The Private Suppression of Constitutional Rights

Aziz Z. Huq*

On September 1, 2021, Texas's abortion ban, S.B. 8, went into effect even as the constitutional right to an abortion was under siege at the Supreme Court. It not only prohibited almost all abortions after six weeks but also allowed any private party to sue those who, knowingly or unwittingly, aid or abet such procedures. Texas's law has been described as unprecedented and inventive. These evaluations of the measure reflect a widely shared assumption that the state's legislature broke new ground by empowering private citizens to frustrate a presently valid constitutional right. But such assessments miss important historical context. Laws enabling the private suppression of constitutional rights have been enacted, and aggressively used, throughout American history. Indeed, many of the most potent elements of S.B. 8 have been prefigured by specific features of earlier, anti-constitutional-rights schemes. This Article foregrounds and analyzes these historical practices—which it labels "private suppression"—as a distinct modality of constitutional change via legal coercion. Its threshold contribution is the non-exclusive identification of state and federal private suppression schemes from the early Republic through the War on Poverty. Having flagged (but not exhausted) the range of historical examples, it identifies several regularities in the political economies from which private suppression schemes arise and predictable downstream effects on regulated populations, constitutional norms, and legal institutions.

With this ground established, the Article situates the private suppression of constitutional rights first as a species of popular constitutionalism and, alternatively, as an exercise in privatization. These two frames are useful because they bring into sharp focus private suppression's likely effects. Beyond its proximate operation, the Article suggests, private suppression reproduces underlying social "facts" that can be used to justify and legitimate social hierarchies of race, class, and gender. In this process, it wreaks a novel and distinctive harm by configuring some individuals into objectionable postures of vulnerability and exposing them to their co-citizens. Private suppression hence

* Frank and Bernice J. Greenberg Professor of Law, University of Chicago Law School, with support from the Frank J. Cicero Fund. Thanks to Brenda Cossman, Yasmin Dawood, Chris Essert, Lee Fennell, William Hubbard, Larissa Katz, Aaron Liskow, Michael Morse, Richard McAdams, David Noll, Farah Peterson, and Kerry Rittich—for perceptive comments—and to participants at a University of Chicago Works-in-Progress workshop and a University of Toronto Critical Analysis of Law workshop for their demanding questions. Sophia Shams, Jason Onyediri, and the other editors of the *Texas Law Review* gave extensive and insightful editorial help, for which I am very grateful. All those efforts have enriched the paper; all remaining errors are mine.

plays an important role marking out, calling into being, and reifying spoiled social identities (e.g., certain understandings of race or gender).

Considering private suppression directly also casts new light on the concept and practice of the rule of law along two dimensions. First, while seemingly a loss of control on the part of the state, private suppression is in practice a way for the state to weaken constitutional constraints—and so to amplify its reach and achieve policy changes that could not be directly wrought. This analysis also casts doubt on a pervasively held premise of the American constitutional discourse—i.e., the idea that hazards to individual rights and concentrations of power vary linearly with the size of the central state. Diffuse, privatized authority can also be liberty's foe. Second, private suppression destabilizes the ordinary relationship between courts and the rule of law by conscripting adjudication as an instrument to weaken legality, rather than as a law-enforcing tool. Rather than the validation of precedent, these antecedent examples suggest fertile ground for moral and legal concern about S.B. 8, all quite independent of the divisive question of reproductive choice.

Introduction

On September 1, 2021, a Texas law came into effect banning abortions six weeks after conception absent a medical emergency.[1] Since a pregnancy is commonly identified only after six weeks,[2] and since appointments for treatment in Texas can take days or even several weeks to obtain, the prohibition reached most abortions. Yet the statute, called Senate Bill 8 (S.B. 8), ruled out the possibility that a state official would enforce the ban.[3] Instead, S.B. 8 allowed *any* private party to bring a suit for either damages of no less than $10,000 or injunctive relief against a person who "performs or induces" a covered abortion or "aids or abets the performance or inducement of an abortion," whether knowingly or not.[4] As critics took pains to point

1. Neelam Bohra, *Texas Law Banning Abortion as Early as Six Weeks Goes into Effect as the U.S. Supreme Court Takes No Action*, TEX. TRIB. (Sept. 1, 2021), https://www.texastribune.org/2021/08/31/texas-abortion-law-supreme-court/ [https://perma.cc/NHF7-GTK9].

2. *See* I. Goldstein, E.A. Zimmer, A. Tamir, B.A. Peretz & E. Paldi, *Evaluation of Normal Gestational Sac Growth: Appearance of Embryonic Heartbeat and Embryo Body Movements Using the Transvaginal Technique*, 77 OBSTETRICS & GYNECOLOGY 885, 886 tbl.1 (1991) (conducting a study in which the majority of patients had detectable gestational sacs after six weeks).

3. TEX. HEALTH & SAFETY CODE ANN. § 171.207(a) (West 2021) (barring "enforcement . . . taken or threatened by this state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision").

4. *Id.* § 171.208(a)(1)–(2), (b)(1)–(2).

out,[5] and the State of Texas barely denied,[6] the law's recourse to private remedies was plainly designed to shield the law from frontal attack via a suit for injunctive relief pursuant to *Ex parte Young*.[7] It almost worked. The absence of a specific state official responsible for enforcing S.B. 8 led the Supreme Court to rebuff an early effort to have the law's effect suspended, while allowing in the short term a limited set of private suits against the law.[8] A few months later, however, the Court would take a step further and abrogate the constitutional right to abortion in its entirety, rendering the state's concern about injunctive challenges based on the Fourteenth Amendment's Due Process Clause purely notional.[9]

Before the Court's abrogation of the constitutional right to reproductive choice, S.B. 8's remedial mechanism was subject to a barrage of criticism as "unprecedented,"[10] "inventive,"[11] and "really unorthodox."[12] Commentators complained about the "radical expansion" that S.B. 8 wrought in the range of potential plaintiffs—in effect, any private person anywhere in the United

5. *See* Whole Woman's Health v. Jackson (*Whole Woman's Health I*), 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting) (describing S.B. 8 as a "scheme to insulate its law from judicial review by deputizing private parties to carry out unconstitutional restrictions on the State's behalf").

6. *See* Timothy Bella, *Texas Governor Signs Abortion Bill Banning Procedure as Early as Six Weeks into Pregnancy*, WASH. POST (May 19, 2021, 9:21 PM), https://www.washingtonpost.com/nation/2021/05/19/texas-abortion-law-abbott/ [https://perma.cc/UDW5-T6HE] (quoting Governor Greg Abbott's claim that the bill would "save th[e] lives" of perhaps "millions" by preventing abortions).

7. 209 U.S. 123, 155–56 (1908).

8. *Whole Woman's Health I*, 141 S. Ct. at 2495 (denying injunctive relief). On October 22, 2021, the Court granted certiorari on a different challenge to S.B. 8 and heard arguments on November 1, 2021. Whole Woman's Health v. Jackson (*Whole Woman's Health II*), 142 S. Ct. 522 (2021). In *Whole Woman's Health II*, a 9–0 majority of the Court ruled that certain pre-enforcement challenges were justiciable. *Id.* at 529–30. In December 2021, a Texas trial court also issued an order enjoining parts of S.B. 8. Reese Oxner & Eleanor Klibanoff, *Texas Judge Declares State's Abortion Law Is Unconstitutional*, ABC NEWS (Dec. 9, 2021), https://abc13.com/texas-news-abortion-law-2021-judge-declares-unconstitutional-is-legal-in/11317588/ [https://perma.cc/2G2F-FK9H]. Supporters of S.B. 8 expressed confidence that the lower court ruling would be overruled. *See id.* (noting that an anti-abortion group appealed the trial court's order).

9. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

10. United States v. Texas, 566 F. Supp. 3d 605, 620 (W.D. Tex. 2021); *see also* Alexandra Svokos, *How Unprecedented the Texas Abortion Law Is in Scope of History*, ABC NEWS (Sept. 3, 2021, 4:00 AM), https://abcnews.go.com/US/unprecedented-texas-abortion-law-scope-history/story?id=79793375 [https://perma.cc/ZW2G-W5AJ] (discussing the breadth of the prohibition).

11. Jill Filipovic, *Is the Texas Abortion Law Backfiring on the People Who Pushed It Through?*, THE ATLANTIC (Oct. 1, 2021), https://www.theatlantic.com/ideas/archive/2021/10/texas-abortion-law-even-more-absurd-practice/620265/ [https://perma.cc/N3JC-XTZ7].

12. Maggie Astor, *Here's What the Texas Abortion Law Says*, N.Y. TIMES (Sept. 9, 2021), https://www.nytimes.com/article/abortion-law-texas.html [https://perma.cc/C8L6-8EZR] (quoting Professor Melissa Murray).

States is licensed to sue an abortion-adjacent defendant.[13] In ordinary civil actions for tort or contract, doctrines such as proximate cause and privity narrow the range of plaintiffs to a subset of individuals.[14] No such doctrinal tethers seemed to bound S.B. 8. Texas's use of a private right of action to thwart what was (at the time of its enactment and promulgation) a constitutional right also ran counter to widely held expectations about the role of courts in a constitutional democracy.[15] Such conventional wisdom holds that courts are supposed to promote conformity with constitutional principles. They are not supposed to erode these principles through private litigation. Judges are also generally perceived as instruments of the rule of law, not devices for its repudiation.[16] Courts, of course, are often criticized for falling short of these ideals.[17] But the prospect of judges being repurposed as a systematic instrument for derogating the rule of law and constitutional rights is prima facie in tension with the American legal tradition.

History tells a different, more troubling, story. As this Article demonstrates, there is nothing unprecedented or inventive about the idea of a legal license for private parties to suppress the constitutional rights of others in the United States. Since the Founding, enterprising legislators have found ways to turn the ordinary law of contract and tort into a tool for *the private suppression of constitutional rights*. Private parties have thus been able to indirectly do what the state cannot directly achieve through its own means.

The history of such private suppression of constitutional rights,[18] which this Article foregrounds, helps isolate a specific, hitherto ignored, technology of anti-constitutional action through a kind of delegation. I draw lessons from this history about the political economy in which "private suppression"

13. Erin Douglas, *Texas Abortion Law a "Radical Expansion" of Who Can Sue Whom, and an About-Face for Republicans on Civil Lawsuits*, TEX. TRIB. (Sept. 3, 2021, 5:00 AM), https://www.texastribune.org/2021/09/03/texas-republican-abortion-civil-lawsuits/ [https://perma.cc/RDU2-NLRH]. The first suits under the statute were filed by men in Arkansas and Illinois. 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/W3DT-VCBS].

