SUBSTANCE AND FORM IN VIGILANTE FEDERALISM

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Procedure is power,[1] to be sure, but we should not let a lawyerly interest in procedural design distract from substantive justice.

Vigilante Federalism makes an invaluable contribution by showing how a particular procedural form has been used to undermine substantive justice.[2] The authors deserve enormous credit for documenting, publicizing, and criticizing what they call "private subordination regimes."[3]

The central insight of *Vigilante Federalism* is that 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."[4] The quintessential example of a private subordination regime is Texas's SB8 ("SB8"),[5] which deputizes citizens to enforce the state's anti-abortion law. *Vigilante Federalism* calls out SB8 as a tool of subordination, and it argues that SB8 is especially pernicious because it relies on private enforcement by any citizen and without many of the typical guardrails that attach to more commonplace private enforcement laws.

I concur with the Article's condemnation of SB8 and its diagnosis of that law as a tool of subordination. I also concur descriptively that SB8 relies on private enforcement and that its private-enforcement scheme can be distinguished from prior archetypes.

Where I slightly part company is that I am somewhat less concerned about the procedural design of SB8, and thus

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1 *See, e.g.*, Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1703 (2004).

2 *See* Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 CORNELL L. REV. 1187, 1187 (2023).

3 *Id.*

4 *Id.* at 1197.

5 *See* Tex. Health & Safety Code §§ 171.201.

relatively more concerned about its substance. In simple terms, then, the goal of this reply is to amplify important aspects of *Vigilante Federalism* and to make sure that those important aspects are not obscured by other claims.[6]

First, although it is true that private subordination regimes rely on private enforcement, I am dubious that the "legal technology of private enforcement" is the problem. Technologies can be used for good or ill. There are countless examples in the past and today of laws relying on the private enforcement technology to achieve goals that we might find normatively attractive. The procedural form does not make these laws good or bad, nor do I think that the drafters of these laws have any special attachment to the procedural designs they employed.

Second, *Vigilante Federalism* criticizes private subordination regimes because they use private enforcement to achieve specific substantive effects, namely subordination. *Vigilante Federalism* should be praised for connecting these laws to subordination. I would go further to suggest that it is this subordination—independent of the legal technology used to achieve it—that deserves our attention. Those forces seeking to limit reproductive freedom may turn to private enforcement, but they also might turn to direct state action (such as criminalizing abortion) or to extralegal private action (such as violence against abortion providers). Focusing on the legal technologies being employed in private subordination regimes risks distracting us from the broader threats to liberty.

Third, I want to sound a further note of caution about getting too in the weeds on the procedural aspects of these private subordination regimes. *Vigilante Federalism*, at times, seeks to distinguish some private subordination regimes based on their attendant procedures. But a focus on procedural details presents real risks. It risks sanitizing these laws by transforming a conversation about substantive justice into a conversation about legal technicalities. It also risks

[6] Along the way, I also connect this project to recent work on subordination by Professor Aziz Huq and earlier work by various scholars on private enforcement generally. *See generally* Aziz Z. Huq, *The Private Suppression of Constitutional Rights*, 101 TEX. L. REV. 1259 (2023) (collecting sources on private enforcement). For his part, Huq defines his category of "private suppression" as "(1) a sustained campaign in which private individuals or organizations are endowed with, and systematically employ, (2) an 'affordance' specifically created by the state, including (albeit not limited to) the filing of a civil action against another private party with (3) the predictable and actual effect of preventing or seriously burdening that person's exercise of a recognized, if potentially disputed, constitutional right." (internal footnote omitted). *Id.* at 1270.

legitimizing these laws by suggesting that changes to the procedural design might make them acceptable. But, again, the procedural design is not the point. SB8 would still be a tool of subordination if standing were limited to purported biological fathers, or if the fee-shifting provision operated in both directions.

Taken together, these comments serve as a reminder that subordination is the problem. This message is important for lawyers, and particularly for litigators and proceduralists, because it is easy for us to get wrapped up in procedural intricacies and doctrinal debates and lose sight of what really matters in people's lives. The substance of *Vigilante Federalism* matters more than its form.

