# VIGILANTE FEDERALISM

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*In battles over abortion, religion, sexuality, gender, and race, state legislatures are mass producing a new weapon. From Texas's S.B. 8 to book bans and a flurry of bills empowering parents to sue schools that acknowledge LGBTQ+ identities or implement anti-racist curricula, state legislatures are enacting laws that call on private parties—and sometimes only private parties—to enforce their commands. These laws were initially viewed as a means of implementing unlawful policies while escaping judicial review. But manipulating judicial review is only the tip of the iceberg. The proliferation of what we term "private subordination regimes" bolsters the right-wing anti-democratic project by legalizing vigilantism and encouraging (White, Christian) partisans to police the most intimate aspects of other people's lives and force Black Americans, women, and LGBTQ+ persons out of public spaces.*

*The spread of private subordination regimes through states such as Texas, Florida, Iowa, Idaho, and Tennessee marks an alarming shift in American federalism. Enacted against the backdrop of a federal legislative process structured to thwart democratic preferences, the Supreme Court's erasure of longstanding constitutional rights, and the Court's intense skepticism toward national regulatory power, private*

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*subordination laws do not validate Justice Brandeis' vision of policy learning through "laboratories of democracy." Instead, these laws (often verbatim copies from state-to-state) promote a larger project of entrenching MAGA policies, insulating those policies from democratic control, and cementing right-wing politicians' hold on power notwithstanding their numerically shrinking base. Rather than enriching our democracy, this strategy further distorts our national politics and cries out for tit-for-tat reprisals, as blue states repurpose private subordination regimes to advance progressive priorities.*

*This Article makes the case for viewing private subordination via legalized vigilantism as a noteworthy development in anti-democratic politics, explains the functions that private subordination regimes perform, and posits that they are emblematic of a new "vigilante federalism." In this permutation of American federalism, state power is first devolved then privatized by turning it over to private partisans newly authorized to surveil members of their communities and newly empowered (and urged) to enforce the MAGA agenda. Understanding vigilante federalism as both a symptom and an accelerant of today's corrosive political dynamics, the Article examines how vigilante federalism is reframing power in the United States and explores what can be done to arrest it.*

INTRODUCTION .......... 1189
I. PRIVATE SUBORDINATION ACTIONS .......... 1194
A. Defining Private Subordination .......... 1195
B. The Landscape of Private Subordination Regimes .......... 1198
1. *Educational Gag Laws* .......... 1198
2. *Erasing LGBTQ+ People* .......... 1202
3. *Eliminating Access to Legal Abortion* .......... 1207
4. *Future Targets: Voting, Immigration, and Public Health* .......... 1211
C. Private Subordination and the Emergence of Vigilante Federalism .......... 1213
D. The Judicial Non-Response to Private Subordination Regimes .......... 1220
II. POLITICAL FUNCTIONS OF PRIVATE SUBORDINATION .......... 1222
A. Manipulating Rights .......... 1228
B. Bolstering the Grievance-Industrial Complex .......... 1234
C. Encouraging Legal Vigilantism .......... 1236
III. PROGRESSIVE RESPONSES AND THEIR IMPLICATIONS FOR AMERICAN FEDERALISM .......... 1245
A. Legal Contestation .......... 1247
B. Blue State Analogs and Countermeasures .......... 1250

1. *Counter-Litigation* . . . . . . . . . . . . . . . . . . . . . . . . 1250
2. *Repurposing Private Subordination Regimes to Advance Progressive Goals* . . . . . . . . . . . . . 1252
C. Market Solutions . . . . . . . . . . . . . . . . . . . . . . . . . . . 1258
1. *Philanthropic Pipelines* . . . . . . . . . . . . . . . . . . . . 1258
2. *Corporate/Commercial Pipelines* . . . . . . . . . . 1261
CONCLUSION . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 1263

## INTRODUCTION

In the fall of 2021, the legal commentariat[1] and the broader public[2] were transfixed by the battle over S.B. 8,[3] Texas's "heartbeat" abortion law.[4] Enacted earlier that year with the backing of hardline anti-choice activists,[5] the law bans doctors from performing abortions after approximately six weeks of pregnancy—a time when many people do not yet realize they are pregnant.[6]

Well aware that the federal courts would enjoin a traditional abortion ban administered by state officials—as they had done time and time again under *Roe* and *Casey*[7]—S.B. 8's

[1] *See, e.g.*, Georgina Yeomans, *Ordering Conduct Yet Evading Review: A Simple Step Toward Preserving Federal Supremacy*, 131 YALE L.J.F. 513 (2021); Amy Howe, *Supreme Court Set to Hear Arguments in Two Challenges to Texas Law That Bans Most Abortions*, SCOTUSBLOG (Oct. 29, 2021), https://www.scotusblog.com/2021/10/supreme-court-set-to-hear-arguments-in-two-challenges-to-texas-law-that-bans-most-abortions/ [https://perma.cc/RSR3-CLUM].

[2] *See, e.g.*, Mabinty Quarshie, *What to Know About Texas Abortion Law That Bans the Procedure Once Heartbeat Is Detected*, USA TODAY (Sept. 1, 2021), https://www.usatoday.com/story/news/politics/2021/09/01/texas-abortion-law-what-to-know/5679581001/ [https://perma.cc/7JRD-RW6R]; Esther Wang, *Here's What Happens When Texas's Extreme Abortion Ban Goes into Effect*, NEW REPUBLIC: THE SOAPBOX (Aug. 31, 2021), https://newrepublic.com/article/163485/heres-happens-texass-extreme-abortion-ban-goes-effect [https://perma.cc/HBZ9-UCWM].

[3] TEX. HEALTH & SAFETY CODE ANN. § 171.201.

[4] S.B. 8's abortion ban applies after the detection of "cardiac activity." *Id.* § 171.201(1), which, as defined in S.B. 8, occurs long before the heart is formed. Bethany Irvine, *Why "Heartbeat Bill" Is a Misleading Name for Texas' Near-Total Abortion Ban*, TEX. TRIB. (Sept. 2, 2021), https://www.texastribune.org/2021/09/02/texas-abortion-heartbeat-bill/ [https://perma.cc/3JBB-HGQM].

[5] Jordan Smith, *Providers Sue to Block Law That Would Eliminate Nearly All Abortions in Texas*, THE INTERCEPT (July 15, 2021), https://theintercept.com/2021/07/15/texas-abortion-lawsuit-sb8/ [https://perma.cc/5WWL-5AY8].

[6] *See* Brief of Leading Medical Organizations as Amici Curiae in Support of Petitioners at 12–13, Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021) (No. 21-463).

[7] Smith, *supra* note 5 (quoting a statement by the legislative director for Texas Right to Life that S.B. 8 was "crafted to lead to judicial victories" and "succeed where 11 other states have failed"). On the precedential force of Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood v. Casey, 505 U.S. 833

drafters added a special twist. They vested enforcement authority in the hands of private actors—and only private actors—empowered to file private civil actions.[8] Such suits could be brought against anyone who "aids or abets the performance or inducement of an abortion" or "intends" to do so.[9] Because the federal courts had always blocked state enforcement—and seemingly only state enforcement—of abortion bans, Texas gambled on private enforcement, hoping to exploit a loophole in justiciability doctrine.

Sure enough, the gambit succeeded. When a challenge arrived at the Supreme Court, the Justices looked the other way.[10] Ten months before the Court disavowed the longstanding constitutional right to reproductive autonomy,[11] *Roe* was a dead letter in America's second largest state.[12]

S.B. 8 is often described as a challenge to the federal courts' authority to enforce the Constitution—and it is. But the law's evasion of judicial review obscures a larger story about the political uses of civil litigation and the changing dynamics of American federalism. S.B. 8 is merely one example of a broader trend among state legislatures to use private rights of action to penalize and suppress highly personal and often constitutionally protected activities—not only abortions but

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(1992), see, for example, Cary Franklin, Whole Woman's Health v. Hellerstedt *and What It Means to Protect Women*, *in* REPRODUCTIVE RIGHTS AND JUSTICE STORIES (Melissa Murray, Katherine Shaw & Reva B. Siegel eds., 2019) (noting the Supreme Court's consistent pattern of reaffirming the holding in *Casey* and striking down state laws that seek, among other things, "[to] offer health justifications for abortion regulations"); Melissa Murray, Commentary, *The Symbiosis of Abortion and Precedent*, 134 HARV. L. REV. 308, 310 (2020) ("Because of stare decisis, Justices, regardless of their views as to whether *Roe* was correctly decided or properly reasoned, have been reluctant to jettison entirely the 1973 decision. And yet, the Court's failure to formally overrule *Roe* has cemented the decision's position as a precedent, legitimizing the abortion right to the dismay of abortion opponents.").

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

9 *Id.* § 171.208(a)(2)–(3).

10 Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021).

11 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

12 *See* Adam Serwer, *A Strategy of Confusion: Don't Be Fooled by the Supreme Court's Veil of Proceduralism on Its Texas Abortion Decision*, THE ATLANTIC (Sept. 10, 2021), https://www.theatlantic.com/ideas/archive/2021/09/republicans-strategy-confusion/620029/ [https://perma.cc/6A4Q-8ZHY] ("Although the *Roe* decision hasn't been officially overturned, a legal landscape in which states pass abortion bans that the Supreme Court pretends to be powerless to address is one in which the decision has no legal force."). One study estimates that S.B. 8 caused the number of abortions performed in Texas to fall by about half on a year-to-year basis. KERI WHITE ET AL., TEX. POL'Y EVALUATION PROJECT, INITIAL IMPACTS OF TEXAS' SENATE BILL 8 ON ABORTIONS IN TEXAS AND AT OUT-OF-STATE FACILITIES 1 (Oct. 2021), http://sites.utexas.edu/txpep/files/2021/11/TxPEP-brief-SB8-inital-impact.pdf [https://perma.cc/VL7E-J4DY].

also LGBTQ+ rights and even the rights of teachers and students to discuss race, gender, and sexual orientation in the classroom. These private rights of action have sweeping real-world effects. By seizing on conduct that is front-and-center in today's culture wars—and by deputizing (and subsidizing[13]) private partisans to prosecute those wars against abortion providers, educators, and school administrators who support their gay and transgender students—these new laws unleash a form of legal vigilantism upon American society. These state-sponsored regimes of private coercion draw inspiration from the cruelest and most corrosive aspects of American history to support their latter-day manifestations in contemporary MAGA politics.

With GOP-controlled legislatures leading the charge—at least a hundred bills have been introduced since 2021[14]—the new laws such as Florida's so-called "Don't Say Gay" and Tennessee's anti-trans bathroom law are already changing the legal and political landscape. They've stripped historically subordinated groups and their allies of the ability to engage in constitutionally protected conduct; they've empowered private actors to enforce traditional understandings of caste and status in the public sphere; and they've further legitimated political violence as an acceptable component of civic discourse. The interplay of these dynamics, in turn, marks a seismic shift in American federalism. With the advent of private subordination regimes, the states function less as Brandeisian laboratories of democracy[15] and more as Trumpian engines of grievance politics.

This Article identifies and examines the nascent surge in private subordination regimes and understands it as both a symptom and an accelerant of today's dominant legal, cultural, and political movements. Most broadly, we argue that the laws contribute to a dynamic we term "vigilante federalism." Vigilante federalism refers, first, to the aggressive decentralization

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13 *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 171.208(b)(2) (authorizing claimants to recover "statutory damages in an amount of not less than $10,000 for each abortion that the defendant performed or induced in violation of this subchapter, and for each abortion performed or induced in violation of this subchapter that the defendant aided or abetted"); *id.* § 171.208(b)(3) (costs and attorney's fees); *id.* § 171.208(i) (barring courts from awarding costs or attorney's fees under the Texas Rules of Civil Procedure to a defendant sued under S.B. 8).

14 *See infra* sections I.B.1–.3.

15 *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

and fragmentation of power in the United States—centrifugal pressures away from Washington, D.C. caused by a structurally warped Congress, a Supreme Court intensely skeptical of federal exercises of legislative and regulatory authority, and extreme political and cultural polarization that make it nearly impossible for federal officials to design and implement national policies that bridge the gaping red-blue divide. The second aspect of vigilante federalism involves the way that red states (whose officials are chief contributors to polarization and paralysis at the national level) use newly devolved power. Operating in the vacuum created by federal legislative and regulatory inactivity and mindful that their archconservative base is diminishing as a share of the electorate, state legislatures deputize private actors to wage and win the culture wars by targeting the likes of abortion providers, trans kids, and teachers who adopt inclusive curricula.

We begin in Part I by describing and situating private subordination regimes. We understand private subordination as a species of private statutory enforcement—one defined by its division of the polity into an authentic (often Christian nationalist) "us" and an illegitimate "them" unworthy of the civil and political rights attendant to democratic equality. Private subordination regimes[16] vary on dimensions including whom they empower to sue, the defendants and activities laws target, the financial incentives they provide to private enforcers, and the extent to which the laws are engineered to evade judicial review in federal court. But a common thread runs through the laws: they empower culture warriors, who often have suffered no material harm, to wield the power of the state to suppress the rights of disfavored or marginalized individuals and groups (or their allies).

In Part II, we explore the links among private subordination regimes and the broader right-wing attack on pluralist, multiracial democracy in the United States epitomized by the January 6, 2021, assault on the Capitol. We posit that private subordination regimes are both the *product* of that movement and effort to *catalyze* it, which work by shifting legal and cul-

[16] Our use of "private subordination regimes" is an adaption of Sean Farhang's understanding of a "private enforcement regime." *See* SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 3–4 (2010) (using "private enforcement regime" to refer to legislative decisions about "who has standing to sue, which parties will bear the costs of litigation, what damages will be available to winning plaintiffs, whether a judge or jury will make factual determinations and assess damages, and rules of liability, evidence, and proof").

tural power from the marginalized groups that the regimes target to the traditionalist White Christian actors who enforce them.

Private subordination regimes flip conventional understandings of rights and dignity on their head to empower individuals motivated by moral outrage to surveil, sue, and punish their neighbors, teachers, colleagues, healthcare providers, and other (politically disfavored) members of their communities. In so doing, these laws and the private partisans they empower promote a coherent, and inescapably anti-democratic, political project. Following a script reminiscent of the Fugitive Slave Acts and, later, the written and unwritten rules of Jim Crow, today's private subordination regimes authorize and legitimate what can only be called *legal vigilantism*, deputizing and directing the MAGA GOP base to reimpose or reinforce a Christian nationalist caste system at precisely the moment when that system is imperiled by an increasingly diverse and inclusive electorate.[17] And they lend support to extra-legal forms of vigilantism, a development that is particularly alarming at a moment when laws and lawmakers are seemingly inviting more violence than at any time since Jim Crow's demise.[18]

Having explored the political functions that private subordination regimes perform, Part III maps potential responses, focusing on those that progressive lawyers, activists, and policymakers can implement without having to negotiate new federal legislation, and the implications of those responses for American federalism. While a range of responses are available to progressives, they face a dilemma that does not burden proponents of red state private subordination regimes. On the one hand, a strategy of full counter-mobilization targeting the parties, funders, and interest groups that have pushed for the enactment of these laws risks widening political polarization

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[17] On the "MAGA faction" and its status as the dominant subgroup within the factions that make up the modern GOP, see Lilliana Mason, Julie Wronski & John V. Kane, *Activating Animus: The Uniquely Social Roots of Trump Support*, 115 AM. POL. SCI. REV. 1508, 1514–16 (2021).

[18] Of course, we recognize that even at its best, American democracy has been an imperfect and imperfectly realized project. In highlighting private subordination regimes' contribution to anti-democratic politics, we aim to contribute to the broader literature on democratic erosion in the United States. For recent contributions, see generally, JACOB M. GRUMBACH, LABORATORIES AGAINST DEMOCRACY: HOW NATIONAL PARTIES TRANSFORMED STATE POLITICS (2022); TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2018); Nikolas Bowie, Commentary, *Antidemocracy*, 135 HARV. L. REV. 160 (2021); K. Sabeel Rahman, *(Re)Constructing Democracy in Crisis*, 65 UCLA L. REV. 1552 (2018).

and further inflaming cultural and religious conflicts. On the other hand, failing to respond to the proliferation and expansion of private subordination regimes constitutes a form of unilateral disarmament—one that allows red states to shape the meaning of rights and national political dynamics unchecked. In part because of this dilemma, and in part because of the realities of national politics, none of the responses we consider helps us return to the status quo prior to S.B. 8, the "Don't Say Gay" law, and the post-insurrection surge in book bans and anti-critical race theory laws.

For this reason—and regardless of whether and how blue states counter—we are confident that vigilante federalism represents a durable development in our law and politics. It also creates new political realities. Private subordination regimes shape the media landscape, mobilize interest groups the laws favor, disempower groups they target, open up new avenues for implementing state regulation and challenging federal regulation, and alter the balance of power among the federal government, the states, and private factions, providing a striking illustration of the truism that "policy creates politics."[19] These laws are part of a larger story of reform and counter-mobilization—one that has long shaped the meaning of rights and governance in the United States, and will continue to do so well into the future.

## I
## PRIVATE SUBORDINATION ACTIONS

Since Joe Biden won the 2020 presidential election, Republican-controlled state legislators have introduced and enacted a wave of laws that empower private culture warriors to sue neighbors, educators, and medical professionals and, if successful, recover substantial financial bounties. These new laws do not merely create private rights of action—i.e., authorize private parties to file suit. They create *private subordination rights* that empower authoritarian-minded citizens to enforce their White, Christian understanding of morality and citizenship and, in the process, subordinate marginalized groups—Black Americans, women, LGBTQ+ persons—and their allies.

We term laws authorizing such actions "private subordination regimes," the cases filed under them "private subordination actions," and the general phenomenon they reflect "private

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19 *See* E. E. SCHATTSCHNEIDER, POLITICS, PRESSURES AND THE TARIFF 288 (1974) (1935) ("New policies create a new politics.").

subordination." Here, we introduce the phenomenon of private subordination, explain how private subordination regimes both borrow from earlier forms of private, statutory enforcement and depart, often significantly, from those precedents, and survey the spread of private subordination regimes through the American South and Midwest. We then consider the political and institutional conditions that have enabled the explosion of private subordination regimes and show that the U.S. Supreme Court has given them a free pass to operate as intended. The result is a powerful new force in our law and politics, one whose political and regulatory functions we examine in Part II.

### A. Defining Private Subordination

Legislatures in the United States have long used private, civil litigation as a tool for implementing, enforcing, and elaborating statutory policy.[20] What scholars term "private enforcement" occurs when private parties bring litigation that advances public regulatory goals[21] and, more specifically, when suits are brought under statutes that combine private rights of action with incentives that encourage private parties and the attorneys who represent them to take on the work of statutory enforcement.[22] From the earliest days of the republic, the political functions that private enforcement serves have been bound up with debates over how expansive and inclusive our representative democracy ought to be. The Fugitive Slave Act of 1793, the first of a pair of slavery-reinforcing private subordination regimes,[23] empowered slave owners, their agents, and attorneys "to seize or arrest" alleged fugitives and obtain certificates authorizing their return to slavery.[24] Any person who "obstruct[ed] or hinder[ed] such claimant, his agent or attorney" was to "forfeit and pay the sum of five hundred

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[20] *See* David L. Noll & Luke Norris, *Federal Rules of Private Enforcement*, 108 CORNELL L. REV. (forthcoming 2023) (manuscript at 11–15).

[21] *See, e.g.*, BRIAN T. FITZPATRICK, THE CONSERVATIVE CASE FOR CLASS ACTIONS 34 (2019) (understanding private enforcement as a "purer form of privatization" in which "the private bar su[es] on behalf of private plaintiffs whenever the bar and the plaintiffs deem it desirable to do so").

[22] *See, e.g.*, Noll & Norris, *supra* note 20, at 6; Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 639 n.2 (2013) ("We use the phrase 'private enforcement' for both enforcement initiated by private parties but taken over by public officials as well as enforcement initiated and prosecuted by private parties.").

[23] *See* ANDREW DELBANCO, THE WAR BEFORE THE WAR: FUGITIVE SLAVES AND THE STRUGGLE FOR AMERICA'S SOUL FROM THE REVOLUTION TO THE CIVIL WAR 20–21 (2018); Aziz Z. Huq, *The Private Suppression of Constitutional Rights*, 101 TEX. L. REV. 1259, 1274–1277 (2023).

[24] Fugitive Slave Act of 1793, ch. 7, § 3, 1 Stat. 302.

dollars" that the slaver could subsequently recover through an action for debt.[25] In 1863, Congress again turned to private statutory enforcement in the False Claims Act, a qui tam law enacted to combat wartime profiteering and fraud against the Union army.[26]

From these early forerunners, private enforcement has evolved into a major tool of regulatory governance.[27] For example, the Fair Labor Standards Act of 1938 gives employees the right to sue for unpaid wages, overtime, liquidated damages, and attorney's fees.[28] Title VII of the Civil Rights Act of 1964 creates a hybrid public-private enforcement regime in which persons "aggrieved" by an unlawful employment practice may, after filing a charge with the Equal Employment Opportunity Commission, initiate a federal suit seeking damages and injunctive relief.[29] And a variety of environmental laws allow individuals to obtain damages and court decrees preventing degradation of the natural environment.[30] Private enforcement is not exclusively a tool of liberal and progressive legislators. Conservative lawmakers were central to Congress's use of private enforcement in Title VII as well as in the Americans with Disabilities Act.[31] And laws such as the Racketeer Influenced and Corrupt Organizations (RICO) Act, which allows "[a]ny per-

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25 *Id.* § 4.

26 False Claims Act, ch. 67, 12 Stat. 696 (1863) (codified as amended at 31 U.S.C. §§ 3729–3733). In a qui tam proceeding, a private party known as a "relator" brings suit on behalf of the government. The Latin phrase is an abbreviation for "qui tam pro domino rege quam pro si ipso in hac parte sequitur," which means, "[w]ho sues on behalf of the King as well as for himself." United States *ex rel.* Jones v. Horizon Healthcare Corp., 160 F.3d 326, 329 n.1 (6th Cir. 1998).

27 For empirical surveys, see FARHANG, *supra* note 16, at 66 tbl.3.1 (showing that, between 1964 and 2004, the number of private enforcement regimes in major federal laws increased from less than 50 to more than 300); Zachary D. Clopton & David L. Noll, The Litigation States 5 (unpublished preliminary data) (on file with authors) (identifying more than 3,000 state law private enforcement regimes enacted over approximately the past forty years).

28 29 U.S.C. § 216(b) ("Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.").

29 42 U.S.C. §§ 2000e-2(a)–(d), 2000e-5(f).

30 *See, e.g.*, Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 186, 192–93 (surveying environmental laws' citizen suit provisions and remedies available for violations of them).

31 *See* FARHANG, *supra* note 16, at 96; Thomas F. Burke & Jeb Barnes, *The Civil Rights Template and the Americans with Disabilities Act: A Sociolegal Perspective on the Promise and Limits of Individual Rights*, *in* THE RIGHTS REVOLUTION REVISITED: INSTITUTIONAL PERSPECTIVES ON THE PRIVATE ENFORCEMENT OF CIVIL RIGHTS IN THE U.S. 167, 171 (Lynda G. Dodd ed., 2018).

son injured in his business or property by reason of" a RICO violation to recover treble damages,[32] have been enacted with bipartisan support and signed into law by Republican presidents.[33]

Today's private subordination regimes borrow the legal technology of earlier private enforcement regimes (progressive and conservative alike) to advance an illiberal agenda that has few parallels in twentieth century private enforcement regimes.[34] The new laws are premised on a restrictive understanding of citizenship, in which only some members of the polity are viewed as legitimate rights-holders.[35] Dividing citizens into an authentic, morally virtuous "us" and a second-class "them," the regimes deploy private, civil litigation to subordinate marginalized groups—women, pregnant people, racial minorities, LGBTQ+ people, and soon, Black and Brown voters—and punish these groups and their allies. In so doing, private subordination regimes often go beyond the statutory and legal precedents from which they borrow. The result is a uniquely powerful form of regulation—one whose *in terrorem* effects can be sufficient to eradicate highly personal and sometimes constitutionally protected activities, force people to relocate to states where they are not targeted with private subordination, or push them into the closet, into back alleys, or, at the very least, to the margins of society.

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32 18 U.S.C. § 1964(c).

33 Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922. *See Vote Breakdown for 91st Congress: Senate Vote 254*, VOTEVIEW, https://voteview.com/rollcall/RS0910254 [https://perma.cc/ZW28-2ZB4] (last visited June 3, 2023) (adoption of RICO by 74-1 Senate vote). For further examples of private enforcement regimes enacted by Republicans or with substantial support from Republican legislators, see FARHANG, *supra* note 16, at 68.

34 There are notable parallels between private subordination regimes' borrowing of earlier private enforcement precedents and what Kim Lane Scheppele terms "autocratic legalism." *See* Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018). As Scheppele explores, a "set of legally clever autocrats" operating in nations such as Hungary, Turkey, and Venezuela have hijacked constitutional democracies in an effort to install one-party authoritarian rule. *Id.* at 547. These new autocrats "masquerade as democrats and govern in the name of their democratic mandates." *Id.* at 573. Their commitments, however, are fundamentally illiberal. Whereas "[l]iberal, democratic constitutionalism . . . is committed to the protection of rights, to checked power, to the defense of the rule of law, and to liberal values of toleration, pluralism, and equality," the new autocrats use law "to consolidate power and to remain in office indefinitely, eventually eliminating the ability of democratic publics to exercise their basic democratic rights." *Id.* at 545, 562.

35 As we describe below, *infra* text accompanying note 178, the regimes' understanding of citizenship is essentially the same one favored by leaders of the populist, post-liberal Right.

### B. The Landscape of Private Subordination Regimes

Our interest in private subordination was sparked by a 2021 Tennessee law that authorized private parties to recover damages for "emotional harm" caused by schools that allowed transgender students to use bathrooms that matched their gender identities.[36] To identify private subordination regimes, we surveyed bills containing private rights of action that were introduced in state legislatures in 2021 or 2022. We then manually reviewed those bills to determine whether they fit the definition set out in the preceding section.[37] This process revealed that, rather than being written from scratch in each jurisdiction where they were introduced, private subordination regimes tended to emerge from what might be labeled a "prototyping" process, in which legislative text was copied verbatim or adapted from earlier-introduced bills or model legislation. We identified the prototype or prototypes that different bills were based upon (some of which were devised earlier than 2021). Next, using Westlaw's proposed legislation database, we searched for signature phrases that appeared in prototype bills to track where regimes were being introduced and adopted.[38] This research revealed that, to date, private subordination regimes have been concentrated in three main areas.

#### 1. *Educational Gag Laws*

In the aftermath of the killings of Breonna Taylor and George Floyd and the ensuing Black Lives Matter protests,

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36 *See* H.B. 1233, 112th Gen. Assemb., Reg. Sess., § 4(a) (Tenn. 2021) (requiring schools to provide a reasonable accommodation to students who object to the presence of trans people in "a multi-occupancy restroom or changing facility designated for the . . . [person's] sex and located within a public school building, or . . . multi-occupancy sleeping quarters . . . [while] attending a public school-sponsored activity); *id.* § 6(c) (providing that "[a person] aggrieved under this section who prevails in court may recover monetary damages, including, but not limited to, monetary damages for all psychological, emotional, and physical harm suffered"). Thanks to Jessica Clarke for bringing this bill to our attention.

