JUDICIAL PROCESS AND VIGILANTE FEDERALISM

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INTRODUCTION

Jon Michaels' and David Noll's *Vigilante Federalism* decries the explosion of a specific class of state law—prohibiting locally unpopular, although perhaps constitutionally protected, conduct using private civil litigation as the exclusive or primary enforcement mechanism.[1] The trend begins with the Texas Heartbeat Act in 2021 (commonly referred to as "S.B. 8"), which prohibited abortions (prior to the Supreme Court rejecting all federal constitutional protection for abortion[2]) following detection of a "fetal heartbeat" (around six weeks of pregnancy).[3] It extends to laws prohibiting public discussion of abortion and abortion drugs to laws limiting how schools and universities cover race and history to laws regulating discussions of sexual orientation and gender identity in schools to laws limiting transgender students' use of bathrooms and participation in athletics to laws regulating access to social-media sites to laws prohibiting assisting voters.[4] All authorize private individuals to sue someone for private civil remedies, with the goal of stopping or deterring the targeted conduct.

Michaels and Noll label these lawsuits "private subordination actions" enforcing "subordination rights" as part of a "private subordination regime."[5] They identify two defects in this regime and its associated laws—one

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

2 *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242-43 (2022).

3 Michaels & Noll, *supra* note 1, at 1189-90; *see also* Howard M. Wasserman & Charles W. "Rocky" Rhodes, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: The Limits and Opportunities of Offensive Litigation*, 71 AM. U. L. REV. 1029, 1032 (2022) [hereinafter Wasserman & Rhodes, *Offensive Litigation*].

4 Michaels & Noll, *supra* note 1, at 1196-1207.

5 *Id.* at 1194.

substantive, one procedural. The laws subordinate marginalized groups; they "are premised on a restrictive understanding of citizenship, in which only some members of the polity are viewed as legitimate rights-holders."[6] They do so through a procedural system of private civil litigation empowering "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."[7] Unlike longstanding and historic uses of private enforcement to support regulatory agendas in areas such as environmental law and employment, these laws turn private enforcement towards "advancing an 'illiberal agenda.'"[8] The private-enforcement mechanism imposes an *in terrorem* effect, sufficient to "eradicate highly personal and sometimes constitutionally protected activities."[9] "Vigilante federalism" describes a category of extraordinary laws that "deputize private actors to wage and win the culture wars."[10]

Unfortunately, *Vigilante Federalism* conflates the substantive and procedural defects.

Their real objection is substantive—the laws undermine substantive rights (or efforts to create substantive rights) for historically disadvantaged groups to the benefit of conservative, white Christians. Process is irrelevant to that objection—subordination is subordination, regardless of the mechanisms for enforcing subordinating laws.

Vigilante Federalism never demonstrates how private, as distinct from public, enforcement exacerbates the illiberalism or the chill on protected conduct. Any law prohibiting historically accurate school discussions of slavery and Jim Crow or prohibiting trans-girls from participating in girls' athletics enforces a particular "understanding of morality and citizenship and, in the process, subordinate[s] marginalized groups."[11] States have many tools with which to target abortion providers, trans kids, and teachers adopting inclusive curricula; any state prohibition on their conduct, whether publicly or privately enforced, eradicates those activities.[12] The prohibition's subordinating effect remains no matter the

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6 *Id.* at 1197.
7 *Id.* at 1194.
8 *Id.* at 1197.
9 *Id.*
10 *Id.* at 1192.
11 *Id.* at 1194.
12 *See infra* Part II.

enforcement mechanism.

We might frame this in different terms. A stupid law is not necessarily a constitutionally invalid law.[13] Michaels and Noll identify arguably meritorious substantive constitutional objections to vigilante federalism laws. But by emphasizing the laws' enforcement schemes and the problems they create for plaintiffs, Michaels and Noll mischaracterize procedural policy objections as broader constitutional concerns. Private enforcement may be stupid; that does not make it, or the laws privately enforced, constitutionally invalid.

Procedural objections to private-enforcement regimes reduce to two concerns. One turns on these new laws' unprecedented nature—they "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."[14] The other considers that these laws erect intentional barriers to raising and litigating their constitutional defects, making it difficult or impossible—in an unprecedented way—for rights holders to assert their subordinated constitutional and sub-constitutional rights.

Both premises fail. States have long authorized private enforcement of laws in ways that might undermine constitutional rights, chill constitutionally protected conduct, and subordinate historically disfavored groups.[15] And the judicial process provides tools for litigating these laws' constitutional validity and vindicating individual rights against private enforcement. We made this point with respect to the Texas Heartbeat Act.[16] And it applies to all laws within Michaels and Noll's "private subordination regime."

We support this conclusion with two taxonomies. The first taxonomy recognizes three postures in which rights holders litigate their constitutional rights: (1) Defensively, defending against government-initiated criminal, civil, or administrative

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13 New York State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 209 (2008) (Stevens, J., concurring).

14 Michaels & Noll, *supra* note 1, at 1197.

15 *See infra* Part II; *see also* Howard M. Wasserman & Charles W. "Rocky" Rhodes, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators:* New York Times v. Sullivan *as Historical Analogue*, 60 HOUS. L. REV. 93, 100-03 (2022) [hereinafter Wasserman & Rhodes, *Historical Analogue*].

16 *See* Wasserman & Rhodes, *Offensive Litigation*, *supra* note 3; Charles W. "Rocky" Rhodes & Howard M. Wasserman, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: The Potential for Defensive Litigation*, 75 SMU L. REV. 187 (2022) [hereinafter Rhodes & Wasserman, *Defensive Litigation*]; Wasserman & Rhodes, *Historical Analogue*, *supra* note 15.

proceedings and against privately initiated civil litigation; (2) Offensively, before enforcement of the challenged law, seeking to stop future enforcement; and (3) Offensively, after enforcement of the challenged law, seeking a retroactive remedy (usually damages) for injuries caused by past enforcement.[17] Different postures offer different benefits and raise different problems; litigants may prefer one over others. But courts recognize all as available and effective mechanisms for vindicating constitutional rights.[18]

The second taxonomy recognizes distinct types of private-enforcement regimes—four frameworks for private enforcement, including laws that subordinate the historically disadvantaged groups Michaels and Noll seek to protect: (1) Exclusive private enforcement of state law by "any person" (regardless of personal injury) against a private federal rights holder; (2) Exclusive private enforcement of state law by a personally injured individual against a private federal rights holder; (3) Mixed or complementary public and private enforcement of state law against a private federal rights holder; and (4) Private enforcement of state law against the state or local government.[19] Each framework provides one or more mechanisms through which defendants can raise, adjudicate, and prevail on their constitutional objections to the subordinating laws.

Combining these taxonomies demonstrates the commonality of private-enforcement schemes and the many ways rights holders can challenge the constitutional validity of the underlying restrictions. Subordination regimes may be constitutionally problematic in suppressing substantive rights, as Michaels and Noll argue. But their enforcement mechanisms do not create distinct procedural problems.

I
A TAXONOMY OF FEDERAL CONSTITUTIONAL LITIGATION

Rights holders—individuals whose federal rights will or have been infringed by law or by government conduct—litigate rights within some adjudicative proceeding. Those proceedings provide mechanisms through which the rights holder asserts and vindicates those rights; the mechanisms vary by available remedies and procedural details.[20]

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17 *See infra* Part I.

18 Whole Woman's Health v. Jackson, 142 S. Ct. 522, 537-38 (2021); Rhodes & Wasserman, *Defensive Litigation*, *supra* note 16, at 204-05.

19 *See infra* Part II.

20 We explain each piece more fully elsewhere. *See* Wasserman & Rhodes,

1. Defensive. Some authorized actor enforces rights-violative substantive law against the rights holder through some enforcement proceeding; the rights holder raises her federal rights as a defense in that proceeding, seeking to avoid liability.[21] The court dismisses the action or otherwise enters judgment for the rights holder if the constitutional defense prevails and the substantive law cannot be enforced against her. This category consists of three sub-categories.

• The government (federal, state, or local) prosecutes a rights holder for violating some criminal prohibition; the rights holder/criminal defendant argues that the law being enforced is constitutionally invalid (for example, it violates the First Amendment) and cannot form the basis for a valid conviction, requiring the court to dismiss the prosecution.[22] More commonly, a rights holder/criminal defendant raises the Fourth, Fifth, and Sixth Amendments to suppress evidence or to challenge the constitutionally invalid processes through which the government prosecutes a violation of an otherwise-valid substantive law.[23]

• The government (federal, state, or local) pursues civil or administrative processes against a rights holder for violating some law; the rights holder argues that the law being enforced is constitutionally invalid and cannot form the basis for liability, requiring the court to enter judgment in the rights holder's favor.[24]

• A private individual initiates civil litigation against a rights holder seeking a civil remedy; the rights holder argues that the statutory or common law forming the basis for the civil claim and to be applied as the rule of decision is constitutionally invalid and cannot form the basis for civil liability. For example, a plaintiff sues a defendant for a tort; the defendant defends that her speech is constitutionally protected and cannot form the basis for tort liability.[25] Or a private property owner brings a civil action to eject the new

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Offensive Litigation, *supra* note 3, at 1048-57; Rhodes & Wasserman, *Defensive Litigation*, *supra* note 16 at 201-04.

21 *See id.*

22 *E.g.*, United States v. Stevens, 559 U.S. 460, 467 (2010); Texas v. Johnson, 491 U.S. 397, 411 (1989).

23 *E.g.*, Lange v. California, 141 S. Ct. 2011, 2013 (2021); Riley v. California, 573 U.S. 373, 373 (2014); Crawford v. Washington, 541 U.S. 36, 40 (2004).

24 *E.g.*, Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2192 (2020); Masterpiece Cakeshop, Inc. v. Colorado Civ. Rts. Comm'n, 138 S. Ct. 1719, 1721 (2018); FCC v. Pacifica Found., 438 U.S. 726, 750 (1978).