14. As Lon Fuller famously observed, "problems [that are] sufficiently polycentric are unsuited to solution by adjudication." Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 398 (1978).

15. Douglas, *supra* note 13.

16. Of course, this idea is famously associated with Chief Justice Marshall's insistence in *Marbury v. Madison* that having "a government of laws, and not of men" required that the law contain a "remedy for the violation of a vested legal right." 5 U.S. (1 Cranch) 137, 163 (1803); *see also* 3 WILLIAM BLACKSTONE, COMMENTARIES *23 ("[W]here there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded.").

17. *See, e.g.*, Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 937 (2019) (arguing that "the Court's pattern [in constitutional tort cases] does not reflect a principled conception of the judicial role as much as hostility to awards of monetary relief against the government and its officials").

18. In this Article, I will use the term "private suppression" as a shorthand for this practice.

arises, and its predictable downstream effects. Rather than serving as validating historical precedent, I argue, these antecedents suggest serious ground for moral and legal concern—all quite independent of the divisive question of reproductive choice.

On first view, the history of private suppression evinces a startling heterogeneity. State and federal law alike, judge-made measures, and carefully drawn legislation—each has been used to create a private right to extirpate the constitutional rights of others. Some have succeeded, sustaining durable regimes of profound deprivation and state-adjacent violence for decades. Others have broken down gradually. Some have been invalidated by the Supreme Court. Yet others have collapsed under social and political struggles for freedom. But against the grain of such variation is a meaningful continuity of form, cause, and effects. There is a core case of private suppression, albeit surrounded by a cluster of variants. Leveraging the parallels and commonalities between them, I aim to clarify the conditions under which the law can become an instrument for suppressing constitutional rights, and then examine potential moral and legal objections to these schemes.

I highlight five moments in American legal history when private law has been machined to the end of enabling some individuals to negate the constitutional rights of others. The American history of private suppression thus usefully begins with the Fugitive Slave Acts of 1793[19] and 1850.[20] The latter deserves greater attention for the simple reason that it was more effective. Under these Acts, private individuals could turn to first the courts, or to "commissioners" appointed by the courts, to legitimate their seizure and rendition of Northern Blacks.[21] Putatively aimed at former slaves, these Acts swept in countless free Blacks too. After the Civil War, and the abandonment of the Reconstruction project, it was Southern states that turned to the private law of tort and contract—supplemented now by criminal law tools such as vagrancy statutes and convict leasing—to guarantee agriculturalists and industrial capitalists a low- or no-wage labor force under conditions familiar from antebellum cotton, sugar, and tobacco plantations.[22] As an adjunct to that economic regime, at least one state—Texas, as it so happened—turned to private actors to fence Black voters out of the franchise. Its initial effort

19. Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (repealed 1864).

20. Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (repealed 1864).

21. *Id.* § 2; Fugitive Slave Act of 1793 § 3.

22. *See* Pete Daniel, Commentary, *The Metamorphosis of Slavery, 1865–1900*, 66 J. AM. HIST. 88, 88 (1979) ("[T]he new labor system in the South was varied and complex, an unpatterned blend of illiteracy, law, contracts, and violence . . . .").

was endorsed by the U.S. Supreme Court.[23] It took almost a decade for the Court to repudiate the state's naked spurning of constitutional equality law.[24]

Meanwhile, in mills, mines, and factories across the industrializing North and West, a different labor struggle was unfolding. Capital owners were locked in often bloody conflicts with unions and workers. When violence alone proved insufficient, those owners turned to the federal courts for private law remedies against labor. They sought and secured the equitable labor injunction as a bludgeon to wear down workers' free speech and association claims. Even when courts recognized the laborers' individual rights, the scope and ferocity of anti-labor sentiment on the bench and the resulting specter of state violence left union leadership with little room to speak or organize politically.

Finally, it is well known that the twentieth century was long characterized by persistent, state-sponsored racial residential segregation. It is less well known that this patterning has been sustained and nurtured using two different private suppression devices created by state and federal law respectively. In the first half of that century, it was the racially restrictive covenant, devised in Chicago and then diffused around the nation. This was used as a substitute for unconstitutional racial zoning ordinances invalidated in 1917.[25] Again, private action offered an alternative for an unlawful state action. Later, it was a 1968 federal statute that channeled federal funding to private mortgage lenders[26] bent on maintaining the segregation of Blacks in cities and the insulation of increasingly monochromatic suburbs from racial minorities. Unlike previous iterations of private suppression, this was originally intended to ameliorate, not entrench, social stratification. These measures carry the story of private suppression from the Founding forward into living memory.

These five cases are illustrative, not exhaustive. To my mind, they are the most obvious examples of private suppression in the historical record. But that concept might be extended and adopted in different conditions. Other examples might include legal institutions such as coverture, which could be glossed over (anachronistically, but accurately) as a delegation by the state to husbands to dominate and sexually exploit their wives. Something similar might be said of marital rape law. More recently, one might think of the legal immunity enjoyed by social media platforms as a delegation by the state of the power to censor speech. Or one might look at the rise of religious arbitration over private rights to intimate relations as private suppression of

23. Grovey v. Townsend, 295 U.S. 45, 55 (1935).

24. Smith v. Allwright, 321 U.S. 649, 666 (1944).

25. Buchanan v. Warley, 245 U.S. 60, 82 (1917).

26. Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 235, 82 Stat. 476, 477–78 (codified as amended in scattered sections of 12 U.S.C. and 42 U.S.C.).

the right to privacy. Or consider the capacity of private regulatory organizations in the financial industry to impose penalties without administrative process as a delegation of enforcement; or the display of firearms, using the Second Amendment, as a way of chilling others' First Amendment rights to speak and protest in public places. Obviously, the list goes on. The examples offered here are intended to illustrate the general concept and demonstrate its reoccurrence across American constitutional history.

These five cases are diverse in a number of ways. But they are all characterized by some version of the same basic logic: A civil legal framework enabled private action that had the predictable effect of suppressing others' constitutional rights. In most (but not all) cases, there was an ambition to suppress a constitutional right at work. These core elements are accompanied frequently by other elements: Often (if not always), these schemes were intended to work—and did work—as a substitute for an unconstitutional state action. They enabled something that could not be done directly. Sometimes the constitutional right was highly contested and lacked a judicial imprimatur; sometimes the right was in its twilight (as proved to be the case with S.B. 8); and sometimes its contours were unclear. My argument is that there are sufficient "family resemblances" across these examples to support the existence of a core concept of private suppression, surrounded by peripheral cases in which one or other traits of that core case is missing.[27]

An exposition of this historical context further draws attention to several continuities in the political and moral economies of private suppression. Since this Article pursues both these lines of inquiry, a word on terminology may be useful. By "political economy," I mean the material, institutional, and legal conditions that characterize a turn to private suppression. A focus on the political economy of private suppression clarifies the circumstances in which such schemes emerge (although it does not yield a simple or mechanical causal algorithm) and have their main intended effects. In contrast, I use the term "moral economy" to pick out the "essentially *noneconomic* norms and obligations . . . that mediate . . . social, political, and/or economic relations" engendered by a legal scheme.[28]

Bringing private suppression into conversation with these concepts sparks new insights about old debates. For example, the private suppression of constitutional rights is a distinct form of popular constitutionalism with two novel effects: It directly acts upon the ability of individuals to exercise constitutional rights, effectively creating discrete, legally defined

27. *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 32e, § 67 (G.E.M. Anscombe trans., Basil Blackwell & Mott, Ltd. 2d ed. 1958) (1953) (explaining use of "family resemblances" descriptor because it encompasses an "overlap and criss-cross" of features).

28. Thomas Clay Arnold, *Rethinking Moral Economy*, 95 AM. POL. SCI. REV. 85, 85 (2001) (emphasis added); *see infra* note 302 (discussing the idea of moral economy further).

populations for whom the right does not exist. More subtly, private suppression has epistemic effects. It creates and then sustains the social "facts" against which the sorry drama of inequality and contemptuous subordination play out. Turning to the literature on privatization, I further suggest that private suppression often works as a constitutional workaround to the claims of specific public rights holders as well as more general constitutional constraints.

The cumulative effect of these dynamics is the relegation of individuals, and even populations, to an objectionable posture of vulnerability and exposure to their co-citizens' capricious will. Private suppression schemes are objectionable because they institutionalize, via law, a distinctive kind of exposure, vulnerability, and hence subordination. They link particular identities with inferior legal and material circumstances. In doing so, they do not just impose transient pecuniary disadvantage. They also materially disparage a specific group by denying its members the dignity of "being on a par" or "standing on an equal footing" with other individuals.[29] As a result of these entangled material and expressive effects, these schemes play an important role in marking and hence calling into being certain social identities (e.g., race or gender classification) as inferior. They do so by making certain individuals "systematically dependent on the merely unilateral will of private actors."[30] Private suppression, in short, uses law to make concrete the brute fact of caste.

Situating private suppression in its full historical context further casts new light on the practice of the rule of law. While seemingly a loss of control on the part of the state, private suppression works in practice as a mechanism for the state to magnify its reach and—under the garb of private action—achieve policy goals that could not be directly wrought. It is the flexing of state power by plausibly deniable means. This puts into question a broadly shared assumption of the American constitutional theory of power in public law—that concentrations of state power are linearly associated with the hazard to individual rights. In addition, private suppression destabilizes the ordinary relationship between judicial institutions and the rule of law because it conscripts courts as law-ousting, rather than law-enforcing, institutions, begging questions about the best way to institutionalize a rule of law.

Many of these historical patterns are substantiated in the experience of S.B. 8. But at the same time, my analysis helps to uncover ways in which S.B. 8 also innovates dangerously. A close historical reading of that measure suggests new reasons for objecting to its enforcement structure, independent of one's judgment about the appropriate scope of reproductive choice.

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29. *See* Nancy Fraser, *Recognition Without Ethics?*, THEORY, CULTURE & SOC'Y, June 2001, at 21, 40 n.11 (emphasis omitted) (defining parity in the context of gender equality in France).