37 To identify bills with private rights of action, we used search criteria from Clopton & Noll, *supra* note 27, which in turn were adapted from FARHANG, *supra* note 16.

38 For example, "Fairness in Women's Sports" Acts drafted by or with the assistance of the Alliance Defending Freedom frequently quote from a *Washington Post* op-ed by Duke Law professor Doriane Coleman, former tennis star Martina Navratilova, and former Olympic sprinter Sanya Richards-Ross to the effect that "there will always be significant numbers of boys and men who would beat the best girls and women in head-to-head competition." Doriane Coleman, Martina Navratilova & Sanya Richards-Ross, *Pass the Equality Act, But Don't Abandon Title IX*, WASH. POST (Apr. 29, 2019), https://www.washingtonpost.com/opinions/pass-the-equality-act-but-dont-abandon-title-ix/2019/04/29/2dae7e58-65ed-11e9-a1b6-b29b90efa879_story.html [https://perma.cc/UAD9-9C3W].

right-wing activists organized a countermovement that, among other things, demonized critical race theory (CRT), a niche academic framework that interrogates the pervasive influence of race on U.S. law and legal institutions.[39] Often intentionally misrepresenting critical race theorists' writings (and their aims),[40] the countermovement self-consciously aimed to ignite a moral panic by, among other things, conflating classroom and workplace diversity initiatives with CRT indoctrination.[41]

In September 2020, President Trump signed Executive Order 13950, which barred government agencies from using trainings that incorporated nine "divisive concepts"[42] that the order's author, Office of Management and Budget Director Russell Vought, falsely attributed to CRT[43] and established a tip line at the Department of Labor for federal employees to report

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39 *See* Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict over Critical Race Theory*, NEW YORKER (June 18, 2021), https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory [https://perma.cc/WP39-DWSB]; Hakeem Jefferson & Victor Ray, *White Backlash Is a Type of Racial Reckoning, Too*, FIVETHIRTYEIGHT (Jan. 6, 2022), https://fivethirtyeight.com/features/white-backlash-is-a-type-of-racial-reckoning-too/ [https://perma.cc/4382-NXLM].

40 *See, e.g.*, Vivian E. Hamilton, *Reform, Retrench, Repeat: The Campaign Against Critical Race Theory, Through the Lens of Critical Race Theory*, 28 WM. & MARY J. WOMEN & L. 61, 72-81 (2021); Victor Ray, *Trump Calls Critical Race Theory 'Un-American.' Let's Review.*, WASH POST., Oct. 2, 2020, https://www.washingtonpost.com/nation/2020/10/02/critical-race-theory-101/.

41 *See, e.g.*, Sarah Jones, *How to Manufacture a Moral Panic*, NEW YORK, July 11, 2021, https://nymag.com/intelligencer/2021/07/christopher-rufo-and-the-critical-race-theory-moral-panic.html; Paul Kiernan, *Conservative Activist Grabbed Trump's Eye on Diversity Training*, WALL ST. J., OCT. 9, 2020, https://www.wsj.com/articles/conservative-activist-grabbed-trumps-eye-on-diversity-training-11602242287.

42 Exec. Order No. 13950, 85 Fed. Reg. 60683 (Sept. 228, 2020). The "divisive" concepts were:

> (1) [O]ne race or sex is inherently superior to another race or sex; (2) the United States is fundamentally racist or sexist; (3) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (4) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (5) members of one race or sex cannot and should not attempt to treat others without respect to race or sex; (6) an individual's moral character is necessarily determined by his or her race or sex; (7) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (9) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race.

*Id.* at 60685.

43 *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, M-20-34, MEMORANDUM FROM RUSSELL VOUGHT: TRAINING IN THE FEDERAL GOVERNMENT (2020), https://www.whitehouse.gov/wp-content/uploads/2020/09/M-20-34.pdf [https://

CRT indoctrination.[44] (There is—and never was—any evidence of any federal department or agency engaging in anything remotely akin to CRT indoctrination.) After President Biden rescinded Trump's order, a "complex web of individuals and conservative organizations" drafted model bills that borrowed the executive order's prohibitions and imposed them on state schools, universities, agencies, and government contractors.[45] Among those right-wing groups number the Manhattan Institute;[46] the Heritage Foundation;[47] Citizens for Renewing America (a group headed by Vought);[48] and the Alliance for Free Citizens (where, at the time, current Kansas Attorney General Kris Kobach served as general counsel).[49] Though a Manhattan Institute publication warned readers of the risk of extortionate litigation,[50] the model bills adopted a variety of citizen enforcement mechanisms. Under the Alliance's bill, for example, "[a]ny taxpayer in this state" was empowered to file suit over the mention of a divisive concept.[51] If the court determined that "the state, county, municipal, or school district entity, or public postsecondary institution" violated the law, it was to "enjoin the violating entity or institution from receiving any funding from the state in the following fiscal year" and award the complainant costs and attorney's fees.[52]

According to a database maintained by PEN America and supplemented by us, state legislators have introduced 276 ed-

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perma.cc/93VV-DS9T]. On the misunderstandings and misrepresentations of CRT in the campaign to ban it, see sources cited *supra* n.40.

44 Press Release, U.S. Dep't of Lab., U.S. Department of Labor Launches Hotline to Combat Race and Sex Stereotyping by Federal Contractors (Sept. 28, 2020), https://www.dol.gov/newsroom/releases/ofccp/ofccp20200928-0 [https://perma.cc/35C6-WSGQ].

45 Sarah Schwartz, *Who's Really Driving Critical Race Theory Legislation? An Investigation*, EDUC. WK. (July 19, 2021), https://www.edweek.org/policy-politics/whos-really-driving-critical-race-theory-legislation-an-investigation/2021/07 [https://perma.cc/X35X-CSS6].

46 James R. Copland, *How to Regulate Critical Race Theory in Schools: A Primer and Model Legislation*, MANHATTAN INST. (Aug. 26 2021), https://www.manhattan-institute.org/copland-critical-race-theory-model-legislation [https://perma.cc/VZS9-T57A].

47 *Protecting K-12 Students from Discrimination*, HERITAGE FOUND. (June 18, 2021), https://www.heritage.org/article/protecting-k-12-students-discrimination [https://perma.cc/DG4Z-25KX].

48 Schwartz, *supra* note 45.

49 *Id.*

50 COPLAND, *supra* note 46.

51 Alliance for Free Citizens Model Legislation: The Teaching Racial and Universal Equality ("TRUE") Act § 6(a), https://res.cloudinary.com/dqvxp4dnm/image/upload/v1651771699/a3u3tr22li4myattcblc.pdf [https://perma.cc/H94W-RBFS] (last visited June. 3, 2023).

52 *Id.* § 6(b).

ucational gag laws since January 2021.[53] Nineteen bills in sixteen states have been enacted. Among bills introduced, 25% authorize private subordination actions. Four of the enacted laws—in Florida, Iowa, New Hampshire, and Tennessee—contain private subordination rights.[54]

Litigation enforcing educational gag laws has, so far, been modest, but one should not mistake this for an absence of real-world impact. Private subordination regimes use the familiar machinery of private rights of action to reconfigure real-world relationships and catalyze aggressive enforcement by private parties against private parties. What's more, the mere threat of enforcement has had profound effects on classrooms, schools, and workplaces. In Oklahoma, a teacher filed a complaint alleging that a compliance course "contain[ed] a section that includes statements that specifically shame white people for past offenses in history, and state that all are implicitly racially biased by nature."[55] In response, the state board of education downgraded the certification of the state's largest school district.[56] In Utah, a principal forced a student group called "Black and Proud" to rename itself.[57] In Texas, a Black parent who believed educators were telling her child that she could not succeed because of systemic racism testified to a legislative committee that "I am encouraging every parent I know to sue you; to sue every teacher, every principal, every system, everybody up the chain . . . because we're tired of y'all."[58] And in a national survey conducted by the RAND Corporation, "1 in 4

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53 *See* JONATHAN FRIEDMAN & JAMES TAGER, PEN AMERICA, Educational Gag Orders: Legislative Restrictions on the Freedom to Read, Learn, and Teach 4, 25–28 (2022), https://pen.org/wp-content/uploads/2022/02/PEN_EducationalGagOrders_01-18-22-compressed.pdf [https://perma.cc/C63F-HMEN]. Our count includes bills introduced through August 2022.

54 Some of these bills also bar discussion of LGBTQ+ identities. Thus, the educational gag laws discussed in this section overlap with anti-LGBTQ+ laws the next section describes.

55 Marisa Sarnoff, *Oklahoma Board of Education Downgrades Accreditation of Two Public School Districts for Alleged Violation of Anti-Critical Race Theory Bill*, LAW & CRIME (Aug. 3, 2022), https://lawandcrime.com/education/oklahoma-board-of-education-downgrades-accreditation-of-two-public-school-districts-for-alleged-violation-of-anti-critical-race-theory-bill/ [https://perma.cc/H87D-9VLB].

56 *Id.*

57 Laura Meckler & Hannah Natanson, *New Critical Race Theory Laws Have Teachers Scared, Confused and Self-Censoring*, WASH. POST (Feb. 14, 2022), https://www.washingtonpost.com/education/2022/02/14/critical-race-theory-teachers-fear-laws/ [https://perma.cc/KLH8-XWPN].

58 Hannah Grossman, *Mom Threatens Texas House Meeting With 'Ambulance-Chasing' Lawsuits over CRT: 'Ya'll Are Trippin'*, FOX NEWS (Aug. 3, 2022), https://www.foxnews.com/media/mom-threatens-texas-house-meeting-ambulance-chasing-lawsuits-crt [https://perma.cc/G4M5-AE4B].

teachers said they were told by school or district leaders to limit their classroom conversations about political and social issues."[59] This survey is consistent with reporting from journalists such as Jennifer Berkshire, which has documented the massive chilling effects of gag laws on the classroom. Berkshire, among others, has found that the mere threat of lawsuits and other forms of enforcement have led teachers and administrators to scrub their curricula of references to race, and prompted conscientious educators to leave districts, if not the profession altogether.[60]

2. *Erasing LGBTQ+ People*

In February 2020, lawyers at the Alliance Defending Freedom ("ADF"), an advocacy organization designated a hate group by the Southern Poverty Law Center,[61] filed suit against five Connecticut school boards seeking to force them to exclude transgender girls from girls' sports teams.[62] The suit argued that allowing transgender student athletes to compete with cisgender students violated Title IX.[63] It failed on procedural grounds.[64] In a striking example of what Douglas NeJaime calls "winning through losing,"[65] ADF's lawyers drafted model legislation to do by state statute what their court case failed to

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59 Kalyn Belsha, *Chilling Effect: 1 in 4 Teachers Told to Limit Class Talk on Hot-Button Issues*, CHALKBEAT (Aug. 10, 2022), https://www.chalkbeat.org/2022/8/10/23299007/teachers-limit-classroom-conversations-racism-sexism-survey [https://perma.cc/YB72-BYLF].

60 *See, e.g.*, Justin Gamble, *Race Left Out of Rosa Parks Story in Revised Weekly Lesson Text for Florida Schools Highlights Confusion with Florida Law*, CNN (Mar. 22, 2023), https://www.cnn.com/2023/03/22/us/florida-textbook-race-rosa-parks-reaj/index.html [https://perma.cc/SGP9-S386]; Jennifer C. Berkshire, *Why Teachers Are Dropping Out*, NATION (Feb. 21, 2022), https://www.thenation.com/article/society/teachers-covid-culture-wars/ [https://perma.cc/QF9J-FSCE]; Jennifer C. Berkshire, *The GOP's Grievance Industrial Complex Invades the Classroom*, NATION (Oct. 28, 2021), https://www.thenation.com/article/politics/parents-vigiliante-gop-crt/ [https://perma.cc/Q8VX-C9LL]; *see generally* Sarah Mervosh, *Back to School in DeSantis's Florida, as Teachers Look Over Their Shoulders*, N.Y. TIMES (Aug. 27, 2022), https://www.nytimes.com/2022/08/27/us/desantis-schools-dont-say-gay.html [https://perma.cc/ZW57-68DP].

61 *Alliance Defending Freedom*, SPLC, https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom [https://perma.cc/7BMJ-SHMJ].

62 Verified Complaint at 49–50, Soule v. Conn. Ass'n of Schs., Inc., No. 3:20-cv-00201-RNC (D. Conn. Apr. 25, 2021).

63 *Id.* at 3.

64 Soule v. Conn. Ass'n of Schs., No. 3:20-cv-00201-RNC, 2021 WL 1617206, at *1 (D. Conn. Apr. 25, 2021), *aff'd*, 57 F.4th 43 (2d Cir. 2022), *reh'g en banc granted*, No. 21-1365-cv, slip op. at 2 (2d Cir. Feb. 13, 2023).

65 Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 941–42 (2011).

accomplish via federal civil rights law.[66] Under the ADF's model legislation, which appears to have first been introduced in Idaho, schools must segregate sports teams by sex-assigned-at-birth and thus are barred from allowing trans girls to plays on designated girls teams.[67] A student who claims to suffer "any direct or indirect harm" caused by a trans classmate's presence on a team that matches their gender identity may bring suit to recover "monetary damages, including for any psychological, emotional, or physical harm suffered, reasonable attorney's fees and costs, and any other appropriate relief."[68]

The number of trans athletes is, in fact, infinitesimally small, and evidence that trans girls enjoy an unfair advantage is difficult to find.[69] But this did not deter lawmakers operating out of ADF's slickly crafted and aggressively peddled playbook from painting a false picture of school athletics under siege from a veritable horde of elite trans athletes who allegedly enjoy

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66 Dan Avery, *State Anti-Transgender Bills Represent Coordinated Attack, Advocates Say*, NBC NEWS (Feb. 17, 2021), https://www.nbcnews.com/feature/nbc-out/state-anti-transgender-bills-represent-coordinated-attack-advocates-say-n1258124 [https://perma.cc/9V5X-NAXD]; *see also* Mary Emily O'Hara, *This Law Firm Is Linked to Anti-Transgender Bathroom Bills Across the Country*, NBC NEWS (Apr. 8, 2017), https://www.nbcnews.com/feature/nbc-out/law-firm-linked-anti-transgender-bathroom-bills-across-country-n741106 [https://perma.cc/2KDV-AVFS]. Sensitive to the optics of a national anti-LGBTQ+ group drafting model trans sports ban legislation that is enacted verbatim by part-time lawmakers, ADF would not confirm any authorship. ADF concedes, however, its extensive lobbying in statehouses across the nation and that the organization "is often asked by legislators to review possible legislation and offer advice." Avery, *supra*. And in 2016, Matt Sharp, currently the organization's senior counsel and state government relations national director, boasted that "lawmakers in at least five states" had used the ADF's model legislation to draft bathroom bills that banned transgender people from bathrooms that matched their gender identity. Emma Brown & Moriah Balingit, *Transgender Students' Access to Bathrooms Is at Front of LGBT Rights Battle*, WASH. POST (Feb. 29, 2016), https://www.washingtonpost.com/local/education/transgender-students-access-to-school-bathrooms-is-new-front-in-war-over-lgbt-rights/2016/02/29/ba66d676-da61-11e5-925f-1d10062cc82d_story.html [https://perma.cc/Q5GW-4CDC].

67 H.B. 500, 65th Leg., 2d Reg. Sess., § 33-6203 (Idaho 2020).

68 *Id.* § 33-6205(1), (4).

69 Rachel Axon & Brant Schrotenboer, *Ban Effort Has Shaky Evidence; Examples Tend to Be Vague, Overstated*, COURIER J., July 5, 2021, at A1; *see generally* Moriah Balingit, *Kentucky's Lone Transgender Athlete Can't Play on the Team She Helped Start*, WASH. POST (Aug. 25, 2022), https://www.washingtonpost.com/education/2022/08/25/fischer-wells-trans-athlete-kentucky/ [https://perma.cc/DY2A-FCT9] (reporting the presence of only one trans student-athlete in Kentucky high schools); Molly Ball, *The Red-State Governor Who's Not Afraid to Be 'Woke'*, TIME (Aug. 18, 2022), https://time.com/6206233/spencer-cox-utah-governor-interview/ [https://perma.cc/ BA8A-HGNJ] (repeating a report by the governor of Utah noting that of Utah's "75,000 high-school athletes, only four were known to be trans").

a competitive advantage because of muscle and bone characteristics associated with their sex assigned at birth.[70]

In 2021 and 2022, lawmakers in twenty states filed, pre-filed, or introduced trans sports bans using language from ADF-supported legislation, and ten of those states enacted such bans into law.[71] Ninety-seven of the introduced bills (82.2%) and all but one of the enacted bills (Kentucky's[72]) contain private subordination rights that empower private parties to sue schools that allow trans kids to play on teams matching their gender identities.

Trans sports bans' enforcement provisions are shocking in their cruelty. In June 2022, for instance, Ohio lawmakers advanced a law, not reported in the above statistics, that seemingly allows anyone—opposing coaches, parents, administrators, or even school bullies—to dispute a high school athlete's biological gender.[73] Once an allegation is registered, the "disputed" athlete must undergo a medical examination of their "internal and external reproductive anatomy," submit to testosterone testing, and undergo genetic screening to continue playing.[74]

To illustrate the proliferation of these laws, Table 1, below, charts the number of trans sports bans using ADF language introduced in state legislatures by year. As it shows, the bans were relatively rare in 2020 then exploded in number in 2021.

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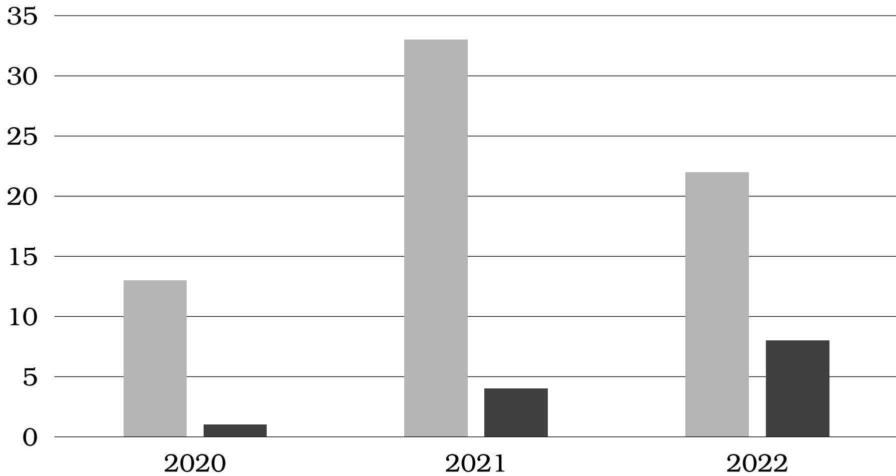
70 In Arizona, the daughter of ADF's General Counsel, Kristen Waggoner, falsely testified "that her team had lost the first state tournament game it had played in decades to an opponent with a transgender player." In fact, the player who Waggoner's team assumed was male—the daughter of the opposing team's coach—simply had short hair. Axon & Schrotenboer, *supra* note 69, at A1.

71 The states in which lawmakers introduced, pre-filed, or filed bills are Arkansas, Arizona, Delaware, Florida, Iowa, Idaho, Kansas, Kentucky, Louisiana, Maryland, Montana, Mississippi, Montana, New Jersey, Ohio, Rhode Island, South Carolina, South Dakota, West Virginia, and Wyoming. The states with enacted laws are Arkansas, Arizona, Florida, Idaho, Kansas, Kentucky, Louisiana, Montana, South Carolina, and South Dakota.

72 S.B. 83, 2022 Gen. Assemb., Reg. Sess. (Ky. 2022).

73 H.B. 61, 134th Gen. Assemb., Reg. Sess., sec. 1, § 3313.5317 (Ohio 2022).

74 *Id.* § 3313.5317(C). Lest one think no parent would be cruel enough to lodge a protest of this sort, two sets of parents have filed complaints in Utah, alleging the winner of a high school athletics competition was transgender. The basis of the complaint, besides sour grapes, was that the winning athlete "didn't look feminine enough." (The winner was investigated and was, in fact, a cisgender girl.) *See* Nick McGurk, *Utah Girl Investigated for Being Transgender After Winning State Title; She Wasn't*, KTLA (Aug. 20, 2022), https://ktla.com/news/nationworld/girl-investigated-for-being-transgender-after-winning-state-title/ [https://perma.cc/W7J9-2HDL].




Trans sports bans have been introduced and enacted alongside a raft of other measures that, similarly, deploy private subordination actions to erase LGBTQ+ persons from public spaces and punish their allies, and sometimes pair private subordination rights with mandatory reporting or notification requirements that facilitate citizen enforcement of their anti-LGBTQ+ agenda. In Tennessee, the "Accommodations for All Children Act," enacted in March 2021, purports to protect cisgender students from having to share a bathroom with trans students.[75] A student, teacher, or employee of a public school, or the student's parent or legal guardian may sue if they "encounter[ ] a member of the opposite sex [sic] in a multi-occupancy restroom or changing facility located in a public school building" and a school "intentionally allowed a member of the opposite sex [sic, again] to enter the multi-occupancy restroom or changing facility while other persons were present."[76] Plaintiffs may recover attorney's fees, costs, and "monetary damages for all psychological, emotional, and physical harm suffered."[77] The ACLU reports that similar legislation has been introduced in six states and enacted in two.[78]

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75 H.B. 1233, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021) (codified at TENN. CODE ANN. §§ 49-2-801 to -805).

76 TENN. CODE ANN. § 49-2-805(a)(1).

77 *Id.* § 49-2-805(c).

78 *Legislation Affecting LGBTQ Rights Across the Country*, ACLU, https://www.aclu.org/legislation-affecting-lgbtq-rights-across-country-2022 [https://perma.cc/3773-W6YJ] (last updated Dec. 2, 2022). The states where bills have

In March 2022, Florida enacted House Bill 1557—now commonly known as the "Don't Say Gay" Act—barring school officials from discussing sexual orientation or gender identity in any manner that is not "age-appropriate."[79] (The statute does not define age-appropriate instruction, and implementing regulations are not expected until 2023.) The law empowers parents to sue for violations and provides: "A court may award damages and shall award reasonable attorney fees and court costs to a parent who receives declaratory or injunctive relief" for a violation of the law.[80]

The level of litigation under these laws is, again, modest.[81] But here too the specter of enforcement (directed at school boards and ordinary employees who do not have the resources to defend litigation) and the laws' vague prohibitions are chilling classroom lessons and conversations and exposing LGBTQ+ people to intensive bullying and intimidation. Gay teachers and allies have scrubbed their classrooms of pride symbols.[82] A lesbian mother wrote that "Don't Say Gay" had "killed all the excitement I might have had" for her three-year-old daughter to begin kindergarten.[83] Teenagers warned that "Don't Say Gay" would endanger trans kids—already under severe emotional stress and deemed high-risk for suicide—by encouraging bullying and sending the message they were not welcome in Florida's schools.[84] In Kentucky, where lawmakers

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been introduced are Alabama, Minnesota, Mississippi, Oklahoma, South Dakota, and Virginia. The states with enacted laws are Alabama and Oklahoma. *See id.*

79 H.B. 1557, 2022 Leg., Reg. Sess. (Fla. 2022).

80 *Id.* at § 1; *see also* Christina Cauterucci, *The New Face of "No Promo Homo" Laws*, SLATE (Jan. 27, 2022), https://slate.com/news-and-politics/2022/01/florida-lgbtq-parental-rights-desantis.html [https://perma.cc/KHN2-DP2X].

81 We searched for court documents that referenced "Fairness in Women's Sports" and "Save Women's Sports" in Lexis's CourtLink database. As of August 2022, the search returned mainly documents filed in connection with constitutional challenges to the laws.

82 Kathryn Varn, *'No One Felt Safe': Florida Schools, Students Feel Effects of So-Called 'Don't Say Gay' Law*, TALLAHASSEE DEMOCRAT (June 30, 2022), https://www.tallahassee.com/story/news/2022/06/30/florida-schools-feel-impact-dont-say-gay-law/7751681001/ [https://perma.cc/FGB3-LKFB].

83 Matthew Dicks, Cassy Sarnell & John Eric Vona, *How Will Florida's "Don't Say Gay" Bill Play Out in Classrooms?*, SLATE: CARE & FEEDING (March 31, 2022), https://slate.com/human-interest/2022/03/dont-say-gay-classrooms.html [https://perma.cc/N5GZ-NTSB].

84 Varn, *supra* note 82; Ariel Gilreath, *In the Wake of 'Don't Say Gay,' LGBTQ Students Won't Be Silenced*, HECHINGER REPORT (June 13, 2022), https://hechingerreport.org/in-the-wake-of-dont-say-gay-lgbtq-students-wont-be-silenced/ https://hechingerreport.org/in-the-wake-of-dont-say-gay-lgbtq-students-wont-be-silenced/ [https://perma.cc/6KHZ-DJL4]; Alisha Ebrahimji, Leyla Santiago & Sara Weisfeldt, *Critics of Florida's 'Don't Say Gay' Law Say It Will Damage LGBTQ Students, Parents and Teachers*, CNN (Apr. 1, 2022), https://www.cnn.com/

have introduced a bill that prohibits "mandatory gender or sexual diversity training or counseling" and outlaws "[a]ny orientation or requirement that presents any form of race or sex stereotyping,"[85] community members showed up at a local school board meetings to denounce a gay high-school English teacher who had just won Kentucky's 2022 Teacher of the Year award.[86] His transgression: being a "groomer"—a QAnon-inspired slur which Florida Governor Ron DeSantis's press secretary helped usher into mainstream discourse.[87] Shortly after this incident, this teacher left the profession, citing institutionalized homophobia.[88]

### 3. *Eliminating Access to Legal Abortion*

As noted in the Introduction, the most politically and legally salient private subordination regime is Texas's S.B. 8.[89] The centerpiece of the law (which now operates in tandem with a criminal law that threatens abortion providers with life imprisonment[90]) is a ban on performing abortions after a fetal "heartbeat" is detected—a restriction that flagrantly violated governing Supreme Court precedent when the law was drafted, enacted, and took effect.[91] S.B. 8 extends liability to anyone who "aids or abets" an abortion (for example, by driving a patient to a hospital) or merely "intends" to do so.[92] Knowing that the law would be enjoined pursuant to *Roe v. Wade* if it were enforced by public officials, S.B. 8's drafters deployed a Kafkaesque enforcement scheme to shield it from federal judicial review[93] and ensure that it imposed such a crushing threat

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2022/04/01/us/florida-dont-say-gay-bill-desantis-critics/index.html [https://perma.cc/CJ6T-532N]; Matt Lavietes, *From Book Bans to 'Don't Say Gay' Bill, LGBTQ Kids Feel 'Erased' in the Classroom*, NBC NEWS (Feb. 20, 2022), https://www.nbcnews.com/nbc-out/out-news/book-bans-dont-say-gay-bill-lgbtq-kids-feel-erased-classroom-rcna15819 [https://perma.cc/C7K4-CJEW].