25 *E.g.*, Snyder v. Phelps, 562 U.S. 443, 451 (2011); Florida Star v. B.J.F., 491 U.S. 524, 524 (1989); New York Times v. Sullivan, 376 U.S. 254, 255 (1964).

owner from adjacent property in furtherance of a racially restrictive covenant; the new owner defends that the restrictive covenant is constitutionally invalid and unenforceable.[26] Or a fired church-school teacher sues the school for employment discrimination; the church defends that the teacher qualifies as a minister and the First Amendment protects a religious organization's employment decisions related to ministers.[27] Having found the rule of decision constitutionally invalid, the court in all cases must dismiss the action or otherwise enter judgment in favor of the rights holder.

2. Offensive/Pre-Enforcement. A law (federal, state, or local) exists and may be enforced against a rights holder, but enforcement violates the rights holder's federal rights. The rights holder sues (usually in federal court) the government or official responsible for enforcing that law under 42 U.S.C. § 1983 and *Ex parte Young*[28] (or perhaps under analogous state-law doctrines in state court);[29] the suit urges the court to declare the law constitutionally invalid and to enjoin the government or official from enforcing it against that rights holder.[30] The court issues a declaratory judgment that the law is constitutionally invalid and an injunction prohibiting present and future enforcement.[31]

3. Offensive/Post-Enforcement. Past government enforcement efforts cause the rights holder a constitutional injury; she brings a private civil action (usually in federal court) under § 1983 (or a similar state provision) against the offending government or official, seeking compensation (usually money damages) for the past constitutional injury.[32]

These postures need not be mutually exclusive. Some controversies allow or require parties to pursue multiple mechanisms—alternatively, simultaneously, or sequentially. Other controversies limit parties to one mechanism.

Different mechanisms offer distinct remedial advantages and disadvantages. Through offensive pre-enforcement

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26 *See* Shelley v. Kramer, 334 U.S. 1, 4 (1948).

27 *See* Our Lady of Guadalupe Sch. v. Morrisey-Berru, 140 S. Ct. 2049, 2055 (2020); Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 565 U.S. 171, 177 (2012).

28 42 U.S.C. § 1983; *Ex parte Young*, 209 U.S. 203 (1908).

29 Alexander Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. REV. 737, 769-71 (2021).

30 *E.g.*, June Med. Servs. LLC v. Russo, 140 S. Ct. 2103, 2112 (2020); Obergefell v. Hodges, 576 U.S. 644, 647 (2015); Reno v. ACLU, 521 U.S. 844, 849 (1997).

31 *See* Rhodes & Wasserman, *Defensive Litigation*, *supra* note 16, at 202.

32 *E.g.*, City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 251 (1981).

litigation, rights holders establish their constitutional rights and determine the validity of a challenged law, without having to act "at their peril" by engaging in protected-but-statutorily prohibited conduct, violating the law, and risking enforcement, liability, and sanction, including prison.[33] Offensive litigation also offers preliminary relief pending litigation, prospective relief against future enforcement beyond a one-time remedy, and potential class-wide relief for all rights holders in a certified class, beyond one plaintiff; none is available in defensive litigation.[34] And offensive litigation allows the federal rights holder to control the timing and forum in which to litigate the issues—she decides when to litigate (suing once the threat of enforcement becomes sufficiently likely)[35] and where.

With this framework in mind, Part II considers different private-enforcement regimes and the available mechanisms through which federal rights holders can challenge each type of subordination right.

II
A TAXONOMY OF PRIVATE ENFORCEMENT REGIMES AND PROCESSES FOR FEDERAL CONSTITUTIONAL CHALLENGE

Our taxonomy recognizes four private-enforcement regimes—four ways in which legislatures can authorize private enforcement of constitutionally problematic laws to subordinate the historically disadvantaged groups Michaels and Noll seek to protect. This Part defines and illustrates each category with historic and contemporary examples; *Vigilante Federalism* identifies some examples, and we add others. This Part then describes the processes through which federal rights holders challenge laws and assert and vindicate their federal rights within each regime.

A. Exclusive Injured Person Enforcement v. Private Federal Rights Holder

1. *Examples*

States grant private individuals personal legal rights and authorize them to sue for damages and other remedies when other private individuals violate those personal legal rights.

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33 Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158-59 (2014); Steffel v. Thompson, 415 U.S. 452, 459 (1974).

34 Douglas Laycock, *Federal Interference with State Prosecutions: The Need for Prospective Relief*, 1977 SUP. CT. REV. 193, 202-04, 213, 220 (1977); Wasserman & Rhodes, *Offensive Litigation*, *supra* note 3, at 1051-54.

35 *Susan B. Anthony List*, 573 U.S. at 158-59.

Tort, contract, and property law comprises the core of this category, whether the common law or statutes provide the state rights.[36] In some cases, those holding state rights assert them against individuals engaged in arguably federally constitutionally protected conduct.

The obvious, longstanding example involves suits for defamation[37] and intentional infliction of emotional distress[38] against people engaged in constitutionally protected speech on matters of public concern. But this category is not and need not be limited to free speech. State courts cannot grant remedies under racially restrictive covenants in property deeds, whether by ejecting one property owner at the request of his neighbor or by awarding damages to one property owner because his neighbor sold the property to a non-white purchaser in violation of the deed.[39]

Long before the Texas Heartbeat Act controversy, states allowed pregnant patients and others to sue abortion providers for damages resulting from that abortion.[40] Anti-choice activists in the 1990s pursued a litigation campaign of wrongful death, medical malpractice, informed consent, and similar civil actions against providers; they hoped that litigation and the threat of liability would make services prohibitively expensive and drive providers from the market.[41] *Dobbs* resuscitated this tactic. Some state wrongful death statutes authorize parents or estate executors to sue on behalf of an "unborn child," defined to encompass any stage of gestation after fertilization.[42] A Texas man brought a wrongful death claim against three individuals who allegedly helped his former wife obtain medications for a self-managed abortion of his "unborn child" without his knowledge and in violation of

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36 Diego A. Zambrano et al., *Private Enforcement in the States*, 171 U. PA. L. REV. (forthcoming 2023).

37 *New York Times*, 376 U.S. at 256. Although a few states have criminal defamation laws, these are rarely enforced. Eugene Volokh, *What Cheap Speech Has Done: (Greater) Equality and Its Discontents*, 54 U.C. DAVIS L. REV. 2303, 2313-15 (2021). Several circuits have declared such statutes valid when limited to false statements made with actual malice. Frese v. Formella, 53 F.4th 1, 4 (1st Cir. 2022); Phelps v. Hamilton, 59 F.3d 1058, 1070-73 (10th Cir. 1995); *accord* Grimmett v. Freeman, 59 F.4th 689 (4th Cir. 2023).

38 *Snyder*, 562 U.S. at 450; Hustler Mag. v. Falwell, 485 U.S. 46, 47-48 (1988).

39 Barrows v. Jackson, 346 U.S. 249, 251-52 (1953); Shelley v. Kraemer, 334 U.S. 1, 14, 18-19 (1948).

40 *E.g.*, LA. STAT. ANN. § 9:2800.12; OKLA. STAT. ANN. tit. 63, § 1-740.

41 MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA: *ROE V. WADE* TO THE PRESENT 130, 173-74 (2020).

42 *E.g.*, TEX. CIV. PRAC. & REM. CODE ANN. §§ 71.001-.012.

Texas abortion laws.[43] Plaintiff's attorneys intend to join the abortion-pill manufacturer as a defendant, threatening that "[a]nyone involved in distributing or manufacturing abortion pills will be sued into oblivion."[44]

States continue to create new statutory and property rights, as seen in the wave of "ag-gag" laws. These laws restrain animal-rights activists and other critics of commercial-farming and slaughterhouse practices from engaging in undercover investigations.[45] By prohibiting access to any "nonpublic area of a commercial property" to engage in any act that "exceeds the person's authority,"[46] ag-gag laws prevent animal-rights investigators from obtaining employment with the farm, gathering information about the farm's practices through observation and recording of business activities, and publicizing that information.[47] Several states chose criminal prosecution and criminal penalties as the enforcement mechanism, then lost offensive pre-enforcement challenges in which federal courts agreed with activists that the laws violate their First Amendment rights.[48] Seeing these results, Arkansas turned to private enforcement—it granted owners or operators of commercial property an exclusive private right of action to protect their new property interests.[49]

No sharp line separates common law and statutory law as the source of privately enforced private rights. Legislatures can amend existing common-law torts, creating hybrid common-law/statutory rights with exclusive private enforcement.

Proposed-but-unenacted (as of 2023) Florida legislation demonstrates. The bill would have amended state defamation law in a manner inconsistent with aspects of *New York Times*

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43 *See* Plaintiff's Original Petition, Silva v. Noyola, No. 23-CV-0375 (56th Jud. Dist., Galveston Cnty., Tex., March 10, 2023).

44 *See* Eleanor Klibanoff, *Three Texas Women are Sued for Wrongful Death After Allegedly Helping Friend Obtain Abortion Medication*, TEX. TRIB. (March 10, 2023, updated 4:27 p.m.), https://www.texastribune.org/2023/03/10/texas-abortion-lawsuit/ [https://perma.cc/WM9N-3DAA].

45 Rebecca Aviel, *Remedial Commandeering*, 54 U.C. DAVIS L. REV. 1999, 2071-72 (2021); Alan K. Chen, *Cheap Speech Creation*, 54 U.C. DAVIS L. REV. 2405, 2439-40 (2021).

46 ARK. CODE ANN. § 16-118-113(b); Animal Legal Def. Fund v. Vaught, 8 F.4th 714, 717 (8th Cir. 2021).

47 *Animal Legal Def. Fund v. Vaught*, 8 F.4th at 717-18.