30. CHIARA CORDELLI, THE PRIVATIZED STATE 9 (2020).

One headline difference is worth underscoring at the outset: Whereas most of these examples embodied efforts to prevent a color line of one sort or another being eroded away, the function of S.B. 8 is not to protect the status quo, racial or otherwise. It is also not primarily aimed at the preservation of extant economic hierarchies. Rather, S.B. 8 is a bid to recast gender relations by using the force of coercive private law to carve out social conditions in which women are not treated as peers, but instead are acutely vulnerable to the unmediated and capricious whims of others. Perhaps the most forceful parallel instance of private suppression deployed against women arose long before the Republic's birth: It came between 1580 and 1630.[31] In this period, European states not only criminalized "witchcraft," but officials "travel[ed] from village to village in order to teach people how to recognize [witches]."[32] This "female crime" was enforced by popular presentation to a court by a motley cast of suspected perpetrators.[33] The resulting witch trials led to hundreds of deaths. They proved just a "first step in . . . the transformation of female sexual activity into work, a service to men, and procreation."[34] While the parallel should not be exaggerated, both the means and ends of patriarchal control across different historical eras evince remarkable parallels.

The argument proceeds as follows: Part I recounts five histories of private suppression from diverse moments in time in some detail. Part II then maps out a political economy common to all five case studies. Doing so deepens our understanding of when law is likely to be deployed as an instrument against recognized constitutional rights or proximate, unrecognized entitlements. Shifting the discussion from the descriptive to the normative, Part III deploys three analytic frames drawn from public-law scholarship—popular constitutionalism, privatization, and rule of law—to capture different perspectives on the moral economy of private suppression. Its larger aim is to anatomize private suppression's normative stakes. Finally, Part IV circles back to Texas's S.B. 8. It reconsiders that statute with the benefit of learning from the historical experience of private suppression mechanisms. As I show by this analysis, that context yields new insight into the reasons for S.B. 8's adoption, above and beyond its evasion of judicial review. It prefigures a step change in the way that popular suppression is likely to be used in coming years and decades. The past, while no certain guide to what is to come, thus illuminates the perils and promises of law as an instrument of constitutional erosion, rather than of constitutional defense.

31. SILVIA FEDERICI, CALIBAN AND THE WITCH: WOMEN, THE BODY AND PRIMITIVE ACCUMULATION 166 (2004).

32. *Id.*

33. *Id.* at 171–72, 179.

34. *Id.* at 192.

I. A History of Five Private Suppressions (1800–1970)

Private efforts to suppress Americans' basic freedoms, and so insulate social and economic hierarchies from challenge, are older than the Republic. Indeed, they antedate the idea of a constitutional right. In 1696, for example, the Colony of South Carolina enacted a law compelling slaves traveling beyond their master's plantation to carry a pass and exhorting all whites to "apprehend bondsmen and give them a moderate whipping if they had no pass."[35] Slave patrols staffed by "all white men," who had volunteered or who were pressed into service, kept tight control over Black mobility and sociality using this pass system.[36] Of course, slave patrols did not trench on any recognized or arguable constitutional rights for the simple reason that pre-Revolutionary slaves had none. But they are evidence that private coercion (often overtly violent) with state authorization has deep historical roots.

This Part demonstrates that private suppression of constitutional rights has long been an element in the American constitutional tradition. Drawing together examples from the antebellum period up to the early 1970s, I aim to demonstrate a commonality of legal form and practical effect across seemingly disparate campaigns. This long, if varied, history suggests that, rather than being an outlier, S.B. 8 has ample precursors in the historical record.

To make this case, I begin by offering a more precise account of the private suppression of constitutional rights and consider how that concept can be distinguished from close cognates such as vigilantism and constitutional violations simpliciter. Drawing upon law reports and secondary historical work, I then develop five different examples running from antebellum times to the Nixon Administration. These are as follows: (1) the federal statute passed in 1850 to allow private recapture of fugitive slaves from Northern states; (2) the network of Southern state laws used to enforce involuntary servitude via contract and tort; (3) the so-called white primaries used to suppress Black votes by empowering private associations; (4) the turn-of-the-twentieth-century, common-law use of labor injunctions and yellow-dog contracts to suppress union-related speech and associational rights; and (5) racially restrictive covenants (up to the 1950s), and then predatory mortgage practices in federally sponsored urban-housing programs (from the 1960s onward), which were aimed at thwarting the constitutional right against de jure racial segregation.

35. SALLY E. HADDEN, SLAVE PATROLS 18 (2001).

36. *Id.* at 165; *id.* at 114 (describing patrol work as "searching slave dwellings, breaking up slave meetings, and regulating slave movement").

A. Defining Private Suppression

I use the term "private suppression of constitutional rights," or more succinctly "private suppression," to capture a class of cases that, to some degree or another, share three elements: (1) a sustained campaign in which private individuals or organizations are endowed with, and systematically employ,[37] (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. This effect may not be intended, but in the core case, the designers of the affordance have a suppression ambition in respect to a recognized or arguable right.

Like many concepts, this is not one with "sharp borders," and so not all instances necessarily "share some definite set of features" to the same extent.[38] The core case of private suppression is nevertheless one in which a specific legal remedy is created by the state with the anticipated *and* intended effect of allowing private parties to suppress a constitutional right in a way that the state could not. Further, it requires that the constitutional right have some measure of recognition, whether in the courts or otherwise. Beyond this core case are a number of peripheral cases where suppression may be a predictable but unintended consequence. The constitutional right at stake might not be recognized by federal courts, or it might rest on fragile jurisprudential ground. Private suppression, in short, is not intended to be a crisply defined concept but one characterized by some core cases (such as S.B. 8) and a periphery of other examples joined by a "complicated network of similarities overlapping and criss-crossing."[39]

Under this definition, private suppression commonly is accomplished systematically by a class of non-state actors using a specific legal mechanism. Isolated incidents of private violence tolerated by the state fall beyond the definition's scope; rather, a sustained series or campaign is needed. Further, the definition requires a link to a specific legal mechanism. For this reason, the waves of racial violence after the Civil War associated with the Ku Klux Klan fall outside my study. They were not linked to a

37. This element of the definition excludes sporadic uses of, say, contract law to extract commitments not to exercise a constitutional right, such as speech. Those cases are also excluded by the requirement in the second element that the affordance be specifically created by the state. As I shall explain, contractual devices to maintain residential segregation were crafted by the state, whereas noncompete clauses limiting a counterparty's speech are generally not. *See infra* text accompanying note 180.

38. *Cf.* Gregory S. Kavka, *Wittgensteinian Political Theory*, 26 STAN. L. REV. 1455, 1459 (1974) (book review) (exploring Wittgenstein's criticism of a language model where the objects referred to by a word must share a definite set of features).

39. *See* WITTGENSTEIN, *supra* note 27, at 32e, § 66 (discussing this concept in the context of games).

specific legal scheme but were formally extralegal. Indeed, the definition takes the private use of a legal affordance (e.g., a civil action) as the *cause* of the suppression: The exercise of one person's legal right, that is, is strictly inconsistent with another's constitutional entitlement.

One of the relationships formed by a legal scheme of private suppression can be described in more formal terms using the taxonomy that turn-of-the-century legal theorist Wesley Hohfeld developed to rank all legal entitlements.[40] In Hohfeld's influential terms, a private suppression scheme vests in private parties a "power," which entails the "power to effect the particular change of legal relations."[41] The rights to abandon or transfer chattels, Hohfeld observed, are "powers" insofar as both comprise a unilateral legal ability to directly alter the legal relations of others.[42] The private actor who uses a legal affordance to suppress another's constitutional right similarly has a Hohfeldian power insofar as their action immediately eliminates or encumbers what would otherwise be another's right. This captures an important subset, although not all, of the cases discussed below.

The definition also excludes purely private action—or vigilantism—with the effect of suppressing constitutional rights. This would exclude not just the Ku Klux Klan, but also the contemporary Minuteman of the southern border.[43] It also excludes policies initiated by state actors exclusively using the official machinery of state. Putting aside these poles of purely private and purely public action still leaves a wide gray area. As Jody Freeman has observed, this domain is characterized by "a highly interdependent network of public-private partnerships woven together by history, practice, and mission."[44] I am focused on a subset of that domain in which private parties leverage an adjudicatory mechanism created by law to deprive others of their

40. *See generally* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) (exploring the meaning of some foundational legal terms and concepts).

41. *See id.* at 44 (discussing the meaning of a "legal power").

42. *Id.* at 45. For a careful discussion of "powers" as a jurisprudential category, see Christopher Essert, *Legal Powers in Private Law*, 21 LEGAL THEORY 136 (2015).

43. The United States has a long history of purely private vigilantism that runs parallel to the history of private suppression charted here. Vigilantism involves "a communal desire and willingness to enforce existing law or to precipitate a new 'necessary and proper' order by popular rule." WILLIAM C. CULBERSON, VIGILANTISM: POLITICAL HISTORY OF PRIVATE POWER IN AMERICA 6 (1990). In the antebellum period, "vigilance committee[s]" would involve a "time-honored frontier method of enforcing 'justice'" to put Black and Hispanic populations in their subordinated place. Paul D. Lack, *Slavery and Vigilantism in Austin, Texas, 1840–1860*, 85 SW. HIST. Q. 1, 6 (1981). Vigilantism is purely private action, even if it arises when someone is "disillusioned by the criminal justice system's apparently intentional failures of justice." Paul H. Robinson, *The Moral Vigilante and Her Cousins in the Shadows*, 2015 U. ILL. L. REV. 401, 404.

44. Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1288 (2003).

constitutional right, and not—say—to fight fraud within the government.[45] This subset of uses overlaps with a larger class of mechanisms that Jon Michaels has called "government by bounty"; this class is "[e]xemplified by such diverse arrangements as regulatory vouchers, prediction markets, qui tam suits, R&D prizes, and social-impact bonds."[46] There is an important kinship between private suppression and the mechanisms that Michaels describes. But given the way that it implicates constitutional rights, private suppression is not the same as government by bounty.

Consider two immediate objections to this definition. First, it seems to assume that private action can trench on a constitutional entitlement despite the "state action" prerequisite.[47] Second, it also seems to wish away disagreement about the existence of a constitutional right. Underlying both these assumptions is a further premise that doctrinal uncertainty in the courts precludes a nonjudicial phenomenon from being described as constitutional.

I disagree. It is perfectly sensible, and indeed quite ordinary, to speak of a claim as constitutional in character even if it has not been recognized by a court. As Hendrik Hartog has pointed out, to do otherwise would "deny the moral significance of the constitutional struggles of former slaves and of women."[48] As Reva Siegel observed in her pathbreaking article two decades ago, "[t]hroughout American history, groups of Americans have mobilized

45. The other context in which "legislators . . . deploy private litigation as a regulatory tool" is in qui tam actions focused on fraud within the government. David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1251 (2012). The dominant theme in literature on qui tam actions is their agency costs and benefits in relation to other forms of regulation. *See* SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 20 (2010) ("Lawsuits provide a form of auto-pilot enforcement that will be difficult for bureaucrats or future legislative coalitions to subvert, short of passing a new law."); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 110 (2005) ("[A] potential benefit of private enforcement suits is that they can correct for agency slack—that is, the tendency of government regulators to underenforce certain statutory requirements because of political pressure, lobbying by regulated entities, or the laziness or self-interest of the regulators themselves." (footnotes omitted)). I am not focused on the enacting coalitions and their agency problems here.

