. *New Motor Vehicle Bd.*, 439 U.S. at 109.

63. See text accompanying *infra* notes 83–87.

64. See also *Gen. Elec. Co. v. N.Y. State Dep’t of Labor*, 936 F.2d 1448, 1455 (2d Cir. 1991) (“*Eubank* and *Roberge* remain good law today.”); *Silverman v. Barry*, 727 F.2d 1121, 1126 (D.C. Cir. 1984) (noting that the Supreme Court has had recent opportunity to overrule *Eubank* and *Roberge* but has chosen to distinguish them instead); *cf.* A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 155 (2000) (making this point about *Carter Coal*); Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411, 457 n.199 (2000) (same).

65. 407 U.S. 67 (1972).

66. *Id.* at 69–70.

67. *Id.* at 84–90.

the possessor.⁶⁸ But, in the portion of its opinion rebutting the claim that this was an “extraordinary situation[.]” justifying a departure from the requirement of a predeprivation hearing,⁶⁹ the Court wrote:

The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark.⁷⁰

The Court added, in a footnote, that “[t]he seizure of possessions under a writ of replevin is entirely different from the seizure of possessions under a search warrant” (evidently to counter the concern that its holding might now require predeprivation hearings in those situations): Among other distinctions, “the Fourth Amendment guarantees that the State will not issue search warrants merely upon the conclusory application of a private party. It guarantees that the State will not abdicate control over the issuance of warrants and that no warrant will be issued without a prior showing of probable cause.”⁷¹

Fuentes thus sets up a mandatory-discretionary distinction, which one can trace through its progeny of cases about garnishment and prejudgment attachment procedures.⁷² This is consistent with the old cases: in *Eubank*, property owners could

68. *Id.* at 80–84.

69. *Id.* at 90 (internal quotation marks omitted). This case was decided before *Mathews v. Eldridge*, 424 U.S. 319 (1976), which sets forth the current balancing test, under which predeprivation hearings aren’t always necessary.

70. *Fuentes*, 407 U.S. at 93.

71. *Id.* at 93 n.30.

72. See *N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606–07 (1975) (finding a due process violation: The “writ of garnishment [was] issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer” and was based on “conclusory allegations.”); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 605–06 (1974) (finding due process satisfied: “The writ [of sequestration] . . . will not issue on the conclusory allegation of ownership or possessory rights” but only when a judge is convinced of particular facts.); *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337, 338 (1969) (finding a due process violation: “[N]otice and an opportunity to be heard are not given before the *in rem* seizure of the wages . . . [T]he clerk of the court issues the summons at the request of the creditor’s lawyer . . .”).

force establishment of a building line; in *Roberge*, they could force a waiver of the rule against old people's homes; in *Carter Coal*, coal producers could force a binding wage through their collective bargaining activity.⁷³ In all these cases, the due process problem was that they were able to force an alteration in the legal regime without any discretion remaining in government and without any protection against their personal biases.⁷⁴

The Supreme Court's decision the following year in *Gibson v. Berryhill*⁷⁵ was also consistent with this principle. The Alabama Board of Optometry sued Lee Optical Co. and its employees in Alabama state court, charging that they were engaged in the "unlawful practice of optometry" by working for a corporation rather than being self-employed.⁷⁶ The state court agreed with the Board and "enjoined Lee Optical both from practicing optometry without a license and from employing licensed optometrists."⁷⁷ When the state court proceedings were over, the Board moved to hold delicensing proceedings against the individual optometrists.⁷⁸ The optometrists sued to enjoin the Board pro-

73. Froomkin, *supra* note 64, at 149 ("The coal boards' decisions went into effect directly, without review or intervention by the federal government.").

74. If there were some standards to protect against personal bias, the result might well have been different. See, e.g., *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 610 (6th Cir. 2006) (finding no due process violation when a statute required abortion clinics to be licensed by hospitals, because a government official retained the ability to waive the requirement); *Biener v. Calio*, 361 F.3d 206, 216 (3d Cir. 2004) ("Delaware's limitation on the [primary election] filing fee amount[, set by the relevant political party itself,] is a sufficient limitation on the Party's authority to prevent the delegation from running afoul of the Due Process Clause."); *Gen. Elec. Co. v. N.Y. State Dep't of Labor*, 936 F.2d 1448, 1455 (2d Cir. 1991) (stating that *Eubank* and *Roberge* "stand for the proposition that a legislative body may not constitutionally delegate to private parties the power to determine the nature of rights to property in which other individuals have a property interest, without supplying standards to guide the private parties' discretion." (emphasis added)); *Seidenfeld*, *supra* note 64, at 457 n.199 ("There is some academic disagreement about the extent of an agency's discretion to deviate or reject negotiated rules necessary to avoid the process being deemed unconstitutional private law making, but the agency or courts must retain some power to ensure that negotiated rules do not contravene statutory provisions and aim to implement something other than deals struck by some, but not all, affected interest groups." (citations omitted)); cf. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 188 n.4 (2000) ("[T]he Federal Government retains the power to foreclose a citizen suit by undertaking its own action.").

75. 411 U.S. 564 (1973).

76. *Id.* at 568 (internal quotation marks omitted).

77. *Id.* at 569.

78. *Id.*

ceedings on the grounds (among others) that the Board was impermissibly biased.⁷⁹ After all, by statute, the Board was entirely composed of self-employed optometrists.⁸⁰ The Supreme Court agreed: “[T]hose with substantial pecuniary interest in legal proceedings should not adjudicate these disputes,” whether as judges or as administrative adjudicators.⁸¹

Gibson didn’t invalidate the entire Board; it made no pronouncements on the Board’s ability to proceed by lawsuit in state court against optometrists or corporations it believed were unlawfully practicing optometry, which it had just done before the attempted delicensing proceedings. In light of *Fuentes*, this makes sense: Running your own potentially biased tribunal makes your victim fully subject to your bias, like the target of your writ of replevin in *Fuentes*. Suing someone in court, on the other hand, has no coercive effect beyond forcing the opposing party to appear to answer your charges. That’s an important coercive effect, to be sure, but at least the entity is limited to making a *request* for government action—a request that the court may deny.⁸²

79. *Id.* at 569–70.

80. *Id.* at 571. Specifically, board members had to be members of the Alabama Optometric Association, which excluded from membership non-self-employed optometrists. *Id.*

81. *Id.* at 579; see also *Wall v. Am. Optometric Ass’n, Inc.*, 379 F. Supp. 175, 188–90 (N.D. Ga. 1974), *summarily aff’d sub nom Wall v. Hardwick*, 419 U.S. 888 (1974); cf. *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 146–50 (1968) (pecuniary bias of arbitrator).

82. Of course, claimants may still sometimes lose for one reason or another under this line of cases. For example, merely speculative, remote, or conflicting claims of bias aren’t sufficient. In *Schweiker v. McClure*, the Court unanimously upheld the delegation of authority to administer Part B Medicare payments, and adjudicate disputed claims, to private insurance companies like Blue Shield of California. 456 U.S. 188 (1982). The Court held that there was no basis for finding that the hearing officers were biased because their salaries, as well as the medical claims they approved, were paid by the federal government, not by the company that employed them. *Id.* at 196–97. While it’s quite plausible that self-employed optometrists will benefit financially from disqualifying corporate-employed optometrists, the same can’t be said of Blue Shield employees who deny Medicare claims. I thus disagree with the discussion of *McClure* in Abramson, *supra* note 1, at 202–03. See also *N.Y. State Dairy Foods, Inc. v. Ne. Dairy Compact Comm’n*, 198 F.3d 1, 14–15 (1st Cir. 1999); *Chrysler Corp. v. Tex. Motor Vehicle Comm’n*, 755 F.2d 1192, 1199 (5th Cir. 1985); cf. *Marjorie Webster Junior Coll., Inc. v. Middle States Ass’n of Colls. & Secondary Schs., Inc.*, 432 F.2d 650, 658–59 (D.C. Cir. 1970) (rejecting a due process challenge to an educational accreditation organization (assuming that it could be a state actor) without even mentioning the possibility of

The same distinction from *Fuentes*, between giving private parties *mandatory* control over coercive processes and merely allowing them to petition the government to (in its *discretion*) coerce private parties, seems to continue to be key in the recent cases, even if the Supreme Court hasn't been very clear in its reasoning. In *New Motor Vehicle Board of California v. Orrin W. Fox Co.*,⁸³ the Supreme Court examined a scheme where car manufacturers had to get the approval of the New Motor Vehicle Board before opening a new dealership, but only if a nearby incumbent franchisee protested.⁸⁴ The Supreme Court upheld the scheme, though the portion dealing with private delegation had little depth of analysis. Here is the entirety of its private delegation analysis:

Appellees and the dissent argue that the California scheme constitutes an impermissible delegation of state power to private citizens because the Franchise Act requires the Board to delay franchise establishments and relocations only when protested by existing franchisees who have unfettered discretion whether or not to protest.

The argument has no merit. Almost any system of private or quasi-private law could be subject to the same objection. Court approval of an eviction, for example, becomes necessary only when the tenant protests his eviction, and he alone decides whether he will protest. An otherwise valid regulation is not rendered invalid simply because those whom the regulation is designed to safeguard may elect to forgo its protection.⁸⁵

The Court ended this analysis with a citation to *Thomas Cusack*, a case that does not appear relevant here. There was no blanket prohibition of car dealerships that incumbents could waive, and in any case car dealerships aren't like nuisances. Rather, the status quo, if there is no protest, is that a car dealership is allowed. In this respect, it's more like *Eubank* (no building line unless some property owners petition for one)⁸⁶ or

financial bias). A private organization could also alleviate due process concerns by its own internal regulations. See *N.Y. State Dairy Foods*, 198 F.3d, at 15.

As another example, delegation to the state referendum process isn't really a private delegation. *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 677–78 (1976). Referenda are part of democracy and don't fall within the rule.

83. 439 U.S. 96 (1978).

84. *Id.* at 98.

85. *Id.* at 108–09.

86. See text accompanying *supra* notes 43–45.

Carter Coal (no binding wages unless some producers and unions agree to them).⁸⁷

Nonetheless, read in light of the mandatory-discretionary distinction, the result makes sense. Incumbent auto dealers couldn't unilaterally shut down entrants: all they could do was force the New Motor Vehicle Board to decide whether to allow a new dealership. And it isn't as though Board consideration is a meaningless rubber stamp: The Board actually allowed the new dealership in 99% of cases.⁸⁸ So the incumbent auto dealers were more in the position of private parties authorized to sue in court (recall, in the Court's quote above, a tenant's power to force court consideration of his eviction). The incumbent auto dealers' only coercive power was to delay matters while their protest was pending.⁸⁹

The Supreme Court relied on the weakly justified private delegation holding in *New Motor Vehicle Board* in an even more under-reasoned private delegation holding in *Hawaii Housing Authority v. Midkiff*.⁹⁰ The Hawaii Legislature enacted a statute under which certain tenants could ask a state agency to condemn the property on which they lived; if the state agency, after a public hearing, decided that condemnation would serve the statute's public purposes, it could condemn the property and could then sell it to tenants who had applied for fee simple ownership.⁹¹ Famously, the Supreme Court upheld this scheme against a Takings Clause challenge, holding that the condemnation was for a "public use" because it was "rationally related to a conceivable public purpose."⁹² Less famous, though, is the Court's private-delegation-based due process holding, buried in a footnote, the entirety of which runs as follows:

87. See text accompanying *supra* notes 56–57.

88. *New Motor Vehicle Bd.*, 439 U.S. at 120 (Stevens, J., dissenting).

89. This is admittedly an important coercive power, but not one whose self-interested exercise raises due process concerns. In fact, filing lawsuits (unless they're "sham") is a form of petitioning the government and, as such, is protected under the Petition Clause of the First Amendment under the *Noerr-Pennington* doctrine. See *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180 (9th Cir. 2005).

90. 467 U.S. 229 (1984).

91. *Id.* at 233–34.

92. *Id.* at 241; see also *Kelo v. City of New London*, 545 U.S. 469, 480 (2005).

We similarly find no merit in appellees' Due Process . . . Clause argument[.]. The argument that due process prohibits allowing lessees to initiate the taking process was essentially rejected by this Court in [*New Motor Vehicle Board*].⁹³

The best way to explain this result is, again, via the mandatory-discretionary distinction. Hawaiian tenants couldn't force a condemnation, they could only force the state agency to *determine* whether to condemn land. The actual decision whether to condemn rested with the agency itself, based on whether the agency believed a condemnation would serve the Act's public purposes.⁹⁴ In this sense, the private petitioners had no greater delegated coercive power than any litigant who can set legal machinery in motion.⁹⁵

The best reading of these cases thus suggests that the basic *Eubank* due process rule against delegating mandatory authority to private parties without protection against self-interested decisionmaking continues to this day. Lower federal court cases⁹⁶ and state cases⁹⁷ bear this out.

93. *Midkiff*, 467 U.S. at 243 n.6; see also Br. for Appellees at 82–85, *Midkiff*, 467 U.S. 229, Nos. 83-141, 83-236, 83-283, 1984 WL 987633 (citing *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928), *Eubank v. City of Richmond*, 226 U.S. 137 (1912), and other cases).

94. *Midkiff*, 467 U.S. at 233–34.

95. See also *Berry v. Bd. of Governors of Registered Dentists of Okla.*, 611 P.2d 628, 630 (Okla. 1980) (bias in a board's decision to enforce the law by suing in state court doesn't violate due process).

96. See *Biener v. Calio*, 361 F.3d 206, 215–17 (3d Cir. 2004) (entertaining under *Eubank* and *Roberge*, though ultimately rejecting, a challenge to political parties' right to charge and keep filing fees for primary elections); *Gen. Elec. Co. v. N.Y. State Dep't of Labor*, 936 F.2d 1448, 1455 (2d Cir. 1991) (“[T]he determination of wage and supplement rates is delegated in the first instance to private parties who are not those persons the statute is designed to protect, and . . . the statute gives the state no option other than to accept the decision made by those private parties.”); *Silverman v. Barry*, 727 F.2d 1121, 1126 (D.C. Cir. 1984) (holding that a challenge to a delegation of tenants of the power to prevent conversion of apartments to condos can survive a motion to dismiss); *Beary Landscaping Inc. v. Shannon*, No. 05 C 5687, 2008 WL 4951189 (N.D. Ill. Nov. 18, 2008) (similar to *General Electric Co. v. New York State Department of Labor*); *Schulz v. Milne*, 849 F. Supp. 708, 712–13 (N.D. Cal. 1994) (holding that allegations that a city had unlawfully surrendered permitting power to a “neighborhood review board,” a local citizens' group, adequately stated a § 1983 claim under *Eubank* and *Roberge*); *Independence Pub. Media of Phila., Inc. v. Pa. Pub. Television Network Comm'n*, 808 F. Supp. 416, 424–27 (E.D. Pa. 1992); *Nissan Motor Corp. in U.S.A. v. Royal Nissan, Inc.*, 757 F. Supp. 736, 740–41 (E.D. La. 1991); *Wall v. Am. Optometric Ass'n, Inc.*, 379 F. Supp. 175, 187–90 (N.D. Ga. 1974); cf. *Geo-Tech Reclamation Indus., Inc. v. Hamrick*, 886 F.2d 662, 666–67 (4th Cir. 1989) (suggesting that consideration of

3. Application

Now let's apply this framework to our examples. The Amtrak delegation is probably invalid under the Due Process Clause because Amtrak can unilaterally impose a disadvantageous regulatory regime on its market adversaries.⁹⁸ I discuss this case at greater length below in connection with the D.C. Circuit's Amtrak case.⁹⁹ Challengers could enjoin Amtrak's conduct, as well as potentially obtain money damages under *Bivens*¹⁰⁰ against the Amtrak officials involved in the formulation of the performance measures.¹⁰¹

adverse public sentiment in waste facility permitting raises similar issues to those in *Eubank* and *Roberge*); *Sierra Club v. Sigler*, 695 F.2d 957, 962 n.3 (5th Cir. 1983) (stating, in a case where the U.S. Army Corps of Engineers apparently rubberstamped information provided by a private firm for an Environmental Impact Statement, that "an agency may not delegate its public duties to private entities, particularly private entities whose objectivity may be questioned on grounds of conflict of interest," but locating the source of this prohibition in NEPA (internal citations omitted)); *Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir. 1974) (same).

97. Some of these state courts may also be applying their own constitutional law. See, e.g., *People ex rel. Rudman v. Rini*, 356 N.E.2d 4, 7 (Ill. 1976) (striking down delegation to political parties of the power to fill vacancies in political offices, citing *Carter Coal* and *Illinois* cases); *People ex rel. Chi. Dryer Co. v. City of Chicago*, 109 N.E.2d 201, 204-06 (Ill. 1952) (striking down delegation to residents of the power to name streets, citing *Eubank* and *Thomas Cusack*); *Am. Motors Sales Corp. v. New Motor Vehicle Bd. of Cal.*, 138 Cal. Rptr. 594, 596-600 (Cal. Ct. App. 1977); *Bayside Timber Co. v. Bd. of Supervisors*, 20 Cal. App. 3d 1, 10-15 (Cal. Ct. App. 1971) (striking down law giving private parties veto power over enforcement of environmental and public protection laws on their property, citing *Carter Coal* and *California* cases); *Murtha v. Monaghan*, 151 N.E.2d 83 (N.Y. 1958); David N. Wecht, Note, *Breaking the Code of Deference: Judicial Review of Private Prisons*, 96 YALE L.J. 815, 827 n.66 (1987) (collecting state cases); cf. *Santaniello v. N.J. Dep't of Health & Senior Servs.*, 5 A.3d 804, 809 (N.J. Super. Ct. App. Div. 2010) (recognizing the doctrine but calling it a "principle[] of administrative law" rather than a state or federal constitutional doctrine).

98. See *supra* Part I.B.1.

99. See *infra* Part III.C.3. This would require a showing that Amtrak is a state actor, but fortunately one can simply rely on *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995).

100. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

101. Perhaps not against Amtrak itself. See *FDIC v. Meyer*, 510 U.S. 471 (1994); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001); Volokh, *Modest Effect*, *supra* note 7, at 297. As with all these examples, the employees sued under *Bivens* or 18 U.S.C. § 1983 would be able to argue qualified immunity. The question would be whether the boards are closer to the private attorney hired by the government in *Filarsky v. Delia*, 132 S. Ct. 1657 (2012), or the private prison firm in *Richardson v. McKnight*, 521 U.S. 399 (1997). I would lean toward *Filarsky* (and thus the presence of qualified immunity), but this is an unresolved issue. See Volokh, *Supreme Court*,

The North Carolina Board of Dental Examiners didn't create the rule against non-dentist teeth-whiteners; that rule is statutory.¹⁰² Obviously the private-bias arguments against the Board do not apply to the state legislature. Nor can the Board expel non-dentist teeth-whiteners from the market except by suing them in court; they're saved by the mandatory-discretionary distinction. At that point, it's the court, not the Board, that rules that the non-dentists are violating the law.¹⁰³ But—though the Board's actions in connection with driving out the non-dentist teeth whiteners don't violate due process—it is still possible that the Board could violate due process through other things it does, like its own disciplinary hearings against dentists.¹⁰⁴

Whether the Mississippi Board of Pharmacy is violating due process depends on what they do and how. If turning over sensitive business information were required by a general statute, then—as with the dental examiners—the Board of Pharmacy's pecuniary bias wouldn't seem relevant unless the Board adjudicates violations of the rule in its own tribunal. But because the statute empowers the Board to demand “[a]ny other information” relating to pharmacy benefit managers' operations,¹⁰⁵ one can challenge the Board's bias when such extra information is demanded. Similarly, the proposed fiduciary duty for pharmacy benefit managers¹⁰⁶ would have been a Board regulation. Perhaps one could then bring a due process challenge to the rule based on the Board's bias even in the case of in-court enforcement,¹⁰⁷ and obtain money damages under 42 U.S.C. § 1983 against the board members. But this is less clear because some Supreme Court cases have suggested that potential pecuniary bias in adjudication is easier to challenge than potential

supra note 7. But even if this argument succeeded, that wouldn't help against clear violations of due process or against injunctive challenges. *See also* Barbara Kritchevsky, *Civil Rights Liability of Private Entities*, 26 CARDOZO L. REV. 35 (2004) (discussing qualified immunity, vicarious liability, and punitive damages issues in § 1983 suits).

102. N.C. GEN. STAT. ANN. § 90-29(b)(2) (West 2013).

103. *See supra* Part I.B.2.

104. N.C. GEN. STAT. ANN. §§ 90-27, 90-41.1.

105. MISS. CODE ANN. § 73-21-157(3)(b) (West 2013).

106. *See* Shepherd, *supra* note 19.

107. Or there may be pre-enforcement review of the biased rule, regardless of the forum in which the rule will ultimately be enforced.

pecuniary bias in rulemaking.¹⁰⁸ The same is true of enactments by the Texas Boll Weevil Foundation.¹⁰⁹

The property owners in the Texas water quality protection zones present a much easier case. They aren't violating due process, as (1) they're probably not state actors,¹¹⁰ and (2) even if they were, they don't have coercive authority over other landowners, so no one suffers a deprivation of "life, liberty, or property" within the meaning of the Due Process Clause.¹¹¹

It's clear, then, that the Due Process Clause has the potential to be a strong tool against private regulatory delegation. Biased rulemakers can be challenged, unless their role is limited to enforcing commands they didn't create by suing violators in courts they don't operate.

B. No Private Due Process Doctrine

The reality about due process, though, is that there's no federal doctrine specific to private parties.¹¹² Indeed, some of the classic cases of this line of doctrine involve *public* officials.¹¹³

108. As to general allegations of bias (not necessarily pecuniary), compare *Federal Trade Commission v. Cement Inst.*, 333 U.S. 683, 701 (1948) (a rulemaker is impermissibly biased if his mind is "irrevocably closed"), with *Cinderella Career & Finishing Schools, Inc. v. Federal Trade Commission*, 425 F.2d 583, 589–92 (D.C. Cir. 1970) (an adjudicator is impermissibly biased if he has prejudged the law or facts). For pecuniary bias, see *Friedman v. Rogers*, 440 U.S. 1, 18–19 (1979) ("Finding [in previous cases involving adjudicatory hearings] the presence of . . . prejudicial [pecuniary] interests [in regulatory board members], it was appropriate for the courts to enjoin further proceedings against the plaintiffs. In contrast, [the current challenger's] challenge to the fairness of the Board does not arise from any disciplinary proceeding against him."), *N.Y. State Dairy Foods, Inc. v. Northeast Dairy Compact Comm'n*, 198 F.3d 1, 13–14 (1st Cir. 1999), *Alliance of Auto. Mfrs. v. Gwadosky*, 353 F. Supp. 2d 97, 108–09 (D. Me. 2005) (distinguishing between facial and as-applied challenges to boards), *Wall v. Am. Optometric Ass'n*, 379 F. Supp. 175, 190–91 (N.D. Ga. 1974) (invalidating board adjudication because of biased board membership, but upholding validity of rules without even mentioning biased board membership). *But see* Wecht, *supra* note 97, at 825 n.58 (arguing that this distinction is "murky").

109. Challengers should have no trouble showing that all three of these boards are state actors since, as regulators, they fulfill traditionally exclusive governmental functions. *See, e.g.*, *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974).

110. Non-state actors are not subject to Bill of Rights protections like the Due Process Clause. *See, e.g.*, *Brentwood Acad. v. Tenn. Secondary Sch. Athletic. Ass'n*, 531 U.S. 288, 295 (2001); *Rendell-Baker v. Kohn*, 457 U.S. 830, 840–41 (1982).

111. *See* *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 572 (1972).

112. *See* Volokh, *supra* note 5, at 153–56.

113. *Cf. Galaxy Fireworks, Inc. v. City of Orlando*, 842 So. 2d 160, 166–67 (Fla. Dist. Ct. App. 2003) (noting that it would be unconstitutional (though the precise

For instance, in *Tumey v. Ohio*,¹¹⁴ the offender was a village mayor who also sat as a judge in prohibition-related cases (this was in the dry '20s) and who was impermissibly biased because his costs were only reimbursed by the defendant in case of a conviction.¹¹⁵ In *Ward v. Village of Monroeville*,¹¹⁶ the offender was another village mayor who also sat as a traffic court judge; his bias arose because the traffic fines he assessed as judge contributed a substantial portion of the village finances that he would be able to use as mayor.¹¹⁷ And in *Aetna Life Insurance Co. v. Lavoie*,¹¹⁸ the offender was an Alabama Supreme Court Justice whose rulings on a case could directly affect a pending case in which he was a litigant.¹¹⁹

Thus, if the Due Process Clause applies with special force to private delegations, it's only to the extent that bias is more obviously present in such cases.¹²⁰ This will certainly be true if private parties are given unconstrained discretion: In such cases, we can probably assume that the private parties will seek their individual gain. Public officials, on the other hand, are often presumed to be public-minded.¹²¹ But cases like *Tumey* and *Ward* show that this presumption can be overcome even without a

constitutional provision is left ambiguous) for a state statute to incorporate federal laws or private code provisions *as they may exist in the future*, without distinguishing between the public and private sources incorporated).

114. 273 U.S. 510 (1927).

115. *Id.* at 514–20.

116. 409 U.S. 57 (1972).

117. *Id.* at 57–60.

118. 475 U.S. 813 (1986).

119. *Id.* at 821–25.

120. See *Withrow v. Larkin*, 421 U.S. 35, 47 & n.14 (1975) (identifying “pecuniary interest” cases as one type where “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable,” and citing *Gibson v. Berryhill*, *Ward v. Village of Monroeville*, and *Tumey v. Ohio*—both private-adjudicator and public-adjudicator cases).

121. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (“[I]t is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.”); *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 122 (1928) (“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.”); see also text accompanying *infra* notes 233–235.

showing of *actual* bias¹²²—for instance by showing the details of public employee or agency compensation arrangements.¹²³

III. NON-DELEGATION DOCTRINE

Non-delegation doctrine is a separation of powers doctrine based on the idea that legislative power is vested in the legislative branch and that there are limits to how much (if any) of it the legislature can give away. At the federal level, non-delegation doctrine isn't terribly strict—all Congress needs to do to avoid being held to have delegated legislative power is to provide an “intelligible principle” to guide the delegate's exercise of power. Nor is there any difference between public and private delegations.

So non-delegation doctrine seems to have much less bite than the Due Process Clause in potentially controlling private delegations of regulatory power (though there's a chance that, as a matter of constitutional avoidance, non-delegation concerns might affect the interpretation of the statute).¹²⁴ But this may be different at the state level: Some states have non-delegation doctrines that are stricter than the federal one; these are discussed in Subpart B. The most interesting state doctrine comes from Texas, which recently has devised its own strict non-delegation doctrine exclusively for *private* delegations.

Moreover, because the Due Process Clause is also relevant to delegations, the common presence of the word “delegation” leads many courts to indiscriminately mix non-delegation and due process ideas. Subpart C explains this commingling. The most recent offender is the D.C. Circuit, in a case concerning the delegation of regulatory power to Amtrak, but the confusion has possibly existed since 1936 and infects many state-level doctrines.

The moral of non-delegation doctrine is that an attack under the federal doctrine is likely to lose, except possibly in the D.C. Circuit—or in other circuits, to the extent they follow the D.C. Circuit's lead. All five of our examples are probably valid under the permissive federal non-delegation doctrine. Many more

122. See Wecht, *supra* note 97, at 825–26 & n.59.

123. See, e.g., *Esso Standard Oil Co. v. Cotto*, 389 F.3d 212, 218–19 (1st Cir. 2004); *United Church of the Med. Ctr. v. Med. Ctr. Comm'n*, 689 F.2d 693, 698–700 (7th Cir. 1982).

124. See text accompanying *infra* notes 130–132.

private delegations might be vulnerable under a Texas-style private non-delegation doctrine—obviously, the two Texas examples that have in fact been struck down under the doctrine, though the other examples are vulnerable as well. Note, though, that Texas is an outlier among states in having a doctrine that’s so strict and that’s limited to private parties.

A. *At the Federal Level*

Non-delegation doctrine in the federal Constitution derives from the Vesting Clause of Article I: “All legislative Powers herein granted shall be vested in a Congress of the United States.”¹²⁵ This language has long been interpreted to mean that the legislative powers—being vested in Congress—can’t be transferred to anyone else,¹²⁶ though this reading isn’t an obvious one.¹²⁷ Clearly rights that “vest” aren’t usually inalienable: consider vested property rights¹²⁸ or vested stock options.¹²⁹

This separation of powers doctrine hasn’t been explicitly used very often: The Supreme Court has used it only twice to strike down a federal statute, both times in 1935.¹³⁰ Nonetheless, the doctrine plays a more significant role under the radar than it might seem: A Supreme Court majority in 1974 and a plurality in 1980 used it as an avoidance canon to save statutes from unconstitutionality by adopting narrowing constructions,¹³¹ and Cass Sunstein argues that the doctrine continues to play an important role in this way.¹³² The basic doctrinal test

125. U.S. CONST. art. I, § 1.

126. See *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 472 (2001); *Field v. Clark*, 143 U.S. 649, 692 (1892).

127. See *Am. Trucking*, 531 U.S. at 487–90 (Stevens, J., concurring in part and concurring in the judgment).

128. See, e.g., JOSEPH WILLIAM SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* 590 (2d ed. 1997) (quoting the traditional Rule Against Perpetuities: “No interest is good unless it must vest, if at all, no later than 21 years after the death of some life in being at the creation of the interest”).

129. See, e.g., *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 986 (9th Cir. 1999).

130. See *Panama Refining v. Ryan*, 293 U.S. 388, 430 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935).

131. *Nat’l Cable Television Ass’n, Inc. v. United States*, 415 U.S. 336, 341–42 (1974); *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality opinion); cf. *Arizona v. California*, 373 U.S. 546, 626–27 (1963) (Harlan, J., dissenting in part) (using constitutional doubts raised by a broad delegation to “buttress the conviction, already firmly grounded in [a statute] and its history,” that an agency lacked certain power under the statute).

132. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315–16 (2000).

has been the same since 1928: Congress must provide an “intelligible principle” to guide the delegate’s discretion.¹³³ An intelligible principle makes the difference between, on the one hand, a (forbidden) delegation of legislative power, and on the other hand, a (permitted) delegation of gap-filling power, which is essentially executive.

The structure of non-delegation doctrine suggests that it should be irrelevant whether the recipient of the delegation is public or private: the focus is whether Congress has given up too much power, not to whom it’s given the power.¹³⁴

True, in 1935, the Supreme Court expressed itself somewhat negatively about broad private delegations:

But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? 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 answer is obvious. Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress.¹³⁵

133. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

134. See Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2167–68 (2004); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1731, 1757 (2002). But see Merrill, *supra*, at 2168 (suggesting that private delegations might run afoul of deep structural considerations—there are only three branches, and delegation to someone outside of the three branches is invalid—or some other provision like “the Appointments Clause, Article III’s guarantee of judicial independence, or the Due Process Clause” (footnotes omitted)). Thus, for instance, one can object to the delegation to citizens of the power to enforce federal statutes on Article II grounds; this is one of the dormant themes of *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), though the point wasn’t squarely presented there, see *id.* at 209 (Scalia, J., dissenting). As Justice Kennedy wrote:

Difficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States.

Id. at 197 (Kennedy, J., concurring).

135. *Schechter Poultry*, 295 U.S. at 537.

But this was dictum,¹³⁶ and it was 1935. The language doesn't question private delegation as such, only extremely broad private delegation. Further, because the case went on to strike down the delegation based entirely on the delegation to the President (without reference to the participation of private industry),¹³⁷ it's not clear that the public-private distinction played any role.

The existence of administrative procedures and judicial review has occasionally been used to provide an intelligible principle,¹³⁸ and these tend to be less common when delegates are private.¹³⁹ Perhaps privateness should make some difference in how the doctrine plays out in the cases, but that doesn't require a special doctrine for private delegations.¹⁴⁰

And indeed, in practice the public-private distinction hasn't much mattered in the federal non-delegation cases. In *Currin v. Wallace*,¹⁴¹ the Supreme Court examined a challenge to the Tobacco Inspection Act of 1935.¹⁴² The Act was designed to provide "uniform standards of classification and inspection" of tobacco, without which "the evaluation of tobacco [would be] susceptible to speculation, manipulation, and control" and "unreasonable fluctuations in prices and quality determina-

136. See Note, *The Vagaries of Vagueness: Rethinking the CFAA as a Problem of Private Nondelegation*, 127 HARV. L. REV. 751, 763 (2013) ("[T]his passage relating to the industrial actors might best be read as unnecessary dicta.").

137. I thus disagree with David Wecht, Michael Froomkin, and David Horton, who argue that this was a *holding* of *Schechter* regarding delegation to private organizations. See Wecht, *supra* note 97, at 824; Froomkin, *supra* note 64, at 148; David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 475 (2011). The delegation was to the President, and analyzed as such, so any statement about delegation to private groups was dictum.

138. See, e.g., *Fahey v. Mallonee*, 332 U.S. 245, 253 (1947); *Yakus v. United States*, 321 U.S. 414, 426 (1944) (noting adequate opportunity for judicial review); *Schechter Poultry*, 295 U.S. at 539–40 (distinguishing delegation to the ICC, which acts on "notice and hearing," and the Federal Radio Commission, which enforces congressional standards "upon hearing, and evidence, by an administrative body acting under statutory restrictions adapted to the particular activity"); see also *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring) (one goal of non-delegation doctrine is to ensure adequate judicial review).

139. See Abramson, *supra* note 1, at 180–87 (discussing difference in accountability mechanisms for public and private actors); see also, e.g., text accompanying *infra* note 191.

140. See also text accompanying *infra* notes 259–61.

141. 306 U.S. 1 (1939).

142. *Id.* at 5.

tions”¹⁴³ Under the Act, the Secretary of Agriculture was authorized to “designate those markets where tobacco bought and sold at auction or the products customarily manufactured therefrom move in commerce”; the result of a designation was that “no tobacco [could] be offered for sale at auction [at such a market] until it [had] been inspected and certified by an authorized representative of the Secretary according to the established standards.”¹⁴⁴

But the Act contained a delegation of discretion to the regulated industry: The Secretary was not to designate a market “unless two-thirds of the growers, voting at a prescribed referendum, favor[ed] it.”¹⁴⁵ Private industry thus held the “on-off” switch for regulation.

The Supreme Court upheld this delegation. First, it made a few preliminary comments:

- “Similar conditions are frequently found in police regulations. [*Thomas Cusack.*]”¹⁴⁶
- “This is not a case where a group of producers may make the law and force it upon a minority [*Carter Coal.*]”¹⁴⁷
- This was also not a case “where a prohibition of an inoffensive and legitimate use of property is imposed not by the legislature but by other property owners. [*Roberge.*]”¹⁴⁸

These cases cited—*Thomas Cusack*, *Carter Coal*, and *Roberge*—are all due process cases.¹⁴⁹ Perhaps citing the due process cases in a non-delegation opinion was somewhat sloppy, as non-delegation and due process cases aren’t interchangeable, for reasons explained below;¹⁵⁰ but in any event, this much is dictum.¹⁵¹

143. *Id.* at 6 (quoting Act) (internal quotation marks omitted).

144. *Id.*

145. *Id.*

146. *Id.* at 15.

147. *Id.* at 15–16.

148. *Id.* at 16.

149. See *supra* Part II.A.1.

150. See text accompanying *infra* notes 241–64.

151. Or perhaps the Court was hinting that private delegations *become* due process issues (and thus problematic even if states do it), while public delegations are just a matter of the division of power within the government (and therefore only a matter of constitutional concern if the federal government does it). This is all very tantalizing, but this, too, is dictum.

The Court held: "Here it is Congress that exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required favorable vote upon the referendum is one of these conditions."¹⁵² In this sense, the relevant distinction was one stated in *J.W. Hampton, Jr., & Co. v. United States*:¹⁵³

Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an Executive, or, as often happens in matters of state legislation, it may be left to a popular vote of the residents of a district to be effected by the legislation. While in a sense one may say that such residents are exercising legislative power, it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution, the condition of its legislation going into effect being made dependent by the legislature on the expression of the voters of a certain district.¹⁵⁴

One may quarrel with the theory here. In *Panama Refining Co. v. Ryan*,¹⁵⁵ the President also held an on-off switch—he could decide whether to prohibit (as a matter of federal law) the shipment of oil in excess of permitted amounts under state law.¹⁵⁶ And his discretion in choosing whether to flip the switch had no constraint, except for a hodgepodge of vague and conflicting policy statements in the preamble of the statute.¹⁵⁷ If that sort of unconstrained delegation were valid, the *Panama Refining* Court said, "it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law-making function."¹⁵⁸ But the private tobacco growers' discretion in flipping this particular on-off switch was just as unconstrained, if not more so; they didn't even have the minimal constraint of a statement of policy, and on the contrary could have voted based on whim or (more likely) private interest.

152. *Currin*, 306 U.S. at 16.

153. 276 U.S. 394 (1928).

154. *Id.* at 407. This section was cited in *Currin*, 306 U.S. at 16.

155. 293 U.S. 388 (1935).

156. *Id.* at 406.

157. *Id.* at 416–19.

158. *Id.* at 430.