48 *See, e.g.*, Animal Legal Def. Fund v. Reynolds, 8 F.4th 781, 783 (8th Cir. 2021); Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1189-90 (9th Cir. 2018); Aviel, *supra* note 45, at 2072; Chen, *supra* note 45, at 2439-40.

49 ARK. § 16-118-113(b); *Animal Legal Def. Fund*, 8 F.4th at 717.

v. Sullivan[50] and the First Amendment edifice around defamation,[51] with the stated goal of challenging and overruling the *New York Times* regime. The proposal excepted from the definition of public figure (obligated to prove actual malice) non-elected and non-appointed government employees,[52] making it easier for rank-and-file police officers to sue and prevail against critics.[53] It required a factfinder to infer actual malice where a speaker fails to validate, corroborate, or verify a statement, contrary to caselaw requiring affirmative subjective knowledge of falsity.[54] It presumed statements by anonymous sources to be false, despite general protection for anonymous speech.[55] It defined accusations of discrimination as defamation per se, ignoring that an allegation of discrimination may be protected non-provable opinion or rhetorical hyperbole.[56] And where the alleged discrimination is because of sexual orientation or gender identity, a defendant could not prove truth where the plaintiff based her alleged discriminatory acts on religious or scientific beliefs;[57] that provision was impermissibly viewpoint discriminatory, imposing liability on some views about sexual orientation and gender identity while eliminating liability against opposing views.

2. *How to Challenge*

Federal rights holders in these historic examples proceeded defensively. They engaged in arguably federally protected (but state-prohibited) conduct; got sued (in state court) for violating plaintiffs' state-law rights; raised their federal constitutional rights as defenses to state-law liability; and won these cases because judicial liability under these laws

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50 *New York Times*, 376 U.S. at 256.

51 *See generally* LEE LEVINE & STEPHEN WERMIEL, THE PROGENY: JUSTICE WILLIAM J. BRENNAN'S FIGHT TO PRESERVE THE LEGACY OF *NEW YORK TIMES V. SULLIVAN* (2014).

52 H.B. 991, 2023 Leg. Reg. Sess. (Fla.).

53 St. Amant v. Thompson, 390 U.S. 727, 730 (1968); Rogers v. Smith, No. 20-517, 2022 WL 1524329, at *3 (E.D. La. May 13, 2022); Jones v. Buzzfeed, Inc., No. 7:19-CV-00403, 2022 WL 803382, at *21 n.10 (N.D. Ala. Mar. 15, 2022). *But see* Young v. Gannett Satellite Info. Network, Inc., 734 F.3d 544, 549-50 (6th Cir. 2013).

54 *St. Amant*, 390 U.S. at 731-32; McFarlane v. Sheridan Square Press, Inc., 91 F.3d 1501, 1508–09 (D.C. Cir. 1996); Palin v. N.Y. Times Co., No. 17-CV-4853, 2022 WL 599271, at *18 (S.D.N.Y. Mar. 1, 2022).

55 McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341-42 (1995). *See generally* JEFF KOSSEFF, THE UNITED STATES OF ANONYMOUS: HOW THE FIRST AMENDMENT SHAPED ONLINE SPEECH 7 (2022).

56 Milkovich v. Lorain Journal, 497 U.S. 1, 19-20 (1990).

57 H.B. 991, 2023 Leg. Reg. Sess. (Fla.).

violated their federal constitutional rights. Although incurring the risk, cost, and burden of violating state law, getting sued, and defending and seeking multiple layers of appellate review, their (valid) assertions of federal right prevailed at the end of the day. The Shelleys followed this path for Fourteenth Amendment equal protection defenses to racially restrictive property covenants.[58] The New York Times followed this path in making the First Amendment a meaningful defense to defamation tort liability.[59] Notably, the Times and other northern media outlets confronted not a single lawsuit, but a coordinated campaign of defamation litigation by southern officials intended to chill coverage of the Civil Rights Movement.[60] Nevertheless, the Times could not and did not pursue any form of offensive litigation; defending against lawsuits and vindicating federal rights at the end of litigation offered sufficient procedural protection.

Defensive litigation offers sufficient protection against new statutory subordination rights. Whatever the (substantial) First Amendment defects in Florida's proposed revised defamation law, no potential speaker can pursue pre-enforcement offensive litigation to enjoin enforcement of the law. The new provisions would have formed part of the private tort claim, not an independent law enforced by any executive official. Like the New York Times 60 years earlier, media outlets must publish and challenge the revised defamation tort in court.

Litigation under Florida's proposed defamation law would require parties to flip positions on appeal. The Times lost in state court, then prevailed when the Supreme Court established a new First Amendment regime.[61] Florida's proposed revised tort law conflicts with existing judicial precedent, which lower courts must apply in the defamation plaintiff's state lawsuit. While the plaintiff will urge the trial court to impose liability under amended law, lower courts must follow constitutional precedent and accept the speaker's *New York Times*-based First Amendment defense, no matter how wrong they believe *New York Times* or how correct they believe Florida's new law.[62] The plaintiff will lose at every level of state court until the final stage of review; he can ask the Supreme

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58 *Shelley*, 334 U.S. at 14, 18-19.

59 *New York Times*, 376 U.S. at 265, 283.

60 Wasserman & Rhodes, *Historical Analogue*, *supra* note 15, at 103-06, 132-33.

61 *Id.* at 105-07.

62 *Cf.* Dershowitz v. CNN, Inc., 541 F. Supp. 3d 1354, 1370 (S.D. Fla. 2023).

Court to overrule *New York Times* and its progeny, reject actual malice, and declare Florida's proposed amended law, and potential liability under it, constitutionally valid.[63]

An unusual case demonstrates why defensive litigation offers the lone option for this class of subordination claims. The Animal Legal Defense Fund pursued an offensive challenge to Arkansas' private-enforcement ag-gag law. It brought a pre-enforcement action against a chicken slaughterhouse and a pig farm (owned by the state legislator who had introduced and voted for the law); a divided Eighth Circuit held that the Fund had standing to sue and allowed the offensive case to proceed, because the plaintiffs showed an intent to investigate the defendant farms and a reasonable fear the farms would sue them for doing so.[64] But the court skipped the real and obvious problem with this suit—a private property owner/potential state tort plaintiff does not act under color of law in filing civil litigation or pursuing available state civil remedies through state process.[65]

The defendants in *Animal Legal Defense Fund* raised this issue in passing, but the majority identified it as a merits issue for the district court in the first instance.[66] The district court on remand corrected the Eighth Circuit's mistakes; dismissing the action against the slaughterhouse for lack of state action, it recognized the similarity between Arkansas' ag-gag law and the Texas Heartbeat Act.[67] And it captured the essential distinction—lost on the plaintiffs and most commentators[68] — between offensive and defensive litigation and the effect of the presence or absence of state action.[69]

Potential constitutional defenses to private enforcement of, and liability under, challenged state law do not open the door to offensive litigation. Federal rights holders lack any target

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63 *Cf.* Counterman v. Colorado, 143 S. Ct. 2106, 2132-33 (2023) (Thomas, J., dissenting); Berisha v. Lawson, 141 S. Ct. 2424, 2425 (2021) (mem.) (Thomas, J., dissenting from denial of certiorari); *id.* at 2427–30 (Gorsuch, J., dissenting from denial of certiorari); McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (mem.) (Thomas, J., concurring in denial of certiorari).

64 *Animal Legal Def. Fund*, 8 F.4th at 720-21; *id.* at 722 (Shepherd, J., dissenting).

65 *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 622 (1991); Dennis v. Sparks, 449 U.S. 24, 28 (1980); Rhodes & Wasserman, *Defensive Litigation*, *supra* note 16, at 216-17.

66 *Animal Legal Def. Fund*, 8 F.4th at 721.

67 Animal Legal Def. Fund v. Peco Foods, Inc., 2023 WL 2743238, at *3, *7 (E.D. Ark. 2023).

68 *Cf.* Richard H. Fallon, Jr., *Constitutional Remedies: In One Era and Out the Other*, 136 HARV. L. REV. 1300, 1338-40 (2023).

69 *Animal Legal Def. Fund*, 2023 WL 2743238, at *4-5.

for offensive litigation.[70] Because state law does not authorize public enforcement, no state official serves as a responsible executive to be enjoined from enforcing the law; because injured private litigants seeking redress do not act under color, no would-be private plaintiff is subject to an offensive suit under § 1983 or *Ex parte Young* to enjoin enforcement of that constitutionally defective state law. Where state law adopts exclusive private enforcement by injured persons, defensive litigation provides federal rights holders' sole option for challenging that law's constitutional validity.

B. Exclusive Private "Any Person" Enforcement v. Private Federal Rights Holder

1. *Examples*

The Texas Heartbeat Act launched the current controversy over private enforcement and private subordination. It offers the foundational example of a state authorizing vigilante federalism by "any person"—regardless of any personal injury or personal connection to the underlying conduct—intended to chill constitutionally protected activity and to subordinate disadvantaged communities.[71]

Enacted one year prior to *Dobbs*, the heartbeat ban contradicted then-prevailing jurisprudence prohibiting states from banning pre-viability abortions.[72] The law banned abortions following detection of a fetal heartbeat, around six weeks of pregnancy.[73] Texas joined several states in enacting abortion restrictions designed to challenge (ultimately successfully) constitutional protection for abortion.[74] It

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70 *Id.* at *5; Wasserman & Rhodes, *Offensive Litigation*, *supra* note 3, at 1055; Howard M. Wasserman, *Precedent, Non-Universal Injunctions, and Judicial Departmentalism: A Model of Constitutional Adjudication*, 23 LEWIS & CLARK L. REV. 1077, 1084-85 (2020).

71 *See* B. Jessie Hill, *Response to Wasserman & Rhodes: The Texas S.B. 8 Litigation and "Our Formalism,"* 72 AM. U. L. REV. F. 1, 4-10 (2022); Michaels & Noll, *supra* note 1, at 1207-09.