I

A defining feature of the private subordination regimes described in *Vigilante Federalism* is that they rely on "private enforcement."

Private enforcement involves "situations in which government responds to a perception of unremedied systemic problems by creating or modifying a regulatory regime and relying in whole or in part on private actors as enforcers."[7] Quintessentially, private enforcement relies on private civil lawsuits, often incentivized by fee shifting or extra-compensatory damages, to enforce laws of public concern.[8]

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."[9]

This reply's first claim is that the legal technology is not the problem. Private enforcement, like other tools of enforcement, is just a tool. Tools can be used for good or for ill.

To illustrate, let's turn back the clock to the 19th century. *Vigilante Federalism* cites two early examples of private

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[7] Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 639-40 (2013). *See also* STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (Cambridge Univ. Press 2017); SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (Princeton Univ. Press 2010); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1137 (2012).

[8] *See generally* Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 784 (2011).

[9] Michaels & Noll, *supra* note 2, at 1197.

enforcement: The Fugitive Slave Act of 1793 ("Fugitive Slave Act") and the False Claims Act of 1863.[10] The former was odious; the latter, for better or worse, remains a central pillar of the government's efforts to fight fraud.[11]

So, yes, private enforcement can be used for rights suppression—but not only for rights suppression. Staying in the 19th century, private litigation was an important tool of the movement *against* the Fugitive Slave Act.[12] A group of Quakers successfully lobbied legislatures to adopt private-enforcement statutes to stop the slave trade.[13] The spectrum of private enforcement laws, in other words, has long been quite wide.

In more recent years, private enforcement has been used in civil rights, environmental law, antitrust, securities, and more.[14] What one thinks normatively about private enforcement in these areas must turn, at least in large part, on what one thinks about the substantive law being enforced. These examples illustrate that private enforcement is a technology that can be used for normatively desirable and undesirable ends. It is possible to think that private enforcement has strengths and weaknesses as an enforcement tool in general, but the normative implications of those strengths and weaknesses should be considered in light of the laws being enforced.

Furthermore, like any other tool, private enforcement may be selected for many reasons. *Vigilante Federalism* could be read to imply that the drafters of these laws intended to contribute to a master plan of vigilantism and authoritarianism, or at least are inspired by those forces.[15]

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10 *Id.* at 1195-96.

11 *See* 31 U.S.C. §§ 3729-3732 (False Claims Act). *See generally* David F. Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1246 (2012). Aziz Huq, meanwhile, sees more continuity between SB8 and its precursors, identifying a range of older regimes that share many similar features. *See* Huq, *supra* note 6, at 6.

12 *See* Alexandra D. Lahav & R. Kent Newmyer, *The Law Wars in Massachusetts, 1830-1860: How A Band of Upstart Radical Lawyers Defeated the Forces of Law and Order, and Struck A Blow for Freedom and Equality Under Law*, 58 AM. J. LEGAL HIST. 327, 328 (2018). *See also* Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1877 (2019).

13 James E. Pfander, *Public Law Litigation in Eighteenth Century America: Diffuse Law Enforcement for a Partisan World*, 92 FORDHAM L. REV (forthcoming 2023).

14 *See, e.g.*, FARHANG, *supra* note 7.

15 *See, e.g.*, Michaels & Noll, *supra* note 2, at 1192-93 ("[W]e 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

I do not find these explanations to be likely. Instead, I think Justice Kagan's quip at oral argument in *Whole Women's Health v. Jackson* gets closer to the truth. In a colloquy with the Solicitor General of Texas, she observed that "the entire point of this law, its purpose and its effect, is to find the chink in the armor of *Ex parte Young*. . . . [a]nd . . . after, oh, these many years, some geniuses came up with a way to evade the commands of that decision."[16] Like engineers facing the constraints of the laws of physics, "some geniuses" with a copy of HART & WECHSLER'S concluded that the best way to avoid federal litigation was a private enforcement workaround of Article III.