So maybe *Currin* was wrong given the doctrine as it stood in 1939; or maybe it implicitly overruled *Panama Refining*. But the important thing is that the *Currin* Court treated the two on-off switches identically; the power to flip a regulatory on-off switch isn't a legislative power, whether the switch is flipped by "the decision of an [e]xecutive" or "a popular vote of the residents of a district to be affected by the legislation."¹⁵⁹ The result is that public and private delegations are both judged by the same "intelligible principle" standard¹⁶⁰—even though the

159. *Currin*, 306 U.S. at 16 (quoting *J.W. Hampton*, 276 U.S. at 407) (internal quotation marks omitted). The Supreme Court relied on *Currin* under similar circumstances in *United States v. Rock Royal Co-Operative, Inc.*, 307 U.S. 533, 577–78 (1939). See also *United States v. Frame*, 885 F.2d 1119, 1127–28 (3d Cir. 1989) (upholding similar industry referendum provision based on *Currin*). The Court also upheld a regulatory scheme for the coal industry in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940), where Congress delegated power to a government commission but made private industry into advisors to the commission. Justice Douglas wrote: "Nor has Congress delegated its legislative authority to the industry. The [private industry] members of the code function subordinately to the [government] Commission. It, not the code authorities, determines the prices. And it has authority and surveillance over the activities of these authorities. Since lawmaking is not entrusted to the industry, this statutory scheme is unquestionably valid." *Id.* at 399. See also *Frame*, 885 F.2d at 1128 (upholding delegation to beef industry of power to collect assessments and plan spending of funds, because of considerable government involvement and lack of actual lawmaking power in hands of beef industry); *Cospito v. Heckler*, 742 F.2d 72, 86–89 (3d Cir. 1984) (no invalid delegation to Joint Commission on Accreditation of Hospitals because Secretary of Health, Education and Welfare retained ultimate authority on accreditation); *Todd & Co., Inc. v. SEC*, 557 F.2d 1008, 1012–13 (3d Cir. 1977) (self-regulation of over-the-counter securities dealers by the National Association of Securities Dealers was not an unconstitutional delegation because "the Association's rules and its disciplinary actions [are] subject to full review by the SEC"); *R.H. Johnson & Co. v. S.E.C.*, 198 F.2d 690, 695 (2d Cir. 1952) (similar).

160. See *Frame*, 885 F.2d at 1128 (upholding delegation to beef industry based on the presence of sufficient standards, without referring to any special test for private delegates); *Crain v. First Nat'l Bank of Or., Portland*, 324 F.2d 532, 537 (9th Cir. 1963) (under Article I, Section 1, "Congress cannot delegate to *private corporations or anyone else* the power to enact laws" (emphasis added)); *Metro Med. Supply, Inc. v. Shalala*, 959 F. Supp. 799, 801 (M.D. Tenn. 1996) ("Plaintiffs aver that the pedigree provisions constitute an unconstitutional delegation of legislative authority, under Article I, Section 1, of the Constitution, to the FDA and, in turn, to private drug manufacturers."); *Abramson*, *supra* note 1, at 193 (asserting that, in *Currin* and *Rock Royal*, the Supreme Court examined private delegation "under the same test that it applied to public delegations"); *id.* at 198 (arguing that, in *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), involving "an Article III challenge to a private adjudication, . . . the majority did not analyze the implications of [the] crucial fact [that the adjudicators were private]; instead it concluded summarily that delegation did not 'diminish the likelihood of impartial decisionmaking'"); cf. *Luxton v. N. River Bridge Co.*, 153 U.S. 525, 529–30 (1894)

occasional lower court decision will at least hint that private delegations are more problematic.¹⁶¹

Let's turn to the examples noted in Part I.¹⁶² Most of the examples are state delegations, which aren't subject to the federal non-delegation doctrine, so let's assume that the identical programs were passed by Congress;¹⁶³ or let's assume that the programs occur in states with vesting clauses and non-delegation doctrines identical to those found in federal constitutional law.

These examples mostly have sufficient intelligible principles to protect them against a federal non-delegation challenge. Amtrak is supposed to "be operated and managed as a for-profit corporation."¹⁶⁴ This principle is general, but the Supreme Court has made it clear that general language can be "intelligible" enough for purposes of non-delegation doctrine.¹⁶⁵

The other examples fare similarly. The North Carolina dental board authorizes regulation of dentistry "in the public interest"¹⁶⁶—pathetic, but welcome to non-delegation doctrine.¹⁶⁷

(implying that Congress can not only exercise the power of eminent domain, but also create a corporation to exercise eminent domain if this is necessary and proper to exercise Congress's powers).

161. The most recent case is *Ass'n of American Railroads v. Department of Transportation*, 721 F.3d 666 (D.C. Cir. 2013), discussed *infra* Part III.C.1, which does quite a bit more than hint. *Pittston Co. v. United States*, 368 F.3d 385 (4th Cir. 2004), is also discussed below, *see* text accompanying *infra* notes 296–303. *See also* *Cospito v. Heckler*, 742 F.2d 72, 87 n.25 (3d Cir. 1984) (in dictum, citing *Schechter* and *Roberge* as cases possibly establishing a higher bar for private delegations under non-delegation doctrine); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1143 (D.C. Cir. 1984) ("[A non-delegation] argument is typically presented in the context of a transfer of legislative authority from the Congress to agencies, but the difficulties sparked by such allocations are even more prevalent in the context of agency delegations to private individuals. [But w]e need not examine the problem because we divine no such abdication of the Commission's role as disinterested arbiter to any interested party."); *United States v. Mazurie*, 487 F.2d 14, 19 (10th Cir. 1973) ("Congress cannot delegate its authority to a private, voluntary organization, which is obviously not a governmental agency, to regulate a business on privately owned lands, no matter where located."), *rev'd*, 419 U.S. 544, 557 (1975) (holding that the Indian tribe to which authority was delegated wasn't private but rather a "unique aggregation[] possessing attributes of sovereignty").

162. *See supra* Part I.B.

163. Assume away any problems of Congressional powers, such as Commerce Clause problems.

164. *See* 49 U.S.C. § 24301(a) (2006).

165. *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 474–75 (2001).

166. N.C. GEN. STAT. ANN. § 90-22(a) (West 2013).

167. *See, e.g., NBC v. United States*, 319 U.S. 190, 225–26 (1943); *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24–25 (1932).

The Texas Boll Weevil Eradication Foundation, as the dissenting Justices point out, “contains relatively comprehensive standards to guide both the Commissioner of Agriculture (a statewide elected official) and the Foundation in their joint efforts to execute the legislative mandate to ‘suppress and eradicate boll weevils and other cotton pests.’”¹⁶⁸ And the Texas statute authorizing water quality protection zones, as the Texas Supreme Court acknowledged, “provides fairly detailed statutory standards to guide landowners in formulating their initial water quality plans” (though not as many standards as the court would have liked).¹⁶⁹ Landowners in these zones also can’t implement their own water quality plans and suspend the operation of municipal ordinances unless the state agency determines that their plans reasonably can be expected to maintain background levels of water quality in waterways or capture and retain the first one and half inches of rainfall from developed areas.¹⁷⁰ Of the five examples, only the Mississippi board of pharmacy seems to lack an intelligible principle for licensing pharmacy benefit managers.¹⁷¹

B. *In the States*

Because the federal non-delegation doctrine derives from Article I of the federal Constitution, which only discusses the legislative powers of the *federal* government,¹⁷² it has no applicability to state delegations. Various states, however, have their own non-delegation doctrines. Mississippi’s doctrine is about as loose as the federal one; Mississippi courts are “committed to a liberal rule governing the delegation of legislative functions”;¹⁷³ “[t]he essential is that the statute delegating the power must reasonably define the area in which the administrative agency operates and the limitations upon its powers.”¹⁷⁴ But

168. *Tex. Boll Weevil Eradication Found. v. Lewellen*, 952 S.W.2d 454, 496 (Tex. 1997) (Cornyn, J., concurring in part and dissenting in part) (quoting TEX. AGRIC. CODE § 74.101(c) (1995)).

169. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 887 (Tex. 2000).

170. See text accompanying *supra* note 34.

171. See MISS. CODE ANN. § 73-21-157 (West 2013).

172. See text accompanying *supra* notes 125–27.

173. *Abbott v. State*, 63 So. 667, 669 (Miss. 1913).

174. *State ex rel. Patterson v. Land*, 95 So. 2d 764, 777 (Miss. 1957); see also *City of Belmont v. Miss. State Tax Comm’n*, 860 So. 2d 289 (Miss. 2003); *State v. Allstate Ins. Co.*, 97 So. 2d 372, 375 (Miss. 1957).

other states' non-delegation doctrines are stricter than the federal one.¹⁷⁵ Gary Greco lists 18 states that (as of 1994) had relatively strict non-delegation doctrines: Arizona, Florida, Kentucky, Massachusetts, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Virginia, and West Virginia.¹⁷⁶ Some states, like Florida¹⁷⁷ and Oklahoma,¹⁷⁸ clearly ground their doctrines in separation of powers concerns;¹⁷⁹ other states, like Arizona, have non-delegation doctrines that don't clearly distinguish between separation of powers concerns and due process concerns, as discussed later in this Article.¹⁸⁰

175. See *Tex. Boll Weevil Eradication Found. v. Lewellen*, 952 S.W.2d 454, 468 (Tex. 1997) (citing KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 3.14, at 204 (2d ed. 1978)); PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 617–19 (11th ed. 2011) (citing *Boreali v. Axelrod*, 517 N.E.2d 1350 (1987)); HANS A. LINDE ET AL., LEGISLATIVE AND ADMINISTRATIVE PROCESSES 477–78 (2d ed. 1981)). The state cases are often criticized for being not very well reasoned or not forming a coherent whole. See, e.g., DAVIS, *supra*, § 3.12, at 196 (“[I]dentifiable principles do not emerge.”).

176. Gary J. Greco, Note, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. 567, 580–88 (1994).

177. See *Askew v. Cross Key Waterways*, 372 So. 2d 913, 924 (Fla. 1978).

178. See *In re Initiative Petition No. 366*, 46 P.3d 123 (Okla. 2002); *Democratic Party of Okla. v. Estep*, 652 P.2d 271 (Okla. 1982); *Oliver v. Okla. Alcoholic Beverage Control Bd.*, 359 P.2d 183 (Okla. 1961).

179. See also *City of Covington v. Covington Lodge No. 1*, 622 S.W.2d 221, 222–23 (Ky. 1981) (adopting powers-based approach to forbid a municipality from delegating “legislative or discretionary,” but not “administrative,” powers).

180. See *infra* Part III.C.4; see also *Grp. Health Ins. of N.J. v. Howell*, 193 A.2d 103, 108–09 (N.J. 1963) (striking down a requirement that the nomination of trustees of medical service corporations be approved by “a recognized medical society or professional medical organization” under both a separation of powers analysis and a due process analysis). Several states have moved from a separation of powers view to a “procedural safeguards” view, which sounds more in due process. Colorado, for instance, followed a separation of powers-based view, see *Olinger v. People*, 344 P.2d 689, 691–92 (Colo. 1959) (en banc), but later adopted the procedural safeguards view, see *People v. Lowrie*, 761 P.2d 778, 782 (Colo. 1988) (en banc). The same evolution can also be seen in New York. Compare *Fink v. Cole*, 97 N.E.2d 873, 876 (N.Y. 1951) (citing N.Y. CONST. art. III, § 1) (referring to the need for “guides and proper standards”), with *Boreali*, 517 N.E.2d at 1353–54 (stating that “[t]he modern view” insists on “reasonable safeguards and standards”). And likewise in Maryland. Compare *Md. Co-operative Milk Producers v. Miller*, 182 A. 432, 435 (Md. 1936), with *Dep’t of Transp. v. Armacost*, 532 A.2d 1056, 1060 (Md. 1987).

Some states, like Iowa,¹⁸¹ Minnesota,¹⁸² Pennsylvania,¹⁸³ and South Carolina,¹⁸⁴ have non-delegation doctrines, based on their state constitution's vesting clauses, that specifically impose some limits on delegations to private parties.¹⁸⁵ Perhaps the most interesting such state is Texas, which (more recently than Greco's article) came up with a new non-delegation doctrine, based on the vesting clauses of the Texas constitution, specifically to deal with private delegations.¹⁸⁶ The first use of this doctrine was to declare the structure of the Boll Weevil Eradication Foundation illegal.¹⁸⁷

181. *Gamel v. Veterans Memorial Auditorium Comm'n*, 272 N.W.2d 472, 475 (Iowa 1978) (citing IOWA CONST. art. III, § 1); *id.* at 476 (striking down a delegation to a veterans' group of the power to spend public funds; also citing similar cases from other jurisdictions); *see also* *Vietnam Veterans Against the War v. Veterans Memorial Auditorium Comm'n*, 211 N.W.2d 333, 338–39 (Iowa 1973) (McCormick, J., dissenting).

182. *Remington Arms Co. v. G.E.M. of St. Louis, Inc.*, 102 N.W.2d 528, 534–35 (Minn. 1960); *West St. Paul Fed. of Teachers v. Indep. Sch. Dist. No. 197*, West St. Paul, 713 N.W.2d 366, 376–77 (Minn. App. 2006) (recognizing *Remington Arms* as good law but distinguishing it). A recent challenge to Minnesota's occupational licensing of horse teeth floaters relied in part on a private delegation theory. *See Challenging Barriers to Economic Opportunity*, INSTITUTE FOR JUSTICE, <http://www.ij.org/minnesota-horse-teeth-floating-background>, [perma.cc/FC55-9LKR]. But this challenge failed in a district court in 2008. *See Minnesota District Court Upholds Economic Protectionism*, INSTITUTE FOR JUSTICE (June 23, 2008), <http://www.ij.org/minnesota-horse-teeth-floating-release-6-15-07>, [http://perma.cc/G8Z9DQMV].

183. *Hetherington v. McHale*, 329 A.2d 250, 253–54 (Pa. 1974) (striking down delegation to private organizations of the power to select eight out of seventeen members of a board responsible for spending public funds); *Commonwealth ex rel. Kane v. McKechnie*, 358 A.2d 419, 420–21 (Pa. 1976); *Independence Pub. Media of Phila., Inc. v. Pa. Pub. Television Network Comm'n*, 808 F. Supp. 416, 422–24 (E.D. Pa. 1992).

184. *Toussaint v. State Bd. of Med. Exam'rs*, 329 S.E.2d 433 (S.C. 1985); *Gold v. S.C. Bd. of Chiropractic Exam'rs*, 245 S.E.2d 117, 119–20 (S.C. 1978); *Gould v. Barton*, 181 S.E.2d 662, 674 (S.C. 1971); *Ashmore v. Greater Greenville Sewer Dist.*, 44 S.E.2d 88, 95 (S.C. 1947).

185. Some Utah cases have struck down private delegations, but the constitutional basis for these holdings has been quite ambiguous. *See, e.g., Salt Lake City v. Int'l Ass'n of Firefighters*, 563 P.2d 786, 789 (Utah 1977); *Union Trust Co. v. Simmons*, 211 P.2d 190, 191–93 (Utah 1949); *Revne v. Trade Comm'n*, 192 P.2d 563, 565–68 (Utah 1948).

186. *Tex. Boll Weevil Eradication Found. v. Lewellen*, 952 S.W.2d 454, 465 (Tex. 1997) (citing TEX. CONST. art. II, § 1; *id.* art. III, § 1). For previous cases applying a non-delegation doctrine against the judiciary and a state administrative agency, *see id.* at 468–69 (citing cases).

187. *See supra* Part I.B.4.

First, the Court established that the Boll Weevil Eradication Foundation was private. This wasn't obvious, as "the statutory provisions as to governmental powers suggest both public and private attributes."¹⁸⁸ The court listed the public factors:

The Act exempts the Foundation from taxation and affords state indemnification to its board members. The Foundation's board members, officers, and employees have official immunity except for gross negligence, criminal conduct, or dishonesty. The Foundation must adopt and publish its rules in accordance with state requirements, it may be dissolved by the Commissioner when its purpose has been fulfilled, and it (or at least its board) is subject to . . . the Texas Sunset Act. The Legislature specifically denominates the Foundation a "governmental unit" for purposes of immunity from suit under the Tort Claims Act. Finally, the Foundation does not dispute that it is a "governmental body" subject to the Texas Open Meetings Act.¹⁸⁹

On the other hand, some factors cut in favor of describing the Foundation as private. For instance, the statute classified the board and the Foundation as "state agencies" only for the limited purposes of tax exemption and indemnification.¹⁹⁰ Moreover:

[T]he funds the Foundation collects are expressly "not state funds and are not required to be deposited in the state treasury." The Act also does not subject the Foundation to state purchasing or audit requirements, and its board members are not required to take oaths of office. Finally, there is no provision for administrative appeal from Foundation decisions, except as to penalties imposed for non-payment of assessments.¹⁹¹

The court ended up coming down on the side of the Foundation's being private, because the statute "delegate[d] authoritative power to private interested parties."¹⁹²

188. *Tex. Boll Weevil*, 952 S.W.2d at 470.

189. *Id.* (citing TEX. AGRIC. CODE §§ 74.109(d), 74.109(f), 74.110, 74.120(c), 74.127; TEX. GOV'T CODE § 551.001(3) (1995) (internal citations omitted)).

190. *Id.* (citing TEX. AGRIC. CODE § 74.109(d)).

191. *Id.* (citing TEX. AGRIC. CODE § 74.109(e), 4 TEX. ADMIN. CODE § 3.57) (internal citations omitted).

192. *Id.* at 471. *But see id.* at 494 (Cornyn, J., concurring in part and dissenting in part) ("The Court also fails to adequately explain why this largely fictional distinction [between public and private agencies], which leads it to propose an 'either/or' choice, is so important that this entire statute should turn on it."); *see also*

As to the validity of the private delegation, the court created its own eight-part test:

1. Are the private delegate's actions subject to meaningful review by a state agency or other branch of state government?
2. Are the persons affected by the private delegate's actions adequately represented in the decisionmaking process?
3. Is the private delegate's power limited to making rules, or does the delegate also apply the law to particular individuals?
4. Does the private delegate have a pecuniary or other personal interest that may conflict with his or her public function?
5. Is the private delegate empowered to define criminal acts or impose criminal sanctions?
6. Is the delegation narrow in duration, extent, and subject matter?
7. Does the private delegate possess special qualifications or training for the task delegated to it?
8. Has the Legislature provided sufficient standards to guide the private delegate in its work?¹⁹³

We can immediately see how the Texas private delegation doctrine differs from the federal doctrine (which doesn't distinguish between public and private). The federal doctrine only requires an intelligible principle, which appears in Texas's factor 8, but Texas adds (1) supervision, (2) representation, (3) generality, (4) bias, (5) restriction to civil cases, (6) narrowness, and (7) expertise. In the court's view, factors one, three, four, seven, and eight cut against the delegation in this case, while factor two cut in favor; factor five was neutral because the criminal penalties were severable from the rest of the statute; and factor six was "inconclusive" because the purpose was narrow but cost and duration weren't.¹⁹⁴ With so many factors cutting against the delegation, the court concluded that the delegation as a whole was unconstitutional.¹⁹⁵

text accompanying *infra* note 248 (noting potential disadvantages of developing new public-private tests).