72 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992); Roe v. Wade, 410 U.S. 113, 162-63 (1973); Wasserman & Rhodes, *Offensive Litigation*, *supra* note 3, at 1034.

73 TEX. HEALTH & SAFETY CODE ANN. § 171.203.

74 Bryant v. Woodall, 1 F.4th 280, 283 (4th Cir. 2021) (North Carolina); Little Rock Fam. Plan. Servs. v. Rutledge, 984 F.3d 682, 686 (8th Cir. 2021) (Arkansas); Planned Parenthood S. Atl. v. Wilson, 527 F. Supp. 3d 801, 806 (D.S.C. 2021) (South Carolina); SisterSong Women of Color Reprod. Just. Collective v. Kemp, 472 F. Supp. 3d 1297, 1314 (N.D. Ga. 2020) (Georgia); Robinson v. Marshall, 415 F. Supp. 3d. 1053, 1055, 1057–58 (M.D. Ala. 2019) (Alabama); ZIEGLER, *supra* note 41, at 205-06; Wasserman & Rhodes, *Offensive Litigation*, *supra* note 3, at 1032-33.

distinguished itself through its enforcement scheme. The law disclaims public enforcement—no state or local government or officer can bring an enforcement action for a violation of its provisions.[75] It creates a private cause of action exclusively empowering "any person" to sue a provider or other person who performs or aids or abets any post-heartbeat abortion.[76] This "any person" can recover statutory damages of not less than $10,000 per prohibited abortion, attorney's fees, and injunctive relief.[77]

The law stoked fear of copycats:

> New permutations of S. B. 8 are coming. In the months since this Court failed to enjoin the law, legislators in several States have discussed or introduced legislation that replicates its scheme to target locally disfavored rights.[78]

And states did not disappoint. Oklahoma pursued an identical privately enforced heartbeat ban.[79] Idaho's heartbeat ban limited exclusive enforcement to parents, grandparents, siblings, aunts, or uncles of the "preborn child."[80] Missouri and Texas have proposed (but not yet enacted) bills authorizing "any person" to sue those who seek, assist, or provide out-of-state abortion services to state residents.[81]

States need not and do not limit exclusive private enforcement to abortion restrictions. Michaels and Noll imagine laws authorizing private suits against those who provide rides to polls or offer water to voters standing in line.[82] States also target First Amendment rights, as in a Texas bill prohibiting online posting of information about abortion-inducing drugs.[83]

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

76 *Id.* §§ 171.208(a)-(b).

77 *Id.*

78 Whole Woman's Health v. Jackson, 142 S. Ct. 522, 545 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part).

79 *See* H.B. 4327, 58th Leg., 2d Sess. (Okla. 2022) (codified at OKLA. STAT. ANN. tit. 63, §§ 1-745.31-.40); *but see* Oklahoma Call for Reproductive Justice v. State of Oklahoma, 531 P.3d 117 (Okla. 2023).

80 *See* S.B. 1309, 66th Leg., 2d Sess. (Idaho 2022) (codified at IDAHO CODE ANN. §§ 18-8801-07); S.B. 1358, 66th Leg., 2d Sess. (Idaho 2022) (codified at IDAHO CODE ANN. § 18-8807).

81 Caroline Kitchener & Devlin Barrett, *Antiabortion Lawmakers Want to Block Patients from Crossing State Lines*, WASH. POST (June 30, 2022), https://www.washingtonpost.com/politics/2022/06/29/abortion-state-lines/ [https://perma.cc/U5T7-RVU5]; Mary Tuma, *Texas Lawmakers Plan to Further Decimate Abortion Rights in Upcoming Legislative Session*, THE INTERCEPT (Dec. 26, 2022, 5 a.m.), https://theintercept.com/2022/12/26/texas-abortion-legislative-session/ [https://perma.cc/4QTS-GYUL].

82 Michaels & Noll, *supra* note 1, at 1212.

83 H.B. 2690, 88th Leg., Reg. Sess. (Tex. 2023).

Nor is exclusive private enforcement limited to conservative causes. California prohibited the sale, manufacture, or distribution of assault weapons, numberless weapons, and ghost guns.[84] Modeled on and copying the language of S.B. 8, the law disclaims public enforcement and authorizes "any person" to sue for statutory damages, attorney's fees, and injunctive relief.[85] Michaels and Noll recognize opportunities for other Blue states to enact similar laws furthering progressive policies.[86]

2. *How to Challenge*

a. Offensive Litigation. The unavailability of offensive pre-enforcement litigation defined the S.B. 8 controversy.[87] Abortion providers and activists sued the usual targets for offensive challenges to abortion restrictions (attorney general, head of the state health agency, and medical licensing boards) and some unusual government targets (state-court clerks who would accept and file S.B. 8 suits and state judges who would adjudicate and decide those suits).[88] While allowing claims against licensing officials to continue past the motion to dismiss stage, the Supreme Court rejected other claims on grounds of sovereign immunity and lack of standing.[89] Because the attorney general lacked power to enforce S.B. 8, he was not a responsible executive official; a federal court could not enjoin him from enforcing a law he had no power to enforce.[90] Clerks and judges were not adverse to would-be state defendants/federal rights holders and did not "enforce" the law under that term's common understanding; clerks

84 S.B. 1327, 2021-22 Reg. Sess. (Cal. 2022) (codified at CAL. BUS. & PROF. CODE §§ 22949.60-.71).

85 *Id.*

86 Michaels & Noll, *supra* note 1, at 1010-13.

87 *See* Hill, *supra* note 71, at 5; Fallon, *supra* note 68, at 1339; Wasserman & Rhodes, *Offensive Litigation*, *supra* note 3, at 1057-77; Rhodes & Wasserman, *Defensive Litigation*, *supra* note 16, at 191-92.

88 Whole Woman's Health v. Jackson, 142 S. Ct. 522, 530 (2021). The providers also sued an abortion-rights opponent who advocated for the law and might have pursued litigation. *See id.*

89 *Id.* at 539. The Court declined to dismiss offensive claims against the licensing boards. *See id.* at 535 & n.3, 539; *id.* at 544 (Roberts, C.J., concurring in the judgment in part and dissenting in part). Justice Gorsuch recognized (in a plurality section) that state law controlled whether the state boards had any such indirect enforcement authority. *Id.* at 536 (opinion of Gorsuch, J.). On remand, the Texas Supreme Court, on a certified question from the Fifth Circuit, interpreted S.B. 8 to strip state boards of any authority to enforce this law, leading to the federal suit's dismissal. *See* Whole Woman's Health v. Jackson, 642 S.W.3d 569, 583 (Tex. 2022).

90 *Whole Woman's Health*, 142 S. Ct. at 534-35.

perform a ministerial function and judges act as neutral adjudicators of law and fact in these lawsuits.[91]

Paradoxically, S.B. 8 and other exclusive "any person" private-enforcement state laws offer federal rights holders unique offensive opportunities, unavailable to rights holders facing ordinary, injured-plaintiff tort or property claims. An "any person" state plaintiff in an exclusive-enforcement regime differs from an ordinary civil litigant. Any person performs the traditional-and-exclusive government function of enforcing state law for public (rather than private) benefit; he therefore acts under color of state law and becomes subject to a § 1983 action.[92] This follows from three unique features of these state plaintiffs in these state enforcement schemes—they replace the executive as the sole enforcer of state law, without whom the statute goes unenforced; they act for the broader public interest rather than remedying private personal injuries; and they seek monetary recovery limited to one statutory violation rather than for all individual injuries (multiple plaintiffs cannot recover for one violative abortion under S.B. 8).[93] These features reify the public (rather than individual) nature of the state rights asserted and the remedies sought. S.B. 8 enforcement, particularly the $ 10,000 statutory remedy and the singular nature of recovery, resembles public criminal prosecution sanctioning individual misconduct more than private pursuit of tort remedies for all who suffer personal injuries from that misconduct. That distinction makes a plaintiff a state actor analogous to a public executive officer[94] and might require state enforcement actions to incorporate criminal procedural protections.[95]

A federal rights holder can pursue offensive litigation against "any person" at either or both of two moments in time. She can enjoin a would-be state plaintiff from bringing or continuing with the state enforcement action.[96] Or she can

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91 *Id.* at 531-34.

92 Wasserman & Rhodes, *Offensive Litigation*, *supra* note 3, at 1078-83.

93 *Id.* at 1080-83; Ann Woolhandler, *State Separation of Powers and the Federal Courts*, 31 WM. & MARY BILL RTS. J. 633, 656 (2023).

94 Anthony J. Colangelo, *Suing Texas State Senate Bill 8 Plaintiffs Under Federal Law for Violations of Constitutional Rights*, 74 SMU L. REV. F. 136, 138 (2021); Wasserman & Rhodes, *Offensive Litigation*, *supra* note 3, at 1082; Woolhandler, *supra* note 93, at 656.

95 Guha Krishnamurthi, *Are S.B. 8's Fines Criminal?*, 101 TEX. L. REV. ONLINE 141, 146-47, 150-51 (2023).

96 Wasserman & Rhodes, *Offensive Litigation*, *supra* note 3, at 1086-90. *Younger v. Harris* might require abstention if "any person" filed the S.B. 8 action before the federal rights holder filed the federal § 1983 action, although plaintiffs can overcome that bar. *See id.*

defend and prevail in the state-court action, then pursue damages in a post-enforcement § 1983 action.[97]

An ordinary federal rights holder defending ordinary private civil litigation—whether under historic torts or new statutory causes of action—lacks this offensive option. The New York Times could not sue L.B. Sullivan under § 1983 and the Shelleys could not sue Kraemer under § 1983;[98] an animal-rights organization cannot sue the meat factory it wants to investigate under § 1983.[99] State tort plaintiffs enforcing personal state rights to remedy personal and property injuries—including where state-law liability infringes the defendant's constitutional rights—lack the public focus of "any person" plaintiffs. They therefore do not perform the traditional-and-exclusive government function that creates state action and allows federal rights holders to pursue offensive §1983 claims against them.

b. Defensive Litigation. Federal rights holders also challenge the constitutional validity of "any person" state laws as they challenge the constitutional validity of injured-person state laws—through defensive litigation. They engage in arguably federally protected (but state-prohibited) conduct, get sued, and raise the law's constitutional invalidity as a defense to liability.[100]

Offensive litigation allows a federal rights holder to control the timing of the constitutional challenge. She can sue when she faces a "credible threat" a state actor will enforce the challenged law against her,[101] without having to act at her peril, violate the law, and expose herself to liability.[102] Federal rights holders lose that control when limited to defensive litigation; their opportunity to defend depends on their violating the law and an authorized enforcer initiating an enforcement proceeding.