85 H.B. 14, 2022 Gen. Assemb., Reg. Sess. (Ky. 2022).

86 Matt Lavietes, *Kentucky's 2022 Teacher of the Year Quits Profession, Citing Homophobia*, NBC NEWS (June 27, 2022), https://www.nbcnews.com/nbc-out/out-news/kentuckys-2022-teacher-year-quits-profession-citing-homophobia-rcna35224 [https://perma.cc/QZ7U-BN9V].

87 *Id.*; *see* Brooke Migdon, *Gov. DeSantis Spokesperson Says 'Don't Say Gay' Opponents Are 'Groomers'*, THE HILL: CHANGING AM. (Mar. 7, 2022), https://thehill.com/changing-america/respect/equality/597215-gov-desantis-spokesperson-says-dont-say-gay-opponents-are/ [https://perma.cc/4XFS-6B4A].

88 Lavietes, *supra* note 86.

89 TEX. HEALTH & SAFETY CODE ANN. § 171.201.

90 *Id.* § 170A.004.

91 *Id.* § 171.203(b).

92 *Id.* § 171.208(a)(2)–(3).

93 Smith, *supra* note 5 (quoting the legislative director of Texas Right to Life, the state's largest anti-abortion group, to the effect that S.B. 8 was "crafted to lead

of liability that clinics would (as they did) immediately turn away patients[94] or altogether shutter their doors.[95]

First, S.B. 8 restricts enforcement to private, civil actions.[96] In doing so, the law seeks to prevent abortion providers from bringing a pre-enforcement suit against state officers under Section 1983 and *Ex parte Young*.[97] Such suits are the standard procedural route for raising constitutional challenges to state-enforced laws, including many of the prior anti-choice statutes enacted during the forty-nine years since *Roe* recognized a federal constitutional right to reproductive autonomy.[98]

Second, S.B. 8 provides that "[a]ny person" other than a government official may sue to enforce its provisions.[99] Because the universe of potential private plaintiffs is unlimited, providers targeted by suits have no way of knowing who should be named defendant in a pre-enforcement challenge to S.B. 8's constitutionality.[100] Conceivably, Texas courts could narrow standing to enforce S.B. 8 in the same manner that the U.S. Supreme Court has restricted private plaintiff standing to enforce federal environmental laws.[101] But state standing doc-

to judicial victories" and "succeed where 11 other states have failed"). For a preview of this gambit, see Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933 (2018).

94 Paul J. Weber, *Texas Abortion Law Strains Clinics: 'Exactly What We Feared'*, NBC DFW (Sept. 15, 2021), https://www.nbcdfw.com/news/local/texas-news/texas-abortion-law-strains-clinics-exactly-what-we-feared/2743660/ [https://perma.cc/S5J2-HKSZ].

95 Shefali Luthra, *Even If Texas' Six-Week Abortion Ban Is Overturned, Clinics Will Close*, THE 19TH NEWS (Aug. 31, 2021), https://19thnews.org/2021/08/texas-abortion-six-week-ban-clinics-close-their-doors/ [https://perma.cc/GMT6-MCHV].

96 TEX. HEALTH & SAFETY CODE ANN § 171.207(a) ("No enforcement of this subchapter . . . may be taken or threatened by this state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision against any person . . . .").

97 209 U.S. 123 (1908).

98 *See* Maya Manian, *Privatizing Bans on Abortion: Eviscerating Constitutional Rights Through Tort Remedies*, 80 TEMPLE L. REV. 123 (2007).

99 TEX. HEALTH & SAFETY CODE ANN. § 171.208(a).

100 For analysis of how broadly statutory standing under S.B. 8 extends, see, for example, Diego A. Zambrano & Sharon Driscoll, *Maneuvering Around the Court: Stanford's Civil Procedure Expert Diego Zambrano on the Texas Abortion Law*, STAN. L. SCH.: SLS BLOGS (Sept. 8, 2021), https://law.stanford.edu/2021/09/08/maneuvering-around-the-court-stanfords-civil-procedure-expert-diego-zambrano-on-the-texas-abortion-law/ [https://perma.cc/P2U5-HDSZ].

101 In December 2022, "state District Judge Aaron Haas in Bexar County said [in a bench ruling that] people who have no connection to the prohibited abortion and have not been harmed by it do not have standing" to bring suit under S.B. 8. Eleanor Klibanoff, *Texas State Court Throws Out Lawsuit Against Doctor Who Violated Abortion Law*, TEX. TRIB. (Dec. 8, 2022), https://www.texastribune.org/2022/12/08/texas-abortion-provider-lawsuit/ [https://perma.cc/K8QT-G5BF]; *see generally* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (to satisfy

trine is more flexible and varied than the Supreme Court's interpretation of Article III;[102] S.B. 8's backers explicitly stated that they intended its "any [non-governmental] person" language to be interpreted literally;[103] and that unlimited statutory standing is central to S.B. 8's design.[104] Thus, it would be surprising if the nine elected judges on Texas's high court (*all* Republicans) read restrictive standing rules into the statute.[105]

Third, S.B. 8 holds out generous financial rewards to parties that enforce it, providing that a successful "claimant" is entitled to injunctive relief, costs and attorney's fees, and "statutory damages in an amount of not less than $10,000 for each abortion that the defendant performed or induced in violation of this subchapter, and for each abortion performed or induced in violation of this subchapter that the defendant aided or abetted."[106]

Fourth, the law bars defendants from raising defenses based on "ignorance or mistake of law," "any court decision that has been overruled on appeal or by a subsequent court," "any state or federal court decision that is not binding on the court in which the action has been brought," "non-mutual issue preclusion," and "non-mutual claim preclusion."[107]

Fifth, the statute's broad venue provision essentially allows plaintiffs to sue in any of Texas's 472 district courts, and courts are prohibited from transferring actions to a more con-

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"irreducible constitutional minimum of standing . . . the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical'" (citations omitted)).

102 *See* Zachary D. Clopton, *Justiciability, Federalism, and the Administrative State*, 103 CORNELL L. REV. 1431, 1455 (2018).

103 *See* Smith, *supra* note 5 (quoting Facebook posts by the director of one of the most prominent anti-choice groups that lobbied for S.B. 8 stating, "You will be able to bring many lawsuits later this year. . . . Let me know if you are looking for an attorney to represent you if you choose to do so. Will be glad to recommend some.").

104 *See* TEX. HEALTH & SAFETY CODE ANN. § 171.207(a) (providing that the law "shall be enforced exclusively through the private civil actions described in Section 171.208"); *id.* § 171.208(a) (authorizing suits by "[a]ny person, other than an officer or employee of a state or local governmental entity in this state").

105 *See* Samuel Postell & Luke Seeley, *Ballotpedia Courts: State Partisanship/ The Most and Least Divided State Supreme Courts*, BALLOTPEDIA, https://ballotpedia.org/Ballotpedia_Courts:_State_Partisanship/ The_Most_and_Least_Divided_State_Supreme_Courts [https://perma.cc/R96X-C7UQ] (last visited June 3, 2023); *cf.* Whole Woman's Health v. Jackson, 642 S.W.3d 569 (Tex. 2022) (interpreting S.B. 8 in a manner that blocked the only avenue for pre-enforcement judicial review permitted by the U.S. Supreme Court).

106 TEX. HEALTH & SAFETY CODE Ann. § 171.208(b).

107 *Id.* § 171.208(e).

venient venue without the plaintiff's consent.[108] In Texas, each district court has a single district judge who is elected in partisan elections to a four-year term.[109] Because some counties are served by a single district court, S.B. 8's venue provisions effectively allow plaintiffs to handpick the judge who will hear their case—or otherwise pick a venue that is very far from and inconvenient to the defendant.

Sixth, although a plaintiff may recover costs, attorney's fees, and statutory damages, the court may not award costs or attorney's fees to the defendant under the Texas Rules of Civil Procedure.[110]

In 2021 and 2022, bills that made use of S.B. 8's enforcement verbatim scheme were introduced, pre-filed, or filed in ten states.[111] Four states—California, Idaho, Oklahoma, and Texas—enacted laws that copied its scheme. The enacted bills include two anti-abortion measures, in Idaho and Oklahoma,[112] and California's AB 1621 (discussed below), which uses S.B. 8's enforcement scheme to enforce a ban on assault weapons and ghost guns.

In what is now a familiar pattern, the number of cases filed under these laws is low.[113] But their deterrent and *in terrorem*

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[108] *Id.* § 171.210(b) ("If a civil action is brought under Section 171.208 in any one of the venues described by Subsection (a), the action may not be transferred to a different venue without the written consent of all parties.").

[109] *See* TEXAS COURTS: A DESCRIPTIVE SUMMARY 7, https://www.txcourts.gov/media/10753/court-overview.pdf [https://perma.cc/9RHS-KUH4].

[110] TEX. HEALTH & SAFETY CODE ANN. § 171.208(i).

[111] The states were Arkansas (22 bills), Arizona (4), Hawaii (1), Iowa (1), Idaho (3), Louisiana (2), Maryland (1), Michigan (1), Minnesota (1), and Texas (4).

[112] H.B. 366, 66th Leg., 1st Reg. Sess. (Idaho 2021); S.B. 1503, 58th Leg., 2d Reg. Sess. (Okla. 2022).

[113] To date, efforts to enforce S.B. 8 have fallen into two categories. After Dr. Alan Braid announced that he had performed an abortion in violation of the statute, he was sued by three out-of-state plaintiffs in cases that can fairly be described as stunts, and which have not been actively litigated since they were filed. *See* Ann E. Marimow, *Abortion Rights Advocates, in 'Legal Limbo,' Go Out of State to Try to Block Texas Law*, WASH. POST (Oct. 5, 2021), https://www.washingtonpost.com/politics/courts_law/abortion-braid-texas-illinois/2021/10/05/7e1f67f4-260b-11ec-9de8-156fed3e81bf_story.html [https://perma.cc/K24M-8ACN]. Separately, the activists who worked to enact S.B. 8 have sought to depose the directors of two abortion funds and abortion providers under Rule 202 of the Texas Rules of Civil Procedure, which allows for pre-suit discovery "to investigate a potential claim or suit." *See* Karen Brooks Harper, *Texas Abortion Foes Use Legal Threats and Propose More Laws to Increase Pressure on Providers and Their Allies*, TEX. TRIB. (July 18, 2022), https://www.texastribune.org/2022/07/18/texas-abortion-laws-pressure-campaign/ [https://perma.cc/Y7HA-83B8]; Eleanor Klibanoff, *Anti-Abortion Lawyers Target Those Funding the Procedure for Potential Lawsuits Under New Texas Law*, TEX. TRIB. (Feb. 23, 2022), https://www.texastribune.org/2022/02/23/texas-abortion-sb8-lawsuits/ [https://perma.cc/79R3-UN5F]. Those cases are ongoing.

effects are, as stated, beyond dispute. After Texas abortion providers failed to obtain emergency relief protecting them from S.B. 8 suits, they stopped providing constitutionally protected abortions after the law's six-week cutoff.[114] The sole exception was Dr. Alan Braid, who announced in a *Washington Post* op-ed that he had performed a single abortion in an attempt to provoke a state court case in which he could challenge S.B. 8's constitutionality in a defensive posture.[115] In effect, the law weaponized the state judiciary to extinguish an entire category of constitutionally protected activity through the threat of punitive, structurally-biased legal proceedings.

#### 4. *Future Targets: Voting, Immigration, and Public Health*

Already, private subordination has spread beyond the three substantive areas we highlight above.[116] Importantly, S.B. 8 and similar laws provide a battle-tested template for future legislation in other areas. As we explore below, fomenting—and *monetizing*—social, cultural, and racial grievances while re-instantiating caste and status hierarchies is a central strategy of contemporary right-wing politics in the

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114 Adam Liptak, J. David Goodman & Sabrina Tavernise, *Supreme Court, Breaking Silence, Won't Block Texas Abortion Law*, N.Y. TIMES (Sept. 1, 2021), https://www.nytimes.com/2021/09/01/us/supreme-court-texas-abortion.html [https://perma.cc/22Y2-LQFL].

115 Alan Braid, *Why I Violated Texas's Extreme Abortion Ban*, WASH. POST (Sept. 18, 2021), https://www.washingtonpost.com/opinions/2021/09/18/texas-abortion-provider-alan-braid/ [https://perma.cc/4LHG-6BJZ].

116 A bill introduced in Oklahoma in 2022 prohibited K-12 teachers from "promoting" any position "that is in opposition to closely held religious beliefs of students." Parents are authorized to sue "for injunctive relief whereby the school and applicable personnel will immediately be enjoined" from promoting prohibited views. If the school does not immediately remove the offending materials, the litigant parents may return to court and recover "damages at a minimum of Ten Thousand Dollars ($10,000.00) per incident, per individual." The bill goes on to provide: "All persons found liable for damages shall make payment from personal resources and shall not receive any assistance from individuals or groups." S.B. 1470, 58th Leg., 2d Reg. Sess. (Okla. 2022); *see also, e.g.*, S.B. 34, 87th Leg., 2d Spec. Sess. (Tex. 2021) (creating a cause of action against hospitals that require employees to provide non-life-sustaining care to patients when the employee objects to providing care for reasons of conscience); S.B. 1142, 58th Leg., Reg. Sess. (Okla. 2022) (prohibiting public school libraries from holding books that have the primary subject of sexual identity or gender identity and creating a cause of action through which a parent or legal guardian can recover "monetary damages including a minimum of Ten Thousand Dollars ($10,000.00) per day the book requested for removal is not removed, reasonable attorney fees, and court costs"); H.B. 2161, 55th Leg., 2d Reg. Sess. (Ariz. 2022) (creating a cause of action against teachers who fail to inform parents of information "relevant to the physical, emotional or mental health of the parent's child" and specifying that, in addition to civil remedies, "conduct in violation of this subsection is grounds for discipline of the employee").

United States. It is not difficult to imagine future legislatures adapting from the bills described above and authorizing lawsuits against other groups that they designate as immoral, dangerous, or unworthy of civil rights.[117]

In Texas, for instance, House Bill 1752 would use a modified version of S.B. 8's enforcement scheme to target doctors who provide gender-affirming care. Under H.B. 1752, plaintiffs may recover attorney's fees, nominal and compensatory damages, and—for those claiming "irreversible sterilization or sexual dysfunction"—punitive damages of not less than $10 million.[118] Republican officeholders have targeted minority voters with exacting ballot-access rules and actions,[119] and Republican state and county officials have encouraged partisan poll watchers to police minority voters in the name of "election integrity."[120] While the current wave of voter-suppression legislation is enforced largely through criminal penalties and purges of voting rolls, it is only a matter of time before a state lawmaker inspired by S.B. 8 introduces a private right of action targeting individuals who, say, conduct voter registration drives, provide rides on election day, or simply "offer to give . . . food and drink" to voters waiting on line.[121] As we discuss below, Republican officeholders have also encouraged private parties to take it upon themselves to enforce the immigration laws against migrants crossing the southern border.[122]

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117 *See, e.g.*, Amy Simonson, *Florida Bill to Shield People from Feeling 'Discomfort' over Historic Actions by Their Race, Nationality or Gender Approved by Senate Committee*, CNN (Jan. 20, 2022), https://www.cnn.com/2022/01/19/us/florida-education-critical-race-theory-bill/index.html [https://perma.cc/4MKG-DVB4].

118 H.B. 1752, 88th Leg., Reg. Sess. (Tex. 2023).

119 *See State Voting Bills Tracker 2021*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/our-work/research-reports/state-voting-bills-tracker-2021 [https://perma.cc/4CMS-M5UM] (last updated May 28, 2021).

120 *See* Jen Kirby, *Your Voting Precinct Might Have a Poll Watcher. Here's What to Know*, VOX (Oct. 23, 2021), https://www.vox.com/21514657/poll-watchers-trump-army-voters [https://perma.cc/WVK2-TFRQ]; Alexandra Berzon & Nick Corasaniti, *Right-Wing Leaders Mobilize Corps of Election Activists*, N.Y. TIMES (Oct. 17, 2022), https://www.nytimes.com/2022/10/17/us/politics/midterm-elections-challenges.html [https://perma.cc/4CNT-JJPP]; Bob Ortega, Audrey Ash, Yahya Abou-Ghazala, & Drew Griffin, *Michigan GOP Leaders Encourage Rule Breaking at Poll Worker Training Session*, CNN (Sept. 8, 2022), https://www.cnn.com/2022/09/07/politics/michigan-gop-poll-worker-training-invs/index.html [https://perma.cc/8TQS-ZK9Z]; Sam Levine, *Republican Push to Recruit Election Deniers as Poll Workers Causes Alarm*, THE GUARDIAN (June 30, 2022), https://www.theguardian.com/us-news/2022/jun/30/republican-recruit-poll-workers-election-integrity [https://perma.cc/PMM6-9ESR].

121 S.B. 202, 2021 Gen. Assemb., Reg. Sess. (Ga. 2021).

122 As evidence of how mutually reinforcing patterns of state-private deputization arrangements have become—particularly against the backdrop of what sub-

A state legislature dissatisfied with the federal government's enforcement of immigration laws could provide for litigation against employers or landlords of undocumented persons, forcing them to close their doors to immigrants.[123]

In short, today's private subordination regimes may be just the opening salvo. With lawmakers learning from one another, reaping political rewards for advancing private subordination legislation, and—dare we say—vying with one another to enact ever more punitive laws,[124] private subordination is bound to spread to many other domains.

### C. Private Subordination and the Emergence of Vigilante Federalism

American lawyers, lawmakers, and judges have long used statutes, regulations, and procedural rules to subordinate marginalized groups, and as the preceding section describes, private enforcement may be a powerful tool of subordination.[125] Yet, while the current wave of private subordination regimes draw upon historical archetypes, we view them as a new development, one linked closely to contemporary political conditions. Our research did not locate any direct analogues to the educational gag laws and anti-LGBTQ+ measures that are spreading quickly through state legislatures. And while earlier private rights of action have targeted abortion, their substantive provisions were less restrictive than S.B. 8's, and they did not deploy anything like the deck-stacking, vigilante-empower-

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part I.D terms a radical version of federalism—a private donor from Tennessee provided funds which allowed the governor of South Dakota to deploy National Guard troops to Texas to "assist in securing the U.S.-Mexico border." *See* Chelsey Cox, *Tennessee Foundation to Pay to Send National Guard Troops from South Dakota to Southern Border*, THE TENNESSEAN (June 30, 2021), https://www.tennessean.com/story/news/2021/06/30/tennessee-foundation-pay-deploy-south-dakota-national-guard-troops/7810093002/ [https://perma.cc/6SAX-7LSB].

[123] For an article anticipating this possibility, see Louise N. Smith, *Employers Beware: Civil RICO Provision Creates Private Enforcement of Immigration Laws*, 27 A.B.A J. LAB. & EMP. L. 103 (2011). Thanks to David Lopez for calling this source to our attention.

[124] *See* Samira Sadeque, *Republicans in Six States Rush to Mimic Texas Anti-Abortion Law*, THE GUARDIAN (Sept. 3, 2021), https://www.theguardian.com/world/2021/sep/03/texas-abortion-republicans-six-states-arkansas-florida-indiana-mississippi-north-south-dakota [https://perma.cc/2CXG-N3M2]; Dan Solomon, *Greg Abbott and Ron DeSantis Are Competing to Be Trump. Who's Winning?*, TEX. MONTHLY (Oct. 13, 2021), https://www.texasmonthly.com/news-politics/greg-abbott-ron-desantis-primary/ [https://perma.cc/TL9J-FXWE].

[125] *See* sources cited *supra* note 24-25.

ing procedures S.B. 8 uses to intimidate its targets into submission.[126]

The appearance of private subordination regimes changes the dynamics of American federalism. But the regimes, alone, are not responsible for this shift. Their interventions grow out of long-term historical trends that encouraged state lawmakers to enact private subordination regimes and made those regimes possible as both a political and legal matter.

Going back to the 1970s, there has been a decades-long decline of federal legislative and administrative capacity.[127] Federal statutory protections for civil rights have largely stalled out.[128] And broader changes in the dynamics of federal lawmaking, American politics and political culture have created barriers to the enactment of new federal civil rights legislation, reinforcing and accelerating the substantive and institutional hollowing out of the federal civil rights infrastructure. Tight party control,[129] heightened polarization (and concomitant distrust) between the two parties,[130] a legislative process rife with

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126 *See* Manian, *supra* note 98, at 130–48 (analyzing LA. STAT. ANN. § 9:2800.12 (1999), which gave women who received an abortion a right of action against the doctor who provided it, and OKLA. STAT. ANN. tit. 63, § 1-740 (2004), which created a right of action against providers who performed an abortion on a minor without their parents' consent or knowledge); Stephen B. Burbank & Sean Farhang, *A New (Republican) Litigation State?*, 11 U.C. IRVINE L. REV. 657, 677 (2021) (discussing H.R. 4712, 115th Cong. (2017), which provided a private right action for the mothers of infants who were born alive following an abortion, and S. 3306, 114th Cong. (2016), which provided a private right of action against doctors to parents of minor children on whom the doctor performed a "dismemberment abortion"). Under all of the laws that Professors Manian, Burbank, and Farhang discuss, statutory standing was limited to pregnant women or parents of a minor who received an abortion.

127 *See generally* M. ERNITA JOAQUIN & THOMAS J. GREITENS, AMERICAN ADMINISTRATIVE CAPACITY: DECLINE, DECAY, AND RESILIENCE (2021); JACOB HACKER & PAUL PIERSON, AMERICAN AMNESIA: HOW THE WAR ON GOVERNMENT LED US TO FORGET WHAT MADE AMERICA PROSPER (2016); JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC 79–142 (2017).

128 Congress last enacted major amendments to the Civil Rights Act of 1964 in the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071.

129 *See generally* KATHRYN PEARSON, PARTY DISCIPLINE IN THE U.S. HOUSE OF REPRESENTATIVES (2015); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2315 (2006).

130 NOLAN MCCARTY, POLARIZATION: WHAT EVERYONE NEEDS TO KNOW 30–31 (2019); Maggie Koerth & Amelia Thomson-DeVeaux, *Our Radicalized Republic*, FIVETHIRTYEIGHT (Jan. 25, 2021), https://fivethirtyeight.com/features/our-radicalized-republic/ [https://perma.cc/CSZ7-T29H]; Lee Drutman, *How Hatred Came to Dominate American Politics*, FIVETHIRTYEIGHT (Oct. 5, 2020), https://fivethirtyeight.com/features/how-hatred-negative-partisanship-came-to-dominate-american-politics/ [https://perma.cc/C3XE-PMBM].

veto-gates and supermajority requirements,[131] and one party's indifference to constructive governance have limited the areas in which Congress can legislate, at least so long as the two parties' elected representatives remain in rough numerical parity with one another[132] and the Senate filibuster remains in place.[133] So even though, for instance, reproductive rights are broadly popular throughout the United States,[134] any federal guarantee of the rights targeted by S.B. 8 would likely require a majority of the House, sixty votes in the Senate, and a Democratic president, something that last occurred for seventy-two legislative days in 2009 and early 2010.[135]

At the same time that right-wing legislators and activists gutted federal statutory and regulatory protections for civil rights and proved all but unwilling to vote for any Democratic legislation,[136] they also worked hard to install reactionary judges to lock-in the new status quo and, in time, further retrench rights Congress wouldn't or couldn't dismantle. By ruthlessly manipulating the appointments process, Senate Republicans, Trump White House officials, and movement makers such as Federalist Society leader Leonard Leo succeeded in stacking the Supreme Court with a six-justice supermajority that is swiftly dismantling or repurposing existing rights to benefit the ultra-wealthy and White Christian nation-

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131 *See, e.g.*, ADAM JENTLESON, KILL SWITCH: THE RISE OF THE MODERN SENATE AND THE CRIPPLING OF AMERICAN DEMOCRACY (2021); JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 296–301 (2017).

132 Lee Drutman, *How Much Longer Can this Era of Political Gridlock Last?*, FIVETHIRTYEIGHT (Mar. 4, 2021), https://fivethirtyeight.com/features/how-much-longer-can-this-era-of-political-gridlock-last/ [https://perma.cc/2SXE-FLJU].

133 Marianne Levine & Burgess Everett, *Senate Dems' Filibuster Ambitions Fall Short*, POLITICO (Jan. 19, 2022), https://www.politico.com/news/2022/01/19/democrats-senate-rules-change-527366 [https://perma.cc/RJ99-22HF].

134 *See, e.g.*, Jason Lange, *Factbox: Broad U.S. Support for Abortion Rights at Odds with Supreme Court's Restrictions*, REUTERS, (June 24, 2022), https://www.reuters.com/world/us/broad-us-support-abortion-rights-odds-with-supreme-courts-restrictions-2022-06-24/ [https://perma.cc/WG4U-5EXK].

135 *See When Obama Had "Total Control of Congress"*, AKRON BEACON J. (Sept. 9, 2012), https://www.beaconjournal.com/story/news/2012/09/09/when-obama-had-total-control/985146007/ [https://perma.cc/X6V4-E2JX] (explaining that President Obama had "total control" of Congress for four months); Michael Cooper, *G.O.P. Senate Victory Stuns Democrats*, N.Y. TIMES (Jan. 19, 2010), https://www.nytimes.com/2010/01/20/us/politics/20election.html [https://perma.cc/7BLJ-TTRL] (explaining that after the election of Scott Brown, a Republican from Massachusetts, Democrats "no longer control[led] the 60 votes in the Senate").

136 *See* MATT JONES & CHRIS TOMLIN, MITCH, PLEASE!: HOW MITCH MCCONNELL SOLD OUT KENTUCKY (AND AMERICA, TOO) 130 (2020) (describing GOP Senate leader Mitch McConnell as relishing his role as "guardian of gridlock").

alists.[137] Already the Supreme Court has nullified key aspects of the Voting Rights Act;[138] kneecapped the federal government in its efforts to address economic dislocations,[139] public health crises,[140] and the existential threat of climate change;[141] and abandoned federal protections for abortion.[142] In June 2023, the Court effectively banned race-conscious admissions in higher education,[143] broadened religion-based exemptions to antidiscrimination laws,[144] and reserved for itself an ongoing role in resolving election disputes.[145] Perhaps soon, the supermajority will revisit the constitutional protections accorded to birth control and same-sex marriage.[146] All told, this Court

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137 For the history of the successful effort to stack the Court, see, for example, Thomas M. Keck, *Court-Packing and Democratic Erosion*, *in* DEMOCRATIC RESILIENCE: CAN THE UNITED STATES WITHSTAND RISING POLARIZATION? 141, 147–58 (Robert C. Lieberman, Suzanne Mettler & Kenneth M. Roberts eds., 2022); Robert O'Harrow Jr. & Shawn Boburg, *A Conservative Activist's Behind-the-Scenes Campaign to Remake the Nation's Courts*, WASH. POST (May 21, 2019), https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/ [https://perma.cc/R9QJ-BJWN]. On the role of Trump White House counsel Don McGahn and the cadre of Jones Day lawyers he brought to the White House, see DAVID ENRICH, SERVANTS OF THE DAMNED: GIANT LAW FIRMS, DONALD TRUMP, AND THE CORRUPTION OF JUSTICE (2022).