46. Jon D. Michaels, *Privatization's Progeny*, 101 GEO. L.J. 1023, 1042 (2013) (emphasis omitted). On the long history of direct "facilitative payments" and "bounties," including for maritime seizes and successful criminal prosecutions, see generally NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE (2013).

47. This is associated with Justice Bradley's opinion in *The Civil Rights Cases*, 109 U.S. 3, 11 (1883) ("It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment."). An exception is the Thirteenth Amendment, which authorizes "legislation . . . necessary or proper to eradicate all forms and incidents of slavery . . . , [and which] may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not." *Id.* at 23. For further discussion of the state action requirement in relation to questions of whether private suppression can be countered, see *infra* notes 99–102 and accompanying text.

48. Hendrik Hartog, *The Constitution of Aspiration and "The Rights That Belong to Us All"*, 74 J. AM. HIST. 1013, 1014 (1987).

to make interpretive and amendatory claims on the Constitution's text."[49] Slaves and early feminists not only made constitutional claims, but "invested the constitutional rights they sought with immanent and unchanging meaning."[50] As a matter of historical practice, judicial interpretations have no ontological monopoly. The mutually constitutive and "dialectical" role of extrajudicial "culture" and constitutional law, indeed, has been recognized and explored in a rich literature on social movements and the idea of popular constitutionalism.[51] These movements are rightly described as constitutional in character even when their claims are not yet embraced by judges or recognized in such piecemeal or disingenuous ways as to make the asserted rights illusory. I fully accept that because of the state action doctrine, or otherwise, some of the "constitutional" claims I identify might well fail in court. But that does not make their depiction as "constitutional" inapt in a historical perspective.

The balance of this Part introduces five different waves of private suppression stretching the length of American history.[52] In each case, I take care to identify the constitutional right in question, the legal mechanism used

49. Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 300 (2001); *see also* Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 GEO. L.J. 897, 898–99 (2005) (noting that "'the People' have become constitutional theory's hottest fashion" and summarizing the major popular constitutionalism literature to that date). On the variable political valance of popular constitutionalism, see Andrea Scoseria Katz, *The Lost Promise of Progressive Formalism*, 99 TEXAS L. REV. 679, 740 (2021).

50. Hartog, *supra* note 48, at 1024.

51. *E.g.*, Robert C. Post, Foreword, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003) ("[C]onstitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture.").

52. One important process of private–public dispossession falls outside the scope of my analysis, and readers are owed an explanation why. When the colonial and early Republic encountered Native Americans, "[t]wo societies converged in a marketplace, and the better organized took wealth from the poorly organized." STUART BANNER, HOW THE INDIANS LOST THEIR LAND 74 (2005). Under the doctrine of preemption, these states "asserted an exclusive government right to purchase Indian title within the claimed boundaries of the United States." Michael A. Blaakman, *"Haughty Republicans," Native Land, and the Promise of Preemption*, 78 WM. & MARY Q. 243, 244 (2021); *see also* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 584 (1823) (recognizing "the exclusive right of the discoverer to appropriate the lands occupied by the Indians"). Congress occasionally "brokered private contracts" for Indian land. Blaakman, *supra*, at 247. But by and large, the occasionally violent and invariably unwilling transfer of land from Indian to Caucasian hands was driven by the state rather than by private parties. Alyosha Goldstein, *By Force of Expectation: Colonization, Public Lands, and the Property Relation*, 65 UCLA L. REV. DISCOURSE 124, 126 (2018). Unilateral private seizures were at least formally criminalized. *Id.* at 132 (collecting examples); *see also* Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 387, 393 (2006) (emphasizing that settler colonialism is "not dependent on the presence or absence of formal state institutions"). And—critically—the state did not create a mechanism for private individuals to directly dispossess Native Americans of their land analogous to the ones examined here. Hence, the dispossession of native lands does not fall within my definition even though its direct beneficiaries were private actors and it involved state as well as private violence.

to suppress that right, and the social group likely to exercise that legal instrument.

B. The Private Rendition of Fugitive Slaves

The Fugitive Slave Act of 1850[53] was one element of Senator Henry Clay's legislated omnibus "Compromise of 1850."[54] It aimed to create an effectual mechanism for slave owners to retrieve escaped captives in the teeth of Northern resistance.[55] The provision's main drafter, James Mason of Virginia, was expressly motivated by the "staggering"[56] financial losses experienced by slave owners as their "property" fled north and by a belief that the Fugitive Slave Act of 1793[57] had failed because of "Free State laws" barring state officials from collaborating in slave rendition and the resistance of "abolitionists, free blacks, and fugitive slaves."[58] The reason to focus on the 1850 Act here, indeed, is precisely the relative inefficacy of its predecessor.

Under the 1850 statute, slave rendition was initiated and driven by private actors. A putative slave owner could either seek a warrant from a judge or "commissioner," or alternatively could proceed directly by "seizing and arresting such fugitive, where the same can be done without process," in order to bring them before a judge or commissioner.[59] The latter had to act "in a summary manner."[60] The judge or commissioner would determine simply if "satisfactory proof," either written or testimonial, existed for handing over the slave.[61] The law prohibited "the testimony of such alleged fugitive [to] be admitted in evidence."[62] Congress created a cadre of federal officials empowered to act as commissioners. Formerly "minor legal

53. Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462 (repealed 1864).

54. Jeffrey Schmitt, *Rethinking* Ableman v. Booth *and States' Rights in Wisconsin*, 93 VA. L. REV. 1315, 1319 (2007).

55. On the context of its enactment, see R.J.M. BLACKETT, THE CAPTIVE'S QUEST FOR FREEDOM: FUGITIVE SLAVES, THE 1850 FUGITIVE SLAVE LAW, AND THE POLITICS OF SLAVERY 4–18 (2018).

56. *Id.* at 5.

57. Fugitive Slave Act of 1793, ch. 7, 1 Stat. 302 (repealed 1864).

58. BLACKETT, *supra* note 55, at 5; Earl M. Maltz, *Slavery, Federalism, and the Constitution:* Ableman v. Booth *and the Struggle Over Fugitive Slaves*, 56 CLEV. ST. L. REV. 83, 87 (2008) (documenting free state laws in force around the 1850s). In 1842, Justice Story's opinion in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), invalidated Pennsylvania's anti-kidnapping statute but left open the constitutional possibility of state laws withdrawing cooperation from slave rendition. *Id.* at 625–26.

59. Fugitive Slave Act of 1850, ch. 60, § 6, 9 Stat. 462, 463 (repealed 1864).

60. *Id.*

61. *Id.* A "certificate" from a slave-state magistrate was "sufficient to establish the competency of the proof." *Id.*

62. *Id.*

administrators,"[63] commissioners were vested in 1850 with concurrent jurisdiction to state and federal district courts over fugitive-slave cases.[64] Unlike judges, commissioners received a fee per case of ten dollars for each slave rendered to claimants and five dollars if the proof did not "warrant such certificate and delivery."[65] They could further deputize private citizens as a posse comitatus to recover an alleged slave.[66] No judicial review nor petition by habeas corpus was available, despite the constitutional commitments of the Fifth Amendment's Due Process Clause[67] and the Suspension Clause.[68]

The statute further created a civil remedy against those who aided slaves.[69] Anyone who might "knowingly and willingly obstruct, hinder, or prevent" a rendition, or "aid, abet, or assist" or "harbor or conceal" a fugitive could be subject both to a criminal fine and also a civil suit for "the sum of one thousand dollars" to an "injured" party.[70]

Each of the elements of private suppression was present in the 1850 Act. While the statute was aimed at the recovery of slaveholders' property, the risk of free Black men, women, and children being swept up under the statute was widely understood (and realized) at the time.[71] In the antebellum period, free Blacks often claimed citizenship[72] despite the hostility of whites and the indifference of judges. They made "legal arguments in newspapers, legislatures, and courts that birth in the United States established their citizenship and guaranteed their rights" and "conduct[ed] themselves like

63. BLACKETT, *supra* note 55, at 7.

64. Fugitive Slave Act of 1850 § 4, 9 Stat. at 462.

65. *Id.* § 8, 9 Stat. at 464.

66. *Id.* § 5, 9 Stat. at 462–63.

67. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .").

68. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

69. Fugitive Slave Act of 1850 § 7, 9 Stat. at 464. The 1793 law had a narrower provision imposing civil liability on those who "obstruct[ed] or hinder[ed]" a rendition. Fugitive Slave Act of 1793, ch. 7, § 4, 1 Stat. 302, 305 (repealed 1864); *see also* Paul Finkelman, *The Kidnapping of John Davis and the Adoption of the Fugitive Slave Law of 1793*, 56 J.S. HIST. 397, 415–16 (1990) (describing origins and use of this provision).

70. Fugitive Slave Act of 1850 § 7, 9 Stat. at 464. This tracked a provision under the 1793 law. *See, e.g.*, Jones v. Vanzandt, 13 F. Cas. 1054, 1056 (C.C.D. Ohio 1849) (No. 7,503) ("If the act be in violation of the law, and it shall deprive the master of the services of his slave, an action of trespass on the case is sustainable."). I have not been able to find suits filed under the 1850 civil damages provision.

71. *See* ANDREW DELBANCO, THE WAR BEFORE THE WAR: FUGITIVE SLAVES AND THE STRUGGLE FOR AMERICA'S SOUL FROM THE REVOLUTION TO THE CIVIL WAR 5 (2018) (describing how "free black people in the North—including those who had never been enslaved—found their lives infused with the terror of being seized and deported on the pretext that they had once belonged to someone in the South"); BLACKETT, *supra* note 55, at 15 (describing the formation of "vigilance committees" in Black communities to guard against this risk).