193. *Tex. Boll Weevil*, 952 S.W.2d at 472 (majority opinion).

194. *Id.* at 473–75.

195. *Id.* at 475. Justice Hecht believed the unconstitutionality of the delegation was even clearer than the majority had thought; in his view, the Foundation was "little more than a posse: volunteers and private entities neither elected nor appointed, privately organized and supported by the majority of some small group,

The Texas approach is potentially quite stringent; a partial dissent in the *Texas Boll Weevil* case charged that it could invalidate school choice plans (delegations to parents), prison privatization (delegations to private prison firms),¹⁹⁶ the Texas Automobile Insurance Plan (which is administered by private insurers),¹⁹⁷ the delegation of the power of eminent domain to utilities,¹⁹⁸ or lawyer licensing through the American Bar Association (as well as licensing in other professions),¹⁹⁹ though of course dissents can be hyperbolic in characterizing the slippery slope.²⁰⁰ Since that case, the Texas Supreme Court has upheld the Civil Service Act's delegation of the power to designate permissible arbitrators to the American Arbitration Association and the Federal Mediation and Conciliation Service.²⁰¹ Not that arbitrators are immune from delegation analysis: The Court has been continually mindful of the potential private delegation problems surrounding arbitrators. In one case, it interpreted a statute to give municipalities the right to appeal arbitrators' decisions, lest the first prong of the *Texas Boll Weevil* test be violated.²⁰²

The Texas Supreme Court also struck down the provision of the Texas Water Code allowing water quality protection

backed by law but without guidelines or supervision, wielding great power over people's lives and property but answering virtually to no one." *Id.* at 479 (Hecht, J., concurring in part and concurring in the judgment). Justice Hecht's opinion analyzed the delegation using due process cases like *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), *Eubank v. City of Richmond*, 226 U.S. 137 (1912), and *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928). See *Tex. Boll Weevil*, 952 S.W.2d at 487–89 (Hecht, J., concurring in part and concurring in the judgment). The majority opinion avoided using such cases. See text accompanying *infra* note 304. These due process cases are discussed above, see *supra* Part II.A.1. For a discussion of why non-delegation ideas and due process ideas should be kept separate, see *infra* Part III.C.

196. *Tex. Boll Weevil*, 952 S.W.2d at 492 (Cornyn, J., concurring in part and dissenting in part).

197. *Id.* at 493.

198. *Id.*

199. *Id.* at 493–94.

200. Justice Abbott recapitulated the concerns of the *Texas Boll Weevil* dissent the next time the Texas Supreme Court used the doctrine to strike down a private delegation. See *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 899 (Tex. 2000) (Abbott, J., dissenting).

201. See *Proctor v. Andrews*, 972 S.W.2d 729, 734–38 (Tex. 1998).

202. See *City of Houston v. Clark*, 197 S.W.3d 314, 320 (Tex. 2006); see also *City of Pasadena v. Smith*, 292 S.W.3d 14 (Tex. 2009). For the analogous use of the federal non-delegation doctrine as an avoidance canon, see text accompanying *supra* notes 131–32.

zones.²⁰³ The landowners establishing a zone were empowered to create their own water quality plan. Unlike in *Texas Boll Weevil*, this didn't give the landowners regulatory authority over other people's property.²⁰⁴ But, the Court said, there was still a delegation of legislative power to the landowners, because water quality regulation is a legislative power, as is the power to decide which municipal regulations are enforceable.²⁰⁵ Then, relying on the factors from *Texas Boll Weevil*, the Court concluded that this delegation was unconstitutional; the most significant factors weighing against the delegation were that, in the Court's view—referring to the eight prongs of the test—(1) the opportunities for governmental review were insufficient, (2) affected persons such as downstream landowners were inadequately represented, (4) landowners had a pecuniary interest in protecting their property values, and (6) the extent of the delegation was broad.²⁰⁶

Going to our examples under this test, we already know how the two Texas cases would be resolved, as they were in fact resolved under the Texas test by the Texas Supreme Court. The North Carolina Board of Dental Examiners (in its regulation of teeth-whiteners) and the Mississippi Board of Pharmacy (in their regulation of pharmacy benefit managers) seem likewise questionable, as (2) the targets of the regulation aren't represented in the process, (3) the organizations apply rules to particular individuals, (4) the organizations are peopled with practicing practitioners who have a pecuniary bias against their competitors, (6) the extent of the delegation is broad, and (8) the legislature hasn't provided detailed standards. (As to (8), general guidance like "public interest" may be enough for the federal doctrine,²⁰⁷ but Texas is more demanding.²⁰⁸)

The Amtrak delegation also appears to violate a few of the Texas factors: (1) there's no meaningful review, (2) affected parties aren't represented, (4) Amtrak has a pecuniary bias, and (8) there are likely insufficient standards for Texas's liking. So

203. See *supra* Part I.B.5.

204. *FM Props.*, 22 S.W.3d at 879.

205. *Id.* at 875–77.

206. *Id.* at 880–88; see also Froomkin, *supra* note 64, at 158 (suggesting that, according to *FM Properties*, factors (1) and (4) are most important).

207. See text accompanying *supra* notes 160–61.

208. See, e.g., *FM Props.*, 22 S.W.3d at 887–88 (fairly searching review of standards).

the Amtrak delegation might be vulnerable under a Texas non-delegation standard, though on the other hand, (3) Amtrak's power is limited to making rules, (5) there are no criminal sanctions attached, (6) the delegation is narrow, and (7) Amtrak has railroad expertise.

C. *Commingleing Non-Delegation and Due Process*

1. *The D.C. Circuit's Private Delegation Doctrine*

The D.C. Circuit has recently applied a special private non-delegation doctrine in a new and, as this Article contends, incorrect way. In *Association of American Railroads v. Department of Transportation*,²⁰⁹ it held that Amtrak was private and that therefore a statute that delegated regulatory power to it violated non-delegation doctrine.²¹⁰

The court wrote that, though generally an "intelligible principle" is enough to save a delegation by Congress, such a principle isn't enough when the recipient of the delegation is private: "Even an intelligible principle cannot rescue a statute empowering private parties to wield regulatory authority"²¹¹— here citing *Carter Coal*.²¹² The court distinguished *Currin*, where industry merely held the on-off switch,²¹³ and *Sunshine Anthracite Coal Co. v. Adkins*, where industry merely had an advisory role.²¹⁴ This case was more like *Carter Coal*, where industry had binding authority over wages: here, Amtrak had an "effective veto" over Federal Railroad Administration regulations and, in fact, enjoyed "authority equal to the FRA."²¹⁵

209. 721 F.3d 666 (D.C. Cir. 2013).

210. *Id.* at 668. For the facts surrounding the Amtrak case, see *supra* Part I.B.1. This case is already being relied on to challenge other delegations of regulatory authority to private parties. See, e.g., Appellants' Brief, *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, No. 13-11052, 2013 WL 6823424 (5th Cir. Dec. 18, 2013) (challenging rule delegating USDA's enforcement authority under Horse Protection Act to private parties).

211. *Ass'n of Am. Railroads*, 721 F.3d at 671.

212. *Id.* at 671 n.3 (citing *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936)).

213. See text accompanying *supra* notes 141–51.

214. See *supra* note 159; *Ass'n of Am. Railroads*, 721 F.3d at 671.

215. *Ass'n of Am. Railroads*, 721 F.3d at 671.

To complete the reasoning, the D.C. Circuit had to establish that Amtrak was indeed private.²¹⁶ Such an approach could be problematic in light of *Lebron v. National Railroad Passenger Corp.*,²¹⁷ where the Supreme Court held, in a First Amendment context, that Amtrak was a state actor.²¹⁸ No problem, said the D.C. Circuit: one can be governmental for purposes of the state action doctrine, but private for purposes of non-delegation doctrine.²¹⁹

The court then tallied up the indicia of privateness and publicness. Cutting in favor of calling Amtrak public was *Lebron*.²²⁰ Also, Amtrak's Board of Directors has nine members, one of whom is the Secretary of Transportation and seven of whom are presidential appointees; the ninth, the president of Amtrak, is elected by the other eight.²²¹ Amtrak has some private shareholders, but almost all its stock is preferred stock held by the federal government.²²² Amtrak receives substantial subsidies from the federal government²²³—though the amount of government money an actor receives generally isn't relevant to whether that actor is public or private.²²⁴

Cutting in favor of calling Amtrak private, the 1970 statute specifies that Amtrak "is not a department, agency, or instrumentality of the United States Government."²²⁵ The statute also commands that Amtrak "shall be operated and managed as a for-profit corporation."²²⁶ Relatedly, by statute, "Amtrak is encouraged to make agreements with the private sector and undertake initiatives that are consistent with good business judgment and designed to maximize its revenues and minimize Government subsidies."²²⁷ Amtrak itself announces that

216. See text accompanying *supra* notes 188–95 (explaining the Texas Supreme Court's test establishing that the Boll Weevil Eradication Foundation was private).

217. 513 U.S. 374, 400 (1995).

218. *Id.*

219. *Ass'n of Am. Railroads*, 721 F.3d at 676–77.

220. *Id.*

221. *Id.* at 674.

222. *Id.*

223. *Id.*

224. See *Rendell-Baker v. Kohn*, 457 U.S. 830, 840–41 (1982); *Blum v. Yaretsky*, 457 U.S. 991, 1010–11 (1982).

225. *Ass'n of Am. Railroads*, 721 F.3d at 675 (quoting 49 U.S.C. § 24301(a)) (internal quotation marks omitted).

226. *Id.* (quoting 49 U.S.C. § 24301(a)) (internal quotation marks omitted).

227. *Id.* at 676 (quoting 49 U.S.C. § 24101(d)) (internal quotation marks omitted).

it's "not a government agency or establishment [but] a private corporation operated for profit."²²⁸ The D.C. Circuit attached some significance ("somewhat tellingly"²²⁹) to the fact that Amtrak's URL is amtrak.com—not amtrak.gov—but this marketing decision doesn't really seem all that telling, as one could make a similar claim about the U.S. Postal Service, whose website is located at usps.com.

To decide the issue, the D.C. Circuit looked to "what functional purposes the public-private distinction serves when it comes to delegating regulatory power."²³⁰ 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.²³¹ (Perhaps; but if something goes wrong, why can't the voters blame the government for the initial decision to delegate?²³²) Another purpose is the distinction between the public good and private gain: public recipients of delegated power are "presumptively disinterested"²³³ and are bound by "official duty," whereas private recipients may act "for selfish reasons or arbitrarily."²³⁴ (Perhaps; but doesn't this display an overly optimistic view of the motivations of public employees?²³⁵) In the D.C. Circuit's view, these considerations cut in favor of treating Amtrak as private: the statutory command that it be "managed as a for-profit corporation" requires that it seek its private good, not the public good, and Congress's and Amtrak's consistent labeling of Amtrak as "private" tends to distance Amtrak's decisions from democratic accountability.²³⁶ The end result was that

228. *Id.* at 675 (quoting NAT'L R.R. PASSENGER CORP., FREEDOM OF INFORMATION ACT HANDBOOK 1 (2008)) (internal quotation marks omitted).

229. *Id.*

230. *Id.*

231. *Id.*

232. See Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 85–91 (1985).

233. *Ass'n of Am. Railroads*, 721 F.3d at 675 (quoting *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936)) (internal quotation marks omitted).

234. *Id.* (quoting *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 118, 122 (1928)) (internal quotation marks omitted).

235. Cf. Volokh, *supra* note 5, at 172–87.

236. *Ass'n of Am. Railroads*, 721 F.3d at 676.

the statute delegated regulatory power to a private party and was therefore invalid.²³⁷

2. *The Carter Coal Puzzle*

Whether the D.C. Circuit is correct depends in large part on how to interpret *Carter Coal*, which is, doctrinally speaking, a confusing case. The quote reproduced earlier is replete with references to “delegation.”²³⁸ But it also mentions arbitrariness and denial of “due process.” Is it a delegation case or a due process case (or both)?

By deciding that an intelligible principle couldn’t save a private delegation,²³⁹ the D.C. Circuit chose to treat *Carter Coal* as a non-delegation decision. But, at the same time, the court suggested that the characterization didn’t matter: it wrote, in a footnote, that “the distinction evokes scholarly interest,” but the parties in this case didn’t press the point, and “neither court nor scholar has suggested a change in the label would effect a change in the inquiry.”²⁴⁰ But this is quite wrong. Labels don’t always matter, though in this case, non-delegation and due process doctrines have quite different implications.

First—as a matter of doctrine—a non-delegation holding only applies against federal delegations while a due process holding applies against the states as well.²⁴¹ Admittedly, this wouldn’t change the result in the Amtrak case, which concerned a federal delegation; but making the basis clear would help litigants in future cases of state delegation. Non-delegation cases have their particular “intelligible principle” doctrine, while due process cases have their own separate doctrine involving *Washington ex rel. Seattle Title Trust Co. v. Roberge*,²⁴² *Mathews v. Eldredge*,²⁴³ *Board of Regents v. Roth*,²⁴⁴ and so on. Thus, treating the doctrine of private delegations as a uni-

237. This case is also discussed in Alexander Volokh, *A New Private Delegation Doctrine?*, REASON.ORG (Aug. 1, 2013), <http://reason.org/news/show/private-delegation-doctrine-amtrak>, [perma.cc/CUZ9-5FPR].

238. See text accompanying *supra* note 58.

239. See text accompanying *supra* note 206.

240. *Ass’n of Am. Railroads*, 721 F.3d at 671 n.3.

241. See Wecht, *supra* note 97, at 825 n.57; *The Vagaries of Vagueness*, *supra* note 136, at 764; text accompanying *supra* note 172.

242. 287 U.S. 116 (1928).

243. 424 U.S. 319 (1976).

244. 408 U.S. 564 (1972).

tary entity rooted in both the Vesting Clause and the Due Process Clause needlessly raises questions that could be avoided if the doctrinal basis were clear. For instance, must all non-delegation cases import due process case law? Must cases involving federal delegations (where both clauses apply) proceed identically with cases involving state delegation (where only one clause applies)?

Second, plaintiffs in cases involving federal delegation would prefer to win on a due process theory rather than on a non-delegation theory. A due process victory can give rise to a damages claim under *Bivens* against the federal actors responsible for the violation,²⁴⁵ while *Bivens* has never been applied to non-delegation doctrine.²⁴⁶

Third—as a matter of realpolitik—given the widespread perception that non-delegation doctrine is mostly dead²⁴⁷ while due process is used constantly, a theory grounded in due process is probably more likely to be used.

Fourth—as a matter of convenience—a due process approach would have the advantage of being able to use the existing holding of *Lebron* that Amtrak is a state actor for constitutional rights purposes, rather than having to invent a new ad hoc test to make Amtrak private for non-delegation purposes.²⁴⁸

Finally, and most fundamentally—as a jurisprudential matter, even putting aside pragmatic concerns and assuming away all cases involving state delegation—the Due Process Clause and non-delegation doctrine serve quite different purposes. Non-delegation doctrine is structural and seeks to ensure that Congress makes the important decisions. Due process, on the other hand, is all about fairness. Fairness and structural boundaries may be related, but not in any necessary way.

245. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

246. On *Bivens*, see Volokh, *Modest Effect*, *supra* note 7.

247. See *Fed. Power Comm'n v. New England Power Co.*, 415 U.S. 345, 352–53 (1974) (Marshall, J., dissenting); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 131–33 (1980); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 58–81 (1993); Sunstein, *supra* note 132, at 315.

248. Cf. *Tex. Boll Weevil Eradication Found. v. Wellen*, 952 S.W.2d 454, 494 (Tex. 1997) (Cornyn, J., concurring in part and dissenting in part) (criticizing majority's newly minted public-private analysis).

Consider, for instance, *Whitman v. American Trucking Ass'ns, Inc.*,²⁴⁹ where the Supreme Court considered a non-delegation challenge to a provision of the Clean Air Act.²⁵⁰ Earlier, the D.C. Circuit had agreed with the challengers that the delegation of regulatory authority to the EPA lacked an intelligible principle.²⁵¹ Nonetheless, it had given the EPA a chance to cure the overbreadth of the delegation by adopting a limiting construction.²⁵² The D.C. Circuit's approach had been suggested by administrative law scholar Kenneth Culp Davis, who argued that the goal of non-delegation doctrine should be to protect against "arbitrariness" and "uncontrolled discretionary power," and that administrative safeguards could fulfill this purpose as well as statutory language.²⁵³

No way, said the Supreme Court: If Congress has delegated too broadly, separation of powers has already been breached.²⁵⁴ The EPA's trying to adopt the limiting construction would itself be a forbidden exercise of regulatory power.²⁵⁵ But note that, under the Davis theory, there would be no unfairness: everyone will be on notice as to the precise conduct required or prohibited, and everyone will have had an opportunity to comment under the Administrative Procedure Act.²⁵⁶ So presumably, if the limiting regulations were adopted, a due process challenge would, and should, fail.

A violation of non-delegation doctrine thus needn't violate due process. The same is true in reverse: If Congress passes a very specific statute allowing welfare benefits to be withdrawn without any process, presumably due process will be violated²⁵⁷ but there will be no impermissible delegation.

249. 531 U.S. 457 (2001).

250. *Id.*

251. *Id.* at 463 (citing *Am. Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir. 1999)).

252. *Id.* (citing *Am. Trucking*, 175 F.3d at 1038).

253. Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 713 (1969). The D.C. Circuit, by the time of *American Trucking*, had already used this approach in *Amalgamated Meat Cutters & Butcher Workmen AFL-CIO v. Connally*, 337 F. Supp. 737, 758–59 (D.D.C. 1971) (three-judge panel).

254. *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472–73 (2001).

255. *Id.* at 473.

256. See 5 U.S.C. § 553(b)–(c) (2012).

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

Not that non-delegation doctrine and due process should never talk to each other. As noted above, the presence of procedures has sometimes been held to prevent a violation of non-delegation doctrine.²⁵⁸ This is still good law after *American Trucking*, as long as these procedures aren't made up by the recipient of the overbroad delegation. APA procedures or the availability of statutory or constitutional judicial review really do narrow a delegation—in the case of APA procedures, Congress made some of the important decisions in 1946, and in the case of constitutional review, Congress legislated against the background of decisions that were made in, say, 1791 or 1868 and that are now out of the delegate's hands. The availability of these procedures will no doubt also be relevant to a due process inquiry. So the doctrines aren't entirely unrelated. Moreover, to the extent certain procedures are unavailable against the government (for example, the APA, which governs only agencies,²⁵⁹ or Bill of Rights protections, which often don't apply against private actors²⁶⁰), non-delegation doctrine—just like due process—might end up applying differently against public and private parties even though the inquiry is the same.²⁶¹

Nonetheless, the doctrines should still be kept distinct as an analytic matter. The procedures that save a delegation from overbreadth are the sorts that constrain a delegate's discretion, for instance by enforcing substantive rationality. One example might be "hard look" review under the APA.²⁶² The procedures that save a delegation from violating due process, on the other hand, are the sorts that ensure fair treatment for the affected party, for instance by minimizing bias or by ensuring that the three-

258. See *supra* notes 138–39 and accompanying text.

259. See 5 U.S.C. § 551(1) (defining "agency"); *id.* § 551(4)–(7) (limiting the definitions of "rule," "rule making," "order," and "adjudication" to agencies).