138 *See, e.g.*, Nicholas O. Stephanopoulos, *The Anti-*Carolene *Court*, 2019 SUP. CT. REV. 111; *Opinion: The Roberts Court Systematically Dismantles the Voting Rights Act*, WASH. POST (July 1, 2021), https://www.washingtonpost.com/opinions/2021/07/01/voting-rights-act-roberts-supreme-court-dismantle/ [https://perma.cc/9FUR-MWAB].

139 Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021) (per curiam).

140 Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661 (2022) (per curiam).

141 *See* West Virginia v. EPA, 142 S. Ct. 2587 (2022).

142 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

143 *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 20-1199, 2023 WL 4239254 (U.S. June 29, 2023).

144 *See* 303 Creative LLC v. Elenis, No. 21-476, 2023 WL 4277208 (U.S. June 30, 2023)

145 *See* Moore v. Harper, No. 21-1271, 2023 WL 4187750, at *16 (U.S. June 27, 2023); *id.* at *17-18 (Kavanaugh, J., concurring); Richard L. Hasen, *There's a Time Bomb in Progressives' Big Supreme Court Voting Case Win*, SLATE (June 27, 2023), https://slate.com/news-and-politics/2023/06/supreme-court-voting-moore-v-harper-time-bomb.html [https://perma.cc/2M4A-2WMN] (recognizing that though the Court rejected "the most extreme version of the [Independent State Legislature] theory," the opinion nonetheless gives "great power to federal courts, especially to the US Supreme Court, to second-guess state court rulings in the most sensitive of cases").

146 *See Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring) ("[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell.*"); Joan E. Greve, *Contraception, Gay Marriage: Clarence Thomas Signals New Targets for Supreme Court*, THE GUARDIAN (June 24, 2022), https://www.theguardian.com/world/2022/jun/24/clarence-thomas-roe-gay-marriage-contraception-lgbtq [https://perma.cc/6KHM-ZKQ5]; Lawrence Hurley & Andrew Chung, *U.S. Supreme Court Overturns*

has reconfigured longstanding federal power and constitutional commitments,[147] allowing the American conservative movement to check off all the items on its wish list, and then some. It also leaves Congress, federal agencies, and the people with huge gaps in the modern welfare state and huge vacuums of political power for the states to fill.[148]

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Roe v. Wade, *Ends Constitutional Right to Abortion*, REUTERS (June 27, 2022), https://www.reuters.com/world/us/us-supreme-court-overturns-abortion-rights-landmark-2022-06-24/ [https://perma.cc/RD4Y-3A54].

[147] *E.g.*, Ron Brownstein, *The Republican Axis Reversing the Rights Revolution*, THE ATLANTIC (Dec. 24, 2021), https://www.theatlantic.com/politics/archive/2021/12/republican-states-rights-restrictions/621101/ [https://perma.cc/W2RS-R7GK]; Jacob M. Grumbach, *From Backwaters to Major Policymakers: Policy Polarization in the States, 1970–2014*, 16 PERSP. ON POL. 416, 419 (2018) (citing Joe Soss, Sanford F. Schram, Thomas P. Vartanian & Erin O'Brien, *Setting the Terms of Relief: Explaining State Policy Choices in the Devolution Revolution*, 45 AM. J. POL. SCI. 378 (2001)).

[148] *See* Jon D. Michaels, *If the Supreme Court Lets Other States Copy Texas's Abortion Law, It'll Be Chaos*, WASH. POST (Jan. 10, 2022), https://www.washingtonpost.com/outlook/2022/01/10/court-legal-vigilantes-polarize/ [https://perma.cc/VN3P-GETD]. In devolving power from the federal government to the states, the Court partially realized a top priority of the conservative movement—one pursued by southern conservatives during slavery and segregation, *see generally* DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM (1988); WILLIAM W. FREEHLING, 1 THE ROAD TO DISUNION: SECESSIONISTS AT BAY 1776–1854 (1990); WILLIAM W. FREEHLING, 2 THE ROAD TO DISUNION: SECESSIONISTS TRIUMPHANT 1854–1861 (2007); MANISHA SINHA, THE COUNTERREVOLUTION OF SLAVERY: POLITICS AND IDEOLOGY IN ANTEBELLUM SOUTH CAROLINA (2000); JOHN KYLE DAY, THE SOUTHERN MANIFESTO: MASSIVE RESISTANCE AND THE FIGHT TO PRESERVE SEGREGATION (2014); Nixon-era conservatives under the banner of New Federalism, *see* Bruce Katz, *Nixon's New Federalism 45 Years Later*, BROOKINGS (Aug. 11, 2014), https://www.brookings.edu/blog/the-avenue/2014/08/11/nixons-new-federalism-45-years-later/ [https://perma.cc/6M8K-Z2A7]; Reagan-era conservatives who championed states' rights and devolution alongside adjunctive commitments to privatization and deregulation, *see* TIMOTHY J. CONLAN, FROM NEW FEDERALISM TO DEVOLUTION: TWENTY-FIVE YEARS OF INTERGOVERNMENTAL REFORM (1998); MICHAELS, *supra* note 127, at 91–98; and, most recently, Tea Party and now MAGA conservatives who conflate federalism with Christian-nationalist populism, *see* President Donald J. Trump, Inauguration Speech (Jan. 20, 2017), https://www.politico.com/story/2017/01/full-text-donald-trump-inauguration-speech-transcript-233907 [https://perma.cc/K3NR-KUB6] ("[W]e are not merely transferring power from one administration to another, or from one party to another, but we are transferring power from Washington, D.C., and giving it back to you, the people."); Noah Bierman, *Trump Shifts Meaning of 'Drain the Swamp' from Ethics to Anything He Objects To*, L.A. TIMES (Feb. 9, 2018), https://www.latimes.com/politics/la-na-pol-swamp-20180209-story.html [https://perma.cc/33PW-T84S]; Lisa Rein, Tom Hamburger, Juliet Eilperin & Andrew Freedman, *How Trump Waged War on His Own Government*, WASH. POST (Oct. 29, 2020), https://www.washingtonpost.com/politics/trump-federal-civil-servants/2020/10/28/86f9598e-122a-11eb-ba42-ec6a580836ed_story.html [https://perma.cc/Z5DY-48CB]. While we focus here on the Court, officials have used agencies themselves to pursue the same project during Republican presidential administrations. *See* David L. Noll, *Administrative Sabotage*, 120 MICH. L. REV. 753 (2022); Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585 (2021).

Louis Brandeis's canonical account of American federalism predicts that, freed of federal constraints, states will engage in a process of policy experimentation that, through quasi-market dynamics, leads successful policy "experiments" to spread to other states.[149] But as scholars of contemporary federalism have shown, the dynamics of state policymaking today are at odds with Brandeis's vision of states as laboratories of democracy.

Gerrymandered legislative districts,[150] the "sorting" of voters into ideologically cohesive parties who live in enclaves of like-minded people,[151] elite and grassroots polarization,[152] and the lack of professional legislative staff (combined with legislatures that convene on a part-time basis)[153] make many state legislatures more polarized and less democratically representative than national political institutions. In 2018, fifty-nine million Americans lived in states where the state legislature was controlled by the party that received a minority of votes.[154] Aware that the most serious electoral threat for state legislators comes from primary challengers on the ideological extremes, national organizations have turned to state legislatures as a point of least resistance for engaging and intervening in national partisan battles.[155] That strategy was pioneered by groups focused on radical economic deregulation[156] but has

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149 *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

150 *See, e.g.*, CHRISTIAN R. GROSE, JORDAN CARR PETERSON, MATTHEW NELSON & SARA SADHWANI, UNIV. S. CAL. SCHWARZENEGGER INST. FOR STATE & GLOB. POL'Y, THE WORST PARTISAN GERRYMANDERS IN U.S. STATE LEGISLATURES 6 (2020), http://schwarzeneggerinstitute.com/theworstpartisangerrymanders/ [https://perma.cc/64MM-39JH]; Nicholas O. Stephanopoulos, *The Causes and Consequences of Gerrymandering*, 59 WM. & MARY L. REV. 2115 (2018).

151 *See, e.g.*, MATTHEW LEVENDUSKY, THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME REPUBLICANS (2009); Gregory J. Martin & Steven W. Webster, *Does Residential Sorting Explain Geographic Polarization?*, 8 POL. SCI. RSCH. & METHODS 215, 216 (2020).

152 MCCARTY, *supra* note 130, at 30–31.

153 *See* ALEXANDER HERTEL-FERNANDEZ, STATE CAPTURE: HOW CONSERVATIVE ACTIVISTS, BIG BUSINESSES, AND WEALTHY DONORS RESHAPED THE AMERICAN STATES—AND THE NATION, at ix (2019) ("Across the United States, many state legislatures are run without either professional lawmakers or staffs.").

154 Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1765 (2021) (citing GROSE, PETERSON, NELSON & SADHWANI, *supra* note 150, at 6). The states were Michigan, North Carolina, Ohio, Pennsylvania, Virginia, and Wisconsin.

155 *See* GRUMBACH, *supra* note 18, at 34–36; Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1085–86 (2014).

156 *See* HERTEL-FERNANDEZ, *supra* note 153, at xiii–xiv.

now been adopted by Christian nationalist groups such as the Alliance Defending Freedom and National Association of Christian Lawmakers, which have adapted it for "culture wars" bills that reify traditionalist understandings of race, gender, and the family.[157] Through this approach, policies that defy the preferences of national and even local majorities are cemented into state law. S.B. 8, for example, was enacted on a near-party-line vote[158] by an overwhelmingly White group of lawmakers[159] who benefitted from Texas's gerrymandered legislative districts.[160] Polls report the law is opposed by 63% of Texans[161] and 74% of voters nationally.[162]

In place of Brandeis's "laboratories of democracies," then, today's devolution of governmental power has given rise to a new "vigilante federalism." Operating in the vacuums created by the decline and reconfiguration of federal civil rights and the Court's incapacitation of federal agencies, states have further devolved power to nominally private vigilantes who operate with explicit state support to surveil and prosecute their neighbors, doctors, and teachers. Vigilante federalism is not simply a novel regulatory technique; it is the confluence of specific power, a partisan mandate at a moment of surging Christian nationalism, and imputed institutional significance that in many respects positions governors and state legislators to

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157 *See* Joanna Wuest & Briana Last, *Church Against State: How Industry Groups Lead the Religious Liberty Assault on Civil Rights, Healthcare Policy, and the Administrative State*, J. L. MED. & ETHICS (forthcoming 2023), https://ssrn.com/abstract=4306283 [https://perma.cc/9MV3-X3G2]; Hannah Dick, *Advocating for the Right: Alliance Defending Freedom and the Rhetoric of Christian Persecution*, 29 FEM. L. STUD. 375, 385–89, 393–94 (2021); Amy Littlefield, *The Christian Legal Army Behind the Ban on Abortion in Mississippi*, THE NATION (Nov. 30, 2021), https://www.thenation.com/article/politics/alliance-defending-freedom-dobbs/ [https://perma.cc/PNM6-CWCT].

158 *Roll Call: TX SB8*, LEGISCAN (May 19, 2021), https://legiscan.com/TX/rollcall/SB8/id/1039526 [https://perma.cc/8X54-Q5CL].

159 Photographs of S.B. 8's signing ceremony provide a striking illustration of the racial makeup of the law's backers. *See, e.g.*, *Abbott Signs Texas Heartbeat Act into Law*, WAXAHACHIE SUN (May 19, 2021), https://www.waxahachiesun.com/news/local/abbott-signs-texas-heartbeat-act-into-law/article_cfb9fff6-b929-11eb-8cae-6363af863b65.html [https://perma.cc/7DEX-ZM8D].

160 *See, e.g.*, Ross Ramsey, *Analysis: Gerrymandering Has Left Texas Voters with Few Options*, TEX. TRIB. (Apr. 20, 2022), https://www.texastribune.org/2022/04/20/texas-redistricting-elections/ [https://perma.cc/N2E5-XKJK].

161 PUB. POL'Y POLLING, TEXAS SURVEY RESULTS: SURVEY OF 593 TEXAS VOTERS 1 (2021), https://avowtexas.org/wp-content/uploads/2021/04/EMBARGO4-29-HB1515Polling.pdf [https://perma.cc/B3NN-RGNA].

162 Domenico Montanaro, *The Provisions in Texas' Restrictive Abortion Law Are Not Popular, an NPR Poll Finds*, NPR (Oct. 4, 2021), https://www.npr.org/2021/10/04/1042454835/the-provisions-in-texas-restrictive-abortion-law-are-not-popular-an-npr-poll-fin [https://perma.cc/8K5S-5YC8].

push especially stridently on tools that will stoke politically salient grievances, rally their base, and further silence or weaken would-be opposition forces. As Part II explores, this forms part of a larger movement to cement right-wing politicians' hold on power and entrench their extremist policies from democratic control.

### D. The Judicial Non-Response to Private Subordination Regimes

The structural conditions and political trends we describe in the prior section suggest that the federal courts, and the U.S. Supreme Court in particular, are unlikely to be a major check on private subordination and its reconfiguration of power in the United States. Indeed, this is precisely what has happened in early litigation over private subordination actions.

The leading case is *Whole Woman's Health v. Jackson*, the 2021 litigation over Texas's S.B. 8.[163] Before S.B. 8 took effect, abortion providers filed suit in federal district court, naming a state court judge, a state court clerk, and the state medical licensing board (among others) as defendants and seeking an injunction that would protect the providers against the threat of limitless S.B. 8 suits.[164] The district court held the case could proceed against some defendants[165] but the Fifth Circuit stayed district court proceedings.[166] The Supreme Court, in turn, declined to set aside the stay, reasoning that the "complex and novel" procedural issues presented by Texas's scheme prevented the Court from addressing its flagrant unconstitutionality.[167]

Facing an outpouring of criticism over gutting *Roe* through a conclusory order entered on the so-called shadow docket,[168]

163 142 S. Ct. 522 (2021).

164 Complaint at 1–2, Whole Woman's Health v. Jackson, 556 F. Supp. 3d 595 (W.D. Tex. 2021) (No. 1:21-CV-616-RP).

165 Whole Woman's Health v. Jackson, 556 F. Supp. 3d at 633.

166 Whole Woman's Health v. Jackson, No. 21-50792, 2021 WL 3919252, at *1 (5th Cir. Aug. 29, 2021).

167 Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2499 (2021) (Sotomayor, J., dissenting).

168 *See, e.g.*, Adam Serwer, *Five Justices Did This Because They Could*, THE ATLANTIC (Sept. 2, 2021), https://www.theatlantic.com/ideas/archive/2021/09/supreme-court-guts-roe-shadow-docket/619957/ [https://perma.cc/5VYC-6AQX]; Maggie Astor, *How the Supreme Court Quietly Undercut* Roe v. Wade, N.Y. TIMES (Sept. 2, 2021), https://www.nytimes.com/2021/09/02/us/politics/roe-v-wade-supreme-court.html [https://perma.cc/Y2QF-FGN7]. Adam Serwer's essay accurately pointing out that the Court had nullified *Roe* provoked a response from Justice Alito in an unusual, closed-door speech delivered before a sympathetic audience at the University of Notre Dame. Ariane de Vogue, *Justice Samuel Alito*

the Court granted certiorari before judgment, reversed itself in part, and held that providers could proceed against members of Texas's medical licensing board.[169]

But that decision did nothing to ameliorate S.B. 8's real world effects. Injunctive relief against members of the medical board (even if it had been granted[170]) would not have protected providers against suits by private plaintiffs.[171] So providers continued to face the prospect of unbounded, financially ruinous lawsuits.

Because the United States is not limited by state sovereign immunity,[172] the Justice Department filed a separate challenge to S.B. 8 after the Supreme Court initially declined to halt enforcement of the law.[173] The district court granted a preliminary injunction barring Texas courts from hearing S.B. 8 claims.[174] But the Fifth Circuit stayed the injunction in an illogical four-sentence order.[175] After granting certiorari to review the Fifth Circuit's stay, the Supreme Court dismissed the writ as improvidently granted and left the Fifth Circuit's stay in play.[176] On remand, the Fifth Circuit slow walked its delibera-

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*Says Supreme Court Is Not a 'Dangerous Cabal'*, CNN (Sept. 30, 2021), https://www.cnn.com/2021/09/30/politics/samuel-alito-notre-dame/index.html [https://perma.cc/JW6W-8GW7]. For further elaboration of the shadow docket and the pathologies associated with it, see STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (2023).

169 Whole Woman's Health v. Jackson, 142 S. Ct. 522, 539 (2021).

170 The suit against medical board members was derailed. On remand from the Supreme Court, the Fifth Circuit asked the Texas Supreme Court to resolve whether members of the state licensing board were authorized to enforce S.B. 8, as the U.S. Supreme Court assumed. Whole Woman's Health v. Jackson, 23 F.4th 380, 388–89 (5th Cir. 2022). The Texas Supreme Court answered "no," ending the providers' effort to obtain pre-enforcement review in the federal courts. Whole Woman's Health v. Jackson, 642 S.W.3d 569, 583 (Tex. 2022).

171 *See* FED. R. CIV. P. 65(d)(2)(a)–(c) (An injunction binds "the parties; the parties' officers, agents, servants, employees, and attorneys; and other persons who are in active concert or participation" with those bound by the injunction, provided that person "receive[s] actual notice of it by personal service or otherwise.").

172 United States v. Texas, 143 U.S. 621, 647–48 (1892).

173 Complaint at 1, United States v. Texas, 566 F. Supp. 3d 605 (W.D. Tex. 2021) (No. 1:21-CV-796-RP).

174 United States v. Texas, 566 F. Supp. 3d 605, 693 (W.D. Tex. 2021).

175 Although the United States' ability to sue states is not limited by sovereign immunity, the Fifth Circuit concluded that the preliminary injunction should be stayed "for the reasons stated in *Whole Woman's Health v. Jackson*, 13 F.4th 434 (5 Cir. 2021), and *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (2021)"—the pre-enforcement challenge filed by *private parties* whose ability to sue Texas *is* restricted by sovereign immunity. United States v. Texas, No. 21-50949, 2021 WL 4786458, at *1 (5th Cir. Oct. 14, 2021).

176 United States v. Texas, 142 S. Ct. 522 (2021) (mem.).

tions, allowing *Dobbs v. Jackson Women's Health Organization*[177] to moot the case.

The practical effect of the Supreme Court's non-decisions and the Fifth Circuit's interventions in the district court's proceedings was to leave S.B. 8 free to operate, eliminating access to legal abortions after the sixth week of pregnancy in the nation's second largest state.[178] And as Part III explores, litigation such as the suits against S.B. 8 to some degree forces advocates into a game of whack-a-mole, in which they must counter *existing* private subordination regimes as new, more punitive ones are designed and enacted. All this makes understanding private subordination's political functions, and the ways it interacts with and supports contemporary right-wing politics, all the more essential. We turn now to those tasks.

## II
## POLITICAL FUNCTIONS OF PRIVATE SUBORDINATION

Galvanized by S.B. 8's nullification of the constitutional right to reproductive autonomy before the Supreme Court formally overturned *Roe*, legal commentators have devoted considerable attention to subordination regimes' use of private enforcement to evade pre-enforcement judicial review in federal court. The main questions this work engages are how private subordination regimes compare to the historical precedents

177 142 S. Ct. 2228 (2022).

178 Though advocates and scholars identified other avenues for challenging S.B. 8, none of these efforts to work around the Court's endorsement of the law has succeeded in restoring the pre-S.B. 8 status quo. James Pfander, for example, focuses on the writ of prohibition, James E. Pfander, *Judicial Review of Unconventional Enforcement Regimes*, 102 TEX. L. REV. (forthcoming 2023), which challengers to Idaho's S.B. 8 copycat employed to temporarily halt that law's implementation before the Idaho Supreme Court allowed it to take effect. *See* Planned Parenthood Great Nw. v. State, No. 49615, 2022 WL 3335696, at *2 (Idaho Aug. 12, 2022). Dr. Alan Braid filed an interpleader action seeking to consolidate all potential claims against him in a Chicago federal court. Complaint at 23–24, Braid v. Stilley, No. 1:21-cv-05283, 2021 WL 9086295 (N.D. Ill. Nov. 29, 2021). Other Texas abortion providers filed state court actions that led Texas courts to create a multidistrict litigation that consolidated all S.B. 8-related litigation and resulted in a decision finding S.B. 8 violated due process. *See* Van Stean v. Tex. Right to Life, No. D-1-GN-21-004179, slip op. at 14–15, 46 (Tex. 98th Dist. Ct. Travis Cnty. Dec. 9, 2021). Although the trial court in *Van Stean* concluded that S.B. 8 is unconstitutional on procedural grounds, its ruling must withstand review in the Texas appellate courts. The trial court, moreover, neglected to sever the portion of its judgment finding S.B. 8 unconstitutional from the portion finding that plaintiffs' suit was not barred by Texas's anti-SLAPP law. That allowed defendants to appeal the entire decision to Texas's 3d Court of Appeals, which did not issue a decision on the anti-SLAPP issue until May 23, 2023. Texas Right to Life v. Van Stean, No. 03-21-00650-CV, 2023 WL 3687408, at *1 (Tex. App. May 26, 2023). .

from which they selectively borrow[179] and how the federal courts' justiciability jurisprudence should adapt to a private enforcement regime that unleashes a state court system to nullify an established constitutional right within the state (if that jurisprudence should adapt at all).[180]

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179 *See, e.g.*, Lauren Moxley Beatty, *The Resurrection of State Nullification—and the Degradation of Constitutional Rights: SB8 and the Blueprint for State Copycat Laws*, 111 GEO. L.J. ONLINE 18, 20–21 (2022) (situating S.B. 8 alongside states' historical efforts to nullify federal law); Joshua C. Wilson, *In the Texas Abortion Law, Conservatives Adopted the Progressive Playbook and Used it Against Them*, WASH. POST (Sept. 3, 2021), https://www.washingtonpost.com/politics/2021/09/03/texas-sbs-abortion-law-conservatives-adopted-progressive-playbook-used-it-against-them/ [https://perma.cc/E7W5-U42R] (comparing S.B. 8 to earlier, civil-rights-focused iterations of private enforcement).

180 *See, e.g.*, Laurence H. Tribe & Stephen I. Vladeck, *Opinion: Texas Tries to Upend the Legal System with Its Abortion Law*, N.Y. TIMES (July 19, 2021), https://www.nytimes.com/2021/07/19/opinion/texas-abortion-law-reward.html/ [https://perma.cc/JF3E-KQGB] (favorably describing pre-enforcement lawsuit filed against S.B. 8 and citing historical precedent for finding the suit justiciable); Yeomans, *supra* note 1, at 515 ("The Court should use the S.B. 8 debacle as an opportunity to hold that when legislation implicates the exercise of fundamental rights, but does not admit of a clear path to pre-enforcement review, litigants can sue state-court judges under *Ex parte Young* to enjoin the law's enforcement."); Howard M. Wasserman & Charles W. "Rocky" Rhodes, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: The Limits and Opportunities for Offensive Litigation*, 71 AM. U. L. REV. 1029, 1102–03 (2022) (depicting S.B. 8 as a routine private right of action and arguing that its "extremity . . . should not affect the process through which [its] validity is litigated and adjudicated"). Private subordination regimes' manipulation of justiciability doctrine has also been lauded by right-wing cheerleaders who seemingly view the elimination of pre-enforcement suits under Section 1983 and *Ex parte Young* as a brilliant example of owning the libs. *E.g.*, Josh Blackman, *The Genius v. SCOTUS*, VOLOKH CONSPIRACY (Nov. 2, 2021), https://reason.com/volokh/2021/11/02/the-genius-v-scotus/ [https://perma.cc/AT6K-PWR3] ("We are living in Jonathan Mitchell's world. And the judicial supremacists can't stand it."); *see also* Josh Blackman, *Opinion: In Texas Abortion Case, Kavanaugh and Barrett Caved to Judicial Supremacy*, NEWSWEEK (Nov. 2, 2021), https://www.newsweek.com/texas-abortion-case-kavanaugh-barrett-caved-judicial-supremacy-opinion-1644807 [https://perma.cc/6NNE-YHAM] (associating judicial supremacy with "the Left" and castigating Justices Kavanaugh and Barrett for "sipp[ing] from the trough of judicial supremacy"). We see none of the brilliance recognized by boosters and critics alike. *See* Mary Ziegler, *The Sinister Genius of Texas Abortion Law*, CNN (Sept. 3, 2021), https://www.cnn.com/2021/09/02/opinions/texas-abortion-law-supreme-court-dystopia-ziegler/index.html [https://perma.cc/6CZ4-3JGX]. We instead endorse the sentiments of Professor Khiara Bridges. *See* Michael S. Schmidt, *Behind the Texas Abortion Law, a Persevering Conservative Lawyer*, N.Y. TIMES (Sept. 12, 2021), https://www.nytimes.com/2021/09/12/us/politics/texas-abortion-lawyer-jonathan-mitchell.html [https://perma.cc/N4LS-TFTP] ("It grinds my gears when people say what's been done here is genius, novel or particularly clever—it was only successful because it had a receptive audience in the Supreme Court and Fifth Circuit." (quoting Khiara M. Bridges)). We are furthermore perplexed why commentators who laud the MAGA-friendly Court's muscular activism in other contexts (and who were on the brink of celebrating that Court's reversal of *Roe v. Wade* on the merits) would be quick to embrace juris-

These commentators are right to drill down on private subordination regimes' historical analogs, their technical trickery, and the way they challenge the supremacy of federal law. Still, their inquiries take us only so far. For private subordination regimes' manipulation of judicial review does not explain the larger functions laws like S.B. 8 and "Don't Say Gay" are serving in post-Trump U.S. politics or their relationship to the embrace of citizenship enforcement that has emerged on the American right. Stated differently, these legal and historical analyses do not grapple with private subordination regimes' lived social meaning or their place in the ecosystem of contemporary right-wing political mobilization.

Looking more broadly to the movements and actors that private subordination regimes emerged from and their downstream political effects, we cannot help but see that those regimes are also, if not primarily, an effort to reframe power in America; to restructure intergovernmental, intergroup, and interpersonal relations; and to advance an illiberal, partisan political agenda. We contend that these political functions—not their manipulation of judicial review or subversion of constitutional rights—are what is most novel about private subordination regimes, what makes them especially dangerous, and what makes them a key mechanism of vigilante federalism.

Today's private subordination regimes cannot be divorced from modern right-wing movements in America. Since the dawn of the Civil Rights Movement, right-wing politics in the United States has moved from the states' rights federalism of southern (Democratic) segregationists to the anti-government, pro-business (old-school Republican) libertarianism of Ronald Reagan to the anti-democratic, authoritarian (New Right) populism of Donald Trump.[181] Contemporary right-wing politics is intertwined with an understanding of "We the People" that deems millions of Americans illegitimate, if not "scum"[182] and

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prudential developments that, as explored below, invite progressive states to ignore or evade this very same exceedingly rightwing Court's pronouncements.