72. For a powerful history, see MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA 130 (2018).

rights-bearing citizens when they litigated disputes over property, credit, and family autonomy in court.[73] In 1853, for example, a Black convention in Rochester, New York, promulgated an address "to the People of the United States" asserting that free Blacks were citizens "by the principles of the Declaration of Independence."[74]

The procedural structure of the Act—in particular the asymmetrical evidentiary rules, payoffs to commissioners, and absence of judicial supervision—plainly accentuated the risk to free Black people at a time of widespread anti-Black prejudice in the North.[75] This risk was recognized not only by free Blacks but also more widely. Within two months of President Millard Fillmore having signed the Fugitive Slave Act of 1850, "scores of meetings were held throughout the North to condemn and declare open defiance of the law," declaring support for runaway slaves.[76] Many passed resolutions "condemning the law as inhumane and unconstitutional."[77] Some of these picked out the risk to "all colored men" and stressed the absence of "provisions to defend blacks against false claims."[78] In Wisconsin, the seizure of a former slave called Joshua Glover catalyzed a riot and jailbreak.[79] The Glover case ultimately led to the Supreme Court's decision in *Ableman v. Booth*,[80] repudiating state courts' authority to exercise habeas jurisdiction over those in federal custody.[81]

Finally, the Act envisaged—indeed catalyzed—private actors' repeated invocation of a legal process, either before a judge or a commissioner, in which the liberty of a person was potentially erroneously extinguished in favor of the counterparty's property claim. It gave private actors a Hohfeldian power to extinguish that liberty interest by the simple act of declaring a person to be one's property. This was a power repeatedly exercised. The first person arrested under the law, James Hamlet of Williamsburg, Brooklyn, was brought before a commissioner (a former judicial clerk), denied the ability to

73. Dorothy E. Roberts, Foreword, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 57 (2019).

74. Benjamin Quarles, *Antebellum Free Blacks and the "Spirit of '76"*, 61 J. NEGRO HIST. 229, 238 (1976) (quoting PROCEEDINGS OF THE COLORED NATIONAL CONVENTION (1853), *reprinted in* MINUTES OF THE PROCEEDINGS OF THE NATIONAL NEGRO CONVENTIONS, 1830–1864, at 7, 11 (Howard Holman Bell ed. 1969)).

75. *See* Scott J. Basinger, *Regulating Slavery: Deck-Stacking and Credible Commitment in the Fugitive Slave Act of 1850*, 19 J.L. ECON. & ORG. 307, 323–24 (2003) (describing these elements of the 1850 Act as "deck-stacking").

76. BLACKETT, *supra* note 55, at 14–15.

77. *Id.* at 15.

78. *Id.* at 18.

79. A.J. Beitzinger, *Federal Law Enforcement and the* Booth *Cases*, 41 MARQ. L. REV. 7, 10–11 (1957); Schmitt, *supra* note 54, at 1316.

80. 62 U.S. (21 How.) 506 (1858).

81. *Id.* at 523.

testify, and summarily transported by steamboat to Baltimore.[82] Even in the antislavery stronghold of Boston, a slave called Thomas Sims could be detained and, with the aid of attorney Daniel Webster, delivered by boat to Georgia.[83] In practice, the Act "muddied" the "legal distinction between free people of color and slaves."[84] Yet writing to Webster—his Secretary of State—about the Sims case, Filmore would "congratulate [him] and the country upon a triumph of law in Boston."[85] The law's "triumph" would ultimately yield some 332 reported cases; of these only thirty-four (10.2%) were "freed by the federal tribunal, escaped, or were rescued."[86]

C. Recreating Slavery with Contract After the Civil War

The Thirteenth Amendment to the Constitution prohibits "slavery" and "involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted."[87] Immediately after the Civil War, and again after the Compromise of 1877, Southern states nevertheless introduced a raft of legal strictures aimed at allowing agricultural and industrial capitalists to recreate the circumstances of unfree Black labor across much of the South. Both criminal and civil law mechanisms generally (albeit not inevitably) were set in motion by private employers seeking discounted or free labor. These legal mechanisms enabled the systematic extinguishing of Blacks' Thirteenth Amendment rights. While the "duly convicted" exception to slavery's prohibition played a role, in large measure, contractual devices were crafted in ways that ensured the persistence of bondage absent criminal convictions.[88] Given these elements, this cluster of laws warrants analysis as an example of private suppression.

The Southern judicial system at the turn of the century had as "one of its primary purposes the coercion of African Americans to comply with the social customs and labor demands of whites."[89] A class of "powerful white planters . . . used every available means—political, economic, legal,

82. DELBANCO, *supra* note 71, at 264.

83. *Id.* at 273–81 (providing a detailed account of Thomas Sims's capture).

84. JONES, *supra* note 72, at 130.

85. DELBANCO, *supra* note 71, at 282.

86. Basinger, *supra* note 75, at 339–40; *see also* STANLEY W. CAMPBELL, THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850–1860 app. at 207 tbl.12 (1968) (reporting these 332 cases based on archival research).

87. U.S. CONST. amend. XIII, § 1.

88. For a discussion of the "duly convicted" exemption, see REBECCA M. MCLENNAN, THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE, 1776–1941, at 85–86 (2008).

89. DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 7 (2008).

violent—to control . . . black workers."[90] "Planters did not wish," above all, "to negotiate with the former slaves as free laborers."[91] They used the legal system to negate any need to do so.

My aim here is to tease out one cluster of legal affordances made available to white landowners and industrial capitalists to extract involuntary labor from Blacks in defiance of the Thirteenth Amendment. Note well that these state laws were merely threads in a much larger "system of coercive labor in which blacks enjoyed neither ownership of the land nor the full rewards of their toil."[92] My account is selective. It is aimed at showing the existence of private suppression, not describing the legal structure of Jim Crow in its full, gory glory.

The range of such private law tools included "[e]nticement laws, emigrant agent restrictions, contract laws, vagrancy statutes, the criminal-surety system, and convict labor laws."[93] Their operation was complex. To begin with, planters would draft "provisions to ensure that blacks would be in debt at the end of the year."[94] The South Carolina planter John DeSaussure, for instance, charged a worker almost $70 for rations and "lost time," while paying wages of less than $50—hence leaving the worker almost $20 in debt.[95] Once a worker accumulated such a debt over time, "a variety of contract-enforcement statutes virtually legalized peonage."[96] In some instances, the law further made it a criminal offense for laborers to break their contract even when no debt was owed.[97] "The fact that simple breach [of contract] was made a crime was enough to ensure the subservience of the laborer . . . ."[98]

Black laborers who did escape their immediate employer could nonetheless be entangled in the wider mesh of vagrancy statutes, which

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90. RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 53 (2007); *see also* Daniel, *supra* note 22, at 88 (noting how economic and political mechanisms were used to deprive Black people of equal rights even after emancipation). The use of violence is charted in NICHOLAS LEMANN, REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR 11 (2006).

91. CAITLIN ROSENTHAL, ACCOUNTING FOR SLAVERY: MASTERS AND MANAGEMENT 162 (2018).

92. LEON F. LITWACK, HOW FREE IS FREE?: THE LONG DEATH OF JIM CROW 36 (2009).

93. Daniel, *supra* note 22, at 95–96.

94. *Id.* at 96.

95. ROSENTHAL, *supra* note 91, at 162–63.

96. William Cohen, *Negro Involuntary Servitude in the South, 1865–1940: A Preliminary Analysis*, 42 J.S. HIST. 31, 33 (1976); *see also* DANIEL A. NOVAK, THE WHEEL OF SERVITUDE: BLACK FORCED LABOR AFTER SLAVERY 20 (1978) (describing South Carolina's breach of contract law).

97. Cohen, *supra* note 96, at 33.

98. NOVAK, *supra* note 96, at 20–21. Black farmers did, however, win contracts claims in an exceedingly small number of cases. *See* Brittany Farr, *Breach by Violence: The Forgotten History of Sharecropper Litigation in the Post-Slavery South*, 69 UCLA L. REV. 674 app. B (compiling and discussing cases).

"enabled police to round up idle blacks in times of labor scarcity and also gave employers a coercive tool" against workers threatening exit.[99] Lest the threat of private suit prove inadequate, many states also set out criminal sanctions "for breach of contract."[100] A 1903 Alabama law, invalidated by the U.S. Supreme Court in 1911, made a supposedly unjustified refusal to work under a contract "prima facie evidence of the intent to injure or defraud [an] employer."[101] Even without these overtly extractive measures, white landowners could falsely accuse Black agricultural workers of fraud, have them arrested, pay their fine, and then force them to work off the debt that ensued.[102]

Another way to recreate the economic conditions of slavery was through the convict leasing system. Under these state-law systems, convicted "prisoners worked for outside employers and labored under the supervision of outside foremen but remained under the disciplinary control of a warden and guards."[103] Prisoners faced conditions "with very real similarities to the slave system."[104] Convict leasing operated most intensively in urban environments where there were no white landowners keeping Blacks tied to their land, but where interracial economic competition was nonetheless acute.[105] Such schemes were hence less concerned with labor extraction. They were rather oriented toward disciplining "African-Americans who rejected their 'place' in the agrarian social order."[106] Economic ordering thus buttressed the material and social facts of racial hierarchy.

State law provided landowners and industrialists with powers not only against Black labor but also against third parties. Enticement statutes created private rights of action to enforce "the proprietary claims of employers to

99. Cohen, *supra* note 96, at 33–34. "[A]ll the former Confederate states except Tennessee and Arkansas passed new vagrancy laws in 1865 or 1866." *Id.* at 47. On the operation of vagrancy statutes, see AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 116–17 (1998). Many remained on the books until *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), in which the Court invalidated a vagrancy ordinance on vagueness grounds. *Id.* at 162.

100. Cohen, *supra* note 96, at 42.

101. *Id.* at 43; Bailey v. Alabama, 219 U.S. 219, 245 (1911).

102. BLACKMON, *supra* note 89, at 66–67; NOVAK, *supra* note 96, at 23.

103. Christopher R. Adamson, *Punishment After Slavery: Southern State Penal Systems, 1865–1890*, 30 SOC. PROBS. 555, 556 (1983); *see also* Matthew J. Mancini, *Race, Economics, and the Abandonment of Convict Leasing*, 63 J. NEGRO HIST. 339, 339 (1978) (describing convict leasing as "a component of that larger web of law and custom which effectively insured the South's racial hierarchy").

104. ROSENTHAL, *supra* note 91, at 182.

105. Christopher Muller, *Freedom and Convict Leasing in the Postbellum South*, 124 AM. J. SOCIO. 367, 371 (2018).

106. *Id.* at 396 (quoting ALEX LICHTENSTEIN, TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH 71 (1996)); *see also* Adamson, *supra* note 103, at 565 ("Southern state penal systems were themselves instruments of social stratification.").