260. Bill of Rights protections apply only against "state actors," a category that often (though not always) excludes private parties. See sources cited *supra* note 110.

261. See text accompanying *supra* notes 139, 160–61.

262. See 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

part *Mathews v. Eldridge* balancing test²⁶³ is met—one example might be the APA procedures for formal adjudication.²⁶⁴

Having established that the label matters, an important question is whether the *Carter Coal* holding²⁶⁵ is best thought of as a non-delegation or due process decision. The Supreme Court's references to "delegation" aren't very probative. Merely saying the word "delegation" isn't enough to invoke non-delegation doctrine. Delegations can be unconstitutional for many reasons. This Article has discussed many cases as being about private delegations even though (as state cases) they were unambiguously about due process.²⁶⁶ One can argue that Congress can't constitutionally delegate a "private attorney general" power to qui tam plaintiffs, either on standing grounds²⁶⁷ or on Appointments Clause grounds;²⁶⁸ or, one can argue that delegation to religious groups violates the Establishment Clause.²⁶⁹ One can thus speak of "delegations" and call them unconstitutional without implying that the case has anything to do with non-delegation doctrine as discussed in *Panama Refining* or *Schechter Poultry*.²⁷⁰

Slightly more probative is the opinion's citation of *Schechter Poultry*, which is indisputably a non-delegation case.²⁷¹ I say "slightly" because mere citation isn't a jurisprudential argument. That citation is immediately followed by citations to *Eubank* and *Roberge*, which are due process cases.²⁷² As I men-

263. 424 U.S. 319, 335 (1976) (holding that analysis of whether procedure conforms to due process is done by balancing affected party's interest, government's interest, and importance of procedure for accuracy).

264. See 5 U.S.C. §§ 554, 556–57.

265. See text accompanying *supra* notes 56–59.

266. See *supra* Part II.A.

267. See *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771–78 (2000) (rejecting this argument).

268. See, e.g., *id.* at 778 n.8 (noting the question but not deciding it); PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* 106–13 (2007); Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 *YALE L.J.* 341, 374–80 (1989).

269. See *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982); Alexander Volokh, *The Constitutional Possibilities of Prison Vouchers*, 72 *OHIO ST. L.J.* 983, 1015–20 (2011); *The Vagaries of Vagueness*, *supra* note 136, at 767–68.

270. See *supra* note 130 and accompanying text.

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

272. See *id.* at 311–12.

tioned above in the context of *Currin v. Wallace* (a non-delegation case that cites *Roberge*, a due process case, as well as *Carter Coal*),²⁷³ perhaps this “commingling” of doctrines is a sign of sloppiness,²⁷⁴ or maybe it’s a sign that the Supreme Court thought private delegations automatically raise due process issues while public delegations don’t. Or perhaps this is reading too much into a mere citation.

One could—on the basis of the *Schechter Poultry* citation—call *Carter Coal* both a non-delegation decision and a due process decision.²⁷⁵ Some venerable commentators take this route and characterize *Carter Coal* in both ways. In 1971, dissenting in *McGautha v. California*,²⁷⁶ Justice Brennan characterized non-delegation doctrine as having “roots both in . . . separation of powers . . . and in the Due Process Clause”—here citing *Carter Coal*²⁷⁷—and stated that, as a due process doctrine, it applied to the states.²⁷⁸ A little bit later, Justice Thurgood Marshall agreed that *Carter Coal* was (at least) a non-delegation case: “The last time that the Court relied on *Schechter Poultry* was in [*Carter Coal*].”²⁷⁹ Paul Verkuil explicitly writes that the *Carter Coal* Court “held the delegation arbitrary both under Article I of the Constitution and the Due Process Clause.”²⁸⁰

273. See text accompanying *supra* notes 141–59.

274. See Abramson, *supra* note 1, at 208–09 (calling *Carter Coal* “[t]he most glaring example of this commingling” and attributing the “persistent” commingling in part to “sloppy judicial analysis”).

275. See Horton, *supra* note 137, at 473–74 & nn.205–07 (listing sources that locate private delegation doctrine in the Vesting Clause, the Due Process Clause, or both—and correctly listing *Carter Coal* as a due process case).

276. 402 U.S. 183 (1971).

277. *Id.* at 272 n.21 (Brennan, J., dissenting).

278. *Id.* at 272.

279. Fed. Power Comm’n v. New England Power Co., 415 U.S. 352, 354 n.2 (1974) (Marshall, J., concurring in the result and dissenting); see also Hornell Ice & Cold Storage Co. v. United States, 32 F. Supp. 468, 470 (W.D.N.Y. 1940) (stating that “Congress did not unlawfully delegate legislative power to private persons in violation of Article I, Section 1 of the Constitution” but, in justifying why not, distinguishing *Carter Coal*); Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 264 n.72 (2010) (“The nondelegation doctrine . . . survives instinctively, . . . appearing variously in the guise of the Due Process Clause, see, e.g., [*Carter Coal*], [and other provisions].”); Posner & Vermeule, *supra* note 134, at 1722 n.5, 1757; Ira P. Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 UCLA L. REV. 911, 914, 919–20 (1988).

280. Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 422 (2006); see also Froomkin, *supra* note 64, at 151 (treat-

The non-delegation rationale wouldn't be crazy: Entrusting a decision entirely to the unreviewable and unguided discretion of private parties is the opposite of having an "intelligible principle." But then the Court wouldn't need to explicitly use the fact that the delegates were private.²⁸¹ So even if *Carter Coal* were labeled a non-delegation case, it wouldn't be one that supports a special doctrine for private parties (some private parties, like Amtrak, do have intelligible principles attached to their delegation²⁸²); nor would it add anything to a due process analysis.

On balance, *Carter Coal* is properly considered a due process case and not a non-delegation case, at least not one that has a distinctive take on private delegations²⁸³—though the text (as well as the text in *Currin*²⁸⁴) isn't a model of clarity. More importantly for the law, the last thirty years' worth of Supreme Court cases agrees with this conclusion.²⁸⁵ In 1983, Justice White, in his dissent in *INS v. Chadha*,²⁸⁶ characterized *Schechter Poultry* and *Panama Refining* as the only two cases where a statute was struck down on non-delegation grounds, and omitted *Carter Coal* entirely.²⁸⁷ Justice Blackmun did the same in his majority opinion in *Mistretta v. United States*²⁸⁸ in 1989,²⁸⁹ and Jus-

ing *Carter Coal* as having been limited by *Currin v. Wallace*, discussed above as a non-delegation case); *id.* at 153 (recognizing due process aspect of *Carter Coal*).

281. Thus, Chief Justice Hughes writes, in his separate opinion in *Carter Coal*, that the delegation violates (1) non-delegation doctrine and (2) the Due Process Clause. *Carter v. Carter Coal Co.*, 298 U.S. 238, 318 (1936) (separate opinion of Hughes, C.J.). But his non-delegation discussion doesn't refer to the public-private distinction: If the argument in support of the delegation were valid, he writes, it "would remove all restrictions upon the delegation of legislative power, as the making of laws could thus be referred to any designated *officials or private persons . . .*" *Id.* (emphasis added). Only the due process discussion treats the private nature of the delegates as relevant. *See id.*

282. *See* text accompanying *supra* notes 164–65.

283. Wecht calls *Carter Coal* a "de facto application of the nondelegation doctrine to private, for-profit entities through the Due Process clause." Wecht, *supra* note 97, at 824 (section title) (section capitalization removed).

284. *See* text accompanying *supra* notes 141–59.

285. *But see* *Tex. Boll Weevil Eradication Found. v. Lewellen*, 952 S.W.2d 454, 467 (Tex. 1997) ("Even in its heyday, the nondelegation doctrine was sparingly applied, having been used by the United States Supreme Court to strike down a federal statute only three times." (citing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), *Carter Coal*, 298 U.S. 238)).

286. 462 U.S. 919 (1983).

287. *See id.* at 985 (White, J., dissenting).

288. 488 U.S. 361 (1989).

tice Scalia did the same in his majority opinion in *Whitman v. American Trucking Ass'ns, Inc.* in 2001.²⁹⁰ A former appellate judge, one Antonin Scalia, wrote in 1986 that, though *Carter Coal* “discussed” non-delegation doctrine, the holding of the case “appears to rest primarily upon denial of substantive due process rights.”²⁹¹

3. *How the Amtrak Case Should Have Been Decided*

The wording of *Carter Coal* (aside from the mere citation of *Schechter Poultry*) and the characterization of the last thirty years of Supreme Court cases establish that *Carter Coal* is a due process case, not a non-delegation doctrine case. What does this imply about the D.C. Circuit’s Amtrak case?

The Amtrak case may have been rightly decided, but for the wrong reason. Here’s how the reasoning should have proceeded.²⁹² As a matter of non-delegation doctrine, there’s no problem. As mentioned above, the statutory command that Amtrak “be operated and managed as a for-profit corporation” is enough to provide an intelligible principle for how Amtrak should exercise its power, jointly held with the FRA, to set performance standards.²⁹³

The very intelligible principle that dooms the non-delegation challenge, however, also establishes bias for purposes of a due process challenge. As a threshold matter for due process protections to apply, Amtrak must be a state actor. (Unlike the D.C. Circuit, which was concerned to call Amtrak private, here we would be concerned to call Amtrak public to achieve the same result.) No problem: see *Lebron*.²⁹⁴ Next, the bias must be substantial enough to establish a due process violation. Here, the statute requires Amtrak to maximize its profits, and

289. *Id.* at 373 (citations omitted); see also *Tex. Boll Weevil*, 952 S.W.2d at 499 n.5 (Cornyn, J., concurring in part and dissenting in part).

290. 531 U.S. 457, 474 (2001).

291. *Synar v. United States*, 626 F. Supp. 1374, 1383 n.8 (D.D.C. 1986), *aff’d sub nom.*, *Bowsher v. Synar*, 478 U.S. 714 (1986).

292. I make many of these arguments in my amicus brief supporting the cert petition in this case. See Brief of Alexander Volokh as Amicus Curiae in Support of Petitioners, *Dep’t of Transp. v. Ass’n of Am. Railroads*, No. 13-1080 (Apr. 10, 2014), available at http://www.washingtonpost.com/news/volokh-conspiracy/wp-content/uploads/sites/14/2014/04/Amtrak_Volokh-Amicus.pdf, [perma.cc/N6TA-GBS4].

293. See *supra* notes 164–65 and accompanying text.

294. See text accompanying *supra* notes 217–19.

Amtrak has an effective veto power over performance measures. Therefore, it plausibly can't, without a conflict of interest, regulate the rest of the railroad industry.²⁹⁵

4. Other Comminglers

The D.C. Circuit isn't the only court that has commingled non-delegation and due process concepts so as to make the precise basis of a holding unclear. In 2004, the Fourth Circuit considered a non-delegation challenge to a supposed delegation of power to the United Mine Workers of America Combined Benefit Fund made in the Coal Industry Retiree Health Benefits Act of 1992.²⁹⁶ Faced with severely underfunded benefit funds in the coal industry and an exit of firms from the industry, Congress required currently active coal companies to pay into the Combined Benefit Fund, which in turn would pay promised healthcare benefits to active and retired coal miners.²⁹⁷ The Pittston Company, a coal company, argued that the Act "unconstitutionally delegates governmental authority to the Combined Fund, a private entity, giving the Combined Fund 'discretionary authority to collect and spend federal taxes and the plenary authority to administer a federal entitlement.'" ²⁹⁸

The Fourth Circuit summarized private non-delegation doctrine by citing *J.W. Hampton, Jr., & Co. v. United States*²⁹⁹ and *Whitman v. American Trucking Ass'ns, Inc.*³⁰⁰—as well as *Carter Coal*. Having characterized non-delegation doctrine as stemming from the Vesting Clauses,³⁰¹ the court continued by stating that a delegation to private entities rather than to the executive branch would be a "legislative delegation in its most obnoxious

295. *But see* Ass'n of Am. Railroads v. Dep't of Transp., 865 F. Supp. 2d 22, 31–32 (D.D.C. 2012) (stating that the Association of American Railroads had waived this argument, but "not[ing]" "[i]n passing" that "in light of the FRA's and STB's involvement and Amtrak's political accountability, the potential for bias appears remote" (citation omitted)).

296. *See* Pittston Co. v. United States, 368 F.3d 385, 389 (4th Cir. 2004).

297. *Id.* at 390–91.

298. *Id.* at 393.

299. 276 U.S. 394 (1928); *see* text accompanying *supra* notes 153–58.

300. 531 U.S. 457 (2001); *see* text accompanying *supra* notes 249–56.

301. *See* Pittston, 368 F.3d at 394 (citing U.S. CONST. art. I, § 1; *id.*, art. II, § 1; *id.*, art. III, § 1).

form.”³⁰² Therefore, “[a]ny delegation of regulatory authority ‘to private persons whose interests may be and often are adverse to the interests of others in the same business’ is disfavored.”³⁰³

This is doctrinally incorrect insofar as it doesn’t recognize that the private delegation aspect of *Carter Coal* is a due process issue, but the doctrinal confusion in this case was innocuous. The *Pittston* court determined that the Combined Benefit Fund didn’t determine who paid it, how much it would get paid (or whether penalties for nonpayment could be excused), who the beneficiaries would be, or the nature or amount of the benefits. Every important decision was made by the Act itself, the Social Security Commissioner, or the Secretary of the Treasury. All the supposed powers of the Fund related to its internal governance, or were non-regulatory, ministerial, advisory, or otherwise inconsequential. Therefore, the court held—relying on *Sunshine Anthracite Coal Co. v. Adkins*³⁰⁴—there was no invalid delegation.

Upholding the delegation based on *Sunshine Anthracite* was clearly correct (assuming the court correctly characterized the Fund’s powers, or lack thereof). In retrospect, the court’s characterization of private delegations as being specially disfavored under non-delegation doctrine is just dictum.

State courts also often commingle. In general, state courts are more likely to analyze delegations under a due process theory; Wyoming is one example of a state that has seen the difference clearly and apparently adopted an exclusively due-process-based theory.³⁰⁵ In fact, several commentators argue that the due process approach is better than the separation of powers approach, and suggest junking the latter and retaining the former.³⁰⁶ Most states haven’t done that, but instead rely on both theories simultaneously.

The Texas Supreme Court, whose private delegation doctrine is discussed above,³⁰⁷ claims to have been careful to keep sepa-

302. *Id.* (quoting *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936)) (internal quotation marks omitted).

303. *Id.* (quoting *Carter Coal*, 298 U.S. at 311) (internal quotation marks omitted).

304. 310 U.S. 381 (1940); see *supra* note 159 and text accompanying *supra* note 214.

305. See *Newport Int’l Univ., Inc. v. State Dep’t of Educ.*, 186 P.3d 382, 388–90 (Wyo. 2008).

306. See, e.g., Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 248 (1937); David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 662 (1986).

307. See *supra* Part III.B.

ration of powers and due process principles separate;³⁰⁸ nonetheless, the potential bias of the private delegate (factor four in its test)³⁰⁹ sounds like an infusion of due process.³¹⁰

Arizona has a non-delegation doctrine based on the legislative vesting clause of the Arizona constitution,³¹¹ but a case apparently based on that vesting clause, *Emmett McLoughlin Realty, Inc. v. Pima County*,³¹² cites *Roberge*,³¹³ a federal due process case, as well as a previous Arizona case³¹⁴ that cites *Carter Coal*. The same goes for Illinois, which also has a general non-delegation doctrine based on its legislative vesting clause³¹⁵ and at least one other specific non-delegation doctrine based on a constitutional grant to the legislature of the power to grant homestead exemptions;³¹⁶ cases citing the relevant structural clauses also cite federal due process cases like *Eubank*, *Thomas Cusack*, and *Carter Coal*, or other cases relying on these.³¹⁷

For states, though, the commingling seems less harmful than for the federal government. Granted, the general concern that structural violations needn't implicate fairness, while unfair delegations raise all their own issues even if they're structurally sound, still applies.³¹⁸ But the concern that non-delegation is

308. See *Tex. Boll Weevil Eradication Found. v. Lewellen*, 952 S.W.2d 454, 467 n.10 (Tex. 1997).

309. See text accompanying *supra* note 193.

310. Factor (1), the availability of "meaningful review by a state agency or other branch of state government," also sounds like the relevant due process factor of the availability of post-deprivation remedies.

311. See *Emmett McLoughlin Realty, Inc. v. Pima Cnty.*, 58 P.3d 39, 41 (Ariz. Ct. App. 2002) (citing ARIZ. CONST. art. IV, pt. 1, § 1(1) ("The legislative authority of the State shall be vested in the Legislature . . .")).

312. *Id.*

313. See text accompanying *supra* notes 51–55.

314. *Emmett McLoughlin Realty*, 58 P.3d at 41 (citing *Indus. Comm'n v. C & D Pipeline, Inc.*, 607 P.2d 383, 385 (Ariz. App. 1979) (citing *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936))).

315. See *People ex rel. Chi. Dryer Co. v. City of Chi.*, 109 N.E.2d 201, 204 (Ill. 1952) (citing ILL. CONST. art. IV, § 1).

316. See *Chicagoland Chamber of Commerce v. Pappas*, 880 N.E.2d 1105, 1118–19 (Ill. App. Ct. 2007) (citing ILL. CONST. art. IX, § 6). The title heading of the section of that case discussing the doctrine is "Nondelegation Doctrine Separation of Powers," *id.* at 1118, which makes the source of the doctrine clear.

317. *Chicagoland Chamber of Commerce*, 880 N.E.2d at 1120 (citing *Chi. Dryer Co.*, 109 N.E.2d at 201, 204); *Chi. Dryer Co.*, 109 N.E.2d at 205–06 (citing *Eubank v. City of Richmond*, 226 U.S. 137 (1912), *Thomas Cusack Co. v. City of Chi.*, 242 U.S. 526 (1917), *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936)).

318. See text accompanying *supra* notes 257–70.

purely federal while due process also applies to states no longer applies when a state has its own structural non-delegation doctrine based on its own constitution.³¹⁹

How does this apply to our examples? Recall from the due process section that several of the examples—Amtrak, and possibly the Mississippi Board of Pharmacy and the Texas Boll Weevil Eradication Foundation, but not the North Carolina Board of Dental Examiners or the Texas homeowners in the water quality protection zones—were vulnerable for bias.³²⁰ (The dental board was immune because its role was limited to enforcing statutory commands through ordinary lawsuits, while the Texas landowners were non-state actors who didn't regulate anyone.) If a state mixes non-delegation concepts with due process concepts, the result should probably be the same as under the Due Process Clause alone.