But that creates a special risk—the enforcer may decline to enforce. If no "any person" private enforcer sues, the federal rights holder cannot defend and cannot obtain a judicial declaration on the constitutional validity of state law.

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97 Wasserman & Rhodes, *Offensive Litigation*, *supra* note 3, at 1091-92. The S.B. 8 plaintiff defending the § 1983 action could defend based on good-faith immunity, if applicable. *See id.*

98 *Supra* notes 58-60 and accompanying text.

99 Animal Legal Def. Fund v. Peco Foods, Inc., 2023 WL 2743238, at *3-5 (E.D. Ark. 2023).

100 *See supra* Part II.A.2.

101 Susan B. Anthony List, Inc. v. Driehaus, 573 U.S. 149, 158-59 (2014).

102 *Id.*; Steffel v. Thompson, 415 U.S. 452, 459 (1974).

Particularly where state law contains glaring constitutional defects (as with S.B. 8 when enacted and other subordination-rights-creating laws), state enforcers may refrain from suing, depriving federal rights holders of the opportunity to raise and vindicate their federal rights. And without an opportunity to adjudicate their rights, federal rights holders may decline to engage in arguably protected conduct that violates state law, avoiding the risk of a lawsuit but surrendering their federal rights.

S.B. 8 has this purpose and effect,[103] which may be its point.[104] Abortion-rights opponents did not intend to bring suits when Texas enacted the law, recognizing the likelihood of losing under then-controlling judicial precedent. Anti-choice activists who pushed for S.B. 8 decried non-activists' enforcement efforts, which created opportunities for constitutional litigation and judicial resolution.[105] Activists instead hoped the threat of a barrage of suits, the high cost of defense, and the risk of retroactive liability would deter providers from performing post-heartbeat abortions.[106] And it worked—abortions in Texas dropped by more than half and providers ceased performing violative procedures.[107] "Educational gag laws" prohibiting teaching of race, gender identity, and other concepts have imposed a similar chilling effect without any lawsuits or liability.[108]

"Any person" state laws offer a creative option to counter this chill—the "friendly" plaintiff. The "friendly" plaintiff supports the federal right and the federal rights holder; she brings the state action to provide the federal rights holder the opportunity to raise the federal defense, pressing the state claim while hoping to lose as the court accepts that federal constitutional defense.[109] These laws authorize "any person"

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103 Rhodes & Wasserman, *Defensive Litigation*, *supra* note 16, at 194, 220-21.

104 Fallon, *supra* note 68, at 1340; Michaels & Noll, *supra* note 1, at 1222.

105 Rhodes & Wasserman. *Defensive Litigation*, *supra* note 16, at 222.

106 *See, e.g.*, Ruth Graham, Adam Liptak & J. David Goodman, *Lawsuits Filed Against Texas Doctor Could Be Best Tests of Abortion Law*, N.Y. TIMES (Nov. 1, 2021), https://www.nytimes.com/2021/09/21/us/texas-abortion-lawsuits.html [https://perma.cc/F3ZP-JTPY]; Transcript of Oral Argument at 4, Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021) (No. 21-463).

107 *See* Paul J. Weber, *Abortions in Texas Fell by 60% in 1st Month Under New Limits*, ASSOC. PRESS (Feb. 10, 2022) https://apnews.com/article/abortion-health-texas-b92eadbe4afd4d29cb6cbf00526c11b0 [https://perma.cc/WW76-WHHM].

108 Michaels & Noll, *supra* note 1, at 1201, 1204.

109 Randy Beck, *Popular Enforcement of Controversial Legislation*, 57 WAKE FOREST L. REV. 553, 625-26 (2022); Rhodes & Wasserman, *Defensive Litigation*, *supra* note 16, at 222-24.

to bring suit,[110] a near-limitless class of private persons.[111] The uninjured plaintiff need not hold any position or view about the conduct sued upon, need not oppose the constitutional rights at issue, and need not want to recover the statutory remedies demanded.[112] This option does not exist under injured-person state laws. A media outlet seeking to challenge Florida's constitutionally suspect proposed defamation law could not rely on a friendly plaintiff. It must publish that negative story about a potential public figure based on anonymous sources; only the person injured by that story can bring the defamation action triggering the First Amendment defense.

That distinction demonstrates a second paradox in private-enforcement schemes. "Any person" state laws spark the sharpest objections and the deepest fears. Michaels and Noll argue that by "deputizing (and subsidizing) private partisans to prosecute those wars," these "laws unleash a form of legal vigilantism."[113] That legal vigilantism by deputized private partisans differs from a state recognizing a new personal or property right in which individuals or businesses can suffer injury and sue to remedy that injury. But the unique lack of injury in "any person" laws offers to subordinated federal rights holders defensive options and protections unavailable as to ordinary state tort law enforced by injured plaintiffs.

c. Defending in Federal Court. Critics of private subordination regimes and vigilante federalism reject defensive litigation as a sufficient litigation option because it fails to offer federal rights holders an adequate means of protecting federal rights.[114] They might raise two related-but-distinct objections to defensive challenges to state-law claims.

Defensive litigation may be procedurally insufficient. Michaels and Noll argue that pushing private subordination claims into a defensive posture creates a "win-win" situation

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110 *E.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 171.208(a).

111 Under S.B. 8, "any person" cannot be a Texas government employee or officer or a person who committed a sexual crime resulting in the terminated pregnancy. *Id.* § 171.208(a) & (j). The law imposes no further limitations on potential plaintiffs.

112 Rhodes & Wasserman, *Defensive Litigation*, *supra* note 16, at 222-23.

113 Michaels & Noll, *supra* note 1, at 1191.

114 Whole Woman's Health v. Jackson, 142 S. Ct. 522, 546-48 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part); Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2498 (2021) (Sotomayor, J., dissenting); Hill, *supra* note 71, at 5; Fallon, *supra* note 68, at 1339; Michaels & Noll, *supra* note 1, at 1210-12; *see also* Rhodes & Wasserman, *Defensive Litigation*, *supra* note 16, at 215.

for "any person" state plaintiffs—thus a lose-lose for federal rights holders. Any person may score a conventional litigation victory, a loss for the federal rights holder. Or any person may lose (and the federal rights holder win) the litigation, but litigation remains costly, burdensome, and inconvenient, such that litigation success also chills federally protected behavior.[115] But that does not render defensive litigation constitutionally inadequate. Accepting that offensive litigation offers certain benefits,[116] defensive litigation represents an historic and widely used vehicle for constitutional litigation never regarded as per se insufficient.[117]

A distinct objection goes to the likely adjudicative forum. Most federal rights holders pursue offensive litigation in federal court. Federal judges, armed with Article III structural protections of life tenure and guaranteed salary and with a federal institutional orientation, are more willing and likely to protect and vindicate federal rights.[118]

By contrast, "any person" plaintiffs pursuing state-law subordination claims likely file in state court, requiring the federal rights holder to defend her federal constitutional rights in state court before state judges. A plaintiff can sue in federal court when the action arises under the Constitution, laws, or treaties of the United States;[119] a defendant sued in state court can remove to federal court when the action arises under the Constitution, laws, or treaties of the United States and the federal court would have jurisdiction.[120] Private subordination actions possess an obvious federal orientation. The federal rights holder's central defense challenges the constitutional validity of the state-created subordination right—prohibiting the posting of abortion information online or removing books from library shelves violates their First Amendment rights; limiting discussions of gender identity discriminates against LGTBQ+ students; prohibiting participation in girls' sports discriminates against trans girls.

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115 Michaels & Noll, *supra* note 1, at 1222.

116 *Supra* notes 33-35 and accompanying text.

117 *Whole Woman's Health*, 142 S. Ct. at 537-38; Rhodes & Wasserman, *Defensive Litigation*, *supra* note 16, at 204-05.

118 MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 83, 153, 346 (2d ed. 1990); Matthew I. Hall, *Asymmetrical Jurisdiction*, 58 UCLA L. REV. 1257, 1264 (2011); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1119-20, 1124-25 (1977); Howard M. Wasserman, *A Jurisdictional Perspective on* New York Times v. Sullivan, 107 NW. U. L. REV. 901, 908-09 (2013).

119 28 U.S.C. § 1331.

120 28 U.S.C. § 1441(a).

But the "well-pleaded complaint" rule requires the federal issue enter the case as part of the plaintiff's well-pleaded complaint; an anticipated federal defense to a state claim cannot establish federal jurisdiction or make a case removable.[121] Subordination actions remain state-law actions not within the district court's original federal-question jurisdiction; that the laws' obvious federal constitutional defects dictate the outcome of the state-court suit does not establish federal jurisdiction.

The forum problem demonstrates two points about S.B. 8 and other vigilante federalism laws.