'their' [workers]."[107] Further, emigrant agent laws imposed prohibitive license fees on those seeking to move labor from one state to another.[108] These laws complemented informal agreements between local landowners not to poach each other's laborers and so allowed those owners to "use[] state power to enforce the interests of their class and prevent those individualists among them who desired to engage in market economics."[109]

In scale and in operation, then, the laws generating involuntary servitude in slavery's wake can be properly characterized as a system of private suppression. As a threshold matter, they aimed largely successfully at recreating, by law, the condition of involuntary servitude purportedly eliminated by the Thirteenth Amendment. They achieved this ambition, on and off, "from 1865 to 1940," across much of the American South.[110] Civil law, in the form of contract enforcement laws, enticement laws, and the like, placed landowners and industrialists in control of the system's operation. To the extent the mechanisms described here are criminal, their initiation formally depended on state action. Nevertheless, in practice the private employers benefiting from a cheap or free labor supply set those laws in motion. And in practice, indeed, even criminal law mechanisms of labor extraction hinged on private initiatives in a number of different ways. To begin with, arresting sheriffs were paid by those to whom a convict was leased and so were "financially motivated to arrest and convict as many people as possible."[111] In addition, the "provincial judges, local mayors, and justices of the peace" who handled these laws were "often men in the employ of the white business owners who relied on the forced labor produced by the judgements."[112] And "more often than not," the powerful justice of the peace was himself proprietor of a "large farm."[113] In short, even the notionally public elements of these systems in practice worked to private ends.

D. The Privatization of Southern Political Power and the Demise of the Black Franchise

This system of involuntary labor could not have survived if Southern Blacks had been able to flex political muscle via the franchise. The third example of private suppression developed concurrently to state laws aimed at forestalling Blacks' exercise of political rights. I focus on one element

107. Cohen, *supra* note 96, at 33.

108. *Id.*

109. Jonathan M. Wiener, *Class Structure and Economic Development in the American South, 1865–1955*, 84 AM. HIST. REV. 970, 974 (1979).

110. Daniel, *supra* note 22, at 96.

111. BLACKMON, *supra* note 89, at 65. Sheriffs technically received fines paid by defendants, but those fines could be paid by the prospective employer. *Id.* at 62–63.

112. *Id.* at 7.

113. *Id.* at 61–62.

here: white primaries, used in Texas, depended not on a private right of action but on a state-law right of private associations to exclude individuals from membership. This cashed out as a powerful tool to take away the Black franchise.

Even before they had possessed a constitutional right to vote, Southern Black men had cast ballots in referendums on new state constitutions organized by military Reconstruction governments in the South.[114] The Fifteenth Amendment, ratified in 1870, stipulated that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[115] While using the passive voice in this text, the radical Republican Congress nevertheless aimed to constitutionalize "the once-radical idea of nationwide black suffrage" at a moment when its post-Civil War persistence seemed particularly precarious.[116]

After 1870, Blacks were still "coerced, defrauded, or intimidated" but nonetheless "continued to vote in large numbers in most parts of the South."[117] Between 1865 and 1900, twenty-two Black men were elected to the U.S. Congress; scores more were also elected to state and local offices.[118] Starting in the early 1870s, and accelerating up to the end of the century, though, Southern states enacted legal measures to limit Black political power. These included gerrymanders, the closure of polling places, financial barriers to vote, literacy tests, secret-ballot laws, and confusing multiple voting-box arrangements.[119] At the same time, campaigns of terrorist violence also kept Blacks from physically reaching polling stations.[120] One strand of this network for political repression merits attention here since it involved a legal affordance for private parties that yielded suppression of Blacks' constitutional right to vote. Like S.B. 8, this legal technology of private suppression was invented in Texas.

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114. THOMAS HOLT, BLACK OVER WHITE: NEGRO POLITICAL LEADERSHIP IN SOUTH CAROLINA DURING RECONSTRUCTION 26 (1977).

115. U.S. CONST. amend. XV, § 1.

116. Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. U. L. REV. 1549, 1604 (2020). Black votes, though, proved essential to the passage of the Fifteenth Amendment. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 103 (2000).

117. C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 53 (3d rev. ed., reprt. 1975) (1955).

118. DARLENE CLARK HINE, BLACK VICTORY: THE RISE AND FALL OF THE WHITE PRIMARY IN TEXAS 52 (2003).

119. KEYSSAR, *supra* note 116, at 89, 105, 112, 115. These measures disenfranchised across the color line. *See* J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910, at 6–8 (2d prtg. 1975) (explaining how "many of the laws that disenfranchised blacks worked nearly as potently against lower-class whites").

120. KEYSSAR, *supra* note 116, at 105–06.

By the end of the century, Texas had become a one-party state. Victory in the Democratic primary meant victory overall.[121] Disenfranchisement in the primary, as a result, was tantamount to exclusion from the franchise writ large. State law vested private actors with legal affordance to preserve a racially exclusive electorate. In 1923, Texas's legislature enacted a measure stating that Blacks were "[i]n no event . . . eligible to participate in a Democratic party primary election held in the State of Texas."[122] In 1927, the Supreme Court in a terse opinion by Justice Holmes invalidated this rule, citing the Fourteenth Amendment.[123] Texas's legislature responded with a law that empowered the executive committee of a political party to prescribe qualifications for membership.[124] Five years later, the Court stepped in again, invalidating this new regime and focusing on Texas's decision to repose the primary electorate's screening in the committee's hands.[125]

Three weeks later, however, the Texas State Democratic Party passed sua sponte a resolution barring Blacks from membership.[126] The primary election was mandated by the state—a legal delegation that predictably enabled a private actor to suppress the Black franchise. As a result of this law, the Democratic Party gained a legal monopoly over access to the franchise that it was able to leverage into blanket Black disenfranchisement. When the inevitable challenge reached the Supreme Court, the Justices discerned no state action and unanimously declined to intervene.[127] Nine years later, however, the Court reversed course.[128] It had by then been substantially reconstituted by President Roosevelt; its members had been

121. *See* Darlene Clark Hine, *The Elusive Ballot: The Black Struggle Against the Texas Democratic White Primary, 1932–1945*, 81 SW. HIST. Q. 371, 390–91 (1978) (describing how the Democratic primary was the de facto election for state leadership).

122. *Id.* at 373.

123. Nixon v. Herndon, 273 U.S. 536, 541 (1927). *Herndon* is a controversial case for reasons that are not relevant here. For an argument that "a straightforward reading of the text makes it clear that the Equal Protection Clause does not require equality in voting," see David A. Strauss, Foreword, *Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 38 (2015). *See also* Crum, *supra* note 116, at 1579 ("[T]he Fourteenth Amendment was originally understood *not* to mandate suffrage for the freedmen.").

124. HINE, *supra* note 118, at 142–44.

125. *See* Nixon v. Condon, 286 U.S. 73, 88–89 (1932) (stating that "[d]elegates of [Texas's] power have discharged their official functions in such a way as to discriminate invidiously between white citizens and black" in violation of the Fourteenth Amendment).

126. *See* Hine, *supra* note 121, at 375 (noting that the resolution allowed only white citizens to be eligible for membership).

127. Grovey v. Townsend, 295 U.S. 45, 52–53 (1935).

128. Smith v. Allwright, 321 U.S. 649, 666 (1944). For criticism of *Smith*'s state action holding, see Note, *The Strange Career of "State Action" Under the Fifteenth Amendment*, 74 YALE L.J. 1448, 1456 (1965).

freshly exposed to the horrors of racial hierarchy in Germany as well as to the heroism of Black soldiers fighting for the Allies.[129]

One more twist remained to this saga. In the 1870s and 1880s, whites in East Texas towns such as Grimes, Wharton, Fort Bend, and Harrison formed racially exclusionary private associations to select candidates for a Democratic primary.[130] In Fort Bend County, for example, the Jaybird Democratic Association exercised this prerogative, without legal sanction, from the 1890s.[131] Once Texas had mandated primaries, and the Court had held that a party itself could bar Blacks from those ballots, associations such as the Jaybirds offered a tempting pathway through which Blacks could again be disenfranchised. The Court by an 8–1 majority struck down the Jaybirds' "hateful little scheme."[132] The Justices' discussions at conference underscored their fear that unless the Jaybirds' power was curtailed, it would "be seized upon" and would replicate the white primary in Texas and beyond.[133]

Today, eligibility in primary elections is largely a matter of state law, not private discretion.[134] Nevertheless, an echo of the white primary still exists in the form of statutes, found in thirty-nine states, that allow private citizens to challenge voters as they enter the polls to cast their ballots.[135] Twenty-four of these state laws allow challengers to act even if they lack evidence of voting irregularities and so leave a voter vulnerable to "frivolous or discriminatory" challenges.[136] Even if that voter is not prevented from casting a ballot, the prospect of hassle and confrontation at the polls may be a disincentive to participating in an election. In one suit filed by Black voters in Ohio, for example, a federal district court granted a preliminary injunction against Ohio's law on the ground that "the presence of vast numbers of

129. *See* KEYSSAR, *supra* note 116, at 248 (noting Roosevelt's appointment of new Justices and the "wartime shift in thinking about racial equality in the United States" as reasons underlying Court's decision in *Smith*); *see also* Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55, 64–65 (2001) (exploring reasons for the Court's decision in *Smith* to overrule *Grovey*).

130. Hine, *supra* note 121, at 372.

131. *Id.* at 391.

132. Klarman, *supra* note 129, at 68; *see also* Terry v. Adams, 345 U.S. 461, 470 (1953) (holding that the Jaybirds' practices "deprived . . . petitioners of their right to vote on account of their race and color").

133. Klarman, *supra* note 129, at 68 (quoting THE SUPREME COURT IN CONFERENCE, 1940–1985, at 839 (Del Dickson ed., 2001)).

134. On the scope of such state power, and the limits imposed by the First Amendment, see Michael S. Kang, *Sore Loser Laws and Democratic Contestation*, 99 GEO. L.J. 1013, 1025–30 (2011).

135. NICOLAS RILEY, BRENNAN CTR. FOR JUST., VOTER CHALLENGERS 5 (2012).

136. *Id.* at 1; *see also* Peter K. Schalestock, *Monitoring of Election Processes by Private Actors*, 34 WM. MITCHELL L. REV. 563, 571 (2008) (explaining that the "means of adjudicating these challenges and the effect if they succeed vary widely from state to state, including barring the voter from casting a ballot and requiring them to vote using a provisional ballot subject to later review").

challengers inexperienced in the electoral process . . . imposes a severe burden on the right to vote of individual voters and of Ohio voters at large."[137] Sixteen years later, during the hotly contested 2020 elections, poll watchers fielded by the Trump campaign reignited a controversy of the same sort.[138] In other words, private use of state-law affordances as a means to suppress others' votes hence remains a live possibility.