IV. ANTITRUST THEORIES

Moving from constitutional theories like non-delegation and due process to federal statutory challenges under antitrust law isn't as great a change of gears as it might seem. As mentioned in Part I, private delegation—in particular an industry “regulating itself”—raises the possibility that incumbents will regulate potential entrants or current competitors, which can be anticompetitive.

For federalism reasons, regulation by the state itself, through the legislature or judiciary, is absolutely immune from antitrust liability under the “state action” doctrine.³²¹ Agencies stretch the doctrine, depending on their degree of privateness. Here, too, agencies can be private for antitrust purposes even if they otherwise look public. Once state action immunity is overcome, however, the question is whether there is an actual antitrust violation. In many of the preceding examples, this will be true, or at least will be easier to prove because of structural factors like the competitive relationship between the regulator and the regulated parties.

Once an antitrust violation is established, there remains the issue of remedy. The standard remedy is treble damages. Mu-

319. See text accompanying *supra* notes 241–44, 247.

320. See *supra* Part II.A.3.

321. Don't confuse this with the “state action” doctrine of constitutional law. See sources cited *supra* note 110.

nicipalities are exempt from damages, and many agencies will be exempt as well under sovereign immunity, mainly if the state is required to pay their bills. For some of the examples, the sovereign immunity question is difficult, so the most that can be said definitively is that they *might* be fully liable, and that they're in any event subject to injunctive lawsuits in which they'll have to pay attorney fees.

A. State Action Immunity

A state board charged with anticompetitive behavior will always argue, as an initial matter, that its behavior is state action exempt from antitrust law under *Parker v. Brown*.³²² The acts of state governments *themselves*—that is, a state legislature³²³ or a state supreme court in its regulatory role³²⁴—aren't covered by federal antitrust law,³²⁵ but a state board doesn't fall within this category. At the opposite extreme, private parties get state action immunity if they satisfy the two prongs of the test from *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*—that is, if they (1) act according to a clearly articulated state policy and (2) are actively supervised by the state.³²⁶

In between these poles, we have intermediate entities like municipalities, which have to satisfy only the first *Midcal*

322. 317 U.S. 341 (1943).

323. *Id.* at 350–52.

324. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 361–62 (1977).

325. *See Hoover v. Ronwin*, 466 U.S. 558, 568 (1984) (summarizing *Parker* doctrine as to state legislatures and state supreme courts acting in legislative capacity).

326. *See Fed. Trade Comm'n v. Phoebe Putney Health Sys. Inc.*, 133 S. Ct. 1003 (2013); *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); *see also, e.g., Patrick v. Burget*, 486 U.S. 94, 100–01 (1988); Alexander Volokh, *Supreme Court Antitrust Ruling Supports Public-Private Neutrality, Reduces Barriers to Privatization*, REASON.ORG, Feb. 21, 2013, <http://reason.org/news/show/scotus-antitrust-privatization>, [<http://perma.cc/C9XR-RLGS>]. William Page has questioned whether active supervision should be required. William H. Page & John E. Lopatka, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum*, 61 B.U. L. REV. 1099, 1125–26 (1981). *But see* William H. Page, *State Regulation in the Shadow of Antitrust: FTC v. Ticor Title Insurance Co.*, 3 SUP. CT. ECON. REV. 189 (1993) (justifying the active-supervision requirement as a way to guarantee that states aren't effecting a naked repeal of antitrust law, as they could if all that was required was clear articulation). *See also* Jarod M. Bona, *The Antitrust Implications of Licensed Occupations Choosing Their Own Exclusive Jurisdiction*, 5 U. ST. THOMAS J.L. & PUB. POL'Y 28, 44–51 (2011) (discussing the application of the state action doctrine to licensing boards).

prong. They don't get blanket *Parker* immunity because they have no sovereignty of their own; but they're also public enough to dispense with the requirement of active supervision. The second *Midcal* prong, as the Supreme Court explained in *Town of Hallie v. City of Eau Claire*,³²⁷ serves an essentially evidentiary purpose—that the first *Midcal* prong is truly satisfied and the body is really acting pursuant to state policy.³²⁸ When the entity is private, “there is a real danger that [it] is acting to further [its] own interests, rather than the governmental interests of the State”;³²⁹ a “private price-fixing arrangement” might be concealed by “a gauzy cloak of state involvement.”³³⁰ But when a municipality is involved, the court “may presume, absent a showing to the contrary, that [it] acts in the public interest,”³³¹ partly because of the increased public scrutiny that comes from municipal elections and mandatory disclosure laws.³³² Thus, the court doesn't need the extra evidentiary benefits that active state supervision would provide.

1. *Applicability to State Agencies*

As for state agencies, the Supreme Court suggested in *Town of Hallie* that “it is likely that active state supervision would also not be required.”³³³ This is dictum, but the influential Areeda-Hovenkamp antitrust treatise agrees with it: “Dispensing with any supervision requirement for municipalities implies, a fortiori, the same for the ‘public’ departments and agencies of the state itself.”³³⁴ The treatise adds that “[t]oday the courts uniformly agree with that conclusion,”³³⁵ which gives a nice three-part doctrine where legislatures themselves get blanket immunity, public state agencies and municipalities are subject to the first *Midcal* prong, and private parties are subject to both *Midcal* prongs. But the apparent uniformity

327. 471 U.S. 34, 46 (1985).

328. *Id.*

329. *Id.* at 47.

330. *Midcal*, 445 U.S. at 106 (quoted in *Town of Hallie*, 471 U.S. at 46–47).

331. *Town of Hallie*, 471 U.S. at 45.

332. *Id.* at 45 n.9.

333. *Id.* at 46 n.10.

334. 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 226b, at 166 (3d ed. 2006).

335. *Id.*

might be misleading, as “determining whether an actor is sufficiently ‘public’ so as not to require supervision has often proven difficult.”³³⁶

2. *The Cursory View*

Determining whether an actor is sufficiently public has proven so difficult that the circuits are split three ways on the question, though the Supreme Court may resolve this split in the 2014 Term, in which case this Subpart will become partly moot.³³⁷ The Fifth Circuit held that Louisiana’s State Board of Certified Public Accountants (CPAs), which made rules prohibiting CPAs from “engaging in incompatible professions” like selling securities,³³⁸ was public enough to be exempt from the active supervision requirement. Even though it was “composed entirely of CPAs who compete in the profession they regulate,” the “public nature of [its] actions mean[t] that there [was] little danger of a cozy arrangement to restrict competition.”³³⁹ The Board was thus “functionally similar to a municipality.”³⁴⁰ The analysis here was unfortunately fairly cursory. Similarly, the Tenth Circuit held, in the context of a public university (which allegedly conspired to “monopolize certain agricultural testing services” in the state³⁴¹), that the active supervision requirement was unnecessary “[g]iven the nature of these defendants, a constitutionally created state board, its executive secretary, and a state created and funded university.”³⁴²

The Second Circuit’s analysis of why an urban development corporation was exempt from the active supervision require-

336. *Id.*; see also Ingram Weber, *The Antitrust State Action Doctrine and State Licensing Boards*, 79 U. CHI. L. REV. 737, 752–54 (2012). This is one of several attempts, aside from the state action doctrine, see *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995), to classify organizations as public or private. See text accompanying *supra* notes 188–93 (discussing the Texas Supreme Court’s description of the Boll Weevil Eradication Foundation as private for purposes of the Texas non-delegation doctrine), 208–26 (describing the test the D.C. Circuit used to classify Amtrak for purposes of the federal non-delegation doctrine).

337. See *N.C. Bd. of Dental Exam’rs v. Fed. Trade Comm’n*, 134 S. Ct. 1491 (2014) (granting cert).

338. *Earles v. State Bd. of CPAs of La.*, 139 F.3d 1033, 1034 (5th Cir. 1998).

339. *Id.* at 1041.

340. *Id.*

341. *Porter Testing Lab. v. Bd. of Regents for the Okla. Agric. & Mech. Colls.*, 993 F.2d 768, 770 (10th Cir. 1993).

342. *Id.* at 772.

ment seems to have the same flavor: The development corporation at issue was presumed to be public-interested because it was “by statute a political subdivision of the state.”³⁴³ This one-factor test certainly seems incorrect in light of the Supreme Court’s holding that the Virginia State Bar, though a state administrative agency,³⁴⁴ was a “private part[y]”³⁴⁵ subject to the active supervision requirement.

3. *The Intermediate View*

Other circuits don’t rely on formal labeling or take the publicness of a state agency for granted. The Oregon State Bar adopted a rule making itself the sole legal provider of malpractice insurance for the state’s lawyers.³⁴⁶ The Ninth Circuit ended up exempting it from the active supervision requirement, but only after analyzing a number of factors: not just the Bar’s formal classification as “a public corporation and an instrumentality of the State of Oregon,” but also how many of its members “must be nonlawyer members of the public,” the requirement that its records be “open for public inspection” and its accounts “subject to periodic audits by the State Auditor,” its open meeting requirements, and the fact that its members “are public officials who must comply with the Code of Ethics.”³⁴⁷ “These requirements leave no doubt that the Bar is a public body, akin to a municipality for the purposes of the state action exemption.”³⁴⁸

The First Circuit seems to also follow a nuanced approach. Then-Judge Stephen Breyer discussed whether the Massachusetts Board of Registration in Pharmacy was acting anticompet-

343. *Cine 42nd St. Theater Corp. v. Nederlander Org., Inc.*, 790 F.2d 1032, 1047 (2d Cir. 1986).

344. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 776 (1975).

345. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 45 (1985). *Goldfarb*, the case discussing the Virginia State Bar, had no occasion to discuss whether the active supervision requirement applied, as it was handed down before *Midcal* enunciated the test in 1980. But *Town of Hallie*, which announced that municipalities aren’t subject to the active supervision requirement, distinguished *Goldfarb* as involving private parties, unlike the municipality at issue there. *Id.* at 45. *Town of Hallie* therefore supports the proposition that the Virginia State Bar, though statutorily defined as a state administrative agency, could be classified on the “private” side of the *Town of Hallie* distinction.

346. *Hass v. Or. State Bar*, 883 F.2d 1453, 1455–56 (9th Cir. 1989).

347. *Id.* at 1460.

348. *Id.*

itively in limiting pharmacist advertising, mail-order pharmacies, and “branch offices” or “pick-up stations.”³⁴⁹ According to Judge Breyer, whether the pharmacy board was essentially private for the purposes of the active supervision requirement would depend “upon how the Board functions in practice, and perhaps upon the role played by its members who are private pharmacists.”³⁵⁰ Just half a year earlier, Judge Breyer had used a similarly pragmatic approach, holding that the Massachusetts Port Authority was similar to a municipality because it possessed “such typical governmental attributes as the power of eminent domain, rulemaking authority, bonding authority, and tax exempt status.”³⁵¹

The Eleventh Circuit summarized its own (and other circuits’) cases as focusing on how “public the entity looks”³⁵² through an analysis of “the government-like attributes of the defendant entity”:

Factors favoring political-subdivision treatment include open records, tax exemption, exercise of governmental functions, lack of possibility of private profit, and the composition of the entity’s decisionmaking structure. The presence or absence of attributes such as these tells us whether the nexus between the State and the entity is sufficiently strong that there is little real danger that the entity is involved in a *private* anticompetitive arrangement.³⁵³

A similar multi-factor analysis—where the entity’s nonprofit status also plays a role—can be found in the Seventh Circuit.³⁵⁴

349. Fed. Trade Comm’n v. Monahan, 832 F.2d 688, 688 (1st Cir. 1987). Pick up stations are locations where patients can “drop off, and pick up, prescriptions that the ‘main office’ (in the interim) would fill in batches.” *Id.*

350. *Id.* at 690.

351. Interface Grp., Inc. v. Mass. Port Auth., 816 F.2d 9, 13 (1st Cir. 1987).

352. Bankers Ins. Co. v. Fla. Residential Prop. & Cas. Joint Underwriting Ass’n, 137 F.3d 1293, 1297 (11th Cir. 1998).

353. *Id.* at 1296–97 (citing Commuter Transp. Sys., Inc. v. Hillsborough Cnty. Aviation Auth., 801 F.2d 1286, 1290 (11th Cir. 1986), Crosby v. Hosp. Auth. of Valdosta, 93 F.3d 1515, 1525 (11th Cir. 1996), and various cases from outside the Eleventh Circuit, as well as the then-current edition of the Areeda-Hovenkamp treatise, *supra* note 334) (citations omitted).

354. See Fuchs v. Rural Elec. Convenience Coop. Inc., 858 F.2d 1210, 1217–18 (7th Cir. 1988).

4. *The FTC and Areeda-Hovenkamp View*

This multi-factor analysis, while more nuanced than the simple “public is public” view of the Second, Fifth, and Tenth Circuits, still is insufficient for the FTC. Rather than a “laundry list of attributes” approach, the FTC prefers to focus on one particular aspect of the challenged bodies: the extent to which they’re driven by private self-interest.

In 2011, the FTC examined the case of North Carolina’s Board of Dental Examiners.³⁵⁵ The Board had been accused of conspiring to drive non-dentists out of the state market for teeth-whitening services.³⁵⁶ The FTC’s position was that the state action exemption required active supervision “in circumstances where the state agency’s decisions are not sufficiently independent from the entities that the agency regulates.”³⁵⁷ This includes cases where the agency has a “financial interest in the restraint that [it] seeks to enforce”³⁵⁸ and is “controlled by private market participants”³⁵⁹ “who [stand] to benefit from the regulatory action.”³⁶⁰

Using this framework, the FTC concluded that the Board must meet the active supervision requirement if it wants to benefit from state action immunity. “Because North Carolina law requires that six of the eight Board members be North Carolina licensed dentists, the Board is controlled by North Carolina licensed dentists.”³⁶¹ Moreover, dentists perform teeth whitening. Therefore, “Board actions in this area could be self interested.”³⁶²

According to the FTC, the need for active supervision is especially acute when the agency “is not accountable to the public but rather to the very industry it purports to regulate.”³⁶³ This political unaccountability concern was present here: The Board was only accountable to dentists, as “the six dentist members of the Board are elected directly by their professional

355. *In re N.C. Bd. of Dental Exam’rs*, 151 F.T.C. 607, 612 (2011); *see also supra* Part I.B.2.

356. *Dental Exam’rs*, 151 F.T.C. at 613.

357. *Id.* at 620.

358. *Id.* at 621; *see also id.* at 620.

359. *Id.* at 623.

360. *Id.*

361. *Id.* at 626.

362. *Id.*

363. *Id.* at 621.

colleagues, the other licensed dentists in North Carolina.”³⁶⁴ Because the Board couldn’t show that it was actively supervised,³⁶⁵ it wasn’t immune from federal antitrust law. The Fourth Circuit affirmed the FTC’s holding, at least to the extent of requiring active supervision when *both* of the FTC’s factors were present—domination by *and* accountability to market participants.³⁶⁶ (This is the decision on which the Supreme Court has granted cert.³⁶⁷)

The Areeda-Hovenkamp treatise seems to take a position closer to the FTC’s, not requiring the additional element of accountability to market participants:

We would presumably classify as “private” any organization in which a decisive coalition (usually a majority) is made up of participants in the regulated market. This presumption would be rather weak . . . where the competitive relationship between the decision maker . . . and the plaintiff is weak and the potential for anticompetitive effects not particularly strong. It would be weaker still where the decision maker responds to the court, governor, or legislature directly and on an ongoing basis. But the presumption should become virtually conclusive where the organization’s members making the challenged decision are in direct competition with the plaintiff and stand to gain from the plaintiff’s discipline or exclusion.³⁶⁸

Or, as Einer Elhauge puts it, “[F]inancially interested parties cannot be trusted to restrain trade in ways that further the pub-

364. *Id.* at 626.

365. *Id.* at 628–33.

366. N.C. State Bd. of Dental Exam’rs v. Fed. Trade Comm’n, 717 F.3d 359, 368 (4th Cir. 2013), *cert. granted*, 134 S. Ct. 1491 (2014); *see also id.* at 376 (Keenan, J., concurring) (noting that the opinion turns not on the mere presence of market participants on the Board but on the fact that the market participants are elected by other market participants). The Fourth Circuit reviewed the FTC’s legal findings *de novo*, with due regard for the FTC’s expertise, *id.* at 370 (majority opinion), which amounts to *Skidmore* deference, *see Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). This case is also discussed in Alexander Volokh, *Privatized Regulation and Antitrust*, REASON.ORG (July 1, 2013), <http://reason.org/news/show/privatized-regulation-and-antitrust>, [http://perma.cc/X924-49HZ]. For another case in the Fourth Circuit raising broadly similar issues, see First Amended Complaint at ¶¶ 120–21, *Petrie v. Va. Bd. of Medicine*, No. 1:13-cv-1486, 2014 WL 494273 (E.D. Va. Feb. 3, 2014).

367. 134 S. Ct. 1491 (2014).

368. 1A AREEDA & HOVENKAMP, *supra* note 334, ¶ 227b, at 209.

lic interest.”³⁶⁹ The strict view could also be supported by capture-based theories of the state action doctrine, like that advocated by John Wiley.³⁷⁰ Aaron Edlin and Rebecca Haw, surveying recent scholarship on the subject, conclude that “although the various accounts differ in other ways, they all agree that self-dealing, unaccountable decision-makers should face anti-trust liability.”³⁷¹

The Areeda-Hovenkamp treatise thus takes issue with the Ninth Circuit’s approach in the Oregon State Bar case,³⁷² agreeing with the dissent that the self-interest of the lawyers composing the Bar should make the Bar private for state action immunity purposes.³⁷³ The treatise additionally disagrees with approaches like that of the Second Circuit, stating that “state legislative declarations that the body is a ‘public’ corporation”³⁷⁴ or “state mandates that the organization serve the ‘public interest’” should count for little.³⁷⁵ Nor should an entity’s nonprofit status³⁷⁶ count for much: “the typical trade or professional association is *itself* a nonprofit organization dedicated to improving the welfare of its members. The key is not the profit or nonprofit status of the organization, but the identity of its decision-making personnel.”³⁷⁷

369. Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 696 (1991); see also *id.* at 697–708 (supporting “a process test that focuses on whether the decisionmakers controlling the restraints are financially interested,” and noting that state action doctrine channels this question into “more formal, and conclusory, adjudications of whether the board is public or private”).

370. See John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 769–73 (1986).

371. Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, U. PA. L. REV. (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2384948, [perma.cc/AZ3H-THVP].

372. *Hass v. Or. State Bar*, 883 F.2d 1453 (9th Cir. 1989); see also text accompanying *supra* notes 346–48.

373. See 1A AREEDA & HOVENKAMP, *supra* note 334, ¶ 227a, at 207.

374. *Id.*

375. *Id.* ¶ 227a, at 207–08.