181 For scholarly and journalistic accounts of the transformations of and in conservative politics, see generally, TIM ALBERTA, AMERICAN CARNAGE: ON THE FRONT LINES OF THE REPUBLICAN CIVIL WAR AND THE RISE OF PRESIDENT TRUMP (2019); GERALD F. SEIB, WE SHOULD HAVE SEEN IT COMING: FROM REAGAN TO TRUMP—A FRONT-ROW SEAT TO A POLITICAL REVOLUTION (2020); JULIAN E. ZELIZER, BURNING DOWN THE HOUSE: NEWT GINGRICH, THE FALL OF A SPEAKER, AND THE RISE OF THE NEW REPUBLICAN PARTY (2020); HEATHER COX RICHARDSON, TO MAKE MEN FREE: A HISTORY OF THE REPUBLICAN PARTY (2014).

182 This particular remark was directed at Justice Department officials. Tom Porter, *Trump Called the FBI 'Scum' and Hit Out at the Report That Discredited His Theory the Russia Probe Was a Deep-State Plot at a Wild Pennsylvania Rally*, BUS.

"rapists."[183] It encourages political violence,[184] gerrymandering, and voter suppression;[185] cheers the January 6, 2021 attack on the U.S. Capitol (described by the RNC as "legitimate political discourse"[186]); and toys with such ideas as outright secession,[187] executing conservative critics,[188] and pardoning the January 6 insurrectionists.[189] In rejecting peaceable, pluralistic, multiracial democracy, movement leaders have worked

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INSIDER (Dec. 11, 2019), https://www.businessinsider.com/trump-called-the-fbi-scum-at-a-pennsylvania-rally-2019-12 [https://perma.cc/HWP2-8KAF].

183 Z. Byron Wolf, *Trump Basically Called Mexicans Rapists Again*, CNN (Apr. 6, 2018), https://www.cnn.com/2018/04/06/politics/trump-mexico-rapists/index.html [https://perma.cc/4A6T-XWFN].

184 Michael Gerson, *Opinion: The Threat of Violence Now Infuses GOP Politics. We Should All Be Afraid.*, WASH. POST (May 20, 2021), https://www.washingtonpost.com/opinions/2021/05/20/trump-republicans-violent-threats-election-2024/ [https://perma.cc/C9GU-XCCY]; Jeet Heer, *The Republicans Have Become the Party of Organized Violence*, THE NATION (Nov. 29, 2021), https://www.thenation.com/article/politics/gop-violence-trump/ [https://perma.cc/YX9D-PQ5Z].

185 Carrie Levine, *States Adopt 'Historic Wave of Restrictions' to the Right to Vote*, CTR. FOR PUB. INTEGRITY (Oct. 1, 2021), https://publicintegrity.org/inside-publici/newsletters/watchdog-newsletter/states-adopt-voting-restrictions/ [https://perma.cc/8BZE-YSP4]; Mac Brower, *How Gerrymandering Helped Republicans Win the House*, DEMOCRACY DOCKET (Dec. 16, 2022), https://www.democracydocket.com/analysis/how-gerrymandering-helped-republicans-win-the-house/ [https://perma.cc/7BSE-YQDK].

186 Jonathan Weisman & Reid J. Epstein, *G.O.P Declares Jan. 6 Attack 'Legitimate Political Discourse'*, N.Y. TIMES (Feb. 4, 2022), https://www.nytimes.com/2022/02/04/us/politics/republicans-jan-6-cheney-censure.html [https://perma.cc/94Q5-BU9P].

187 Sarakshi Rai, *Ted Cruz Wants Texas to Secede If 'Things Become Hopeless' in the US*, THE HILL (Nov. 8, 2021), https://thehill.com/homenews/state-watch/580613-ted-cruz-wants-texas-to-secede-if-things-become-hopeless-in-the-us [https://perma.cc/9KW2-TVM7]; Jennifer Graham, *Opinion: Marjorie Taylor Greene, Ted Cruz and the Dangerous Rhetoric of a National Divorce*, DESERET NEWS (Dec. 30, 2021), https://www.deseret.com/opinion/2021/12/30/22859964/marjorie-taylor-greene-ted-cruz-and-the-dangerous-rhetoric-of-a-national-divorce-texit-secession [https://perma.cc/4B5Q-JXLU]; *see generally* Casey Michel, *Pro-Trump Republican Secession Rhetoric in Texas and Elsewhere Is More Than a Punchline*, NBC NEWS (Feb. 28, 2021), https://www.nbcnews.com/think/opinion/pro-trump-republican-secession-rhetoric-texas-elsewhere-more-punchline-ncna1259016 [https://perma.cc/4C9E-8TX3]; Fintan O'Toole, *Beware Prophesies of Civil War*, THE ATLANTIC (Dec. 16, 2021), https://www.theatlantic.com/magazine/archive/2022/01/america-civil-war-prophecies/620850/ [https://perma.cc/S4ZK-Y2VR].

188 *Liz Cheney's Lonely Fight Against the Extremist Wing of the GOP: Editorial*, PHILA. INQUIRER (June 14, 2022), https://www.inquirer.com/opinion/editorials/jan-6-committee-hearings-liz-cheney-20220614.html [https://perma.cc/2BBP-DQ48].

189 *Trump Dangles Prospect of Pardons for January 6 Defendants If Elected in 2024*, CBS NEWS (Jan. 31, 2022), https://www.cbsnews.com/news/trump-january-6-pardons-2024/ [https://perma.cc/6GAP-7JJ4].

to cement their hold on power—regardless of democratic preferences—and entrench their policies in law.[190]

Of special interest to us here are two strategies that right-wing politicians have used to advance their project of instantiating and institutionalizing minority rule. First, Republican leaders starting with Richard Nixon have cultivated networks of outrage groups that mobilize voters through single-issue messaging pertaining to abortion, gun rights, identity politics, or religious control of public life (branded "religious freedom").[191] These groups have provided crucial sources of political support to the modern GOP. Because they are dedicated to single issues and are generally uninterested in competent governance outside of the specific areas that animate them, outrage groups have every incentive to push their particular issues to the ideological extremes.[192]

The second strategy is, if anything, more alarming. At the same time that the GOP has cultivated a network of single-issue outrage groups, it has sought to suppress or dilute the voting power of Black, Brown, and disproportionately poor Americans, ostensibly in the name of fighting election fraud. The party has used partisan gerrymandering to lock-in control of House seats and state legislatures;[193] embraced a strategy,

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190 *See, e.g.*, Ari Berman, *The Insurrection Was Put Down. The GOP Plan for Minority Rule Marches On*, MOTHER JONES (Mar.–Apr. 2021), https://www.motherjones.com/politics/2021/01/the-insurrection-was-put-down-the-gop-plan-for-minority-rule-marches-on/ [https://perma.cc/N7KC-JQGP]; Corey Robin, *Opinion: Republicans Are Moving Rapidly to Cement Minority Rule. Blame the Constitution.*, POLITICO (Jan. 5, 2022), https://www.politico.com/news/magazine/2022/01/05/democracy-january-6-coup-constitution-526512 [https://perma.cc/9D8K-AZ6S].

191 *See generally* FRANCIS FITZGERALD, THE EVANGELICALS: THE STRUGGLE TO SHAPE AMERICA (2017); SCOTT MELZER, GUN CRUSADERS: THE NRA'S CULTURE WAR (2009); DANIEL K. WILLIAMS, GOD'S OWN PARTY: THE MAKING OF THE CHRISTIAN RIGHT (2010); DANIEL J. BALZ, STORMING THE GATES: PROTEST POLITICS AND THE REPUBLICAN REVIVAL (1996). For an enlightening account of movements' influence on party positions that spans the Republican and Democratic parties, see generally DANIEL SCHLOZMAN, WHEN MOVEMENTS ANCHOR PARTIES: ELECTORAL ALIGNMENTS IN AMERICAN HISTORY (2015).

192 We may, it bears noting, be sufficiently far along in this political outrage project to appreciate that too much success may, ultimately, invite an overwhelming countermovement. The Republican Party's encouragement of anti-abortion activists who have toiled for decades to shred reproductive rights may, post-*Dobbs*, lead to stunning groundswells of support for Democratic candidates. To the extent that happens, it will invite only more concentrated Republican efforts to weaken the democratic standing of women and voters of color already disproportionately affected by anti-choice laws.

193 Reid J. Epstein & Nick Corasaniti, *Republicans Gain Heavy House Edge in 2022 as Gerrymandered Maps Emerge*, N.Y. TIMES (Nov. 15, 2021), https://www.nytimes.com/2021/11/15/us/politics/republicans-2022-redistricting-

inspired by partisan gerrymanders, of "districting everything" to ensure that executive and judicial offices are filled through elections that, by and large, overweigh White, rural votes;[194] and changed election rules to give partisans control of counting votes and reporting election results.[195] On January 6, 2021, 147 Republican members of the Congress endorsed Trump's Big Lie by voting to reject the certification of the electoral college vote.[196] Leaders of the right-wing legal movement—everyone from suspected January 6 conspirators to Federalist Society capos—have even tried to clear a path for state legislatures to override the will of their citizens in elections for the presidency and the House.[197]

At a time when elections are perpetually decided by close margins, the combination of suppression and dilution strategies is central to the GOP's ability to prevail in elections and retain control over the levers of governmental power. But because demographic trends favor Democrats going forward (and because single-issue outrage politics—when successful—sparks powerful countermobilization movements[198]), Republicans are doing even more. As Jacob Hacker and Paul Pierson put it, the party's populist leaders have adopted a strategy of manufacturing or fomenting social divisions that are "strong enough to attract durable political support from the working

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maps.html [https://perma.cc/J4UZ-DEG7] (noting the "flood of gerrymandering" is carried out "predominantly by Republicans").

194 Miriam Seifter, *State Institutions and Democratic Opportunity*, 72 DUKE L.J. 275, 305 (2022).

195 Nicholas Riccardi, *'Slow-Motion Insurrection': How GOP Seizes Election Power*, ASSOCIATED PRESS (Dec. 30, 2021), https://apnews.com/article/donald-trump-united-states-elections-electoral-college-election-2020-809215812f4bc6e5907573ba98247c0c [https://perma.cc/E7J6-JS8R]; Barton Gellman, *Trump's Next Coup Has Already Begun*, THE ATLANTIC (Dec. 6, 2021), https://www.theatlantic.com/magazine/archive/2022/01/january-6-insurrection-trump-coup-2024-election/620843/ [https://perma.cc/A9H7-QV4Z].

196 *The Republicans Who Voted to Overturn the Election*, REUTERS (Feb. 4, 2021), https://graphics.reuters.com/USA-TRUMP/LAWMAKERS/xegpbedzdvq/ [https://perma.cc/72QG-CLQR].

197 *See* Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. CHI. L. REV. 137, 162–176 (2022); Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. 445, 539–41 (2022); Mark Joseph Stern, *A Federalist Society Star Helped Foment the Capitol Riot*, SLATE (Jan. 13, 2021), https://slate.com/news-and-politics/2021/01/john-eastman-federalist-society-capitol-insurrection.html [https://perma.cc/JJL6-P73Q].

198 *E.g.*, Laura Kusisto & Joe Barrett, *Kansas Votes to Protect Abortion Rights in State Constitution*, WALL. ST. J. (Aug. 3, 2022), https://www.wsj.com/articles/kansas-abortion-vote-results-11659440554 [https://perma.cc/CG5L-4H36].

and middle classes."[199] These divisions—"many racially tinged, all involving strong identities and strong emotions"—solidify and mobilize political support by drawing sharp lines between "us" and "them" and then using those divisions to generate perpetual crises.[200]

Enter private subordination actions, stage right. The laws are both the *product* of anti-democratic, White Christian nationalist politics and an effort to affirmatively *create* and *amplify* it. The laws invert grievances and rights, not only negating the rights of those deprived of medical, educational, and athletic services and opportunities but also vesting new rights in those who happen to be offended by abortions, inclusive schools and sports programs, and classroom discussions that addresses race, gender, and sexuality. The inversion of grievances and rights fuels outrage cycles in right-wing media and legitimates and reinforces the righteous fury of the right-wing political base. And, of special consequence, the laws' inversion of rights gives cadres of conservative foot soldiers the authority and monetary incentive to bully political opponents into submission—and, oftentimes, out of civic and political spaces (where they might otherwise contest Republican hegemony). These interventions align with growing right-wing enthusiasm for extralegal forms of intimidation and violence to advance political objectives that cannot be achieved through peaceful civic engagement.[201]

## A. Manipulating Rights

The first key to private subordination regimes' broader political functions is the way they manipulate the definition—and longstanding popular understandings—of legal rights. Through inventive legislative drafting, lawmakers can give anyone the "right" to pursue legal remedies for violations of statutory directives. Private subordination regimes take advantage of this ploy to formally mimic laws such as Title VII, which

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199 JACOB S. HACKER & PAUL PIERSON, LET THEM EAT TWEETS: HOW THE RIGHT RULES IN AN AGE OF EXTREME INEQUALITY 22 (2020).

200 *Id.*

201 *E.g.*, Zach Beauchamp, *"We Are Going to Make You Beg for Mercy": America's Public Servants Face a Wave of Threats*, Vox (Nov. 18, 2021), https://www.vox.com/22774745/death-threats-election-workers-public-health-school [https://perma.cc/4YJB-HH8P]; Alan Feuer, *'I Don't Want to Die for It': School Board Members Face Rising Threats*, N.Y. TIMES (Nov. 5, 2021), https://www.nytimes.com/2021/11/05/us/politics/school-board-threats.html [https://perma.cc/MV99-Y7S6].

authorize discriminated-against plaintiffs to pursue remedies for violations of their individual rights.[202]

But the mimicry is only superficial: the rights the new laws vindicate are conceptually different from those vindicated through consumer, antitrust, and employment discrimination regimes that have been on the statute books for decades.

Let's be perfectly clear what private subordination regimes—targeting abortion, CRT instruction, and transgender inclusivity—are about. A neighbor who is "offended" that the woman across the street is getting an abortion, a townsperson distressed that the local elementary school teachers are acknowledging America's original sin, or an intense soccer parent irked that a trans girl is on the JV team is not seeking vindication for a personal injury. Rather, those plaintiffs are marshaling the power of the state to operationalize moral outrage at others' actions—actions that in no meaningful or cognizable way compromise who those plaintiffs are and the lives that they plan to lead. This was made apparent in oral arguments on S.B. 8 when Texas's solicitor general suggested plaintiffs suffer "the tort of outrage"—in which "an individual becomes aware of a non-compliant abortion and they suffer the sort of same extreme emotional harm."[203] Even Justice Thomas seemed taken aback: "I – I – forgive me, but I don't recall an outrage injury. What would that be? You said extreme outrage, that would be the injury."[204]

Though Justice Thomas regained his credulity by the time the Court decided the case, this "tort" is not one with a reputable historical pedigree.[205] The proper comparison for private

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[202] *Cf.* 42 U.S.C. § 2000e-2(a)(1) (making it an unlawful employment practice "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of" a protected characteristic).

[203] Transcript of Oral Argument at 47–48, Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021) (No. 21-463).

[204] *Id.* at 48.

[205] This view aligns with that of John Goldberg and Benjamin Zipursky, who argue that the distinctive feature of tort law is "empowering victims to hold injurers accountable *to them* for having committed legal wrongs against them." John C. P. Goldberg & Benjamin C. Zipursky, *Tort Theory, Private Attorneys General, and State Action: From Mass Torts to Texas S.B. 8*, 14 J. TORT L. 469, 479 (2021). We part company with Goldberg and Zipursky only in their conclusion that, because S.B. 8 does not require "compensation (or some other kind of redress) reflective of the claimant having suffered a wrongful injury at the hands of the defendant," S.B. 8 actions are asserted on behalf of the state. *Id.* at 489. We think that S.B. 8 violations are better understood as a kind of zombie tort, one which neither provides redress for wrongful injury suffered at the hands of the defendant nor allows someone who is personally affected by an injury to the public at large to sue on the state's behalf.

subordination regimes is not a tort that would elevate every objection to other people's characteristics, traits, or choices to an actionable—and bankable—offense. Nor is it the private enforcement laws that protect public safety or counter acts of discrimination against already subordinated-against individuals and groups. If anything, private subordination laws more accurately resemble (counterfactual) ones that would allow powerful constituencies to delineate and enforce caste. This is precisely what Justice Breyer implied in his colloquy with Texas's lawyer. Breyer remarked that private subordination laws empower a class of plaintiffs not altogether different from the mob of angry White segregationists in 1950s Arkansas, validating (and prioritizing) their hurt feelings, legitimating their racism, and giving them the authority to sue the Black children who risked life-and-limb to integrate Little Rock High.[206]

To appreciate how private subordination law invert conventional and traditional understandings of rights it is helpful to quickly consider what a drastic departure they are from classic, liberal, and libertarian understandings of rights allocation. No doubt, Justice Thomas was drawing upon these understandings—and not some radical or progressive vision—when expressing his utter surprise at the purported "tort of outrage." Wesley Hohfeld, one of the preeminent legal scholars of the early twentieth century, played a crucial role in shaping

206 *See* Transcript of Oral Argument at 57–59, United States v. Texas, 142 S. Ct. 522 (2021) (No. 21-588) ("[S]uppose a governor filed this, you know, had this model law and said anyone who brings a black child to a white school is subject to, you know, and then we copy the law."). Precisely because of this substantive, caste-reinforcing agenda, and private subordination regimes' obvious connections to surging White Christian nationalism, we take exception to efforts to portray the laws as principled opposition to "judicial supremacy." *See, e.g.*, Jeannie Suk Gersen, *The Conservative Who Wants to Bring Down the Supreme Court*, NEW YORKER (Jan. 5, 2023), https://www.newyorker.com/news/annals-of-inquiry/the-conservative-who-wants-to-bring-down-the-supreme-court [https://perma.cc/D8A3-Z9WE]. The suggestion that S.B. 8 reflects principled opposition to judicial supremacy is impossible to reconcile with the law's deliberate use of judicial authority and the threat of judicial proceedings to terrorize individuals inclined, let alone professionally or ethically obligated, to help people secure abortions. Rather than reflecting opposition to judicial supremacy, we view S.B. 8 as engaging in a form of judicial *arbitrage*—one that amplifies the power of courts that share the law's anti-choice agenda while seeking, in the words of the law's putative author, to "box[ ] out" courts with contrary views. Reply Brief of Intervenor-Appellants in Support of Intervenors' Emergency Motion to Stay Preliminary Injunction Pending Appeal at 3–4, United States v. Texas, No. 21-50949, 2021 WL 4786458 (5th Cir. Oct. 14, 2021). We recognize, of course, that such arbitrage is engaged in by all manner of lawyers and lawmakers. Nonetheless, its practice—by the architects of S.B. 8 or anyone else—is a far cry from principled opposition to judicial supremacy.

how American lawyers and jurists understand rights and duties.[207] Hohfeld's central analytical contribution was to pair (1) rights with the absence of rights (jural opposites), and (2) rights with duties (jural correlatives).[208] To the extent private subordination regimes vest rights to sue in nosy neighbors or angry parents, it follows that doctors, teachers, and coaches (let alone the abortion seekers, students, and soccer players) either have no right to exercise what heretofore have been understood as fundamental exercises of personal autonomy—or, worse, owe a legal duty to those litigious people to refrain from engaging in fundamental exercises of personal autonomy.

Classical liberals might prefer John Stuart Mill's formulations. Mill wrote extensively on what he called the harm principle, distinguishing harms and offenses.[209] According to Mill, offenses are irritants, and often fleeting ones at that. Harms, by contrast, are injurious or, at the very least, impede the projects and pursuits of those so aggrieved. Again, it is difficult to conceive of a doctor's performance of a medical procedure (on an utter stranger!), a teacher's instruction, a student's use of their preferred restroom, or a coach's grouping of students by gender identity (rather than sex assigned at birth) as truly disruptive to the life plans and goals of nosy neighbors or townspeople. By contrast, penalizing the delivery of medical services or denying trans kids equitable and non-stigmatizing opportunities in athletics or basic hygiene is—for those so penalized—life altering in ways that are indeed deeply, perhaps irreparably, injurious. So, at most, it may make sense to concede that those empowered under private subordination regimes merit a modicum of consideration as *offended* parties. Yet it is the targets of these private subordination suits who are, without doubt, *harmed*.[210]

Not surprisingly, modern libertarians would concur. The state, as Robert Nozick understood it, cannot justly interfere with the life choices of individuals, even, *pace* Mill, were it to be

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207 *See, e.g.*, WESLEY HOHFELD A CENTURY LATER: EDITED WORK, SELECT PERSONAL PAPERS, AND ORIGINAL COMMENTARIES (Shyamkrishna Balganesh, Ted M. Sichelman & Henry E. Smith eds. 2022); THE CANON OF AMERICAN LEGAL THOUGHT (David Kennedy & William W. Fisher III eds. 2006) (including Hohfeld alongside such luminaries as Holmes, Coase, Dworkin, and Calabresi).

208 *See, e.g.*, Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

209 *See* JOHN STUART MILL, ON LIBERTY 9 (1859).

210 Of note, Mill sees the harm principle as operating not just between individuals and the state but also between individuals and within families. Hence, it applies with full force to the fostering of proxy wars of the sort these right suppressing laws intend. *See id.* at 9–12.

established that such interference advances the greater social good.[211] We doubt, as did Mill, that the state could ever establish that private subordination litigation was actually welfare-enhancing. But, regardless, Nozick wouldn't care. What he would care about is one set of individuals using another set of individuals as instruments to their own happiness. And that's precisely what nosy neighbors and embittered parents are doing, empowered as they are by private subordination regimes.[212]

Our point in highlighting these canonical theories of rights is not that lawmakers who enacted earlier private enforcement regimes invariably followed them or that private enforcement regimes must, as a normative matter, adhere to a particular theory of rights.[213] Instead, we mention them to highlight the political and legal strategy being deployed in private subordination regimes. Relative to widely accepted baseline understandings and doctrines, those regimes *invert* rights, giving private parties who have the *weakest* claim to rights preeminent authority to surveil, prosecute, and sanction those who, according to tradition, convention, and longstanding intuition, have the *strongest* claim. There is little basis in any of our legal or philosophical traditions—except, of course, discredited and disavowed ones built expressly on systems of outright subordination[214]—for rights to be reassigned in this fashion.

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Although the rights elevated by private subordination laws lack any foundation in any of our legal or constitutional traditions that, again, aren't built on theories of subordination, they have an obvious affinity to other misguided "rights" that dominate what might be labelled populist outrage discourse—everything from Tucker Carlson's monologues to Trader Joe's meltdowns. Consider how rights discourse has been distorted during the COVID-19 pandemic when irate customers have asserted their inalienable "right" to shop maskless, seemingly without regard for their presence on someone else's private property or for that proprietor's right to regulate the terms of

211 ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 28–33 (1974).

212 *See id.*

213 Jamal Greene has recently highlighted the risks to constructive governance of a political and legal culture that centers rights at the expense of recognizing, and grappling with, conflicts among legitimate countervailing interests. *See* JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART (2021).

214 *See infra* note 261 and accompanying text.

admission;[215] when religious groups have claimed (and secured) the "right" to special exemptions from generally applicable health and safety regulations;[216] when presidents, lawmakers, state and county officials, and, yes, militia groups have claimed (with some success) the "right" to surveil fellow citizens as they cast ballots[217] and to stand within spitting distance of election administrators as they counted votes;[218] and when judges routinely disparage, diminish, and attempt to undercut what remain (for now, at least) fundamental rights to equal respect and dignity under the law.[219]

All told, the transfer of rights from doctors, patients, teachers, and students to easily offended private attorneys general is entirely inconsistent with—and anathema to—American constitutional and common law jurisprudence and practically every colloquial and philosophical understanding of liberty, equality, and fundamental fairness in and around the modern liberal tradition. If anything, the ease with which that transfer of rights is being effectuated right now makes our argument even more urgent and trenchant. At bottom, private subordination regimes' manipulation of the meaning of rights is a form of gaslighting, designed to make use forget what rights really are and to re-instantiate caste hierarchies that, not long ago, seemed destined for obsolescence.

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215 *See* Abha Bhattarai, *Retail Workers Are Being Pulled into the Latest Culture War: Getting Customers to Wear Masks*, WASH. POST (July 8, 2020), https://www.washingtonpost.com/business/2020/07/08/retail-workers-masks-coronavirus/ [https://perma.cc/4WFC-WPSF]

216 *See* Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam); S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2021) (mem.); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam).

217 *See* Kirby, *supra* note 120.

218 *See* Tom Perkins, Kelly Weill, John L. Smith & Blake Montgomery, *MAGA Mobs Descend on Vote-Counting Sites*, DAILY BEAST, (Dec. 24, 2020), https://www.thedailybeast.com/maga-fanatics-descend-on-detroit-vote-counting-site-as-biden-wins-in-michigan [https://perma.cc/7J2V-9P4J].

219 *See* Jon D. Michaels, *Baller Judges*, 2020 WIS. L. REV. 411, 426–30, 436 (describing rightwing judges as being disproportionately likely to be substantively and rhetorically strident); Ian Millhiser, *The Controversy over a Trump Judge's Oddly Partisan "Religious Liberty" Opinion, Explained*, VOX (Apr. 14, 2020), https://www.vox.com/policy-and-politics/2020/4/14/21218939/trump-judge-justin-walker-religious-liberty-on-fire-partisan-klan [https://perma.cc/3NT8-X8NE]; Ariane de Vogue, *Gorsuch Declines to Wear Mask, as Bench-mate Sotomayor Works from Her Office*, CNN (Jan. 19, 2022), https://www.cnn.com/2022/01/18/politics/neil-gorsuch-mask-sotomayor-supreme-court/index.html [https://perma.cc/TG3E-A4GE]. Of perhaps particular note, two judges on the Fifth Circuit, writing majority opinions in two separate cases, each seemingly gratuitously misgendered a trans party. *See* United States v. Varner, 948 F.3d 250, 252 (5th Cir. 2020) (Duncan, J., deadnaming); Gibson v. Collier, 920 F.3d 212, 216–17 (5th Cir. 2019) (Ho., J., deadnaming).