It triggers a longstanding critique of the well-pleaded complaint rule—the rule eliminates from federal district court a species of case that, given the purposes of federal-question jurisdiction, belongs there. Federal-question jurisdiction ensures a judicial forum with the necessary expertise, respect, and solicitude for federal law, rights, and interests. Federal judges better identify the appropriate level of enforcement of federal law and rights than state judges who lack those protections and who are more oriented to the local community.[122] If the goal of federal-question jurisdiction is to provide an original judicial forum to vigorously and competently respect and enforce federal rights, the procedural posture in which the federal issue presents does not matter. A civil action implicates those underlying policies as much when the federal issue arises as a defense than as part of the claim.[123]

It also mirrors the history of *New York Times Co. v. Sullivan*, showing that new subordination laws, however constitutionally problematic, break no new procedural ground.[124] Like the Times, abortion providers and other subordinated defendants face coordinated campaigns of state-court litigation and massive judgments, intended to chill locally disfavored-but-constitutionally protected activity. All

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121 Vaden v. Discover Bank, 556 U.S. 49, 60 (2009); Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908); REDISH, *supra* note 118, at 106; Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1794-95 (1992); Wasserman, *supra* note 118, at 908.

122 REDISH, *supra* note 118, at 83, 153, 346; Hall, *supra* note 118, at 1264; Neuborne, *supra* note 118, at 1119-20, 1124-25; Wasserman, *supra* note 118, at 908-09.

123 Wasserman, *supra* note 118, at 909.

124 Wasserman & Rhodes, *Historical Analogue*, *supra* note 15, at 100-03; Rhodes & Wasserman, *Defensive Litigation*, *supra* note 16, at 205-07; *supra* Part II.A.

have arguably meritorious and outcome-determinative federal constitutional defenses that they unquestionably will raise to avoid liability. Yet the well-pleaded complaint rule requires all to remain and defend in state court.

The well-pleaded complaint rule reflects federal courts' reluctance "to insult state courts and state judges or to distrust their ability or willingness to understand and apply" the Constitution.[125] But *New York Times* arose in a time and place—the Jim Crow South—in which insults and distrust were warranted.[126] Michaels and Noll and others fear a nationwide wave of subordination laws and a pervasive turn to vigilante federalism. That wave returns us to a similar time and place as to reproductive freedom, LGBTQ+ rights, voting rights, and certain speech—to a time in which distrust is similarly warranted. As the Times desired a federal forum to defend its First Amendment rights against this wave of lawsuits, so do trans athletes desire a federal forum committed to vindicating federal rights. But as the Times's First Amendment defense could not move the defamation actions into federal court, neither can the trans athlete's Fourteenth Amendment defense move the subordination claim into federal court.

C. Mixed Enforcement v. Private Federal Rights Holder

1. *Examples*

Many state laws combine public and private enforcement. Conduct may violate a state-enforced criminal, civil, or administrative prohibition and a privately enforced civil prohibition. These laws authorize private rights of action and incentivize private persons and their attorneys to undertake statutory enforcement.[127] Private litigation supplements government enforcement of a statutory or regulatory scheme, enhancing implementation, elaboration, and enforcement of legislative policy. Governments pursue dual enforcement in

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125 Wasserman, *supra* note 118, at 909.

126 Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 451–52 (1985); Neuborne, *supra* note 118, at 1119 & n.55; Wasserman, *supra* note 118, at 910.

127 Michaels & Noll, *supra* note 1, at 1236; William B. Rubenstein, *On What a "Private Attorney General" Is—and Why it Matters*, 57 VAND. L. REV. 2129, 2171 (2004). *See generally* Zambrano et al., *supra* note 36. Combined public/private enforcement regimes are ubiquitous at the federal level. *See* Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1542, 1547-50 (2014); David L. Noll & Luke Norris, *Federal Rules of Private Enforcement*, 108 CORNELL L. REV. (forthcoming 2023) (manuscript at 13-18).

employment discrimination, labor regulations, business competition, securities fraud, and antitrust.[128]

a. Injured-Person Enforcement. Most mixed-enforcement schemes limit the private right to an injured or aggrieved person or to someone connected to the events at issue.[129] Consider Texas and Florida laws limiting content moderation on social media.[130] These statutes restrict social-media companies in moderating content (including prohibiting them from deplatforming candidates for office) and require sites to disclose moderation policies and explain moderation decisions.[131] Under Florida law, the state election commission enforces the deplatforming provision,[132] while the attorney general and "users" maintaining accounts on the platforms enforce the remaining provisions.[133] Under Texas law, the attorney general enforces the disclosure requirements,[134] while the attorney general and "users" may seek declaratory relief, injunctive relief, costs, and attorneys' fees for other violations.[135]

Florida offers a second example in its "educational gag law" prohibiting public colleges and universities from teaching certain concepts and positions about race, sex, and national origin.[136] The law authorizes suit by "any person aggrieved"[137] and orders the state Board of Governors to promulgate regulations and to enforce the law and accompanying regulations.[138]

Idaho offers a third example in criminalizing "abortion trafficking," defined as assisting a minor to obtain an abortion, within or outside Idaho, without parental consent.[139] The law

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128 *See generally* Zambrano et al., *supra* note 36.

129 *See Whole Woman's Health,* 142 S. Ct. at 537-38.

130 S.B. 7072, 2021 Leg. Reg. Sess. (Fla.) (codified at FLA. STAT. ANN. §§ 106.072, 501.2041); H.B. 20, 87th Leg., Reg. Sess. (Tex. 2021) (codified at TEX. BUS. & COM. CODE §§ 120.001-.151; TEX. CIV. PRAC. & REM. CODE §§ 143A.001-.008).

131 *See id.*

132 FLA. STAT. § 106.072(3).

133 *Id.* § 501.2041(5), (6).

134 TEX. BUS. & COM. § 120.151.

135 TEX. CIV. PRAC. & REM. §§ 143A.007-.08.

136 FLA. STAT. ANN. § 1000.05(4); Pernell v. Fla. Bd. of Governors of State Univ. Sys., No. 4:22-cv-00304-RH-MAF, 2022 WL 16985720, at *2 (N.D. Fla. 2022); Michaels & Noll, *supra* note 1, at 1198-1200.

137 FLA. STAT. § 1000.05(9); *Pernell*, 2022 WL 16985720, at * 2.

138 FLA. STAT. § 1000.05(4)(A); *Pernell*, 2022 WL 16985720, at * 3.

139 H.B. 242, 67th Leg., 1st Sess. (Idaho 2023) (to be codified at IDAHO CODE ANN. §§ 18-623 & 18-8807). The law implicates, and likely transgresses, the right to travel and federalism and due process limits on state authority. *See* David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123

authorizes prosecuting attorneys and the attorney general to pursue criminal charges[140] and provides avenues of civil enforcement.[141] Parents, grandparents, siblings, aunts, or uncles of the "preborn child" can sue those who assist in providing the abortion and the out-of-state medical professionals performing locally lawful procedures.[142]

b. Any-person Enforcement. States may extend supplementary private-enforcement schemes beyond injured persons to authorize suit by any person, citizen, or taxpayer; common efforts include consumer and environmental protection laws.[143] States also allow enforcement of laws against defrauding the government through *qui tam* actions—an otherwise-uninjured private individual (a "relator") seeks statutory forfeiture on the public's behalf, keeping some portion of the money or property forfeited while the government collects the rest.[144]

Prior to 2004, California law prohibiting false advertising and other consumer harms combined public enforcement with private enforcement through "any person acting for the interests of . . . the general public."[145] The law did not require the private plaintiff to have any connection to the violation or violator, and the specific advertisement or statement need not have injured him.[146] Marc Kasky, a politically active consumer advocate[147] who otherwise suffered no injury, sued Nike in state court over press releases responding to and denying reports about overseas factor working conditions.[148] Unsurprisingly, California amended its consumer-protection following that litigation, limiting private enforcement to "a person who has suffered an injury in fact and has lost money or property as a result of the unfair competition."[149] Randy

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COLUM. L. REV. 1, 25-42 (2023).

140 IDAHO CODE ANN. § 18-623(4).

141 *Id.* § 18-8807.

142 *See id.*

143 *E.g.*, CAL. BUS. & PROF. CODE §§ 17204, 17535 (repealed 2004).

144 *See* Beck, *supra* note 109, at 556-58. A listing of *qui tam* statutes is available at U.S. Dep't of Health & Human Servs., Office of the Inspector General, *State False Claims Act Reviews* (2023), https://oig.hhs.gov/fraud/state-false-claims-act-reviews/ [https://perma.cc/FDZ9-4ZY8].

145 CAL. BUS. & PROF. CODE §§ 17204, 17535 (repealed 2004); Michaels & Noll, *supra* note 1, at 1195-97.

146 Kasky v. Nike, Inc., 45 P.2d 243, 249-50 (Cal. 2002) (citing CAL. BUS. & PROF. CODE §§ 17204, 17535).

147 Ronald K.L. Collins & David M. Skover, *The Landmark Free Speech Case That Wasn't*, 54 CASE W. RES. L. REV. 965, 971 (2004).

148 *Id.*; *Kasky*, 45 P.2d at 247-48.

149 CAL. BUS. & PROF. CODE § 17204 (effective 2004).

Beck's historical survey of private enforcement schemes demonstrates that private enforcers "routinely engaged in self-interested practices," including abusive litigation tactics, "inconsistent with legislative goals and other communal interests."[150] Other scholars highlight similar dangers from uninjured private individuals' arbitrary exercises of public enforcement power.[151]

2. *How to Challenge*

Mixed public/private enforcement schemes offer federal rights holders the broadest opportunities for adjudicating and vindicating federal rights.

a. Offensive Litigation. Because state officials (in part) enforce the challenged laws, rights holders can pursue the ordinary, and preferred, litigation strategy—offensive pre-enforcement § 1983/*Ex parte Young* actions in federal court against the executive officer responsible for enforcing the challenged state law. The federal plaintiff must show that she will engage in constitutionally protected-but-statutorily proscribed conduct and that the officer is likely to enforce state law against her.[152] The defendant officer must have a connection to or "particular duty" to enforce the challenged law.[153] Social-media companies pursued this path in challenging the Texas and Florida social-media laws to opposing results.[154] University teachers and students pursued an offensive challenge to Florida's educational gag law; the district court enjoined enforcement as violating their First Amendment rights.[155] Federal rights holders also might seek

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150 Beck, *supra* note 109, at 571, 553.