376. See *Fuchs v. Rural Elec. Convenience Coop. Inc.*, 858 F.2d 1210, 1217–18 (7th Cir. 1988); text accompanying *supra* note 350.

377. 1A AREEDA & HOVENKAMP, *supra* note 334, ¶ 227a, at 208.

5. Application

How might the distinction between the Fourth Circuit's approach and the FTC and Areeda-Hovenkamp approach play out? The distinction is irrelevant if a state legislature imposes restraints on its own, in which case its action is absolutely immunized under *Parker v. Brown*.³⁷⁸ For example, the Mississippi statute requiring pharmacy benefit managers to disclose their financial statements to the state Board of Pharmacy³⁷⁹ is immunized from antitrust attack because it's the act of the legislature. The Board also, however, has a delegated power to require additional information besides balance sheets and income statements,³⁸⁰ so conceivably particular bits of financial information that the Board might eventually require could still be challenged. The fiduciary duty requirement for pharmacy benefit managers, had it been adopted, would have come entirely from the Board.

If there is to be a challenge, consider the applicability of state action immunity. The Mississippi Board of Pharmacy is appointed by the Governor from lists submitted by the Mississippi Pharmacy Association with input from other pharmacist organizations.³⁸¹ All members must be licensed pharmacists and have at least five years of experience practicing pharmacy in Mississippi.³⁸² These requirements probably make the Board "private" for purposes of state action immunity under the FTC and Areeda-Hovenkamp approach.

The Fourth Circuit's approach would, in addition, require accountability to market actors. At first sight, this seems lacking because the Governor appoints and removes the Board members. But, on the other hand, Board members can only be removed for cause and with procedural protections,³⁸³ so the Governor can't remove a Board member for purely policy reasons. The Governor is also constrained to appoint members

378. 317 U.S. 341, 351–52 (1943).

379. MISS. CODE ANN. § 73-21-157(3) (West 2013).

380. *Id.* § 73-21-157(3)(b).

381. *Id.* § 73-21-75(1).

382. *Id.* § 73-21-75(4)(b)–(c). Apparently, the statute technically allows for a Board member to be a retired pharmacist, as long as he's licensed and experienced in Mississippi, so it's not technically true that all members *must* be currently practicing pharmacists.

383. *Id.* § 73-21-75(5).

suggested by pharmacist associations.³⁸⁴ There is thus a plausible, though not inescapable, argument that the accountability is more to market participants than to politicians.³⁸⁵

The Texas Boll Weevil Eradication Foundation should be private enough to require active supervision under either the Fourth Circuit's or FTC and Areeda-Hovenkamp standards, because it's both peopled with growers and accountable to (that is, elected by) growers.³⁸⁶

Texas landowners in water quality protection zones are private under any test, but as we will see in the next section, they don't engage in anticompetitive behavior, so the point is moot. As for Amtrak, state action immunity is irrelevant because Amtrak is federal, so the federalism concerns animating the state action doctrine³⁸⁷ don't apply.³⁸⁸ Hypothetically, if Amtrak were a state entity, its for-profit nature and its statutory labeling as private should satisfy even the loose approach of the Second, Fifth, and Tenth Circuits.

Whether a state agency like the Mississippi Board of Pharmacy or the Texas Boll Weevil Eradication Foundation will be able to benefit from state action immunity from federal antitrust law will thus depend on the circuit and how strictly it analyzes the agency's structure for signs of privateness. A challenger who can show that an agency is dominated by and accountable to market participants is certainly well off in the Fourth Circuit, though such characteristics may also make the difference in "laundry

384. *Id.* § 73-21-75(3), (5).

385. In the federal constitutional context, "for cause" limitations on removal have been held consistent with political accountability, *see Morrison v. Olson*, 487 U.S. 654, 687-88 (1988); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935), though such limitations might at some point go too far, *see Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151-55 (2010).

386. *See* TEX. AGRIC. CODE § 74.106(c) (West 2013) ("A cotton grower who is eligible to vote in a referendum or election under this subchapter is eligible to be a candidate for and member of the board if the person has at least seven years of experience as a cotton grower and otherwise meets the qualifications for the position."); *id.* § 74.106(f) ("An eligible voter may vote for a cotton grower whose name does not appear on the official ballot by writing that person's name on the ballot.").

387. *See* Fed. Trade Comm'n v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003, 1016 (2013); Fed. Trade Comm'n v. Ticor Title Ins. Co., 504 U.S. 621, 632-33 (1992); *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 370 (1991); *Parker v. Brown*, 317 U.S. 341, 351 (1943).

388. *See, e.g., Warfield Phila., L.P. v. Nat'l Passenger R.R. Corp.*, No. 09-1022, 2009 WL 4043112, at *3-4 (E.D. Pa. Nov. 20, 2009) (entertaining, though rejecting, antitrust claims against Amtrak).

list” circuits like the First (where Judge Breyer had specifically referred to pharmacists³⁸⁹), Ninth, and Eleventh, especially among judges who respect the author of the Areeda-Hovenkamp treatise. As to lesser degrees of privateness, the “laundry list” circuits might still deny state action immunity, but it’s always hard to predict the outcome of a broad-ranging multi-factor test. The agencies are best off in the formalist circuits that merely look at the agency’s legal designation as public.

B. Actual Antitrust Violations

Denying the agency state action immunity is only a first step, which is of no help to a challenger unless the agency’s actions violate the antitrust laws.

1. The Fourth Circuit’s Dental Examiners Reasoning

The Fourth Circuit’s recent *Dental Examiners* opinion³⁹⁰ and the FTC decision that it upheld³⁹¹ illustrate how a board found to lack state action immunity can also be found in violation of antitrust law. The FTC determined that the Board’s action—sending cease-and-desist letters to drive non-dentist teeth whiteners out of the North Carolina market—was anticompetitive,³⁹² and the Fourth Circuit had little trouble upholding that determination.³⁹³

First, using the “quick look” framework,³⁹⁴ the FTC determined that the Board’s conduct was “inherently suspect” because “at its core,” the Board was excluding lower-cost competitors.³⁹⁵ The Board offered some procompetitive justifications for its conduct: first, that teeth whitening by non-dentists carried greater health risks; second, that teeth whitening by non-dentists was illegal; and third, that it acted in good faith.³⁹⁶ Promoting public safety, however, isn’t a recognized excuse for

389. See text accompanying *supra* notes 349–50.

390. *N.C. State Bd. of Dental Exam’rs v. Fed. Trade Comm’n*, 717 F.3d 359 (4th Cir. 2013), *cert. granted*, 134 S. Ct. 1491 (2014).

391. *In re N.C. Bd. of Dental Exam’rs*, Final Order, No. 9343, 2011 WL 6229615 (F.T.C. Dec. 7, 2011).

392. *Id.* at *25.

393. *Dental Exam’rs*, 717 F.3d at 374. The Fourth Circuit reviewed the FTC’s factual findings under the “substantial evidence” standard, *id.* at 370; its legal findings received *Skidmore* deference, see *supra* note 366.

394. *Dental Exam’rs*, 717 F.3d at 374 n.11.

395. See *Dental Exam’rs*, 2011 WL 6229615, at *25.

396. *Id.* at *29, *34.

colluding to restrain trade (and, moreover, the alleged health risks weren't sufficiently proven),³⁹⁷ neither is the illegality of the competition sought to be restrained.³⁹⁸ Good faith likewise isn't a valid antitrust defense.³⁹⁹

Next, using a "rule of reason" analysis,⁴⁰⁰ the FTC determined that the Board (obviously) had market power;⁴⁰¹ this power, combined with the competition-suppressing nature of the conduct, provided indirect evidence of anticompetitive effects.⁴⁰² In any event, the actual abandonment of the market by non-dentist providers as a result of the conduct provided direct evidence of anticompetitive effects.⁴⁰³ These findings shifted the burden to the Board to provide procompetitive justifications, but the same analysis from the "quick look" section likewise showed that these justifications were insufficient.⁴⁰⁴

One final consideration concerns whether the Board, arguably a unitary entity, was capable of concerted action, which is required for a "contract, combination . . . , or conspiracy[] in restraint of trade"⁴⁰⁵ that violates Section 1. (A Section 1 violation requires "concerted," not "independent," action,⁴⁰⁶ unlike, say, monopolization under Section 2,⁴⁰⁷ which can be done by a single actor.)

The discussion of Board members' personal commercial interests in the context of state action immunity⁴⁰⁸ also shows up here. The test for concerted action is functionalist, not formalist:⁴⁰⁹ One needs to look for "'separate economic actors pursuing separate economic interests,' such that the agreement 'deprives the marketplace of independent centers of decisionmaking,' and

397. *Id.* at *30.

398. *Id.* at *34.

399. *Id.*

400. *Id.* at *35–39.

401. *See id.* at *36.

402. *Id.* at *37.

403. *Id.* at *37–38.

404. *See id.* at *38–39.

405. 15 U.S.C. § 1 (2000).

406. *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2208 (2010) (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984))).

407. 15 U.S.C. § 2.

408. *See* text accompanying *supra* notes 355–77.

409. *See Copperweld*, 467 U.S. at 773 n.21.

therefore of ‘diversity of entrepreneurial interests,’ and thus of actual or potential competition.”⁴¹⁰ “[C]ompetitors ‘cannot simply get around’ antitrust liability by acting ‘through a third-party intermediary or “joint venture.””⁴¹¹ Applying this framework, the FTC noted that the dentist Board members operated their own dental practices and were elected by practicing dentists; that they thus had a personal financial interest in limiting the teeth-whitening market; and that they therefore remained separate economic actors.⁴¹²

2. *The Other Cases*

The Board’s action in this case made it one of the easier cases for antitrust analysis, because it involved conduct seeking to actually exclude competitors from a market.⁴¹³ In other cases, the antitrust analysis might be more complicated.

410. *Am. Needle, Inc.*, 130 S. Ct. at 2212 (quoting *Copperweld*, 467 U.S. at 769; *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 57 (1st Cir. 2002); *Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133, 1148–49 (9th Cir. 2003); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 214–15 (D.C. Cir. 1986); PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 1462b, at 193–94 (2d ed. 2003)) (citations omitted) (second omission in original).

411. *Id.* at 2215–16 (quoting *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 335 (2d Cir. 2008) (Sotomayor, J., concurring in the judgment)).

412. *Dental Exam’rs*, 2011 WL 6229615, at *20–21.

413. More precisely, the FTC and the Fourth Circuit may have been wrong here because the cease-and-desist letters may have been protected by *Noerr-Pennington* immunity. See sources cited *supra* note 89. On the applicability of *Noerr-Pennington* to demand letters, see *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 933–39 (9th Cir. 2006), *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1560 (11th Cir. 1992), and *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1367–68 (5th Cir. 1983).

The Board argued it was just trying to enforce state law and that enforcement of state law isn’t an antitrust violation, but the Fourth Circuit disagreed, saying “the Board was acting to regulate third parties in a manner not authorized by state law.” *N.C. State Bd. of Dental Exam’rs v. Fed. Trade Comm’n*, 717 F.3d 359, 373 n.9 (4th Cir. 2013), *cert. granted*, 134 S. Ct. 1491 (2014); see also *id.* at 364 (“[T]he Board does not have the authority to discipline unlicensed individuals or to order non-dentists to stop violating the Dental Practice Act.”); *id.* at 370 (“[L]etters were sent without state oversight and without the required judicial authorization.”). Presumably, though, anyone, including a state board, has a First Amendment right under the Free Speech Clause to tell people that their conduct is illegal and anyone who has a right to sue has a First Amendment right under either the Free Speech Clause or the Petition Clause to send a cease-and-desist letter before suing and thus avoid a lawsuit altogether. It’s not clear whether the distinction between a cease-and-desist letter and “order[ing]” someone to stop violating the law can bear the weight the Fourth Circuit sought to place on it.

Areeda and Hovenkamp give an example of a municipality setting “safety standards forbidding any taxicab operator from working more than ten hours per day.”⁴¹⁴ A private arrangement to that effect would of course be illegal. A municipality would want to claim state action immunity, but suppose the immunity fails because the necessary state authorization is lacking. Presumably there would nonetheless be no antitrust liability because this might be considered “reasonable” regulation.⁴¹⁵

And presumably calling this reasonable wouldn’t require a court to actually do an analysis of the policy.⁴¹⁶ Surely it matters more that a municipality is governmental. “This conclusion is strengthened by the fact that the city is presumably (a) not a seller of taxicab services itself; and (b) not in a position to profit from any cartel limiting output of taxicab services.”⁴¹⁷ Areeda and Hovenkamp suggest that a structural inquiry, similar to that of standard-setting organizations, is appropriate.⁴¹⁸ In such a context, it becomes relevant whether the antitrust plaintiffs and defendant are competitors (and, more generally, whether the defendant has a financial interest in the outcome),⁴¹⁹ whether they’re in vertically related or collateral markets,⁴²⁰ and whether they’re in the same geographic market.⁴²¹

The Mississippi Board of Pharmacy thus seems vulnerable. Once state action immunity is overcome,⁴²² the competitive relation between pharmacists and pharmacy benefit managers—which was already relevant to the state action inquiry under

The Board apparently didn’t adequately raise the *Noerr-Pennington* defense, so it was probably waived. In any case, the reasoning of the *Dental Examiners* case is far more general and would apply even in cases not covered by *Noerr-Pennington*.

414. 1A AREEDA & HOVENKAMP, *supra* note 334, ¶ 228b, at 214.

415. *Id.*

416. Cf. 13 HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 2232a, at 444 (3d ed. 2012) (“[D]irect inquiries into the ‘reasonableness’ of a challenged restraint [in the context of standard-setting] quickly involve the court in a morass of technical issues where neither the judge nor the jury has sufficient expertise to produce acceptable results.”).

417. 1A AREEDA & HOVENKAMP, *supra* note 334, ¶ 228b, at 214.

418. *Id.* at 214 n.15 (citing 13 HOVENKAMP, *supra* note 416, ¶¶ 2232a, 2232d, at 443–44, 452–57).

419. 13 HOVENKAMP, *supra* note 416, ¶ 2232d1, at 452–54.

420. *Id.* ¶ 2232d2, at 454–56.

421. *Id.* ¶ 2232d3, at 457.

422. See text accompanying *supra* notes 378–82, 389.

the FTC and Areeda-Hovenkamp approach⁴²³—can at least create a strong presumption of a substantive antitrust violation. As noted above, the requirement of financial disclosure comes from the legislature, so state action immunity is dispositive. The Board of Pharmacy, however, still has its own discretion to choose what extra information to require, and of course the proposed fiduciary duty for pharmacy benefit managers came entirely from the Board.⁴²⁴ Establishing the anticompetitive effect will still take some proof—one can imagine a challenge to disclosure of financial information because knowing one’s adversaries’ costs helps one to compete against them and can also facilitate collusion among pharmacists. In any event, the structural considerations should make a challenge that much easier.

The same goes for Amtrak, which has a competitive relationship with other railroads, and the Texas Boll Weevil Eradication Foundation, whose growers on its board compete with other regulated growers. On the other hand, it’s hard to argue that homeowners in Texas water quality protection zones are acting anticompetitively by using a neutral state law to exempt themselves from certain water quality regulations.

C. Remedies

The result could be treble damages and attorney’s fees⁴²⁵ for those who are found to have conspired to restrain trade.⁴²⁶ In *City of Lafayette v. Louisiana Power & Light Co.*,⁴²⁷ Justice Blackmun, dissenting, noted that municipalities found in violation of antitrust laws and not shielded by state action immunity would be liable for treble damages.⁴²⁸ The majority punted on the question,⁴²⁹ but the “shall recover threefold the damages”

423. See *supra* Part IV.A.4.

424. See text accompanying *supra* notes 378–80.

425. 15 U.S.C. § 15(a) (2012).

426. There might be some immunity when the challenged acts were reasonably thought to be valid at the time. See, e.g., *Lease Lights, Inc. v. Pub. Serv. Co. of Okla.*, 849 F.2d 1330, 1334 (10th Cir. 1988); 1A AREEDA & HOVENKAMP, *supra* note 334, ¶ 228d, at 222–27 (arguing that “damages, especially treble damages, seem completely unwarranted when a reasonable actor had no substantial reason to believe that the challenged act was unlawful at the time it acted”).

427. 435 U.S. 389 (1978).

428. *Id.* at 442–43 (Blackmun, J., dissenting).

429. See *id.* at 402 & n.22 (majority opinion).

language of the Clayton Act⁴³⁰ is mandatory. Justice Rehnquist, dissenting a few years later, wrote that avoiding this conclusion would “take a considerable feat of judicial gymnastics.”⁴³¹

In Rehnquist’s view, the need to avoid subjecting governmental entities to treble damages counseled interpreting anti-competitive local ordinances not as *violating* antitrust law but merely as being *preempted*.⁴³² That was a dissent, however; the law at the time was that even municipalities could violate antitrust law and be found liable.⁴³³

For municipalities, this is no longer the case. Congress passed the Local Government Antitrust Act in 1984 to protect local governments, their “official[s] or employee[s] . . . acting in an official capacity,”⁴³⁴ or anyone acting under a local government or official’s or employee’s direction.⁴³⁵ Municipalities can still violate antitrust law, but now they can only be enjoined.⁴³⁶

But this statute is of no help to private actors or state agencies that fail the tests for state action immunity.⁴³⁷ In *Hoover v. Ronwin*,⁴³⁸ for instance, the majority and the dissent disagreed over whether it was an antitrust violation for the Arizona Supreme Court’s Committee on Examinations and Admissions to have conspired to restrain trade by reducing the number of attorneys in the state.⁴³⁹ The majority thought it wasn’t a violation because the challenged action was that of the Arizona Supreme Court in its sovereign capacity.⁴⁴⁰ The dissent thought it was a violation because the challenged action was that of the Committee, not the Arizona Supreme Court,⁴⁴¹ and there was no clearly articulated state policy to reduce the number of at-

430. 15 U.S.C. § 15(a).

431. *Cnty. Commc’ns Co., Inc. v. City of Boulder*, 455 U.S. 40, 65 n.2 (1982) (Rehnquist, J., dissenting).

432. *Id.* at 60.

433. Areeda and Hovenkamp agree with Rehnquist. See 1A AREEDA & HOVENKAMP, *supra* note 334, ¶ 223a, at 79–80; *id.* ¶ 228c, at 214–15.

434. 15 U.S.C. § 35(a).

435. *Id.* § 36(a).

436. 1A AREEDA & HOVENKAMP, *supra* note 334, ¶ 228c1, at 215.

437. *Id.* ¶ 227a, at 202 (emphasizing the limited scope of “the federal legislation immunizing local governments from damages liability”); *id.* ¶ 228c1, at 215; *id.* ¶ 228c2, at 220.

438. 466 U.S. 558 (1984).