### B. Bolstering the Grievance-Industrial Complex

Private subordination regimes' inversion of legal rights paves the way for additional right-wing populist political moves. The regimes broaden and intensify the culture wars and anoint, arm, and subsidize Christian nationalist partisans to leverage subordination lawsuits for political, cultural, and financial gain.[220]

Here too there are important points of continuation and departure between private subordination and earlier private enforcement regimes. Legislators and activists have long appreciated that private rights of action, attorney's fee shifting provisions, and other supports for private litigation can help build networks of advocates dedicated to advancing a regime's policy goals. For example, Title VII of the 1964 Civil Rights Act catalyzed the growth of the private-sector employment discrimination bar, which barely existed before the landmark Act.[221] Sean Farhang finds that, after Congress provided for jury trials and increased damages for Title VII plaintiffs in the Civil Rights Act of 1991, the number of cases brought under the statute increased,[222] and plaintiffs became 35 percentage points more likely to secure legal representation.[223]

As was true before passage of Title VII, absent the awarding of attorney's fees and the promise of cash bounties in today's private subordinate regimes, there is little to be gained by bringing suits against ob-gyns, high schools, community col-

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[220] Julia Carrie Wong, *From Viral Videos to Fox News: How Rightwing Media Fueled the Critical Race Theory Panic*, THE GUARDIAN (June 30, 2021), https://www.theguardian.com/education/2021/jun/30/critical-race-theory-rightwing-social-media-viral-video [https://perma.cc/GZL5-T2GS]; Tara McKelvey, *'They're Coming For Us'—Right-Wing Media on Biden's Week*, BBC NEWS (Jan. 30, 2021), https://www.bbc.com/news/world-us-canada-55845763 [https://perma.cc/X977-2WRU]; Casey Michel, *Fox News Star Tucker Carlson's 'Great Replacement' Segment Used a New Frame for an Old Fear*, NBC NEWS (Apr. 12, 2021), https://www.nbcnews.com/think/opinion/tucker-carlson-s-great-replacement-fox-news-segment-uses-newer-ncna1263880 [https://perma.cc/3LAU-FGAN]; *cf.* Zach Beauchamp, *Kyle Rittenhouse and the Scary Future of the American Right*, VOX (Nov. 22, 2021), https://www.vox.com/policy-and-politics/22792136/kyle-rittenhouse-verdict-militia-violence-self-defense [https://perma.cc/3YB4-EXF7] ("The right's radical extremists believe that mainstream American institutions have been rotted from within, undermined by the nefarious influence of Blacks, Jews, and liberals. White Americans are justified—maybe even obligated—to take up arms to protect their people and their culture.").

[221] CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 63–64, 69–70 (1998).

[222] *See* Sean Farhang, *Congressional Mobilization of Private Litigants: Evidence from the Civil Rights Act of 1991*, 6 J. EMPIRICAL LEGAL STUD. 1, 31 (2009).

[223] Sean Farhang & Douglas M. Spencer, *Legislating Incentives for Attorney Representation in Civil Rights Litigation*, 2 J.L. & CTS. 241, 263 (2014).

leges, teachers, and coaches. What bona fide *financial* injury could you, a random co-worker or easily irked soccer parent, possibly suffer as a result of a cabbie driving your colleague to an abortion clinic, or a kid (who happened to have been assigned a different gender at birth) playing goalie on the JV team? Even if you lacked a keen understanding of the law or had a loose commitment to fundamental rights, the absence of recoverable damages—and quite possibly sanctions for raising frivolous claims—would deter suits of this sort.

The states' investment in these lawsuits extends beyond encouraging specific cases and trials. As is often the case, "[n]ew policies create a new politics."[224] Enacted laws are not simply the final product of the legislative process; they create new interest groups, make it easier (or more difficult) for groups to organize collective action, and create feedback effects while subsidizing policy learning and advocacy.[225] By underwriting the work of groups that bring private subordination actions, the states are funding a legal bar that, over time, will develop expertise in anti-trans, anti-CRT, and anti-abortion litigation, lobby legislatures to make more "outrages" legally actionable, and perhaps ensure these lawyers have a stable enough financial footing such that they can take on additional, even more impactful cases (outside the scope of these laws) on a pro bono basis.[226] This is all to say, the states are effectively fielding farm teams of grievance lawyers, allowing them to cut their teeth on plaintiff-friendly litigation designed to inconvenience and punish adversaries.

Moreover, private subordination regimes' litigation subsidies help advance right-wing goals whether plaintiffs ultimately prevail; for the lawmakers who enacted them, the laws are a win-win. As Douglas NeJaime has explored in other contexts, court losses may serve an important function mobilizing social movements, particularly where litigation is just one front in a broader movement battle.[227] Losses can help a movement construct its identity and rally constituents. While lawyers often

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224 SCHATTSCHNEIDER, supra note 19, at 288.

225 *See* Lawrence R. Jacobs & Suzanne Mettler, *When and How New Policy Creates New Politics: Examining the Feedback Effects of the Affordable Care Act on Public Opinion*, 16 PERSPS. ON POL. 345, 345 (2018).

226 Although this subsidy is created through legislation, it is important to note that it is paid for by *defendants*. The impact on a state budget of enacting a fee-shifting provision is zero.

227 NeJaime, s*upra* note 65, at 945. For work exploring these dynamics in the abortion context, see, for example, MARY ZIEGLER, ABORTION AND THE LAW: *Roe v. Wade* to the Present 1–5 (2020); Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 409–24 (2007).

assume that successful impact litigation is the only "institutional setting in which the process of law and social change occurs," NeJaime documents how movement leaders use losses to appeal to the public and other state actors.[228]

Hence the win-win: When private subordination actions succeed, plaintiffs secure a conventional win, amplified many times over by the strong chilling effects on other would-be defendants and the celebratory coverage across the wide range of rightwing media platforms. If litigation fails and grievance lawyers are shooed out of court, the results might be even better. Even losing suits will chill defendants' behavior (because mounting a legal defense is so costly and so inconvenient). And the courtroom losses will trigger new waves of right-wing outrage that generate attention and revenue for grievance politicians and grievance broadcasters, respectively. The former will seize upon the courtroom defeats to send out fundraising missives, hold press conferences, stage rallies, and preen before social media and cable TV; the latter will churn out essays, books, documentaries, and the like to profit off of these grievances upon grievances. Either way, private subordination regimes will stoke the combative divisiveness that illiberal right-wing politics relies upon to maintain support.[229]

### C. Encouraging Legal Vigilantism

Private subordination regimes' inversion of legal rights does more than inflame and monetize cultural controversies; it also reinforces and extends the range of vigilante behavior embraced by Christian nationalist politicians and foot soldiers.

Of late, right-wing political leaders at the federal, state, and local levels unable to obtain office or secure policy goals through peaceable and democratic means have openly flirted with groups that pursue the same goals through physical intimidation and force.[230] The interplay of political violence,

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228 NeJaime, *supra* note 65, at 944.

229 *See supra* notes 179-198 and accompanying text.

230 NATHAN P. KALMOE & LILLIANA MASON, RADICAL AMERICAN PARTISANSHIP: MAPPING VIOLENT HOSTILITY, ITS CAUSES, AND THE COUNSEQUENCES FOR DEMOCRACY 1–5 (2022); Fabiola Cineas, *Donald Trump Is the Accelerant*, VOX (Jan. 9, 2021), https://www.vox.com/21506029/trump-violence-tweets-racist-hate-speech [https://perma.cc/8HBQ-HPBF]; Jonathan Freedland, *Opinion: The Republican Party Is Embracing Violence in the Name of Trump*, THE GUARDIAN (Dec. 3, 2021), https://www.theguardian.com/commentisfree/2021/dec/03/republican-party-democracy-political-violence-trumpism [https://perma.cc/62WT-79D3]; Lisa Lerer & Astead W. Herndon, *Menace Enters the Republican Mainstream*, N.Y. TIMES (Nov. 12, 2021), https://www.nytimes.com/2021/11/12/us/politics/republican-violent-rhetoric.html [https://perma.cc/7TXQ-UVKJ].

menacing behavior, vigilantism, and an uptick of—generally speaking—rank-and-file Republican tolerance, if not outright support, for such violence and vigilantism forms part of what Lilliana Mason and Nathan Kalmoe call "radical partisanship."[231] Such radicalism is supercharged by vigilante federalism in which states wrest power from Congress and federal agencies, then deputize private individuals, giving them the legal mandate and financial incentive to take the initial, possibly threatening, steps of surveilling, investigating, doxing, reporting, and demonizing their neighbors and colleagues, not to mention their children's teachers.

The possibilities of such legalized vigilantism are illustrated by a wrongful death suit orchestrated by individuals who were heavily involved in S.B. 8's enactment. In *Silva v. Noyola*, an ex-husband sued three women who helped his former spouse obtain abortion pills for "wrongful death and conspiracy," seeking more than $1 million in damages.[232] The complaint, filed in Galveston County, Texas, relies heavily on photographs of a group chat the defendants participated in, which the plaintiff allegedly accessed without legal authorization.[233] While the case is legally dubious—in Texas, a self-managed abortion is not a criminal act[234]—the message the suit seeks to send is unmistakable. As expressed by Joanna Grossman: "Who is going to want to help a friend find an abortion if there is some chance that their text messages are going to end up in the news? And maybe they're going to get sued . . . and it's going to get dropped eventually, but in the meantime, they will have been terrified."[235]

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[231] Lilliana Mason & Nathan P. Kalmoe, *What You Need to Know About How Many Americans Condone Political Violence—And Why*, WASH. POST (Jan. 11, 2021), https://www.washingtonpost.com/politics/2021/01/11/what-you-need-know-about-how-many-americans-condone-political-violence-why/ [https://perma.cc/5GZ3-CFWD].

[232] Plaintiff's Original Petition at 1, Silva v. Noyola, No. 23-CV-0375 (Tex. 56th Dist. Ct. Galveston Cnty. Mar. 10, 2023). Presumably because S.B. 8 applies only to abortions performed by "a physician," TEX. HEALTH & SAFETY CODE ANN. § 171.204(a), the complaint does not assert a claim under that law.

[233] *See* Defendants/Counter-Plaintiffs Jackie Noyola's and Amy Carpenter's Original Answer and Counterclaims at 6, Silva v. Noyola, No. 23-CV-0375 (Tex. 56th Dist. Ct. Galveston Cnty. May 1, 2023).

[234] *See* Dahlia Lithwick & Mark Joseph Stern, *Sued for Offering Friendship*, SLATE (Mar. 15, 2023) https://slate.com/news-and-politics/2023/03/texas-lawsuit-suing-friends-explained.html [https://perma.cc/6YFU-GETD].

[235] Eleanor Klibanoff, *Three Texas Women Are Sued for Wrongful Death After Allegedly Helping Friend Obtain Abortion Medication*, TEX. TRIB. (Mar. 10, 2023), https://www.texastribune.org/2023/03/10/texas-abortion-lawsuit/ [https://perma.cc/H23W-L2Z2].

Vigilantism seems new and startling but, like so much else, it has really just intensified and been given legal cover over the past few years.[236] Perhaps the first major vigilante project in the twenty-first century centered on what its proponents char-

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[236] Some may object to our characterization of rights suppressing laws as enabling, encouraging, or legitimating vigilantism of a sort that has historical resonance and precedents. *See* Austin Sarat, *Kyle Rittenhouse, SB8 and the Dangerous Legalization of Vigilante Justice*, JUSTIA: VERDICT (Nov. 22, 2021), https://verdict.justia.com/2021/11/22/kyle-rittenhouse-sb8-and-the-dangerous-legalization-of-vigilante-justice [https://perma.cc/2UPY-5LFY]. Sarat writes that "SB8 and its imitators . . . invert the traditional relationship of state legality and vigilantism . . . [insofar as t]he vigilante classically operates outside of and against the law—not as a tool of law itself." *Id.*; *see also* Aziz Huq, *What Texas's Abortion Law Has in Common with the Fugitive Slave Act*, WASH. POST (Nov. 1, 2021), https://www.washingtonpost.com/outlook/2021/11/01/texas-abortion-law-history-rights-suppressed/ [https://perma.cc/ZBZ7-98DL] (noting "vigilantes typically don't rely on the legal system to achieve their goals").

As a preliminary matter, we note that we are hardly alone in characterizing S.B. 8 and related measures as vigilante laws. *See, e.g.*, United States v. Texas, 566 F. Supp. 3d 605, 624 (W.D. Tex. 2021) ("S.B. 8 imposes . . . anti-abortion measures meant to empower anti-abortion vigilantes . . . ."); Brief of Constitutional Law, Federal Courts, Civil Rights, and Civil Procedure Scholars as Amici Curiae in Support of Petitioners at 3, Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021) (No. 21-463) ("S.B. 8's scheme of state-sanctioned private vigilantism"); Brief for the Lawyers' Committee for Civil Rights Under Law and 11 Civil Rights Organizations as Amici Curiae Supporting Petitioners at 4, *Whole Woman's Health*, 142 S.Ct. 522 ("S.B. 8 enacts a scheme of state-sanctioned private vigilantism . . . ."); Reese Oxner & Eleanor Klibanoff, *After Supreme Court's Ruling on Texas Law, Abortion-Rights Supporters See No Clear Path to Victory*, TEX. TRIB. (Dec. 16, 2021), https://www.texastribune.org/2021/12/16/texas-abortion-law-legal-fight/ [https://perma.cc/8NRJ-Q2RU] (quoting Julie Murray of Planned Parenthood as describing "vigilante lawsuits" under S.B. 8).

Beyond taking comfort in the fact that our terminology places us in the company of esteemed jurists, lawyers, and scholars, we think that an understanding of vigilantism that insists it take place outside the law, while supported by one strand of historical usage, is overly restrictive. Characterizing these bounty suits as exercises in vigilantism does important work in underscoring some of the palpable risks, threats, and dangers associated with the creation of private subordination actions—and how those risks, threats, and dangers are essentially and intentionally privatized between would-be bounty seekers and, for instance, those who provide abortions. The absence of the state as a politically and legally accountable intermediary to safely, rationally, and professionally investigate and prosecute alleged regulatory infractions leaves those, such as medical practitioners, vulnerable to particularly aggressive, confrontational, or erratic interactions with bounty seekers. And it is this combination of broad private discretion and imputed private power that, by our lights, invites and validates comparisons between today's private subordination regimes and street vigilantism. Perhaps the more remarkable fact about S.B. 8 and its ilk is, as Sarat insists, that the state is indeed *promoting* vigilantism. Ascribing a different, more muted term (such as, perhaps, deputization or delegation) for what can only be seen as a form of state—and undoubtedly societal—subordination (via the abdication of legally and politically accountable sovereign regulatory control) runs the risk of sanitizing this radical and dangerous development, and obscuring its connections to other forms of state-sponsored vigilantism that have regrettably appeared throughout U.S. history. *See infra* note 261 and accompanying text.

acterized as border security. Driven by often exaggerated if not outlandish fears that a porous southern border would enable both Latin American migrants and Muslim terrorists to endanger U.S. economic and national security, various self-styled and often heavily armed militias took it upon themselves to patrol parts of the border and went so far as to capture and detain individuals they suspected of entering the country unlawfully.[237] Though then-President George W. Bush condemned these groups for their interference with federal officials, both then-California Governor Arnold Schwarzenegger and Bush's own chief immigration enforcement officer cheered their efforts.[238] And, importantly for our purposes, a recent in-depth report by the Brookings Institution traces a direct line from these vigilantes to the insurrectionists of January 6, 2021.[239]

A new wave of political vigilantism emerged in and around 2009, perhaps not coincidently the time when America elected its first Black president and White resentment surged.[240] Among them were the Oath Keepers who have likewise figured prominently in the recent failed insurrection.[241] In 2010, *New York Times* columnist Frank Rich took stock of what at the time

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237 Jon D. Michaels, *Deputizing Homeland Security*, 88 TEX. L. REV. 1435, 1461 n.124 (2010); Vanda Felbab-Brown & Elisa Norio, *What Border Vigilantes Taught U.S. Right-Wing Armed Groups*, BROOKINGS (Mar. 12, 2021), https://www.brookings.edu/articles/what-border-vigilantes-taught-us-right-wing-armed-groups/ [https://perma.cc/J5HW-A3DZ].

238 Michaels, *supra* note 237, at 1461 n.124; *see generally* Ryan Devereaux, *The Bloody History of Border Militias Runs Deep—and Law Enforcement Is Part of It*, THE INTERCEPT (Apr. 23, 2019), https://theintercept.com/2019/04/23/border-militia-migrants/ [https://perma.cc/F4W6-E5NS].

239 *See* Felbab-Brown & Norlo, *supra* note 237.

240 SPLC found a 244% increase in active patriot groups in that year alone. Jared Keller, *Anti-Government Unrest and American Vigilantism*, THE ATLANTIC (Mar. 30, 2010), https://www.theatlantic.com/politics/archive/2010/03/anti-government-unrest-and-american-vigilantism/38229/ [https://perma.cc/L2VC-7P7Y]. For broader treatments of the connection between vigilantism and frustration with demographic or political change, see generally UNIV. OF PA. PRESS, VIGILANTE POLITICS (H. Jon Rosenbaum & Peter C. Sederberg eds., 1976); RICHARD MAXWELL BROWN, STRAIN OF VIOLENCE: HISTORICAL STUDIES OF AMERICAN VIOLENCE AND VIGILANTISM (1975).

241 *See* Alan Feuer & Adam Goldman, *Oath Keepers Leader Charged with Seditious Conspiracy in Jan. 6 Investigation*, N.Y. TIMES (Jan. 13, 2022), https://www.nytimes.com/2022/01/13/us/politics/oath-keepers-stewart-rhodes.html [https://perma.cc/257A-6PDS]; Mike Giglio, *A Pro-Trump Militant Group Has Recruited Thousands of Police, Soldiers, and Veterans*, THE ATLANTIC (Nov. 20, 2020), https://www.theatlantic.com/magazine/archive/2020/11/right-wing-militias-civil-war/616473/ [https://perma.cc/9S8H-Q42D]; Edward Helmore, *Four More Oath Keepers Indicted for Participating in Capitol Attack*, THE GUARDIAN (May 31, 2021), https://www.theguardian.com/us-news/2021/may/31/capitol-attack-four-more-oath-keepers-indicted [https://perma.cc/K7U2-MD6N].

was still an incipient trend toward political violence. With chilling prescience, Rich wrote that the "weapon of choice for vigilante violence at Congressional offices has been a brick hurled through a window. *So far.*"[242]

In 2014 and again in 2016, western ranchers and their confederates took up arms to effectively occupy federal lands. In the process, they vandalized and defaced federal property and bulldozed a road across sacred indigenous land.[243] The majority of those prosecuted were acquitted, but several were convicted of federal offenses.[244] (In 2018, President Trump pardoned the final two participants who were still incarcerated.[245]) In 2020, Ammon Bundy, one of the leaders, violently forced his way into the Idaho Capitol and, as further testament to the mainstreaming of vigilantism, ran for governor of that state.[246]

Throughout this period, Trump and his allies smeared journalists as "enem[ies] of the people" and celebrated supporters' efforts to harass and threaten members of the media.[247] On everything from campaign ads to Christmas cards, his political allies tout their stockpiles of weapons and their enthusi-

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242 Frank Rich, *The Rage Is Not About Health Care*, N.Y. TIMES (Mar. 27, 2010), https://www.nytimes.com/2010/03/28/opinion/28rich.html [https://perma.cc/6HJE-7J7X] (emphasis added).

243 *See* Kirk Siegler, *Roots of U.S. Capitol Insurrectionists Run Through American West*, NPR (Jan. 12, 2021), https://www.npr.org/2021/01/12/955665162/roots-of-u-s-capitol-insurrectionists-run-through-american-west [https://perma.cc/A38C-QTWC].

244 *See* Courtney Sherwood & Kirk Johnson, *Bundy Brothers Acquitted in Takeover of Oregon Wildlife Refuge*, N.Y. TIMES (Oct. 27, 2016), https://www.nytimes.com/2016/10/28/us/bundy-brothers-acquitted-in-takeover-of-oregon-wildlife-refuge.html [https://perma.cc/A7ND-MPTM]; Ken Ritter, *Final Defendant Sentenced in Bundy Ranch Standoff in Nevada*, ASSOCIATED PRESS (Jan. 15, 2019), https://apnews.com/article/8aa87e76188349e9bc9ba14ee82b0aca [https://perma.cc/27WE-98R4].

245 Karolina Rivas, *Trump Pardons Oregon Cattle Ranchers at the Center of Bundy Standoff*, ABC NEWS (July 10, 2018), https://abcnews.go.com/Politics/trump-pardons-oregon-cattle-ranchers-center-bundy-standoff/story?id=56487437 [https://perma.cc/H62H-6CAR].

246 William Danvers, *The Passionate Intensity of Ammon Bundy and the People's Rights Movement*, JUST SEC. (May 25, 2021), https://www.justsecurity.org/76636/the-passionate-intensity-of-ammon-bundy-and-the-peoples-rights-movement/ [https://perma.cc/HV3E-LJHV]; Clark Corbin, *Idaho Republican Gov. Brad Little Wins Re-Election to Second Term*, IDAHO CAP. SUN (Nov. 8, 2022), https://idahocapitalsun.com/2022/11/08/ap-race-call-idaho-republican-gov-brad-little-wins-re-election-to-second-term/[https://perma.cc/Q34T-4R74].

247 Stephanie Sugars, *From Fake News to Enemy of the People: An Anatomy of Trump's Tweets*, COMM. TO PROTECT JOURNALISTS (Jan. 30, 2019), https://cpj.org/2019/01/trump-twitter-press-fake-news-enemy-people/ [https://perma.cc/F2QY-NQ78].

asm for shooting them.[248] He and his confederates routinely speak of two Americas—White, Christian America—and everyone else.[249] In the 2020 presidential debates, Trump advised the self-described "Western Chauvinist" Proud Boys "to stand back and stand by"—a statement that many interpreted as a call to (eventual) violence, one that was seemingly answered on January 6, 2021.[250] Around the same time, Senator Tom Cotton, among others, called upon the military to "restore order" in the face of peaceable, unarmed Black Lives Matter marchers;[251] the Secretary of Defense told America's governors that their national guardsmen and women needed to "dominate 'the battlespace,'" referring—lest there be any doubt—to major American urban thoroughfares regularly used for organized racial justice protests and rallies.[252]

Amidst these calls to control and punish protestors, residents in towns such as Corbett, Oregon decided to set up private armed checkpoints, stopping drivers and demanding that they identify themselves and their connection to the town;[253] Kyle Rittenhouse, who shot and killed two BLM

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[248] Katie Glueck, Azi Paybarah & Leah Askarinam, *In More than 100 G.O.P. Midterm Ads This Year: Guns, Guns, Guns*, NY TIMES (May 25, 2022), https://www.nytimes.com/2022/05/25/us/politics/republicans-campaign-guns.html [https://perma.cc/2MYV-95UY]; Christina Wyman, *A Christmas Card with Guns? Lauren Boebert and Thomas Massie Start a New Culture War.*, NBC NEWS (Dec. 10, 2021), https://www.nbcnews.com/think/opinion/christmas-card-guns-lauren-boebert-thomas-massie-start-new-culture-ncna1285709 [https://perma.cc/BN9Y-ZAKX].

[249] *See* Elizabeth Dias & Ruth Graham, *How White Evangelical Christians Fused with Trump Extremism*, N.Y. TIMES (Jan. 11, 2021), https://www.nytimes.com/2021/01/11/us/how-white-evangelical-christians-fused-with-trump-extremism.html [https://perma.cc/TPG2-DG8F].

[250] Ben Collins & Brandy Zadrozny, *Proud Boys Celebrate After Trump's Debate Callout*, NBC NEWS (Sept. 29, 2020), https://www.nbcnews.com/tech/tech-news/proud-boys-celebrate-after-trump-s-debate-call-out-n1241512 [https://perma.cc/V6LJ-W9MH].

[251] Tom Cotton, *Tom Cotton: Send in the Troops*, N.Y. TIMES (June 3, 2020), https://www.nytimes.com/2020/06/03/opinion/tom-cotton-protests-military.html [https://perma.cc/N4S2-HFTA]; *cf.* Kerby Goff & John D. McCarthy, *Critics Claim BLM Protests Were More Violent than 1960s Civil Rights Ones. That's Just Not True.*, WASH. POST (Oct. 12, 2021), https://www.washingtonpost.com/politics/2021/10/12/critics-claim-blm-was-more-violent-than-1960s-civil-rights-protests-thats-just-not-true/ [https://perma.cc/LU4S-2NPL].

[252] Meghann Myers, *Esper Encourages Governors to 'Dominate the Battlespace' to Put Down Nationwide Protests*, MIL. TIMES (June 1, 2020), https://www.militarytimes.com/news/your-military/2020/06/01/secdef-encourages-governors-to-dominate-the-battlespace-to-put-down-nationwide-protests/ [https://perma.cc/CSY7-KL9H].

[253] Jason Wilson, *Armed Civilian Roadblocks in Oregon Town Fuel Fears over Vigilantism*, THE GUARDIAN, (Sept. 16, 2020), https://www.theguardian.com/us-news/2020/sep/16/oregon-fires-armed-civilian-roadblocks-police [https://

protestors, has been hailed as a heroic vigilante and feted by the most prominent Republican political and media figures;[254] and mobs of citizens have threatened dozens of state and county public health and election officials, hundreds of school board members, and, egged on by Trump, even governors with physical violence for daring to impose public health regulations during a once-in-a-century pandemic.[255]

Against this backdrop, it is difficult not to see private subordination regimes as endorsing a seemingly staider but no less dangerous form of vigilantism. After all, the laws delineate battle lines in the cultural wars, send messages to those on one side of the culture wars to enforce prohibitions against those on the other side, and reward that call to war with generous bounties. The moral urgency underlying their deployment only further justifies intensive surveillance and, no doubt, some legal line-crossing in the name of uncovering and prosecuting "deviant" practices. In the context of clashes over abortion, for example, there is a long history of anti-abortion activists who—without any encouragement from the state—have engaged in outright acts of terrorism to advance their vision of the common good.[256] And, now, we see direct physical threats against teachers and school officials, as community members use intimidation and harassment tactics to challenge public health measures and curricular reform choices that, quite often, enjoy popular support.[257] Taking a page from these efforts, private subordination regimes use well-known legal tools to gin up disturbing and dangerous forms of outside-the-courtroom vigilantism—activities that are wholly absent from less suffocating private enforcement regimes.

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perma.cc/E3YX-8RQY]. At times, law enforcement personnel "were on the scene and did not intervene in the illegal traffic stops." *Id.*

254 *See* Paige Williams, *Kyle Rittenhouse, American Vigilante*, NEW YORKER (June 28, 2021), https://www.newyorker.com/magazine/2021/07/05/kyle-rittenhouse-american-vigilante [https://perma.cc/DPM3-S3SY]; *see also* Maya Young, *Conservative Event Gives Rittenhouse a Standing Ovation a Month After Acquittal*, THE GUARDIAN (Dec. 21, 2021), https://www.theguardian.com/us-news/2021/dec/21/kyle-rittenhouse-turning-point-usa-standing-ovation [https://perma.cc/UA3T-M2MM].

255 *See* Beauchamp, *supra* note 201; Feuer, *supra* note 201; Allan Smith, *Whitmer Blasts Trump's 'Appalling' Response to Her After Feds Foiled Kidnap Plot*, NBC NEWS (Oct. 15, 2020), https://www.nbcnews.com/politics/donald-trump/whitmer-blasts-trump-s-appalling-response-her-after-feds-foil-n1243535 [https://perma.cc/N5WT-5J92].

256 *See* Aaron Winter, *Antiabortion Extremism and Violence in the United States*, *in* EXTREMISM IN AMERICA 218 (George Michael ed., 2014).