The use of white primaries illustrates a variant of private suppression unlike the Fugitive Slave and Jim Crow examples. As in those cases, there is a constitutional right plausibly claimed by a distinct group (now under the Fifteenth Amendment). State law furnished a mechanism to private actors wishing to suppress those rights, and that power was used by the executive committee of the Democratic Party and the Jaybirds for a considerable period of time.

E. Smothering Labor's Speech and Association in the Gilded Age

Immediately before and after the twentieth century's dawn, employers around the nation turned to the federal bench. They asked judges to squash workers' speech and associational rights, citing private law concepts of tort and contract. In the ensuing litigation, judges created new civil-law affordances to enable employers to suppress workers' speech and association, often with violence. Like the legal infrastructure of involuntary servitude, this network of new private law mechanisms was largely a success. Unlike the white primary cases, it never provoked a rebuke from the Supreme Court.

At the turn of the century, state and federal judiciaries recognized few limits on the state's power to regulate or prohibit speech in public places.[139] Unions, in contrast, "conceptualized . . . the rights to strike, boycott, and picket, along with the more familiar right to advocate political change" as "manifestations of expressive freedom, worthy of government toleration and perhaps affirmative support."[140] While their claims were not recognized by

137. Spencer v. Blackwell, 347 F. Supp. 2d 528, 535 (S.D. Ohio 2004).

138. Trevor Hughes, *Trump 'Army' of Poll Watchers Could Frighten Voters, Incite Violence, Election Officials Warn*, USA TODAY (Oct. 14, 2020, 5:17 PM), https://www.usatoday.com/story/news/politics/elections/2020/10/14/2020-election-trump-army-poll-watchers-stirs-fears-violence/5908264002/ [https://perma.cc/G7VZ-CF9H].

139. *See, e.g.*, Davis v. Massachusetts, 167 U.S. 43, 44, 47 (1897) (affirming the conviction of a preacher for speaking on public grounds in Boston without a permit).

140. LAURA WEINRIB, THE TAMING OF FREE SPEECH 15–16 (2016); *see also id.* at 32 (noting labor's commitment to "a vision of free speech more expansive than a right to political advocacy"). For a clear statement of the constitutional character of these claims, see James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 965 (1997).

the federal courts,[141] they were tendered as defiant alternatives to the then-dominant constitutional vision in mainstream politics and also inside the courtroom.[142] The National Civil Liberties Board, precursor to today's ACLU, championed a right to agitation as the core of free speech. It vigorously defended "the right of workers to picket and boycott not only for higher wages or a union contract, but also for a fundamental transformation in the relationship between labor and capital."[143]

Employers did not, of course, go along lightly with this constitutional vision. To the contrary, they turned to federal judges to enjoin workers' efforts at collective bargaining and association. The private law of contract and tort, at times refracted through the substantive due process doctrine of the day, furnished them with an arsenal of weapons to this end. I focus on two: the labor injunction and the yellow-dog contract.

First, although strikes to improve wages and working conditions were "clearly legal," employers were able to use "common law and antitrust doctrine" to condemn boycotts of either consumers or producers in "needlepoint detail."[144] Between 1880 and 1930, state and federal courts issued roughly 4,300 injunctions prohibiting secondary actions.[145] These injunctions were justified on the ground that labor action threatened employers' pecuniary interests, and therefore "trenched on employers' 'property.'"[146] In 1911, the Supreme Court held that "words and signals, printed or spoken, [that] caused or threatened irreparable damage" through a boycott were outside the First Amendment's freedom of speech.[147] In 1908, the Court applied the Sherman Act to combinations of workers engaged in secondary boycotts through the daily press.[148] Seven years later, it also allowed employers to secure treble damages from workers.[149] The lawyer for

141. A later recognition of the right to picket as an element of the First Amendment is *Thornhill v. Alabama*, 310 U.S. 88, 95, 104–05 (1940). Yet even *Thornhill* had a limited effect. *See* JULIUS G. GETMAN, THE SUPREME COURT ON UNIONS 91–92 (2016) (explaining how decisions following *Thornhill* qualified the constitutional right to picket where picketing may force employees to unionize).

142. For example, the American Federation of Labor's reaction to decisions denying the right to boycott was "to ignore the . . . injunction as a violation of freedom of speech and of the press." CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960, at 65 (1985).

143. WEINRIB, *supra* note 140, at 84.

144. WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 59–60 (1991); *see also* WEINRIB, *supra* note 140, at 33 (discussing labor rights recognized at the turn of the twentieth century).

145. FORBATH, *supra* note 144, at 61.

146. *Id.* at 85.

147. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 437 (1911).

148. Loewe v. Lawlor, 208 U.S. 274, 285, 305, 308–09 (1908); *see also* GETMAN, *supra* note 141, at 3 (discussing the effect of this opinion).

149. Lawlor v. Loewe, 235 U.S. 522, 536–37 (1915).

the Danbury, Connecticut manufacturer who litigated those cases combed local bank and real estate records to find union members with assets to attach.[150] By invoking an equitable remedy, employers were also able to do "away with local grand juries, local petit juries, [and] local officers" in favor of a swift, ex parte hearing before a sympathetic judge.[151]

Second, employers inserted yellow-dog clauses into their contracts with workers that prohibited them from joining a union. These were "written promises in which a workman as a condition of employment obligate[d] himself not to join a labor union."[152] From the perspective of unions, these clauses infringed on the "freedom to shape the conditions of daily life," such that whether or not a worker could find work elsewhere "has nothing to do" with their validity.[153] Contemporary observers agreed that these clauses threw "the weight of government behind the anti-union employers in their efforts to destroy the unions."[154]

Until 1900, yellow-dog clauses were largely enforced by "employers' unaided power to intimidate."[155] After 1900, employers seeking injunctions again turned to equity courts.[156] In 1915, the Supreme Court invalidated a Kansas law that prohibited yellow-dog clauses.[157] Then, in 1917, the Justices endorsed the availability of injunctive relief when a yellow-dog contract had been violated, framing the matter as a variation on the enticement problem and so a question of "unfair competition."[158] High-court intervention led to the extension of yellow-dog contracts to new industries. One commentator estimated that 1,125,000 workers were bound by them in 1930.[159]

Employers wielding yellow-dog clauses in court directed their suits against unions, rather than workers.[160] Indeed, there was even by 1930 "[n]o case . . . of an employer's suit against a workman violating a non-union agreement."[161] In the West Virginia coal fields, instead, unions were barred from "holding meetings, publishing information about the [union, and]

150. FORBATH, *supra* note 144, at 93 n.131.

151. *Id.* at 99.

152. Edwin E. Witte, *"Yellow Dog" Contracts*, 6 WIS. L. REV. 21, 21 (1930).

153. Pope, *supra* note 140, at 964.

154. Witte, *supra* note 152, at 31.

155. FORBATH, *supra* note 144, at 116 n.65.

156. *Id.*

157. Coppage v. Kansas, 236 U.S. 1, 26 (1915).

158. Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 259 (1917).

159. Witte, *supra* note 152, at 21. Companies also responded to *Hitchman* by expanding yellow-dog clauses to cover post-termination behavior. Cornelius Cochrane, *Why Organized Labor Is Fighting "Yellow Dog" Contracts*, 15 AM. LAB. LEGIS. REV. 227, 229–30 (1925).

160. Witte, *supra* note 152, at 22 ("The value of yellow dog contracts lies not in enforcement against the workmen who sign them, but in injunctions against attempts of unions to organize . . . .").

161. *Id.*

distributing food to miners striking for union recognition."[162] And the Supreme Court's imprimatur upon anti-union activity further invited and "legitimate[d] the savagery with which the mine operators policed their company towns."[163]

Capital's campaign against what would now be recognized as plainly protected political speech by workers and unions was a success.[164] As one supporter of labor put it, "All that the employees had . . . was a right to try to organize if they could get away with it."[165] To be sure, their defeats did not solely follow from the law: employers also relied on "non-union unions" and the violent services of detective agencies such as the Pinkertons.[166] But the 1910s "mark[ed] a fundamental transition from a private-public system of labor violence to a more centralized repressive state apparatus"[167] that used the labor injunction as its principal sword.

Labor-capital disputes in the Progressive Era, in short, were characterized by repeated "attempt[s] by certain groups of employers to enlist judicial power on their side of labor disputes."[168] While the behavior they aimed to quash was often denied constitutional protection by the courts, labor unions themselves recognized the stakes as constitutional in character. Today, of course, we do not balk at describing activities such as publishing, holding meetings, and speaking in public as First Amendment speech.[169] As a result, this episode of American history is appropriately ranked as yet another instance of the private suppression of constitutional rights.

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162. FORBATH, *supra* note 144, at 116 n.67.

163. *Id.* at 116; *see also* Daniel Ernst, *The Yellow-Dog Contract and Liberal Reform, 1917–1932*, 30 LAB. HIST. 251, 256 (1989) (noting that "users of yellow-dog contracts were typically nonunion firms in competitive industries divided into union and nonunion sectors" and estimating, more modestly, that "yellow-dog contracts covered about 200,000 workers in 1929").

164. *See* TOMLINS, *supra* note 142, at 68 (arguing that judicial "antagonism" caused a "pronounced fall in [unions'] overall rate of growth"). *But see* Hartog, *supra* note 48, at 1023 (noting that *Hitchman* "provided a common symbol for labor organizing throughout the 1920s").

165. JEROLD S. AUERBACH, LABOR AND LIBERTY: THE LA FOLLETTE COMMITTEE AND THE NEW DEAL 7 (1966) (quoting WILLIAM M. LEISERSON, RIGHT AND WRONG IN LABOR RELATIONS 27 (2d prtg. 1942)).

166. Vilja Hulden & Chad Pearson, *The Wild West of Employer Anti-Unionism: The Glorification of Vigilantism and Individualism in the Early Twentieth-Century United States*, *in* CORPORATE POLICING, YELLOW UNIONISM, AND STRIKEBREAKING, 1890–1930, at 205, 206–07 (Matteo Millan & Alessandro Saluppo eds., 2021); *see also* WEINRIB, *supra* note 140, at 270 (describing violence by the Ford Motor Company against workers even after the passage of the Wagner Act).