151 *See* Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 815-820 (2009); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L REV. 689, 699-702 (2004).

152 *See* Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158 (2014).

153 Texas Democratic Party v. Abbott, 978 F.3d 168, 179 (5th Cir. 2020).

154 NetChoice LLC v. Atty Gen., Fla., 34 F.4th 1196, 1203 (11th Cir. 2022); NetChoice LLC v. Paxton, 49 F.4th 439, 445 (5th Cir. 2022). The Eleventh Circuit held that the content-moderation restrictions and the "thorough rationale" disclosure requirement for each decision violate the First Amendment. *NetChoice v. Atty Gen.*, 34 F.4th at 1203. The Fifth Circuit stayed a district court's preliminary injunction, *NetChoice LLC v. Paxton*, 2022 WL 1537249 (5th Cir. 2022), but a divided Supreme Court vacated the stay. NetChoice LLC v. Paxton, 142 S. Ct. 1715 (2022); *id.* at 1716 (Alito, J., dissenting from grant of application to vacate stay). The Fifth Circuit reversed the district court and vacated the preliminary injunction, "reject[ing] the idea that corporations have a freewheeling First Amendment right to censor what people say." *NetChoice v. Paxton*, 49 F.4th at 445. Petitions for certiorari in both cases are pending.

155 Pernell v. Fla. Bd. of Governors of State Univ. Sys., No. 4:22-cv-00304-RH-MAF, 2022 WL 16985720, at *52 (N.D. Fla. 2022).

post-enforcement relief through a § 1983 damages action against public officials following success in the state enforcement action.

But federal rights holders cannot pursue the § 1983 route against potential private statutory enforcers, as ordinary civil plaintiffs do not act under color of state law.[156] Mixed enforcement regimes lack the unique features that convert exclusive "any person" private enforcers into persons acting under color of state law. Private state plaintiffs do not replace the state executive as sole enforcer and they remedy private personal statutory injuries rather than pursuing a public benefit analogous to enforcing a criminal law.[157]

b. Defensive Litigation. Mixed public/private enforcement forces federal rights holders to rely on defensive litigation.

The litigation between Marc Kasky and Nike offers the prominent pre-S.B. 8 example.[158] The ultimate "any person"—a politically engaged and ideologically motivated consumer advocate—sued Nike over its public statements.[159] Nike defended the state court suit by arguing that these statements, even if false, constituted noncommercial political speech enjoying full First Amendment protection that could not form the basis for state-law liability.[160] The California Supreme Court held that Nike's press releases were commercial speech subject to regulation under consumer-protection law if false.[161] When the Supreme Court of the United States dismissed certiorari as improvidently granted,[162] the case settled.[163]

The opportunity for offensive litigation does not obviate all defensive litigation, while the opportunity for defensive litigation limits offensive relief. If the state initiates enforcement proceedings—criminal, civil, or administrative—before the federal rights holder brings her offensive pre-enforcement § 1983/*Ex parte Young* action, *Younger* abstention bars the federal offensive action and requires the rights holder to raise federal constitutional arguments as

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156 *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 622 (1991); *supra* notes 65-70 and accompanying text.

157 *Cf.* Wasserman & Rhodes, *Offensive Litigation*, *supra* note 3, at 1080-83; *supra* notes 92-99 and accompanying text.

158 45 P.3d 243, 249-50 (Cal. 2002), *certiorari dismissed as improvidently granted*, 539 U.S. 654 (2003); *supra* notes 146-151.

159 *Kasky*, 45 P.2d at 247-48; Collins & Skover, *supra* note 147, at 971.

160 *Kasky*, 45 P.2d at 248.

161 *Id.* at 262-63; Collins & Skover, *supra* note 147, at 986-87.

162 Nike, Inc. v. Kasky, 539 U.S. 654, 655 (2003) (per curiam); Collins & Skover, *supra* note 147, at 1014.

163 Collins & Skover, *supra* note 147, at 1020.

defenses to the state enforcement action in state court.[164] State-court resolution of those constitutional defenses has issue-preclusive[165] and other limiting[166] effects on an offensive post-enforcement federal § 1983 damages action.

At the same time, the limited scope of offensive relief may necessitate further defensive litigation.

An injunction issued in X's offensive action protects X against future enforcement but does not prohibit public officials from enforcing that law against Y.[167] Without her own prior offensive remedy or preclusive judgment against an enforcing official, Y may face new enforcement and must raise federal constitutional defenses in that proceeding. The prior federal judgment as to the law's constitutional validity in the action involving X may provide precedent (binding or persuasive, depending on the issuing court) in that second state-court action involving Y.[168] But it does not relieve Y from the burden of defensive litigation.

And X's successful prior offensive litigation against the responsible executive officer has no effect on private enforcers or private enforcement. An injunction prohibiting the attorney general from enforcing the law against X does not affect any potential injured person or "any person" from pursuing a private suit for statutory remedies against X; because the would-be private plaintiff was not party to the prior offensive action and does not act in concert with the state or state officials, the injunction cannot bind him.[169] As with subsequent public enforcement, the opinion supporting the federal judgment offers some precedential effect on the state court, but does not relieve X of the burden of defending the private litigation.

This overlooked point demonstrates the futility of the Texas S.B. 8 litigation leading to *Whole Woman's Health v.*

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164 Sprint Commc'n, Inc. v. Jacobs, 571 U.S. 69, 77-78 (2013); Middlesex Cty. Ethic Comm. v. Bar Ass'n, 457 U.S. 423, 432-34 (1982); Doran v. Salem Inn, Inc., 422 U.S. 922, 928 (1974); Younger v. Harris, 401 U.S. 37, 43-54 (1971); Wasserman & Rhodes, *Offensive Litigation*, *supra* note 3, at 1087-88.

165 Allen v. McCurry, 449 U.S. 90, 96-98 (1980).

166 Heck v. Humphrey, 512 U.S. 477, 486-87 (1994).

167 *Doran*, 422 U.S. at 931; Wasserman, *Departmentalism*, *supra* note 70, at 1092-93.

168 *See, e.g.*, William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1844 (2008); Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 185-86 (2014); Wasserman, *Departmentalism*, *supra* note 70, at 1083-91; Howard M. Wasserman, *Concepts, Not Nomenclature: Universal Injunctions, Declaratory Judgments, Opinions, and Precedent*, 91 U. COLO. L. REV. 999, 1021-25 (2020).

169 FED. R. CIV. P. 65 (d)(2).

Jackson.[170] Success in the offensive action and an injunction prohibiting public enforcement could not have prevented any private "any person" (other than Mark Lee Dickson, the one anti-choice activist named as a defendant) from filing and pursuing a state-court action for statutory damages and other remedies against Whole Woman's Health or any provider or supporter for any post-heartbeat abortion. A Supreme Court decision would have provided precedent as to S.B. 8's constitutional validity binding on the state court, but nothing more.

Haaland v. Brackeen framed this as failing the redressability element of standing.[171] *Haaland* held plaintiffs lacked standing for injunctive or declaratory relief against federal officials in challenging the adoption-placement preferences of the Indian Child Welfare Act under equal protection or the non-delegation doctrine; neither judgment would bind the non-party state officials implementing these adoption preferences in individual cases.[172] Such non-parties would not be "'obliged to honor an incidental legal determination the suit produced.'"[173] While acknowledging that state courts would be likely to defer to a federal court's interpretation of federal law, "'[r]edressability requires that the court be able to afford relief *through the exercise of its power*, not through the persuasive or even awe-inspiring effect of the opinion *explaining* the exercise of its power.'"[174] The federal court's judgment, not its opinion, remedies the constitutional injury.[175] As in *Whole Woman's Health*, the Court could provide an opinion on the Act's constitutional validity, not a judgment binding on the enforcing non-parties.

Mixed regimes illustrate two fundamental points in this debate. No matter how (arguably) constitutionally defective the law, a federal rights holder is not entitled to select its preferred method of asserting federal rights.[176] And from *Nike* and consumer protection to abortion, states have long mixed public and private enforcement; these new subordination laws do not constitute the unprecedented procedural threats Michaels and Noll suggest.

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170 142 S. Ct. 522, 537-38 (2021).

171 143 S. Ct. 1609, 1638-40 (2023).

172 *Id.*

173 *Id.* at 1639 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 569 (1992) (plurality opinion)).

174 *Id.* (quoting Franklin v. Massachusetts, 505 U.S. 788, 825 (1992) (Scalia, J., concurring in part and concurring in judgment (emphasis in original)).

175 *Id.* at 1640.

176 *See Whole Woman's Health,* 142 S. Ct. at 537-38.

D. Private Enforcement v. State Government

1. *Examples*

Michaels and Noll offer two broad examples of next-generation private-subordination regimes. The first involves educational gag laws prohibiting public schools and teachers from teaching "critical race theory" and other "divisive" concepts in public schools;[177] the second involves laws "erasing" LGBTQ+ people, such as prohibiting trans girls from participating in girls' sports or prohibiting public-school teachers from discussing sexual orientation and gender identity.[178] Laws authorizing removal of objectionable books from school and classroom libraries upon public complaint offer a third example.[179]

These new laws differ from S.B. 8, California's consumer-fraud law, and traditional tort law in an important respect—they do not aim the private right of action and remedy at the subordinated group. That is, subordinating private suits and statutory remedies do not run against the putative federal rights holder and the persons whom the state "subordinates." Rather, state law creates a right and a private cause of action allowing any person to sue local and school officials in state court to enforce their preferences—to enjoin the teacher from discussing race or gender identity in the classroom, to remove books from the classroom, and to obtain statutory damages for the past teaching. These laws limit schools and local governments by authorizing private individuals to challenge their efforts to protect or support the subordinated group, to the displeasure of the state-empowered subordinating group.