257 *See* sources cited *supra* note 201.

It is tempting to view the authorization of civil suits as an attempt to domesticate the raw political emotion that drives extra-legal forms of vigilantism. But the idea that private subordination regimes are a substitute for political violence, rather than a complement to it, strikes us as implausible. Private subordination actions give a new and added tool to parties already on the front lines of cultural and social conflicts, some of whom already may be engaged in confrontational activities of questionable legality. Considering the strategies their movements have embraced, it seems to us that giving individuals the right to sue is more of a supplement than an alternative, reinforcing rather than redirecting more physically aggressive forms of political conflict.

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Consider the difference between the divisive and inflammatory nature of today's private subordination actions and the actual and threatened litigation under earlier private enforcement schemes. In Part I, we discussed qui tam suits that permit private parties to recover monetary bounties in conjunction with claims brought against fraudulent government contractors.[258] Qui tam suits do little, and more likely absolutely nothing, to exacerbate or intensify community discord or reinforce caste status hierarchies. If the government pays a false claim, all taxpayers are on the hook (and we all are, in essence, cheated). Given that there is no constituency clamoring to legalize fraud—and that there is a general, if not overwhelming, consensus that fraud is objectionable—relator lawsuits that pit the defrauded against the fraudsters pose little risk of rending communities in socially, culturally, and economically destabilizing ways.

A far more apt historical comparison to laws such as S.B. 8, the wave of recent book bans, and "Don't Say Gay" is the Fugitive Slave Act of 1850,[259] the second antebellum federal law that authorized slavers and the bounty hunters they retained to arrest alleged fugitives and forcibly remit them to slavery.[260] There are striking parallels between the one-sided proceedings under the Act and those under S.B. 8.[261] More to

258 *See supra* text accompanying note 26.

259 Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462.

260 *See* DELBANCO, *supra* note 23, at 226–28.

261 For instance, in a move reminiscent of S.B. 8's one-sided remedies and cost-shifting provisions, commissioners who presided over hearings earned $10 if they determined that the person brought in front of them was a fugitive slave, but only $5 if they found that the proof was insufficient. Fugitive Slave Act of 1850

the point, both the Fugitive Slave Act and today's private subordination laws encourage overenforcement—and strike fear in the hearts of those whom the laws target. After Congress passed the 1850 Act, shockwaves coursed through all the land and sea escape routes out of the South and, of course, through much of the northern United States as well. Slave hunters were newly empowered and emboldened; runaway slaves and free Black people fearful of being wrongly targeted had additional reasons to experience terrorism; and would-be White allies—rendered vulnerable in the face of steep criminal fines and civil liabilities attendant to the 1850 Act—were treated as lawbreakers and deterred from lending a hand.[262]

We hesitate to further sensationalize private subordination actions by associating them with disturbing incidents of political violence that have occurred over the past couple of years or decades. We also don't mean to insist on too strong of a connection between today's private subordination actions and some of the most harrowing legal mechanisms employed to perpetuate and exacerbate America's original sin. Yet, by the same token, to *not* situate private subordination actions within the dark history of state-sponsored vigilantism in the United States would sanitize the current legal and political moment—and, perhaps, signal more distance between antebellum America and 2023 America than exists. And once more, it bears emphasizing that states, which worked hard to evade constitutional review of private subordination regimes, are essentially conscripting the courts to hear even the most abusive subordination actions. Most who believe in democracy tend to think of the courts as the government institutions open and available to protect the little guy from the mob. But when it comes to private subordination actions, the courts provide the mob two additional ways to go after the little guy—denying facial challenges brought by women, LGBTQ+ persons, Black

§ 8. Individuals who secured an order finding that a person was an escaped fugitive were entitled to a separate $5 fee and were authorized to "use such reasonable force and restraint as may be necessary, under the circumstances of the case, to take and remove such fugitive person back to the State or Territory whence he or she may have escaped." *Id.* § 6. On the other hand, those who "knowingly and willfully obstruct[ed], hinder[ed] or prevent[ed]" a forced rendition were liable "for the sum of one thousand dollars." *Id.* § 7.

262 *See, e.g.*, DELBANCO, *supra* note 23, at 260–61; R. J. M. BLACKETT, THE CAPTIVE'S QUEST FOR FREEDOM: FUGITIVE SLAVES, THE 1850 FUGITIVE SLAVE LAW, AND THE POLITICS OF SLAVERY 42–47 (2018); Scott J. Basinger, *Regulating Slavery: Deck-Stacking and Credible Commitment in the Fugitive Slave Act of 1850*, 19 J.L. ECON. & ORG. 307, 323–34 (2003). We are especially indebted to Aziz Huq for help with this discussion and analysis.

Americans, and their allies, and then awarding bounties to those insistent on advancing a Christian nationalist agenda. Say what you want about the previous generations of private attorneys general who alleged fraud on the government or damage to the environment. If you didn't like their causes, you could—and many did—treat them as annoyances, pesky little gadflies.[263] This new group aren't gadflies. They're bullies.

## III
## PROGRESSIVE RESPONSES AND THEIR IMPLICATIONS FOR AMERICAN FEDERALISM

Having explored the range of political, regulatory, and legal functions that private subordination regimes perform, this Part turns to the partisan and geographic asymmetries they engender with a specific question in mind: how ought progressive lawyers, policymakers, and legislatures respond? We focus on progressives not because they are the only group in American politics affected by private subordination regimes; the dynamics described in the proceeding Part should be of concern to anyone concerned with the health of American democracy. Rather, our focus reflects the fact that progressives are both the target of private subordination regimes and the political coalition that seems most willing to oppose, resist, and counter them. Analyzing the progressive response to private subordination regimes, we begin to see a fuller picture of the regimes' implications for federalism in the United States.

In developing responses to private subordination regimes, progressives face a greater set of challenges than the right-wing proponents of those regimes do in enacting them. Simply stated, progressives who mount an aggressive counter-mobilization campaign targeting right-wing partisans, funders, and causes run the risk of accelerating and widening America's red-blue divide, exacerbating cultural, religious, and political tensions, and further undermining the prospects for national policymaking. Such effects are far more acutely felt by progressives—and are far more damaging politically to progressive causes. Yet the polar opposite approach is arguably even less tolerable. Progressives who refuse to play along—that is,

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[263] *See, e.g.*, THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY 24 (2002) (recounting Vice President Dan Quayle's description of civil litigation as a "self-inflicted competitive liability"); Stephen C. Yeazell, *Unspoken Truths and Misaligned Interests: Political Parties and the Two Cultures of Civil Litigation*, 60 UCLA L. REV. 1752, 1757 (2013) (highlighting Ronald Reagan's lamentation that "American society is mired in excessive litigation").

who refrain from mounting counterstrikes—would be engaging in a form of unilateral disarmament. Never an especially good strategy, unilateral disarmament is particularly perilous right now, a moment when vigilante federalism has already advanced the rights, resources, and political leverage of right-wing activists across large swaths of the United States.

There is, conceivably, a third option—neither escalating nor retreating but rather hitting the refresh button and returning to the pre-2021 status quo ante. But that option seems entirely foreclosed. Absent structural reforms to the Supreme Court[264] or, perhaps, to the Senate,[265] there is no clear pathway to revisit S.B. 8 and recognize it for what it is: a manifestation of legal trickery, endorsed by a Supreme Court seemingly (and shamelessly) at peace with the wholesale inversion of rights and political power in America.[266] It is for that reason that we are confident, if chagrined, that private subordination regimes and the legal vigilantism they sanction are here to stay—and why, if nothing else, analysis of how and when to respond should be a central item on the progressive agenda.

In this final Part, we consider the promise and peril of aggressive progressive counter-responses in three domains that have emerged as central points of contestation over private subordination regimes: (1) courts of law; (2) blue state legislatures; and (3) boardrooms of philanthropies and corporations, where private actors are experimenting with various supports for individuals targeted by private subordination. Responses within and across these domains vary in their effectiveness, the

264 *See* Jeremy Dys, *Biden's Supreme Court Commission Ends Not with a Bang but with a Whimper*, THE HILL (Oct. 16, 2021), https://thehill.com/opinion/judiciary/576959-bidens-supreme-court-commission-ends-not-with-a-bang-but-a-whimper [https://perma.cc/D4QB-KK2J].

265 We recognize that most of the laws that we have discussed could be neutralized through federal legislation recognizing a statutory right to engage in the activity a right-suppressing law targets, preempting inconsistent state law. *See, e.g.*, Carliss Chatman, *We Shouldn't Need* Roe, 29 UCLA J. GENDER & L. 81, 98–104 (2022); CAROLINE MEDINA, THEE SANTOS, LINDSAY MAHOWALD & SHARITA GRUBERG, CTR. FOR AM. PROGRESS, PROTECTING AND ADVANCING HEALTH CARE FOR TRANSGENDER ADULT COMMUNITIES 1 (2021), https://www.americanprogress.org/article/protecting-advancing-health-care-transgender-adult-communities/ [https://perma.cc/5V5S-6VB6]. While such legislation provides a legally straightforward way of addressing rights-suppressing laws' harms, its political prospects are fraught. The balance of power in the Senate, especially so long as there is insufficient support for filibuster reform, and other realities make preemptive legislation at best aspirational. *See* Carl Hulse, *Voting Rights Bill: Democrats Fail to Change Filibuster Rules as Republicans Block Action on Voting Rights*, N.Y. TIMES (Jan. 19, 2022), https://www.nytimes.com/live/2022/01/19/us/biden-voting-rights-filibuster [https://perma.cc/MD4T-UGJJ].

266 *See supra* subpart I.D.

extent to which they counter—or fuel—the political dynamics that private subordination regimes contribute to, and their effect on the nation's ability to respond collectively to pressing social and economic problems. Given the downsides inherent to both upping the stakes and unilaterally disarming, we suggest that progressive lawyers, legislators, and philanthropists (as well as corporate executives who recognize private subordination regimes imperil employees and customers alike) follow a principle of proportionality. The goal should be to mitigate, not amplify, private subordination regimes' most pernicious effects while taking advantage of new opportunities these instruments create to advance progressive policy and contest anti-democratic forces in American law and politics.

### A. Legal Contestation

For many attorneys, the reflexive response to private subordination actions is: "I'll see you in court." As the prior Parts explained, the laws target highly personal and often constitutionally protected rights. As such, the laws ought to be vulnerable to court challenges alleging that they violate federal and state constitutions as well as statutes such as the Americans with Disabilities Act.[267] The goal of these challenges would be to neutralize private subordination regimes, either by securing injunctive relief that stops private plaintiffs from enforcing them, or by generating sufficiently authoritative precedent to shield would-be defendants from suit.

Private subordination regimes' substantive provisions provide one obvious target for such legal challenges. Some anti-abortion subordination regimes may violate state constitutional law (and perhaps may even conflict with whatever minimal federal protections survive following *Dobbs v. Jackson Women's Health Organization*[268]). State laws that target transgender students are vulnerable to federal and state equal protection, freedom of association, and statutory challenges.[269]

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[267] 42 U.S.C. §§ 12101–12213.

[268] 142 S. Ct. 2228 (2022); *see, e.g.*, WEN W. SHEN, CONG. RSCH. SERV., LSB10851, EMTALA EMERGENCY ABORTION CARE LITIGATION: OVERVIEW AND INITIAL OBSERVATIONS (PART II OF II) 1–4 (2022) (discussing conflicting district court opinions addressing the Department of Health and Human Services' conclusion that Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd, requires the provision of abortion care to pregnant patients suffering an emergency medical condition), https://crsreports.congress.gov/product/pdf/LSB/LSB10851 [https://perma.cc/XUM5-A4ED].

[269] *See* Katie Eyer, *Transgender Constitutional Law*, 171 U. PA. L. REV. (forthcoming 2023) (manuscript at 7–8) (surveying five years of lower-court decisions addressing transgender parties' equal protection and due process claims and

Laws that target the accurate and inclusive teaching of U.S. history may be vulnerable to federal and state free speech and equal protection challenges, and to challenges based on state constitutional, statutory, and contractual guarantees relating to public education and public employment (for teachers).[270] Conceivably, laws in some states might also transgress home rule provisions that vest local authorities with power over curricular choices and limit state legislatures' ability to overrule local decisionmaking.[271]

In addition, protective litigation can target private subordination regimes' manipulation of court procedure, particularly where the laws depart from the design of traditional private enforcement regimes. As Part I explained, S.B. 8 sets up a regime of one-sided proceedings that exerts *in terrorem* effects until blocked by action of a state supreme court or the U.S. Supreme Court. The enforcement procedures in laws such as Florida's Fairness in Women's Sports Act are not so extreme. But laws that mimic S.B. 8's enforcement structure are, of course, more powerfully burdensome and thus more effective in, among other things, chilling and deterring the targeted conduct, speech, or behavior. It follows that the more effective they are as tools of subordination and suppression, the more vulnerable they ought to be to due process challenges, irrespective of the laws' substantive merits.[272]

In *Van Stean v. Texas Right to Life*, a Texas trial court agreed that S.B. 8's "new and unique set of civil procedures"

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finding, prior to the Eleventh Circuit's decision in *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022) (en banc), that "across almost every way of measuring case 'success,' transgender litigants are prevailing at exceptionally high rates").

270 *See* Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 964–65 (2009).

271 *See generally* Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 970 (2019); Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1997–2002 (2018).

272 This due process vulnerability need not result from any specific procedural provision—S.B. 8 was crafted so that most of its discrete provisions would have some precedential support in traditional private enforcement regimes—but from the overall *in terrorem* effect the law exerts and the resulting denial of judicial impartiality and "fundamental fairness" that due process demands. *See, e.g.*, Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 876 (2009) ("It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" (alteration in original) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955))). For an elaboration of this point, see Brief of Legal Scholars as Amici Curiae in Support of Petitioner at 4–16, Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021) (No. 21-463).

violated due process.[273] *Van Stean* highlights protective litigation's potential as a response to private subordination regimes: the court has already granted declaratory relief recognizing S.B. 8's unconstitutionality, and may enter broader relief that would prevent parties from suing to enforce the law and courts from hearing their claims. But the operative word here is potential.

First, state courts by and large are unlikely to be receptive. Many state judges are elected and, not surprisingly, those in red states tend to operate in the same conservative (and gerrymandered) political ecosystem that produced the current wave of private subordination regimes.[274] Second, litigation dynamics limit legal contestation's effectiveness as a response to private subordination regimes. Litigation necessarily occurs after a law has been enacted and is set to take effect. Confronting an already enacted law, challengers must assemble evidence of its real-world effects and seek emergency pre-trial relief. This requires challengers to run a gauntlet of jurisdictional and procedural obstacles.[275] Third, even if there are victories, they will be costly and perhaps short-lived. After all, the costs of *enacting* a private subordination regime and encouraging private plaintiffs to enforce it are modest. Litigation is therefore a game of whack-a-mole. No sooner will one law be challenged—much less enjoined—than another will be enacted. Meanwhile, the challengers will have to protect favorable judgments from likely even more uniformly right-wing appellate courts, up to and including the U.S. Supreme Court.[276]

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[273] Van Stean v. Tex. Right to Life, No. D-1-GN-21-004179, slip op. at 4 (Tex. 98th Dist. Ct. Travis Cnty. Dec. 9, 2021) (emphasis omitted).

[274] Stef W. Kight, *State Supreme Court Ideologies*, AXIOS (July 13, 2021), https://www.axios.com/state-supreme-court-justices-republican-democrat-25917099-2999-4cac-953e-7b0acafee5a4.html [https://perma.cc/D9D7-ZK4V]; Samuel Postell & Luke Seeley, *State Partisanship/Breakdown of Justices by Confidence Categories*, BALLOTPEDIA (June 2020), https://ballotpedia.org/Ballotpedia_Courts:_State_Partisanship/Breakdown_of_Justices_by_Confidence_Categories [https://perma.cc/BU66-DCXS].

[275] Among them are sovereign immunity, judicial immunity, remedial standing, and identifying a proper defendant.

[276] In litigation over S.B. 8, for example, the Fifth Circuit has thrown up one procedural roadblock after another to a precedential ruling on the law's constitutionality. In a hearing on whether to certify a question about S.B. 8's meaning to the Texas Supreme Court, Judge Edith Jones mused: "Maybe we should just sit on this until the end of June." Tierney Sneed, *Appeals Court Sees Little Urgency in Speeding up Challenge to Texas Abortion Ban After Contentious Hearing*, CNN (Jan. 7, 2022), https://www.cnn.com/2022/01/07/politics/abortion-texas-fifth-circuit-hearing/index.html [https://perma.cc/24ND-N7E2]. On June 24 of that very same year, the Supreme Court did indeed overturn *Roe*.

We do not mean to suggest that protective litigation should never be pursued. In some cases, it may provide a ready means of undoing private subordination regimes' most harmful effects. But progressives should be careful not to signal that the courts are necessarily the answer, particularly not when the relevant judges are at best indifferent, and at worst hostile, to their vision of democratic governance.

### B. Blue State Analogs and Countermeasures

If red states are going to employ private subordination regimes in service of engineering constitutional carve outs, subordinating marginalized groups, stoking cultural outrage, and subsidizing favored constituencies, blue states might well respond in kind. New legislation could target the partisans who bring private subordination actions and the groups and funders who promote grievance and vigilante politics—essentially turning the tables on them by subjecting them to civil liability for engaging in private subordination. Going further still, blue states could borrow S.B. 8's enforcement technology to advance progressive priorities—up to and including policies that violate governing Supreme Court precedent.

#### 1. *Counter-Litigation*

Blue states might attempt to subject the enforcers of private subordination laws to civil liability. This "counter-litigation" aims to deter the enforcement of laws such as S.B. 8, at least so long as the enforcers have a connection to the progressive forum state.[277] Counter-litigation already functions in the antitrust context. There, "blocking" statutes effectively prevent U.S. antitrust law from being enforced in other jurisdictions.[278] For example, the United Kingdom's Protection of Trading Interests Act contains a "clawback" provision "that allows British

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[277] Some scholars have suggested that plaintiffs who sue to enforce private subordination regimes are already subject to liability under existing federal law. Anthony J. Colangelo, *Suing Texas State Senate Bill 8 Plaintiffs Under Federal Law for Violations of Constitutional Rights*, 74 SMU L. REV. F. 136, 137–38 (2021); Laurence H. Tribe & David Rosenberg, *How a Massachusetts Case Could End the Texas Abortion Law*, BOS. GLOBE (Sept. 8, 2021), https://www.bostonglobe.com/2021/09/07/opinion/how-massachusetts-case-could-end-texas-abortion-law/ [https://perma.cc/U8F4-SJEN]. There are, however, significant limits on counter-litigation under existing federal civil rights laws. *See, e.g.*, Colangelo, *supra*, at 143 ("To be perfectly honest, [the attribution of private litigation to the state] is a really hard test to meet, and none of the ways to meet it seem satisfied when it comes to bringing suit under the Texas law." (citing Lansing v. City of Memphis, 202 F.3d 821, 828 (6th Cir. 2000)).

[278] Thanks to Zach Clopton for calling our attention to these laws.

companies to recover in British courts the noncompensatory portion of any foreign multiple damage judgment entered against them where the judgment was not based exclusively on conduct occurring within the territory of the country imposing the judgment."[279] Were an American state (such as New York) to follow the UK's lead, that state could enact a law defining a category of protected activity—say, performing abortions during the first trimester—and include a clawback provision. Then, a doctor or nurse ordered by a Texas court to pay damages would be able to use New York courts to recover the full costs of the action, including attorney's fees, assuming one or more of the Texas plaintiffs has sufficient ties to New York.[280]

We do not want to minimize the number of legal obstacles that clawback legislation would need to address. Most basically, an indemnity obligation could only be imposed on a plaintiff who had a constitutionally sufficient connection to the indemnity-imposing state.[281] And because *anyone* not employed by the State of Texas may bring suit, it may be easy to find a universe of plaintiffs with no connections to New York or any other clawback state. What's more, plaintiffs would doubtless challenge any extraterritorial clawback law as a violation of state sovereignty. Still, clawback legislation would go some ways toward levelling the playing field between those who bring private subordination actions and the individuals they target. For that reason, we believe it warrants consideration as a tool for checking vigilante federalism.[282]

[279] Note, *Reassessment of International Application of Antitrust Laws: Blocking Statutes, Balancing Tests, and Treble Damages*, 50 LAW & CONTEMP. PROBS. 197, 202 (1987); *see also* Stephen A. Tsoris, Note, *Section 6 of Great Britain's Protection of Trading Interests Act: The Claw and the Lever*, 14 CORNELL INT'L L.J 457, 479 (1981).

[280] Legislation would need to specify that it applied extraterritorially to the full extent of the enacting state's legislative jurisdiction. *See generally* Willis L.M. Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587 (1978).

[281] Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–13 (1981).

[282] In New York, State Senator Alessandra Biaggi has introduced a more limited form of clawback legislation targeting interference with travel to the state. S.B. 9039 would create a private right of action for the benefit of anyone who "exercised or attempted to exercise . . . a right protected under the constitution of the state of New York and/or protected or permitted by the laws of the state of New York, to obtain medical care that . . . result[ed] in litigation or criminal charges brought against that person in any court in the United States or its territories." S.B. 9039, 2022 Gen. Assemb, 245th Sess., § 3 (N.Y. 2022).

#### 2. *Repurposing Private Subordination Regimes to Advance Progressive Goals*

Counter-litigation under clawback statutes is a limited response to red states' embrace of private subordination actions. Its biggest impact may be to wall-off major right-wing institutions and organizations (such as the Manhattan Institute and Heritage Foundation) from the nosy co-worker or easily offended neighbor who brings the suit. If blue states wanted to use heavier weaponry, they could adopt progressive private enforcement schemes that make use of S.B. 8's technology to evade pre-enforcement judicial review. Such blue state schemes could target those who bundle millions for political candidates, those who make, sell, or carry firearms, and those who might seek (and secure) religious exemptions from generally applicable health and safety regulations.

Blue states might enact these instruments for a pair of reasons. The first is to test the Supreme Court's mettle. In *Whole Woman's Health*, the Justices endorsed S.B. 8's evisceration of the then-extant constitutional right to abortion in the nation's second largest state.[283] Will they similarly countenance a California law that uses a version of S.B. 8's private enforcement scheme to nullify gun rights or a New York law that restricted wealthy donors' right to bundle campaign contributions?[284] If the Justices decline to strike down such laws, then blue states will have just as much license to rewrite constitutional law as do the red states. And if the Justices were to reject such laws, then the Court would have to decide between walking back what it authorized in *Whole Woman's Health* or further squandering its already diminished legitimacy by embracing a nakedly partisan distinction between blue and red state private enforcement regimes.

The second reason is best understood not as a challenge to the Court but as a recognition of the new regulatory opportunities that S.B. 8 and *Whole Woman's Health* create. For long stretches of time, progressives have proven to be anemic, even sheepish in countering right-wing political and legal gambits.[285] But given the near certain likelihood that the Court will

283 *See supra* text accompanying notes 168–169.

284 *See, e.g.*, Ian Millhiser, *The One Good Thing That Could Come from Gavin Newsom Trolling the Supreme Court*, VOX (Dec. 14, 2021), https://www.vox.com/2021/12/14/22832257/supreme-court-gavin-newsom-abortion-guns-assault-weapons [https://perma.cc/55U3-SG6N].

285 *Cf.* Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 927–33 (2018) (cataloging reasons why the Republican

remain firmly in the hands of an archconservative majority (not to mention the structural advantages red state conservatives have vis-à-vis the Electoral College and the Senate), blue states seemingly have a greater-than-usual (and greater-than-red-states) incentive to embrace private enforcement legislation predicated on the circumvention of One First Street. One need not look any further than two of the blockbuster opinions announced in June 2022—namely, a reversal of *Roe v. Wade*[286] and an eyepopping expansion of gun rights[287]—to glean whether Red or Blue America should be taking pains to bypass the Supreme Court.

a. *The Universe of Blue State Copycats.*—So far, the chief blue state movers are California and Illinois. Just a day after the Court allowed S.B. 8 to remain in effect, Governor Gavin Newsom expressed his dismay at the Court's holding and announced his intention of advancing an S.B. 8-style law empowering private individuals to sue the manufacturers, distributors, and sellers of assault weapons and ghost guns.[288] Writing some days later in the *Washington Post*, Newsom asserted that if S.B. 8-style "lawmaking is fair play, then California will at least use [similar instruments] to save lives instead of harming them."[289] True to his word, California enacted such a law in July 2022.[290]

Meanwhile, legislators in Illinois have pushed similar bills. One would authorize any person to bring private suits (and secure civil damages) against gun sellers and manufacturers of a firearm that causes an injury or fatality.[291] Illinois lawmakers are also sponsoring a law that would empower any

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Party is more likely to resort to strategies of constitutional hardball more frequently than the Democratic Party).

286 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

287 New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

288 @CAgovernor, TWITTER (Dec. 11, 2021), https://twitter.com/CAgovernor/status/1469865007517089798?s=20 [https://perma.cc/T2BU-5TR7].

289 Gavin Newsom, *Opinion: The Supreme Court Opened the Door to Legal Vigilantism in Texas. California Will Use the Same Tool to Save Lives*, WASH. POST (Dec. 20, 2021), https://www.washingtonpost.com/opinions/2021/12/20/newsom-california-ghost-guns-vigilante-justice/ [https://perma.cc/6WAM-DZ6J].

290 Hannah Wiley, *Newsom Signs Gun Law Modeled After Texas Abortion Ban, Setting up Supreme Court Fight*, L.A. TIMES (July 22, 2022), https://www.latimes.com/california/story/2022-07-22/newsom-signs-gun-bill-modeled-after-texas-abortion-ban-setting-up [https://perma.cc/FFB5-VTTJ].

291 *See* H.B. 4156, 102d Gen. Assemb., Reg. Sess. (Ill. 2022) (authorizing "[a]ny person, other than an officer or employee of a State or local government entity," to bring a civil action against manufacturers, importers, or dealers of any firearm that causes an injury or death, setting damages at a minimum of $10,000 for each individual injured or killed, and awarding plaintiffs costs and attorney's fees).

person to bring suit against the those who commit (or enable) acts of domestic violence or sexual assault.[292] (Lest anyone miss the connection to S.B. 8, the latter proposed bill is titled The Expanding Abortion Services Act—or *TEXAS Act*, a label that reflects "some element of trolling."[293])

The universe of potential progressive counterpunches is, to be sure, much larger. Most readily, New York's Attorney General, Letitia James, recently called upon Empire State legislators to follow Newsom's lead.[294] But beyond tangible plans of that sort, we can envisage blue states authorizing private parties to sue individuals who facilitate the bundling or disbursement of large campaign donations.[295] Such a law might be especially popular insofar as it would circumvent the Court's fierce resistance to *government* restrictions on political speech.[296] We can similarly envisage blue states authorizing private suits against those who might seek to peddle election misinformation or otherwise interfere with efforts to register to vote, to actually vote, to support others attempting either to register or vote, or to count and report votes.[297] Blue states could create rights of action to suppress the use of forced arbitration provisions notwithstanding the Supreme Court's view that the Federal Arbitration Act establishes a preemptive "liberal federal policy favoring arbitration agreements."[298] They could, perhaps, create rights of action to penalize individuals and organizations engaged in lobbying or advocacy in support of laws that ban abortions, deny equal protection to trans-

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292 Hannah Meisel, *Democrat-Sponsored 'TEXAS Act' Would Allow $10k Bounties on Sexual Abusers, Those Who Cause Unwanted Pregnancies*, NPR: ILL. (Sept. 14, 2021), www.nprillinois.org/statehouse/2021-09-14/democrat-sponsored-texas-act-would-allow-10k-bounties-on-sexual-abusers-those-who-cause-unwanted-pregnancies [https://perma.cc/UT9X-FCCW].