The same is true for prior adoptions of private enforcement. Legislatures turn to private enforcement when legal, political, or capacity constraints make other modes of enforcement more difficult—not because of some inherent commitment to private enforcement or some larger endorsement of vigilantism.[17] So although it is true that there

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legal and cultural power from the marginalized groups that the regimes target to the traditionalist White Christian actors who enforce them."); *id.* at 1193 (observing that these laws "lend support to extra-legal forms of vigilantism"); *id.* at 1128 ("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.").

For his part, Huq suggests that private suppression typically has three sources, though he acknowledges that these do not perfectly capture the origins of SB8:

> I posit that there are three overlapping reasons for the emergence of regimes of private suppression. *First*, private suppression is an effective mechanism for maintaining control of an economically valuable asset or arrangement, especially when that arrangement has experienced an unexpected, destabilizing shock. . . . *Second*, I suggest that the incentive to install a system of private suppression is sharpest when the state is suddenly incapacitated *by law* from directly maintaining a prior, asymmetrical distribution of rents. That is, legal or constitutional change can be a catalyst for the creation of a private suppression scheme. *Third*, and additionally, private suppression is a sensible strategy under conditions of limited state capacity. Under such conditions, a mix of private and judicial action—but not direct state coercion—is more likely to be effective for achieving the regressive distributional goals of a dominant group.

Huq, *supra* note 5 at 12.

[16] Transcript of Oral Argument, Whole Women's Health v. Jackson, No. 21-463 (Nov. 1, 2021).

[17] This is consistent with a leading account of legislature's uses of private enforcement. *See* Stephen B. Burbank & Sean Farhang, *A New (Republican) Litigation State?*, 11 U.C. IRVINE L. REV. 657, 686-87 (2021) ("One lesson to be learned from the partisan convergence on private enforcement, and the role of rights agendas and separation of powers conflicts in contributing to it, is that both parties' posture toward private enforcement is instrumental. Private enforcement is one institutional strategy for implementing rights. Our evidence suggests that political parties do not have positions on private enforcement and

was a fairly robust anarchist movement in the United States in the late 19th century, I very much doubt it influenced the adoption of the private right of action in the Sherman Antitrust Act of 1890.[18] And although one can point to examples of violence by environmental and civil rights advocates, I do not think their work informed the citizen suits provisions in almost every federal environmental statute or the common use of private enforcement in antidiscrimination legislation.[19]

All of this is to say that private enforcement is merely a tool chosen when it happens to be a fit for the job at hand.

II

The previous part argued that the private enforcement aspect of private subordination is not, in and of itself, the problem. So, what then is the problem? Subordination, of course.

In *Vigilante Federalism*'s "private subordination regimes," the most important word is "subordination."[20] One way to think about this issue is to ask whether subordination by other means would be less intrusive. Imagine, for example, a state choosing between chilling abortion access by adopting a law permitting private enforcement or by requiring that medical records for all abortions be forwarded to the state for evaluation (a real law in Oklahoma[21]). Or imagine an anti-

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access to justice as a matter of general principle, independent of the rights being implemented. They have positions on private enforcement when it is or may be deployed in the service of specific agendas—when it accrues to the advantage of some groups and the disadvantage of others."). And it is consistent with at least much of Huq's account of private subordination. *See supra* note 6.

18 26 Stat. 209 (1890), codified as amended at 15 U.S.C. §§ 1-38. The Sherman Act is held out as an early and important example of private enforcement in U.S. law.

19 *See* Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285, 294-99 (2016) (collecting examples).

20 I should add that these authors' focus on subordination is also, in my view, preferable to *Vigilante Federalism*'s occasional focus on "rights." *See* Michaels & Noll, *supra* note 2, at Section II.A.
The rights discourse has been ably criticized by Jamal Greene among many others. *See, e.g.*, JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART (Mariner Books 2021). Talking rights in this context is particularly distracting because it moves the conversation into rights-claiming territory. Might proponents of private subordination argue that they are protecting the subordinator's right to contract, right to discriminate in the name of religion, right to hunt an endangered species from a helicopter? Might the law protect the rights of fetuses, of biological fathers, high school athletic competitors?

21 *See, e.g.*, 63 OKLA. STAT. ANN. § 1-738k (West 2022) (requiring that physicians submit to the State Department of Health a 41-question "Individual Abortion Form" for each abortion performed).