439. See *id.* at 565–66.

440. See *id.* at 573.

441. See *id.* at 588–89 (Stevens, J., dissenting).

torneys.⁴⁴² But both sides agreed that had there been a violation, the board members would be subject to treble damages.⁴⁴³ *Goldfarb v. Virginia State Bar*⁴⁴⁴ would be another example of this—where the board was denied state action immunity.⁴⁴⁵

This has apparently been the fate of the California Travel and Tourism Commission, which was alleged to have colluded with the rental car industry to fix rental car prices.⁴⁴⁶ The Ninth Circuit found that the Commission—which was chaired by a California cabinet official and whose commissioners were one-third gubernatorial appointees and two-thirds elected by the tourism industry⁴⁴⁷—wasn't acting pursuant to a “clearly articulated” state policy.⁴⁴⁸ Thus, the Ninth Circuit found, the Commission failed *Midcal*'s first prong; the court therefore didn't need to consider whether the Commission had (or required) “active state supervision” under *Midcal*'s second prong.⁴⁴⁹ The case against the Commission was allowed to proceed to trial, and the parties later settled for an amount that included nearly \$6 million in attorneys' fees and costs alone.⁴⁵⁰

Some state agencies will nonetheless be considered “arms of the state” and share the state's sovereign immunity for purposes of the Eleventh Amendment, but other agencies and boards won't. The Supreme Court has explained that the arm-of-the-state inquiry—like the Eleventh Amendment itself—is focused

442. *Id.* at 594.

443. *See id.* at 580–81 n.34 (majority opinion); *id.* at 597–98 (Stevens, J., dissenting) (noting the majority's concern but deflecting it on other grounds); 1A AREEDA & HOVENKAMP, *supra* note 334, ¶ 227a, at 201–02 (“The [Ronwin] dissenters did not acknowledge the harshness of imposing potential treble damage liability on Committee members for the silence of the Arizona court, but perhaps they felt it fair and desirable that Committee members should be in peril of treble damages unless they took the initiative in securing more express court approval of the anti-competitive grading formula.”). Eldin and Haw argue that this result is desirable. *See* Eldin & Haw, *supra* note 371, at pt. IV.A.2.

444. 421 U.S. 773 (1975).

445. *Id.* at 788–92; Edlin & Haw, *supra* note 371, at Pt. IV.A.2.

446. *Shames v. Cal. Travel & Tourism Comm'n*, 626 F.3d 1079, 1081–82 (9th Cir. 2010).

447. *Id.* at 1081.

448. *Id.* at 1084–85.

449. *Id.* at 1085 & n.3.

450. *Shames v. Hertz Corp.*, No. 07-CV-2174-MMA(WMC), 2012 WL 5392159, at *3 (S.D. Cal. Nov. 5, 2012). It's not clear from the opinion how much was paid by the Commission and how much by the rental car companies.

on protecting both the state's dignity and the state's treasury.⁴⁵¹ Operationalizing this two-factor test has been left to the individual federal circuits, with the predictable result that arm-of-the-state jurisprudence "is, at best, confused."⁴⁵² Whether the state is legally liable for the agency's debts is an important factor, but how important is unclear.⁴⁵³ The treasury concern trumps the dignity concern in some circuits,⁴⁵⁴ but dignity can sometimes be more important in others,⁴⁵⁵ and the Eleventh Circuit has stated that the most important factor is how the entity is treated by state courts.⁴⁵⁶

For instance, in the Fourth Circuit, the relevant factors for whether an agency shares the state's sovereign immunity are (1) whether judgments against the entity will be paid by the state or whether recoveries inure to the state's benefit; (2) whether the entity exercises substantial autonomy (this involves looking at who appoints the entity's directors and funds the entity and whether the state can veto the entity's actions); (3) whether the entity is involved with state concerns as opposed to local concerns; and (4) how the entity is treated under state law.⁴⁵⁷ The Fifth Circuit has a similar test, but with more factors: (1) whether state statutes and case law characterize the agency as an arm of the state; (2) the source of funds for the en-

451. See *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47–49, 52 (1994).

452. *Mancuso v. N.Y. State Thruway Auth.*, 86 F.3d 289, 293 (2d Cir. 1996). See generally Jameson B. Bilborrow, *Keeping the Arms in Touch: Taking Political Accountability Seriously in the Eleventh Amendment Arm-of-the-State Doctrine*, 63 EMORY L.J. (forthcoming 2014).

453. Compare, e.g., *Town of Smyrna v. Mun. Gas Auth. of Ga.*, 723 F.3d 640, 651 (6th Cir. 2013) (determining that whether the state is liable is the most important issue), with *Benn v. First Judicial Dist. of Pa.*, 426 F.3d 233, 239–40 (3d Cir. 2005) (finding that financial liability is equal with other factors after *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002)).

454. See *Tucker v. Williams*, 682 F.3d 654, 659 (7th Cir. 2012) (quoting *Peirick v. Ind. Univ.-Purdue Univ. Indianapolis Athletics Dep't*, 510 F.3d, 681, 695 (7th Cir. 2007)); *Gorton v. Gettel*, 554 F.3d 60, 62 (2d Cir. 2009) (citing *Mancuso*, 86 F.3d at 293); *Thomas v. St. Louis Bd. of Police Comm'rs*, 447 F.3d 1082 (8th Cir. 2006).

455. See *Pucci v. Nineteenth Dist. Court*, 628 F.3d 752, 761 (6th Cir. 2010) (stating that although treasury concern is generally most important, there can be sovereign immunity based on other factors even when treasury concern cuts the other way).

456. See *Ross v. Jefferson Cnty. Dep't of Health*, 701 F.3d 655, 659 (11th Cir. 2012).

457. *United States ex rel. Oberg v. Ky. Higher Educ. Student Loan Corp.*, 681 F.3d 575, 580 (4th Cir. 2012); see also *S.C. Dep't of Disabilities & Special Needs v. Hoover Universal, Inc.*, 535 F.3d 300, 305–07 (4th Cir. 2008); *Md. Stadium Auth. v. Ellerbe Becket, Inc.*, 407 F.3d 255, 261 (4th Cir. 2005); *Kitchen v. Upshaw*, 286 F.3d 179, 185 (4th Cir. 2002).

tity; (3) the entity's degree of autonomy; (4) whether the entity is concerned primarily with local concerns; (5) whether the entity has authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property.⁴⁵⁸

An extra twist is that most circuits deny sovereign immunity to private entities.⁴⁵⁹ Some of the private entities that show up in the cases are indisputably private corporations contracting with the state,⁴⁶⁰ but for others, one could make a colorable argument that they were public.⁴⁶¹ Sometimes courts seem to be merely applying their multi-factor "arm of the state" tests to these entities, but at least the Ninth Circuit has an explicit doctrine against extending sovereign immunity to private parties.⁴⁶² It's thus possible that, if an entity is found to be private under some other test—for example, the antitrust state action immunity test discussed above⁴⁶³—one will be able to import that finding of privateness as at least one factor cutting against sovereign immunity.

In any event, even if the entity is covered by sovereign immunity, it will still be subject to injunctive suits. The FTC primarily proceeds by cease-and-desist orders, though it also has

458. *Raj v. La. State Univ.*, 714 F.3d 322, 329 (5th Cir. 2013); *Delahoussaye v. City of New Iberia*, 937 F.2d 144, 147 (5th Cir. 1991); *see also Black v. N. Panola Sch. Dist.*, 461 F.3d 584, 596–98 (5th Cir. 2006); *United States ex rel. Barron v. Deloitte & Touche, L.L.P.*, 381 F.3d 438, 440 (5th Cir. 2004).

459. Justin C. Carlin, *State Sovereign Immunity and Privatization: Can Eleventh Amendment Immunity Extend to Private Entities?*, 5 FIU L. REV. 209, 212–13 (2009) (limiting this rule to the First, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits; only the Eleventh Circuit has extended sovereign immunity to a private entity contracting with the state, *see Shands Teaching Hosp. & Clinics, Inc. v. Beech St. Corp.*, 208 F.3d 1308, 1311 (11th Cir. 2000)).

460. *See, e.g., Del Campo v. Kennedy*, 517 F.3d 1070, 1072 (9th Cir. 2008); *Shands*, 208 F.3d at 1311; Carlin, *supra* note 459, at 222–25.

461. *See, e.g., United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 721 (10th Cir. 2006) (debating the status of a laboratory owned by University of Utah Medical Center); *Takle v. Univ. of Wis. Hosp. & Clinics Auth.*, 402 F.3d 768, 769–71 (7th Cir. 2005) (debating the status of a hospital spun off by University of Wisconsin but retaining many institutional ties with University); *Fresenius Med. Care Cardiovascular Res., Inc. v. P.R. & the Caribbean Cardiovascular Ctr. Corp.*, 332 F.3d 56, 64, 71 (1st Cir. 2003); *Sw. Bell Telephone Co. v. City of El Paso*, 243 F.3d 936 (5th Cir. 2001); Carlin, *supra* note 459, at 225–29.

462. *Del Campo*, 517 F.3d at 1074 (citing *United States ex rel. Ali v. Daniel, Mann, Johnson, & Mendenhall*, 355 F.3d 1140, 1147 (9th Cir. 2004)); Carlin, *supra* note 459, at 223–25.

463. *See supra* Part IV.A.

the power to assess civil penalties,⁴⁶⁴ and even private plaintiffs can pursue injunctions under *Ex parte Young*.⁴⁶⁵ Such suits would still require defendants to pay both their own and the prevailing plaintiff's litigation costs.⁴⁶⁶

Not surprisingly, given the multitude of factors and unclear tests, it's hard to say whether some of our example organizations are potentially subject (if found in violation of antitrust law) to treble damages. Amtrak is easy; it's a for-profit entity, so it should be liable.⁴⁶⁷ The Texas water quality protection zone landowners are likewise easy; they're just private landowners.⁴⁶⁸

The North Carolina Board of Dental Examiners supports itself through fees⁴⁶⁹ and seems fairly autonomous, which cuts in favor of liability, but, on the other hand, it's also treated like an agency under state law (and its employees like state employees)⁴⁷⁰ and deals with an issue of statewide concern, which cuts in favor of immunity. Ultimately, the Board probably has sovereign immunity because North Carolina statutes envision that in case of tort judgments against occupational boards, the state will pay the excess liability over \$150,000 unless the Board's insurance covers more.⁴⁷¹

The Mississippi Board of Pharmacy is funded by licensing fees and penalties,⁴⁷² but the money is deposited into the state treasury "in a special fund to the credit of the board," and funds can be expended only by legislative appropriation.⁴⁷³ So perhaps the state is liable for its debts, but it's hard to tell from the statute. It's also characterized as a state board by the statute⁴⁷⁴ and is concerned with statewide problems, which again cuts in favor of

464. 15 U.S.C. § 45 (2012); *see also* 1A AREEDA & HOVENKAMP, *supra* note 334, ¶ 231b, at 245.

465. 209 U.S. 123, 157 (1908).

466. 15 U.S.C. § 15a; 1A AREEDA & HOVENKAMP, *supra* note 334, ¶ 227a, at 202–03.

467. *Amtrak National Facts*, AMTRAK, <http://www.amtrak.com/ccurl/335/968/Amtrak-National-Fact-Sheet-FY2012.pdf>, [perma.cc/Q4ZT-K9WX] (last visited Feb. 5, 2014).

468. TEX. WATER CODE ANN. § 26.179(d) (West 2013).

469. N.C. GEN. STAT. ANN. § 90-39 (West 2013).

470. *Id.* § 93B-16(b).

471. *Id.* §§ 93B-16(b), 143-299.4; *see also* Petitioner's Opening Brief at 7, *N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n*, 717 F.3d 359 (2013) (No. 12-1172), 2012 WL 2931297.

472. MISS. CODE ANN. §§ 73-21-83, 73-21-103 (West 2013).

473. *Id.* § 73-21-113.

474. *Id.* § 73-21-73.

immunity.⁴⁷⁵ On the other hand, the only state role is appointment and removal of board members by the Governor,⁴⁷⁶ which cuts in favor of liability. It's unclear from the statute whether it has the right to hold and use property. This factor is one of the prongs of the Fifth Circuit test, discussed above.⁴⁷⁷ As for suing and being sued in its own name, there are certainly cases involving the Board both as plaintiff and defendant;⁴⁷⁸ this again is a factor that cuts in favor of liability.⁴⁷⁹

The Texas Boll Weevil Eradication Foundation is a separate nonprofit corporation,⁴⁸⁰ which cuts in favor of liability, though it's also labeled a "quasi-governmental entity,"⁴⁸¹ which (depending on how strong the "quasi" is) might cut in favor of immunity. It's funded through fines and assessments and has power to borrow money,⁴⁸² though this doesn't tell us whether the government is on the hook for its debts. The Foundation does have some autonomy, though a State commissioner retains some authority. His approval is required to change the number of Board positions or change zone representations on the Board.⁴⁸³ The Commissioner also can exempt a grower from excessive penalties,⁴⁸⁴ and the Board can only spend money on Commissioner-approved pro-

475. At least one court has considered the labeling as a state agency dispositive and held the Board immune. *Claiborne v. Miss. Bd. of Pharmacy*, No. 3:07-CV-2.77-HTW-LRA, 2011 WL 3684431, at *4 (S.D. Miss. Aug. 22, 2001).

476. MISS. CODE ANN. § 73-21-75.

477. See text accompanying *supra* note 459.

478. See, e.g., *Garrett-Woodberry v. Miss. Bd. of Pharmacy*, 300 F. App'x 289 (5th Cir. 2008); *Claiborne*, 2011 WL 3684431; *Riddle v. Miss. State Bd. of Pharmacy*, 592 So. 2d 37 (Miss. 1991); *House v. Miss. State Bd. of Pharmacy*, 592 So. 2d 946 (Miss. 1991); *Duckworth v. Miss. State Bd. of Pharmacy*, 583 So. 2d 200 (Miss. 1991); *Miss. State Bd. of Pharmacy v. Baker*, 365 So. 2d 67 (Miss. 1978); *Miss. State Bd. of Pharmacy v. Steele*, 317 So. 2d 33 (Miss. 1975); *Miss. State Bd. of Pharmacy v. Clemer*, 317 So. 2d 37 (Miss. 1975).

479. *Carter v. Mississippi Department of Human Services*, No. 3:05-CV-190 HTW-JCS, 2006 WL 2827691 (S.D. Miss. Sept. 29, 2006), states that the Mississippi Board of Nursing has been found to be an arm of the state and immune under the Eleventh Amendment. *Carter*, 2006 WL 2827691, at *2 (citing *O'Neal v. Miss. Bd. of Nursing*, 113 F.3d 62 (5th Cir. 1997)). But *O'Neal*, on inspection, is about official immunity for Board members, not sovereign immunity for the Board. Still, for what it's worth, *O'Neal* does briefly mention that plaintiffs conceded that the Board of Nursing had sovereign immunity. *O'Neal*, 113 F.3d at 64.

480. TEX. AGRIC. CODE § 74.1011 (West 2013).

481. *Id.* §§ 74.101(3), 74.129.

482. *Id.* §§ 74.115, 74.108(3).

483. *Id.* § 74.107(c).

484. *Id.* § 74.116.

grams.⁴⁸⁵ The Foundation is concerned with the statewide problem of boll weevil eradication, which cuts in favor of immunity. The Foundation can sue in its own name, which cuts in favor of liability,⁴⁸⁶ but the statute also declares the Foundation “immune from lawsuits and liability,”⁴⁸⁷ which of course can cut in favor of immunity depending on how relevant the state-law sovereign immunity treatment is to federal law.⁴⁸⁸

In short, I lean strongly toward sovereign immunity for the North Carolina Board of Dental Examiners but wouldn’t draw any firm conclusions on the immunity of the Mississippi Board of Pharmacy or the Texas Boll Weevil Eradication Foundation. Instead, I would simply reiterate two points: that the boards would at least possibly be liable, and that injunctive suits and attorney’s fees are issues regardless.

Putting the conclusions on state action immunity, substantive antitrust violations, and liability together, Amtrak should be non-immune, in violation, and fully liable. The North Carolina Board of Dental Examiners was found non-immune in the Fourth Circuit and may be found non-immune in the intermediate circuits. It’s in violation and it might be fully liable. The Mississippi Board of Pharmacy’s state action immunity likewise depends on the circuit. It may be found in violation, depending on the anticompetitive effect of its activities, and it might be fully liable. The Texas Boll Weevil Eradication Foundation’s state action immunity depends on the circuit. It may be found in violation, depending on the anticompetitive effect of its activities, and it might be fully liable. The Texas landowners in water quality protection zones are non-immune and fully subject to liability but are unlikely to be substantively violating the law.

V. CONCLUSION

These are just some of the most salient doctrines that are currently being used, often successfully, to challenge the legality

485. *Id.* § 74.109(h).

486. *See, e.g.,* *Garza v. Tex. Boll Weevil Eradication Found.*, Nos. 03-11-00787-CV, 03-11-00788-CV, 03-11-00789-CV, 03-11-00790-CV, 2012 WL 6726685 (Tex. Ct. App. Dec. 19, 2012).

487. TEX. AGRIC. CODE § 74.129; *see also id.* § 74.109(f).

488. As noted above, it’s relevant in the Eleventh Circuit. *See* text accompanying *supra* note 459.

of private regulatory delegations. Federal non-delegation doctrine is unlikely to be a successful avenue for challenging these delegations. State doctrines like that in Texas will probably fare much better. The Due Process Clause seems quite promising for challenging private regulators, especially if the regulators are competitors of the regulated parties and have mandatory control over coercive processes. Due process cases can also lead to money damages against the specific individuals responsible under 42 U.S.C. § 1983 or *Bivens*. (In jurisdictions that confuse non-delegation and due process, the result under their non-delegation analysis should be similar to the result under a proper due process analysis.)

Federal antitrust law likewise seems promising, especially if the regulators are competitors of the regulated parties. State action immunity is then more likely to fail, at least in the more stringent circuits, a substantive antitrust violation is more likely to succeed because of the presence of structural anticompetitive factors, and the more independent the regulators are from the state, the more likely they are to be fully liable for treble damages. Even if treble damages aren't available, injunctive relief and the litigation costs that come with antitrust suits are still an issue.

Even more interesting is the proliferation of public-private tests: the familiar "state action" test for federal constitutional law, including the Due Process Clause; the public-private test for Texas's private non-delegation doctrine; the public-private test for the D.C. Circuit's recent private non-delegation doctrine; and the various circuits' and the FTC's tests for whether state action immunity applies. One can easily dismiss the characterization of Amtrak or the North Carolina Board of Dental Examiners as "private," but one would be wrong. At the very least, one would be wrong to presume that entities with governmental powers are necessarily public or that a finding that an organization (like Amtrak) is public for some legal doctrines implies that it can't be private for other doctrines.

Regulators are, therefore, advised to be extremely careful. Those who think of themselves as public officials might find that they are sadly mistaken, all the more sadly to the extent that they find themselves having to pay out-of-pocket damages to their regulatory victims.