293 *Id.*

294 Lawrence Hurley, *Analysis: Texas Abortion Law Opens Door to Copycat Curbs on Guns, Other Rights*, REUTERS (Dec. 15, 2021), https://www.reuters.com/world/us/texas-abortion-law-opens-door-copycat-curbs-guns-other-rights-2021-12-15/ [https://perma.cc/AE6Q-5KRD].

295 For present purposes, we take no position on the legal or political merits of the possible approaches, though we remain in general apprehensive about a strategy of this sort.

296 McCutcheon v. FEC, 572 U.S. 185, 192 (2014); Citizens United v. FEC, 558 U.S. 310, 340 (2010).

297 *See, e.g.*, Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2351 (2021) (Kagan, J., dissenting) (remarking that the Court "has treated no statute worse" than the Voting Rights Act); *see generally* Ian Millhiser, *How America Lost Its Commitment to the Right to Vote*, VOX (July 21, 2021), https://www.vox.com/22575435/voting-rights-supreme-court-john-roberts-shelby-county-constitution-brnovich-elena-kagan [https://perma.cc/Z9AN-S6KY].

298 Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018) (internal citations omitted).

gender persons, prohibit CRT instruction, or empower parents to have books removed from school libraries. Lastly, we might see blue states pass laws empowering private actors to sue those seeking to interfere with or otherwise opt out of duly enacted laws and regulations designed to protect public health and safety—in essence, a private scheme targeting those obstructing, among other things, Covid-19 protocols.

b. *The Impact of Blue State Copycats*.—Whereas red states have rushed en masse to create anti-abortion, anti-CRT, and anti-LGBTQ+ subordination rights, blue states, so far, have been far more timid. It isn't clear whether their hesitancy or outright reluctance is a function of progressive officials' uneasiness with what we too consider to be unwieldy tools that may further polarize the nation;[299] or that, contrary to Newsom's fighting words, progressives believe there is little value in trying to shame a Court that has shown itself rather impervious to public criticism, notwithstanding the glaringly obvious partisan direction of the Court's decisions.[300] One could imagine the Court simply insisting it never understood S.B. 8 to strike at the heart of a *protected* constitutional right,[301] whereas restrictions on guns and political speech certainly would.

Consider California's proposal. Though, again, the governor insists he's daring the Court to strike it down, the proposal in fact is not a close counterpart to S.B. 8 but a far more modest measure both with respect to the substance of the regulation and the procedural burdens it imposes on defendants. As a substantive matter, neither ghost guns nor assault weapons have (yet) received the type of explicit constitutional protection that the right to abortion has garnered for close to fifty years.[302] (Regardless what the Court said in *Dobbs*,[303] it is undeniable that the constitutional right to an abortion re-

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[299] Newsom, *supra* note 289; Meisel, *supra* note 292 (describing Illinois Governor JB Pritzker's characterization of S.B. 8 as heralding a "dystopian future").

[300] *See* Erwin Chemerinsky, *Op-Ed: Are Supreme Court Justices 'Partisan Hacks'? All the Evidence Says Yes*, L.A. TIMES (Sept. 19, 2021), https://www.latimes.com/opinion/story/2021-09-19/supreme-court-justices-amy-coney-barrett-politics [https://perma.cc/9CGS-45TR]; Jane Mayer, *Is Ginni Thomas a Threat to the Supreme Court?*, NEW YORKER (Jan. 21, 2022), https://www.newyorker.com/magazine/2022/01/31/is-ginni-thomas-a-threat-to-the-supreme-court [https://perma.cc/QLS9-FQM6].

[301] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022) (insisting that "*Roe* was egregiously wrong from the start").

[302] *See, e.g.*, Jake Charles, *Op-Ed: Newsom's Riff on the Texas Abortion Law Is Less Radical than it Sounds*, L.A. TIMES (Dec. 13, 2021), https://www.latimes.com/opinion/story/2021-12-13/newsoms-gun-ban-idea-is-less-radical-than-texas-abortion-law-sb8 [https://perma.cc/UH27-N3Z9].

[303] *See Dobbs*, 142 S. Ct. at 2228.

mained good law on the day *Whole Woman's Health* was decided.) As Jake Charles argues, if Newsom or other Democrats really want "to test the Supreme Court's alarming new precedent" announced in *Whole Woman's Health*, they are going to have to enact laws that have the same vexatious and subordinating effects as S.B. 8.[304]

What's more, even if the blue states' laws were to cut as deeply and impose similarly oppressive procedural burdens on defendants, they still might not work as well in chilling the behavior they target. The gun industry's legal and lobbying resources are staggering,[305] suggesting that gun defendants may be better situated than, say, abortion providers and nurses, teachers, and local school districts when it comes to absorbing the costs and hassles of defending litigation brought under blue state private enforcement schemes. (The same would be substantially true were blue states to authorize lawsuits against plutocratic campaign bundlers or their financial intermediaries. Those parties are, almost by definition, awash in cash and, in any event, could presumably find ways to route whatever campaign financing they're offering through an out-of-state residence or business.)

So, whether the courts treat blue state private enforcement schemes differently (and less favorably) or the blue states simply tread more lightly, the fact remains that blue states are more poorly positioned to pull far away from the pre-S.B. 8 national equilibrium than are red states, which again are already doing so in powerful and expansive ways. That does not necessarily counsel against blue states employing such instruments, particularly if the alternative is to stand down while the red states continue to embrace a radical version of federalism.

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304 *See* Charles, *supra* note 302. Limited as the California law is—and even though it copies verbatim from the statute the Supreme Court allowed to operate in *Whole Woman's Health*—a federal district court declared the California law unlawful on the ground that it violates the First Amendment right of access to the courts by requiring parties who challenge its constitutionality to bear the costs of litigation. *See* Miller v. Bonta, No. 22cv1446-BEN (JLB), 2022 WL 17811114, at *4 (S.D. Cal. Dec. 19, 2022).

305 Though the NRA currently is in some financial and legal turmoil, *see* Danny Hakim, *New York Attorney General Sues NRA and Seeks Its Closure*, N.Y. TIMES (Aug. 6, 2020), https://www.nytimes.com/2020/08/06/us/ny-nra-lawsuit-letitia-james.html [https://perma.cc/UTD5-RUXD], it has long been an absolute litigation and lobbying powerhouse, *see, e.g.*, Julie Bykowicz & Mark Maremont, *NRA to Aggressively Lobby Against Gun Measures, Despite Its Financial Woes*, WALL ST. J. (Mar. 28, 2021), https://www.wsj.com/articles/nra-to-aggressively-lobby-against-gun-measures-despite-its-financial-woes-11616940001 [https://perma.cc/7YJE-E39K].

But it does suggest that blue states need to make a different risk-reward assessment.

As we see it, blue states have both greater rewards and greater risks. On the rewards front, blue states have more reasons than red states to use private enforcement schemes to insulate regulatory spaces from the reach of federal constitutional law. So long as the Court continues in its quest to retrench rights of central importance to progressive communities—everything from affirmative action to same-sex marriage to federal power to combat climate change—it is blue rather than red states that have more to gain by enacting what Judge Higginson of the Fifth Circuit rightly called "mutinous" laws.[306]

But on the other hand, progressives have more to lose in a world of dueling blue and red bubbles of private enforcement. Again, even assuming the Court permits blue analogs (and even assuming the targets of blue state laws were just as likely to be chilled as the targets of red state laws), progressives may—and we think should—have more qualms about embracing vigilante federalism.

The reason for such wariness is simple enough. Progressives tend to care more about efficient, effective, and comprehensive regulatory solutions—and those solutions often require coordination (and funding) at national rather than state levels.[307] Policy experimentation at the state level is important, even vital; and state-level entrepreneurialism, particularly at times of dysfunction and disarray in Washington, can be tremendously impactful.[308] But there are real dangers to the balkanization that would accompany an unrestrained embrace of state-by-state private enforcement regimes.[309] Among other

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306 Whole Woman's Health v. Jackson, No. 21-50792, 2021 WL 6504489, at *2 (5th Cir. Dec. 27, 2021) (Higginson, J., dissenting).

307 *See, e.g.*, MATT GROSSMANN & DAVID A. HOPKINS, ASYMMETRIC POLITICS: IDEOLOGICAL REPUBLICANS AND GROUP INTEREST DEMOCRATS (2016); Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 118 (2010) (understanding federalism in terms of collective action and noting that "much of what the federal government does best is to solve collective action problems that the states cannot solve on their own").

308 *E.g.*, Soumya Karlamangla, *California's Single-Payer Health Care Proposal Faces Crucial Vote*, N.Y. TIMES (Jan. 31, 2022) https://www.nytimes.com/2022/01/31/us/single-payer-health-care-california.html [https://perma.cc/FLR3-CB8X].

309 One of us has considered a middle-ground solution that minimizes the intense balkanization and low economies of scale attendant to state-level policymaking while also evading the multiple structural and political veto-gates currently stymieing federal policymaking. *See* Jon D. Michaels & Emme M. Tyler, *Just-Right Government: Interstate Compacts and Multistate Governance in an Era*

things, the wider the gap between governance decisions in red states versus blue states (and the more time and effort each spends focusing on state governance decisions at the expense of federal governance), the easier it will be to remain suspicious and hostile toward one another; and, the harder it will be to find common ground in those contexts where we truly need national, uniform solutions. What's more, when a state as big as a California or New York becomes increasingly self-reliant, its congressional delegation may be less likely to do the incidental but important work of championing causes of those who don't live in solidly blue states (or who do live in blue states, albeit ones without the economies of scale to achieve the same level of fiscal and regulatory independence that, again, a California or New York may be able to enjoy).[310]

All of this is to say that officials in blue states seeking to avail themselves of the instruments endorsed in *Whole Woman's Health* face a more difficult and complicated task than do their counterparts in red states whose primary objective may well be to unleash neighbor against neighbor for political gain.

### C. Market Solutions

Another route to explore is commercial or philanthropic solutions—that is to say, reliance on a range of market resources to counter, better endure, or skirt oppressive private subordination regimes. Here we consider philanthropic pipelines and commercial ones. We take them up separately, though we recognize that there can be some, perhaps considerable, blending or commingling of charitable and business support.

#### 1. *Philanthropic Pipelines*

a. *Legal Defense Funds.*—Perhaps the most obvious form of assistance would be the creation of legal defense funds to support doctors, teachers, and the like hauled into court via a private subordination action. We don't yet have a full appreciation for how many suits will be brought, how many defendants

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*of Political Polarization, Policy Paralysis, and Bad-Faith Partisanship*, 98 IND. L.J. 863 (2023).

310 Perhaps if the endgame of vigilante federalism would be a true and complete sorting—such that progressive Texans move to California and conservative Californians move to Texas—some of the concerns with state-level governance might dwindle in importance. But the likelihood of such a true and complete sorting is, at present, small—and those with the greatest mobility barriers are, by and large, those who are already most vulnerable in society.

will be named (will deputized plaintiffs go after file clerks and parking attendants at abortion clinics, too?), and what type of damages judges will be apt to award. But between the possibility of multiple defendants named in each cause of action and successive and onerous suits brought in the most inconvenient and inhospitable of venues, it is important to recognize that financial indemnification is likely both inadequate to cover the full costs of litigation and also unhelpful when perhaps the bigger problem is medical professionals (not to mention hourly wage earners) getting tied up for days upon days in faraway courts.

Note too that not every cause or every defendant is likely to attract the same amount of philanthropic support. Maybe abortion providers are well supported but not the aforementioned parking attendants; maybe school districts that run afoul of anti-LGBTQ+ laws are ably supported by the philanthropic community, but those who teach about race, inequality, and chattel slavery receive far less charitable support (or vice versa).[311] We mention this to underscore that philanthropic (or commercial) indemnification is hardly an across-the-board guarantee—and as private subordination regimes reach further, wider, and deeper, there may not be nearly enough resources to go around.

b. *Out of State Safe Havens.*—Another approach, at least for abortions, is to provide financial support to transport patients to blue states, where abortions (for now at least) are readily available.[312] Such a makeshift measure may work, at least for some patients. It may not, however, work for those laborers or caregivers who cannot take the time off; for undocumented persons, as train, bus, and airport terminals are often policed by immigration officials, making what for others may be a quick trip to Chicago or Seattle a prohibitively risky en-

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[311] Some state bills, anticipating the prospects of indemnification, are expressly prohibiting teachers from drawing upon third-party resources to pay damages awards. *See* S.B. 1470, 58th Leg., 2d Reg. Sess., § 2(B)(2) (Okla. 2022) ("All persons found liable for damages shall make payment from personal resources and shall not receive any assistance from individuals or groups.").

[312] Adam Edelman, *'Two Americas': Aid Groups Prepare for More Women Needing to Cross State Lines for Abortions*, NBC NEWS (Jun. 26, 2021), https://www.nbcnews.com/politics/politics-news/two-americas-aid-groups-prepare-more-women-needing-cross-state-n1272133 [https://perma.cc/3WLU-W6VZ]. For consideration of how affluence, or the lack thereof, affects reproductive rights, see generally KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS (2017). For a detailed analysis of the inter-state conflicts likely to emerge in the wake of *Dobbs*, see David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1 (2023).

deavor;[313] for those on parole who may not leave the state;[314] and for those who live with an abusive relative or partner (and cannot explain or otherwise justify an extended absence that travel for an out-of-state abortion would almost certainly necessitate).[315]

Beyond the context of abortion, this notion of an out-of-state safe haven for other defendants targeted by private subordination actions is meaningless. Teachers in Florida cannot offer instruction from the CRT-friendlier confines of, say, Waikiki Beach or Burlington, Vermont. Likewise, inclusive or nonbinary bathroom facilities established in Hartford, Connecticut or Oakland, California are useless to trans kids who attend school in Tampa, Florida.

What's more, we cannot help but name the huge dignitary issues associated with what for some seems like a fairly simple and straightforward Coasian compromise.[316] To have to sneak out of one's state and travel quite possibly hundreds, if not

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313 Thanks to Liz Sepper for bringing this major and often overlooked problem to our attention.

314 Vivian Nixon & David Muhammad, *Abortion on Parole: Access to Reproductive Care Cannot Exclude Those in Our Prison Systems*, THE HILL: CONG. BLOG (Aug. 17, 2022), https://thehill.com/opinion/congress-blog/3605276-abortion-on-parole-access-to-reproductive-care-cannot-exclude-those-in-our-prison-systems/ [https://perma.cc/NJ3E-QS6M].

315 Some scholars have suggested that anti-abortion laws' real-world impact will be blunted by "foot voting" by individuals' ability to travel to more permissive jurisdictions that have not shut down abortion access through rights suppressing laws or state enforcement. For instance, Rick Hills points out that, prior to S.B. 8, pregnant Texans already had to travel hundreds of miles within the state to obtain an abortion. With that in mind, "[t]raveling to Tucumcari or Albuqurque, NM might be a pretty small additional increase in cost above the *Roe/Casey* status quo." Rick Hills, *Will Federalism (and Conflicts of Law Doctrine) Deregulate Abortion?*, PRAWFSBLAWG (Dec. 5, 2021), https://prawfsblawg.blogs.com/prawfsblawg/2021/12/will-federalism-and-conflicts-of-law-doctrine-deregulate-abortion.html [https://perma.cc/MGW9-XHS9]. Hills further posits that, post *Roe/Casey*, pro-choice organizations will reallocate resources that they "now use for litigating 'undue burden' [sic] to defraying those travel costs." *Id.*

Around the same time, Mark Tushnet speculated on Twitter that the overruling of *Roe* and *Casey* would cause "behavioral adaptations . . . like migratory abortions—an underground railway for those seeking abortions where they are legally available." @Mark_Tushnet, TWITTER (Dec. 2, 2021), https://twitter.com/Mark_Tushnet/status/1466451345897054210?s=20&t=8bK_3ZrlR3zlB_lvGyCCQQ [https://perma.cc/MJ7T-ZTR5] (adding that such a railway would be further supported by "enhanced social provision of pre- and post-natal care").

Though we appreciate what we take to be Professors Hills and Tushnet's respective good-faith efforts to consider second-best solutions, for the logistical, distributional, and dignitary reasons we described in the body of the text we are far less confident or comfortable with any paradigm that treats these solutions as unproblematic substitutes for the pre-S.B. 8 status quo.

316 *See* Karlamangla, *supra* note 308; *see also* Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman's Private Choice*, 95 TEX. L. REV. 1189, 1191 (2017)

thousands of miles, to have one's fundamental autonomy recognized is a rather Pyrrhic victory. That's not to say the option shouldn't exist. Obviously, difficult times warrant some tough choices. But that doesn't detract from the simple fact that "options" of the sort are deeply problematic—and we ought not treat an emotionally and physically fraught trip to an Ob-Gyn clinic near LaGuardia Airport as if it were a weekend getaway to Manhattan to do some Christmas shopping along Fifth Avenue.

2. *Corporate/Commercial Pipelines*

a. *Employer Protections.*—As is often the case in a nation with a limited public welfare system, responsibilities may land in the lap of employers, at least some of whom may step up and provide support in the form of legal assistance, time off, or even private insurance to cover the travel costs of securing abortions out of state.[317] This may be especially true if employers fear that they may have trouble recruiting and retaining employees in jurisdictions blanketed by private subordination regimes. (One recent survey found that two-thirds of college educated workers—men and women combined—wouldn't even apply to jobs in states where abortions were outlawed.[318]) Immediately after passage of S.B. 8, both Uber and Lyft (whose drivers seemingly face legal liability if they knowingly ferry passengers to abortion appointments) promised to pay any legal fees.[319] The problem of course is that like any other benefit or protection that's employer-based, support is likely to be rather patchy. Dell and Google may provide a suite of services to protect those employees most affected by S.B. 8, but we are not as confident employees of Dollar General[320] or a local diner will be similarly supported.

("Affluence will not spare women the indignity of traveling to another state or country to obtain abortions.").

317 Jon D. Michaels & S. Mitra Kalita, *Why Abortion Access Is a Workplace Issue*, TIME: CHARTER (Dec. 7, 2021), https://time.com/charter/6126281/abortion-workplace-issue-mississippi-ban/ [https://perma.cc/55YM-GMG6].

318 *Texas Could Lose Out on Skilled Workers Due to Restrictive Abortion Law, Poll Finds*, DIVERSE: ISSUES IN HIGHER ED. (Sept. 2, 2021), https://www.diverseeducation.com/demographics/women/article/15114423/texas-could-lose-out-on-skilled-workers-due-to-restrictive-abortion-law-poll-finds [https://perma.cc/V63Z-G6RL].

319 A Martinez, *Lyft, Uber Will Pay Drivers' Legal Fees If They Are Sued Under Texas Abortion Law*, NPR (Sept. 8, 2021), https://www.npr.org/2021/09/08/1035045952/lyft-uber-will-pay-drivers-legal-fees-if-theyre-sued-under-texas-abortion-law [https://perma.cc/FB9P-DVYJ].

320 *See* Michael Sainato, '*People Are Fed Up': Dollar General Workers Push to Unionize Amid Hostility From Above*, THE GUARDIAN (Oct. 19, 2021), https://

And, again, like with much of the philanthropy, abortion safeguards seem far more feasible than comparable supports for teachers and school districts running into the buzz saw of anti-CRT or anti-LGBTQ+ private subordination regimes.

b. *Corporate Political Pressure.*—Today there is both considerable enthusiasm and angst over so-called woke capitalism—a catchall (and highly misleading) term for what are often moderate levels of corporate support for various political and social causes.[321] It is possible that corporations will push back on state legislatures—and do so out of some combination of corporate social responsibility, customer pressure, and an old-school desire to maximize profits (which may necessitate championing the interests of its employees).[322] We've witnessed some corporate activism on such issues as Black Lives Matter and in response to some states' voter suppression efforts. It stands to reason that corporations might push back on states that pass anti-abortion, anti-LGBTQ+, and/or anti-CRT private subordination regimes.

Reliance on corporate social responsibility is, however, a dicey proposition. Witness how quickly corporate America—

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www.theguardian.com/us-news/2021/oct/19/dollar-general-employees-union-drive-workers [https://perma.cc/249Q-Q4NE].

[321] The degree of anxiety produced by corporations exercising their First Amendment rights in this manner is highlighted by an opinion by Judge James Ho. In this particular opinion, Ho quotes provocatively and gratuitously from a pulpy critique of so-called woke capitalism, Sambrano v. United Airlines, 45 F.4th 877, 883 (5th Cir. 2022) (Ho, J., concurring in denial of rehearing en banc), eliciting concerns—which we share—that the judge may have been (perhaps inadvertently) amplifying and validating invidiously anti-Semitic stereotypes about rich Jewish bankers. *See* Milan Markovic (@ProfMarkovic), TWITTER (Aug. 21, 2022, 3:02 p.m.), https://twitter.com/ProfMarkovic/status/1561428621490679809 [https://perma.cc/M67F-FA4V]; Blake Emerson (@BlakeProf), TWITTER (Aug. 19, 2022, 6:39 p.m.), https://twitter.com/blakeprof/status/1560758355630915584?s=46&t=TMjtvwrYtqYabwnf-a2j0A [https://perma.cc/43AH-S7KG]; Josh Block (@JoshABlock), TWITTER (Aug. 19, 2022, 9:55 a.m.), https://twitter.com/JoshABlock/status/1560626535882788870 [https://perma.cc/E6KM-XZL5].

[322] *See generally* CARLOS BALL, THE QUEERING OF CORPORATE AMERICA: HOW BIG BUSINESS WENT FROM LGBTQ ADVERSARY TO ALLY (2019); *but see* Katie Glueck & Frances Robles, *Punishing Disney, DeSantis Signals a Lasting G.O.P. Brawl with Business*, N.Y. TIMES (Apr. 22, 2022), https://www.nytimes.com/2022/04/22/us/politics/desantis-disney-florida.html [https://perma.cc/5U4E-ZT8F] (describing Governor DeSantis's retaliatory actions against Disney for criticizing "Don't Say Gay"); Anthony Izaguirre, *Florida Gov. Ron DeSantis to Run Disney District after 'Don't Say Gay' Feud*, L.A. TIMES (Feb. 10, 2023), https://www.latimes.com/politics/story/2023-02-10/florida-gov-ron-desantis-to-run-disney-district-after-dont-say-gay-feud [https://perma.cc/KJ2M-R5PB] (describing the passage of state legislation authorizing DeSantis "to appoint a five-member board" to oversee the administration of a large district encompassing Disney World that the legislature had heretofore permitted Disney to "self-govern[ ]").

after initially expressing outrage and promising to cut off campaign donations—resumed its financial support for the hundred-plus members of Congress who endorsed the Big Lie and claimed that Donald Trump, not Joe Biden, won the 2020 presidential election.[323] And given the fact that private subordination regimes are often supported by the most powerful politicians in a state,[324] it is far from certain that corporations would be willing or able to apply sustained pressure.

Note too that when it comes to private subordination regimes, corporations may not be able to apply as much subtle influence. Because the laws vest enforcement authority entirely in the hands of private actors, corporations cannot quietly secure tacit assurances of nonenforcement from chief lawmakers or regulators—assurances that might allow the legislature to save face while also allowing residents a greater sense of confidence knowing that they will not be prosecuted for, among other things, facilitating an abortion, rendering a school campus more trans-friendly, or teaching students about race in America.

## CONCLUSION

This Article has highlighted the recent wave of laws authorizing private subordination actions and explained their mutually reinforcing relationship with a larger embrace of anti-democratic citizen enforcement on the American right. Borrowing from familiar private enforcement regimes, the new laws create private rights of action that empower private actors and their attorneys to enforce their substantive provisions. In contrast to the precedents they borrow from, the current wave of rights suppressing laws manipulate judicial review and play a supporting role in efforts to retrench constitutional protections. More importantly, the new laws redefine the meaning of

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323 Angela Li & Areeba Shah, *The Corporate Insurrection: How Companies Have Broken Promises and Funded Seditionists*, CITIZENS FOR RESP. & ETHICS IN WASH. (Jan. 3, 2022). https://www.citizensforethics.org/reports-investigations/crew-reports/the-corporate-insurrection-how-companies-have-broken-promises-and-funded-seditionists/ [https://perma.cc/K3DE-9BLF].

324 Stoking anti-CRT animus seemed to figure prominently in Glenn Youngkin's successful gubernatorial race in Virginia in 2021. *See* Paul Schwartzman, *In Tight Governor's Race, Virginia GOP Targeting Critical Race Theory to Draw Votes*, WASH. POST (Oct. 2, 2021). https://www.washingtonpost.com/local/virginia-politics/critical-race-theory-virginia-governor-youngkin/2021/10/01/17ad45f0-1cc8-11ec-8380-5fbadbc43ef8_story.html [https://perma.cc/7P89-GNR6]; Charles M. Blow, *Opinion: White Racial Anxiety Strikes Again*, N.Y. TIMES (Nov. 3, 2021), https://www.nytimes.com/2021/11/03/opinion/youngkin-virginia-race.html [https://perma.cc/8DSQ-9DYZ].

rights to encourage litigious citizens to surveil and sue members of their own communities; stoke social and cultural conflicts; encourage private parties to take enforcement of the law and social norms into their own hands; and support broader efforts to entrench minority rule and restrict the polity to "real" Americans. In doing so, they encourage a *legalized* form of vigilantism—one characterized by intensive enforcement of the law by self-appointed citizens who, like the individuals who undertook to enforce the Fugitive Slave Act and Jim Crow, operate with the express or implicit support of the state.

The Article also sought to highlight tremors from these laws that portend a potentially seismic shift in canonical understandings of American federalism. In the classic, Brandeisian federalism, states' policy experiments supply valuable information to other states and the federal government, without creating negative repercussions for other states, the federal government, or individuals' participation in the life of the nation. What we term vigilante federalism challenges the underpinnings of this account. States cease innovating in favor of deputizing great discretion to private parties to surveil, intimidate, and penalize disfavored groups. The new vigilantism erodes rather than bolsters the nation's capacity to coordinate collective action. And as states subject everyday people to starkly different liability regimes, the impact of moving from a red state to a blue one is magnified, further balkanizing a nation that is already divided by partisanship, race, religion, and culture.

For progressives, the challenge is to respond to private subordination regimes, and take advantage of the regulatory opportunities they create, without fueling the corrosive dynamics that they set in motion. As Don King might say, only in America.