LGBTQ advocate choosing between filing a lawsuit under an education gag law or trying to dox local teachers (all too real). The enforcement technology is almost beside the point.

To use a historical example, *Vigilante Federalism* offers the comparison of private subordination regimes to the private enforcement of the Fugitive Slave Act.[22] This is a provocative and illuminating comparison, to be sure, but I worry that it unnecessarily narrows our scope. The Article could have widened its view to compare the pro-slavery movement and the anti-abortion movements, both of which include but are hardly limited to private enforcement.[23]

Two responses are possible: Perhaps the emphasis on private subordination regimes is justified because they are more potent than other forms of subordination, or perhaps they have an accelerative effect on vigilantism and authoritarian. Either of these would "big if true," but I am not convinced.

First, what if private enforcement is an especially effective means at subordination—that is, what if private enforcement is more effective at subordination than public enforcement or pure vigilantism? I simply have not seen evidence that it is so, in this Article or elsewhere.

Theoretical arguments why private enforcement would be more effective do not explain SB8 and its analogs either. For example, Huq notes descriptively that legislatures may be more likely to turn to private suppression when they are constrained by resources.[24] But I am simply not convinced that Texas lacks the resources to menace those seeking reproductive health services,[25] or that the private anti-abortion movement needs a $10,000 bounty to get ginned up about abortion. Similarly, I do not see why a private lawsuit would be more stigmatizing to the defendant than a criminal prosecution or a private doxing.[26]

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22 Michaels & Noll, *supra* note 2, at 1193.

23 *See* United States v. Handy, 2023 WL 1777534 (D.D.C. Feb. 6, 2023) (requesting briefing on whether the Thirteenth Amendment, among others, might provide a right to abortion).

24 Huq, *supra* note 6.

25 It is also hard to imagine that the Texas legislature turned to private enforcement because it was worried that the state executive would be unmotivated to enforce anti-abortion laws. *See* FARHANG, *supra* note 7, at 5 (suggesting that Congress employs private enforcement in the face of an anti-regulatory executive).

26 Professor Huq connects private subordination to the production of "spoiled identities." Huq, *supra* note 6, at 79. He may be right that private suppression contributes to spoiled identities, but he does not claim that it does so more than

Maybe private enforcement has a legal advantage over state action *under current law*.[27] That's the idea that "some geniuses" concocted SB8 to work around legal constraints.[28] But the fact that current law is more amenable to private subordination is not an argument that private subordination is worse than other subordination—nor does it tell us much about extralegal efforts at subordination. Moreover, current law is epiphenomenal. Private subordination might be more effective *at this moment*, but the law is dynamic. On the one hand, Huq shows that periods of private suppression often lead to doctrinal backlash making it harder to privatize rights suppression.[29] On the other, even if we succeeded in outmaneuvering some geniuses by limiting private enforcement, why wouldn't that just encourage them to devote more energies to finding legal loopholes to allow more *public* subordination? The procedural form is not the crucial aspect.

A second class of reasons that we might be especially worried about private subordination would be if it somehow inspired more interest in subordination. *Vigilante Federalism* cautions against thinking that private subordination substitutes for (and thus minimizes) other types of subordination.[30] I agree. But saying that private subordination regimes do not substitute for political violence does not imply that they encourage it—and I sincerely doubt that these laws contribute to cultures of vigilantism. The laws described in *Vigilante Federalism* come out of social and political movements that are already ratcheted up to eleven. Anti-abortion violence predates the turn to private enforcement. The Fugitive Slave Acts were not necessary to stoke slaver violence in the South.

Indeed, it is possible that the causal arrow points in the opposite direction—that states are more likely to enact private subordination regimes when there is a highly mobilized and

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its alternatives.

27 *See* Huq, *supra* note 6, at 7 (suggesting that legal constraints on state action may augur in favor of private enforcement).

28 *Supra* note 15.

29 *See generally* Huq, *supra* note 6.