Members of the subordinated group lose their federal rights indirectly, when the school or local government responds and surrenders to the threat of state-court liability to authorized private enforcers. Fearing private state-lawsuits by (and liability to) any random person, the school removes books, bars trans girls from teams or bathrooms, or establishes a curriculum prohibiting historically accurate discussions of Jim Crow.[180] These laws dampen federal rights as much as other categories—the trans girl loses the right to play sports or to use the appropriate bathroom. But state law does not strip those rights by threatening the federal rights holder with litigation costs and burdens or crippling monetary

177 Michaels & Noll, *supra* note 1, at 1194.
178 *Id.* at 1202.
179 *E.g.*, H.B. 1467, 2022 Reg. Sess. (Fla.).
180 Michaels & Noll, *supra* note 1, at 1198, 1201, 1255.

liability.

From the federal rights holder's perspective, the constitutional defects in these laws remain, independent of the private-enforcement mechanism. Utah bans trans athletes from girls' sports without private enforcement.[181] Yet the athlete occupies the same position regardless of enforcement mechanism—she cannot play on the girls' team. Similarly, a student lacks access to a library book regardless of how or why local government removed the book—on its initiative,[182] under state law requiring the book's re-evaluation,[183] under state law making it a crime for school officials to distribute the book,[184] or because fearing a complaint or state lawsuit by a random any person.

2. *How to Challenge*

This category of private-subordination regime flips the "any person" and injured-person tort models.

Defensive litigation of federal rights becomes impossible. The state lawsuit runs against governments and government officials, not the subordinated federal rights holder. The latter is not a party to the state enforcement action; she cannot raise the state law's constitutional defects as a defense to liability because she does not risk or incur liability. State procedural rules might allow the federal rights holder to intervene as a defendant in the state-court enforcement action to protect her unique federal interests.[185] But this rights holder never encounters the burdens or procedural hurdles of defensive litigation confronting those in the prior categories—she never faces the costs and burdens of state law liability, she need not act at her peril and risk violating the law, and she does not face the chilling effect that no authorized state plaintiff will sue.[186]

Instead, these federal rights holders can pursue offensive litigation—the process denied to abortion providers challenging S.B. 8 and to would-be speakers facing Florida's proposed expanded state defamation law.[187] A school ban on trans students using the appropriate bathroom or a decision to remove books from the library represent official policy; the

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181 Student Eligibility in Interscholastic Activities, H.B. 11, 2022 Sess. (Utah).

182 *See* Board of Educ. v. Pico, 457 U.S. 853, 856-58 (1982).

183 *See* Age-Appropriate Materials Act, S.B. 2407, 2022 Reg. Sess. (Tenn.); Sensitive Materials in Schools Act, H.B. 374, 2022 Sess. (Utah).

184 S.B. 775, 2022 Reg. Sess. (Mo.).

185 *See, e.g.*, FLA. R. CIV. P. 1.230.

186 *See supra* Parts II.A & II.B.

187 *Supra* notes 50-63, 87-91, and accompanying text.

federal rights holder follows the ordinary process for vindicating federal rights as against formal policies. Any vigilante private enforcement compelling the school's policy choice is irrelevant to the procedural posture of the federal constitutional challenge; the regulation represents formal local law, whether enacted out of genuine preference or threat of state-law statutory damages.

If a trans girl possesses a federal right to use the girls' bathroom,[188] she can pursue offensive litigation against the school to vindicate that federal right, asking a court to enjoin the school from enforcing its bathroom policy or awarding damages for past enforcement of that official policy.[189] Similarly, students and parents can bring a First Amendment action challenging book-removal decisions and asking the court to enjoin the government to restore the books to the shelves.[190]

3. Whose Ox is Gored?

These private-enforcement schemes operate on two levels. The threat of private "any person" suit imposes an "*in terrorem* effect" on school officials,[191] scaring them from or into certain actions; those actions deprive someone of a federal right. Where a law fits on this taxonomy—thus how its constitutional defects can be challenged and litigated—depends on which federal rights holder pursues her rights.

Consider Florida's LGBTQ+ "erasure" law, derided as the "Don't Say Gay" Law. One provision prohibits all classroom instruction on "sexual orientation or gender identity" in and before the third grade and from grades four through twelve except as otherwise required or as part of a reproductive health lesson containing a parental opt-out.[192] A parent objecting to discussions of gender may bring a state-court action against the school for injunctive relief, damages, and attorney's fees or ask the school to convene an administrative proceeding.[193]

An LGBTQ+ student vindicating her right not to have her

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188 This point remains open and debatable under existing judicial precedent. *Compare* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 619-20 (4th Cir. 2020) *with* Adams By and Through Kasper v. School Bd. of St. John's Cnty., 57 F.4th 791, 796 (11th Cir. 2023).

189 *See* Monell v. Department of Soc. Servs., 436 U.S. 658, 690 (1978).

190 Little v. Llano Cty., 2023 WL 2731089, at *1 (W.D. Tex. 2023); PEN America Center, Inc. v. Escambia Cty. Sch. Dist., Complaint, No. 23-cv-10385 (N.D. Fla. 2023).

191 Michaels & Noll, *supra* note 1, at 1197.

192 FLA. STAT. ANN. 6A-10.081(2)(a)(6)-(7), *amending id.* § 1001.42(8)(c)(3).

193 *Id.* § 1001.42(8)(c)(7)(b)(I)-(II).

identity erased within the educational space proceeds offensively against the school district, as described above.

But teachers represent a distinct class of plaintiffs. A teacher might challenge the prohibition on discussing these matters in the classroom as violating her First Amendment and academic-freedom rights.[194] Where, as with Florida, the law relies on exclusive private enforcement, the teacher occupies the position of abortion providers and advocates under S.B. 8—without public enforcement, she has no responsible public official or government to sue and no public official for the court to enjoin in offensive litigation. The teacher must violate state law by discussing sexual orientation and gender identity in class, triggering some parental complaint.

That opens several adjudicative, and thus remedial, options. If the parent sues the teacher, the latter can defend on federal constitutional grounds in state court or perhaps pursue § 1983 litigation (pre- or post-enforcement) in federal court, arguing that the state-empowered parent acts under color of state law.[195] Alternatively, if the school reacts to the parent's complaint by firing or sanctioning the teacher, she might challenge the adverse employment action through a § 1983 action against the school, arguing that the school violated her First Amendment rights through its adverse employment action retaliating against her for violating a constitutionally invalid state statute.[196]

CONCLUSION

Vigilante Federalism argues that private subordination regimes "empower individuals motivated by moral outrage to surveil, sue, and punish their neighbors, teachers, colleagues,

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194 A doubtful substantive claim as to primary and secondary schools. Eugene Volokh, *Who Decides What Is Taught in Government-Run K-12 Schools?*, VOLOKH CONSPIRACY (Mar. 21, 2022, 8:01 AM), https://reason.com/volokh/2022/03/21/who-decides-what-is-taught-in-government-run-k-12-schools [https://perma.cc/K292-FBTJ]; *see* Ali v. Woodbridge Twp. Sch. Dist., 957 F.3d 174, 184 (3d Cir. 2020); Evans-Marshall v. Board. of Educ. of Tipp City Exempted Sch. Dist., 624 F.3d 332, 340 (6th Cir. 2010). Courts have been receptive to claims from university faculty, Pernell v. Florida Bd. of Governors of State Univ. Sys., No. 4:22-cv-00304-RH-MAF, 2022 WL 16985720, at *2 (N.D. Fla. 2022); Keith E. Whittington, *Professorial Speech, the First Amendment, and Legislative Restrictions on Classroom Discussions*, 58 WAKE FOREST L. REV. 463, 465-66 (2023); *but see* Eric Segall, *Free Speech on Campus: A Constitutional Void*, DORF ON LAW (Mar. 22, 2023, 7:30 AM), https://dorfonlaw.org/2023/03/free-speech-on-campus-constitutional.html. [https://perma.cc/R9YJ-8E3Q].

195 *See supra* Part II.B.2.a.

196 Presuming, again, that teachers have such First Amendment rights.

healthcare providers, and other (politically disfavored) members of their communities."[197] The laws "divid[e] citizens into an authentic, morally virtuous 'us' and a second-class 'them.'"[198] They pursue a "coherent, and inescapably anti-democratic, political project."[199] They designate certain groups as "immoral, dangerous, or unworthy of civil rights."[200]

We share Michaels' and Noll's views as a matter of policy. The laws subordinate. The laws are stupid.[201] Michaels and Noll also may be correct as a matter of substantive constitutional law—the laws violate their targets' federal constitutional rights and courts should declare them constitutionally invalid and prohibit enforcement.

But their argument runs aground in tying constitutional and policy defects to the state's decision to rely on partial or exclusive private enforcement—the features that convert these from repugnant laws into vigilante federalism. The enforcement mechanism neither exacerbates nor alleviates substantive objections of subordination. A publicly enforced prohibition on trans athletes in girls' sports divides citizens, labels some as unworthy of civil rights, and pursues an anti-democratic agenda—as does a publicly enforced prohibition on teaching race, a publicly enforced prohibition on providing water to those waiting to vote, a publicly enforced prohibition on social-media content moderation, and public decisions to remove books from libraries. Private enforcement triggers unique constitutional objections only if private enforcement creates unique constitutional problems. But Michaels and Noll (and other critics of S.B. 8 and similar laws) identify no such unique problems; their criticisms never move beyond the basic imbalance of substantive rights.

The taxonomy of private enforcement presented in this paper demonstrates why the enforcement scheme creates no unique constitutional problems. Private enforcement regimes, of all forms, predate this wave of legislation. And they leave rights holders opportunities to pursue judicial review and to vindicate their federal rights.

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197 Michaels & Noll, *supra* note 1, at 1193.

198 *Id.* at 1197.

199 *Id.* at 1193.

200 *Id.* at 1212.

201 New York State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 209 (2008) (Stevens, J., concurring).