30 Michaels & Noll, *supra* note 2, at 1243 ("[T]he 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.").

potentially violent political movement demanding radical action from their elected officials.[31] Perhaps this explains the lack of symmetry in blue states, where there are few comparable efforts addressed to gun control or health and safety regulations. Either way, this just brings us back to the beginning: the substance should be our focus, not the form.

III

Even if I have convinced you that private subordination regimes are problematic because of the subordination, not because of the private enforcement, you might still think it is important to call out private subordination regimes because we are already attuned to other forms of subordination. This is one helpful way to understand *Vigilante Federalism*—that it seeks to elevate in the discourse this potentially under-recognized tool of subordination. I applaud that contribution.

I worry, however, that in the process of calling out these laws by their procedural form, and invariably delving into their procedural details, we inadvertently risk sanitizing and legitimating them.

First, focusing on the nuts and bolts of the private enforcement schemes risks sanitizing these laws. *Vigilante Federalism* forcefully explains that "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."[32] This is right, but I worry that asking whether the plaintiff has an injury in fact or whether the government has the right to intervene in the litigation is another way we sanitize these laws. We sanitize them by suggesting that our normal procedural discourse applies.

Second, in the process of talking about the details, we risk legitimizing some of the private subordination regimes that do not fail these procedural tests. An emphasis on SB8's permission for any person to sue, regardless of an injury, risks implying that an equivalent lawsuit available only to those with a genetic interest in the fetus would be acceptable. An emphasis on one-way fee shifting risks implying that two-way

[31] Huq suggests that earlier private suppression innovations were pushed by concentrated interests protecting their economic entitlements. *See* Huq, *supra* note 6, at 9. My argument here is similar, except the entitlement is not economic but socio-cultural.

[32] Michaels & Noll, *supra* note 2, at 1244.

fee shifting might make a normative difference. I simply do not think so.[33]

These examples are not hypothetical. In 2000, Ohio adopted a law criminalizing "partial birth abortion." The law also included a private right of action, with one-way fee shifting, for the purported father of the fetus or the parents of a minor patient against the doctor who performed the procedure.[34] I do not find the Ohio innovations to be untroubling.

The flip side of the coin is that calling out particular procedures might delegitimize other forms of private enforcement that do not have subordination as their goal.[35] It is possible that there are certain procedures that are so abhorrent that they delegitimate any substantive law to which they attach. But, in the main, these statutes invoke procedures that are not inherently dangerous. So even if drawing attention to a particular combination of procedures fells a given private subordination regime, it might bring down other valuable private enforcement laws with it.

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Vigilante Federalism does the important work of drawing attention to a raft of new laws that seek to subordinate underrepresented groups. These laws should be resisted. But so too should laws that subordinate through other means, and so too should extralegal avenues of subordination.

Perhaps it is tempting to emphasize the procedures in private subordination regimes because those features seem susceptible to certain lawyerly responses. And I concede that I find myself not infrequently thinking about potential procedural countermeasures: Interpleader![36] Defendant class actions![37] Claw-back provisions![38] But we should not only fight the fights we can win. We should fight the fights that

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33 For what it's worth, I do not think the authors think so either, but I fear that some readers of the Article (including judges evaluating these laws) might.

34 OHIO REV. CODE ANN. § 2307.53. In 2019, Ohio added "dismemberment abortion" to the statute.

35 I will leave it to the opponents of civil-rights or environmental-protection laws to find their procedural analogs to SB8.

36 *See, e.g.*, Braid v. Stilley, 2022 WL 4291024, at *2-*4 (N.D. Ill. Sept. 16, 2020); Brief of *Amicus Curiae* in Support of Plaintiff at 6, 15, Braid v. Stilley (7th Cir. Feb. 16, 2023).

37 *See, e.g.*, Note, *Private Attorneys General and the Defendant Class Action*, 135 HARV. L. REV. 1419, 1419 (2022).

38 *See, e.g.*, David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 5 (2023) (discussing *inter alia* Connecticut claw-back law).

need fighting.[39]

[39] *Cf.* The American President (Columbia Pictures 1995) (A.J. MacInerney [to President Andrew Shepherd]: Oh, you only fight the fights you can win? You fight the fights that need fighting!).