167. Michael Cohen, *"The Ku Klux Government": Vigilantism, Lynching, and the Repression of the IWW*, J. STUDY RADICALISM, Spring 2007, at 31, 33.

168. Ernst, *supra* note 163, at 251.

169. *See, e.g.*, *id.* at 257 (noting that "even peaceful persuasion intended to induce workers to join the union could be enjoined").

F. The Private Enforcement of Racial Segregation in the 1930s and 1970s

The final historical example of private suppression concerns housing and the state-sponsored reproduction of racial segregation in American cities in the twentieth century. I focus here on two legal mechanisms that were made available by state contract law and federal statutes respectively. The first was the racially restrictive covenant, enforced under state contract law until the 1950s. The second was a mechanism for allocating governmental financing through the private mortgage market under the Housing and Urban Development (HUD) Act of 1968.[170] Both of these legal devices gave private actors powerful tools to sustain and deepen racial residential segregation. In effect, both created a way to negate Black residents' Fourteenth Amendment rights.[171]

In 1917, the Supreme Court in *Buchanan v. Warley*[172] struck down a Louisville zoning ordinance "requiring, as far as practicable, the use of separate blocks, for residences, places of abode and places of assembly by white and colored people respectively."[173] The Court characterized the measure as a violation of due process, not equal protection.[174] Nevertheless, the case established a constitutional right to a residence regardless of race as of 1917, even though racial segregation by law in other facilities was not invalidated until 1955.[175]

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170. Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 235(a), 82 Stat. 476, 477–78 (codified as amended in scattered sections of 12 U.S.C. and 42 U.S.C.).

171. Private suppression using legal affordances was not the only cause of persisting racial residential segregation. In the early twentieth century, the federal government used race as a criterion for the provision of mortgage refinancing. Through the practice of "redlining" minority neighborhoods, "[g]overnment and private industry came together to create a system of residential segregation." RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 75 (2017). But the first mover in this system was the federal government; the law provided no procedural mechanisms for private parties to take the initiative in ways that promoted racial segregation. Recent historical scholarship also points to the role of municipal bond markets in channeling project financing in ways that created and reinforced racial segregation. *See* DESTIN JENKINS, THE BONDS OF INEQUALITY: DEBT AND THE MAKING OF THE AMERICAN CITY 16 (2021) (describing the "expansion of a segregated pie," in which "select neighborhoods" received funding streams). Here again, private–public action resulted in segregation—but there was no legal mechanism that private parties could employ.

172. 245 U.S. 60 (1917).

173. *Id.* at 70. Louisville's was one of several measures enacted in the 1910s. Roger L. Rice, *Residential Segregation by Law, 1910-1917*, 34 J.S. HIST. 179, 180–82 (1968) (tracing the rise of expressly discriminatory zoning to Baltimore).

174. *See Buchanan*, 245 U.S. at 82 (characterizing the measure as improper "state interference with property rights").

175. *E.g.*, Brown v. Bd. of Educ., 349 U.S. 294, 298 (1955) (declaring racial segregation in public schools unconstitutional).

Buchanan's effect is debatable due to the ready availability of substitutes for racially restrictive zoning laws.[176] Indeed, there is little doubt that racial segregation persisted even though it could not be directly imposed by the state via a zoning ordinance. Two workarounds of *Buchanan* merit attention here. Both are private suppression schemes that emerged to circumvent the prohibition on racialized zoning.

First, realtors in the late nineteenth and early twentieth century began adding to deeds "an appendix or article . . . not to sell, rent, or lease property to minority groups, usually blacks, but also, depending on the part of the country, Jews, Chinese, Japanese, Mexicans, or any non-Caucasians."[177] On first encounter in 1926, the Supreme Court upheld these provisions on the ground that the Constitution does not "prohibit[] private individuals from entering into contracts respecting the control and disposition of their own property."[178] In the 1920s, such provisions became "nationalized" in response to *Buchanan* and the influx of Blacks into Northern cities during the Great Migration.[179] This was the result of both deliberate state action and a concerted push by racially discriminatory private actors. On the one hand, the Federal Housing Authority (FHA) in 1936 recommended that deeds on properties on which it issued mortgage insurance contain an explicit prohibition on resale to Blacks.[180] The FHA would continue to exclude "virtually all" Black neighborhoods, thus further extending the reach of residential segregation.[181] According to one historian, moreover, the action of "the political branches of the national government legitimizing restrictive covenants and residential segregation" meant that "the justices were naturally disinclined to interfere."[182] Here, the state did not just play a seminal role in endorsing and propagating the legal affordance of the racially restrictive covenant, it did so in a way that ensured the endurance of racial segregation.

176. *Compare* Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 942–44 (1998) (arguing that regular zoning, racial covenants, informal discrimination, and unofficial violence provided substitutes), *with* William A. Fischel, *Why Judicial Reversal of Apartheid Made a Difference*, 51 VAND. L. REV. 975, 975 (1998) ("Because *Buchanan* helped blacks gain a foothold, albeit a segregated one, in central cities, it was instrumental in facilitating the Great Migration of blacks from the rural South to urban areas in the North.").

177. Michael Jones-Correa, *The Origins and Diffusion of Racial Restrictive Covenants*, 115 POL. SCI. Q. 541, 544 (2000).

178. Corrigan v. Buckley, 271 U.S. 323, 330 (1926).

179. Jones-Correa, *supra* note 177, at 551–52, 567 (emphasizing the 1917–1920 race riots as an especially pivotal moment).

180. ROTHSTEIN, *supra* note 171, at 84. I am grateful to Lee Fennell for calling attention to this source.

181. WILLIAM JULIUS WILSON, MORE THAN JUST RACE: BEING BLACK AND POOR IN THE INNER CITY 28 (2009).

182. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 146 (2004).

But private action mattered too. A standard form clause restricting interracial transfers was drafted by the Chicago Real Estate Board in 1927.[183] Subsequently, "[e]nforcing restrictive covenants took the work of private citizens with state support" in Chicago and elsewhere.[184] Often, this was done by neighborhood associations.[185] At other times, powerful local interests funded their judicial enforcement. On the south side of Chicago, for example, my home institution the University of Chicago "lent its financial resources to the support of the Washington Park Owners' Association" to ensure that the neighborhood of Woodlawn remained "white."[186] The National Association of Real Estate Boards also made it their official policy that "a Realtor should never be instrumental in introducing into a neighborhood . . . members of any race or nationality . . . whose presence will clearly be detrimental to property values in that neighborhood."[187] Defendants in these cases were rarely minority homeowners: racially restrictive covenants could be and were enforced against the original sellers of the property, who tended to be white.[188]

The Supreme Court reversed its earlier endorsement of such devices in 1948, finding racially restrictive covenants a violation of the Equal Protection Clause in *Shelley v. Kraemer*.[189] Nevertheless, state courts in at least Missouri continued to enforce them through awards of damages.[190] Indeed, racially restrictive covenants continued to appear in title deeds up

183. Wendy Plotkin, *"Hemmed In": The Struggle Against Racial Restrictive Covenants and Deed Restrictions in Post-WWII Chicago*, 94 J. ILL. ST. HIST. SOC'Y 39, 41 (2001).

184. *See* Greta Smith, *"Congenial Neighbors": Restrictive Covenants and Residential Segregation in Portland, Oregon*, 119 OR. HIST. Q. 358, 360 (2018) (discussing the enforcement of restrictive covenants in Portland, Oregon); *see also* Kevin Fox Gotham, *Urban Space, Restrictive Covenants and the Origins of Racial Residential Segregation in a US City, 1900–50*, 24 INT'L J. URB. & REG'L RSCH. 616, 623 (2000) ("Race restrictive covenants were the primary mechanism used by the emerging real estate industry to create and maintain racially segregated neighborhoods . . . .").

185. *See* Smith, *supra* note 184, at 358 (discussing associations' role in Oregon); Jones-Correa, *supra* note 177, at 564–65 (making the same observation nationally); *see also* Plotkin, *supra* note 183, at 48 (describing the Federation of Neighborhood Associations, "an organization devoted to the creation and maintenance of racial restrictive covenants").

186. Plotkin, *supra* note 183, at 42.

187. Gotham, *supra* note 184, at 621 (quoting ROSE HELPER, RACIAL POLICIES AND PRACTICES OF REAL ESTATE BROKERS 201 (1969)).

188. *Id.* at 626–27 ("[R]acially restrictive covenant suits often did not include black litigants but white litigants who wanted to stop a white homeowner from selling a home to a black resident." (citation omitted)); *see, e.g.*, Barrows v. Jackson, 346 U.S. 249, 251–52 (1953) (granting certiorari to determine whether a racially restrictive covenant can be enforced against a white seller who allegedly broke the covenant).

189. 334 U.S. 1, 18–19, 23 (1948).

190. *See, e.g.*, Weiss v. Leaon, 225 S.W.2d 127, 131 (Mo. 1949) (distinguishing *Shelley* as a case in equity). It was not until 1953 that the Supreme Court prohibited such damages actions under the Fourteenth Amendment. *Barrows*, 346 U.S. at 258.

through the 1960s.[191] As Professor Richard Brooks has explained, such language could provide a coordination point for like-minded homeowners even in the absence of judicial enforcement.[192] Brooks, however, does not suggest that illegal covenants were equally as effectual as enforceable ones.[193] Among the enduring effects of their legal enforcement was a legitimation of the "belief that racially mixed or predominantly black and minority neighborhoods are of lesser value than all-white neighborhoods."[194]

The second private affordance to suppress the right to purchase and live beyond a racially segregated neighborhood derives from federal law. Recent historical research by Professor Keeanga-Yamahtta Taylor has brought to light the way in which a 1968 federal program of state-subsidized mortgages for the poor created, in practice, another tool for private actors to create and deepen racial segregation.[195] The specific tool here was rather different from other examples. It was government-supplied credit facility, which was channeled to a small group of mortgage brokers.[196] This credit invited and enabled transactions and markets that otherwise would not have existed.[197] While purportedly a tool for advancing racial justice, in practice this governmental credit facility was used by realtors to preserve and defend the separation of wealthier white from impoverished minority communities.[198]

Under the 1968 HUD Act, the federal government provided subsidies to specific commercial lenders who made loans for low- and moderate-income housing by reducing the effective interest rates of long-term

191. Gotham, *supra* note 184, at 624.

192. *See* Richard R.W. Brooks, *Covenants Without Courts: Enforcing Residential Segregation with Legally Unenforceable Agreements*, AM. ECON. REV.: PAPERS & PROC., Jan. 7–9, 2011, at 360, 364 (noting that real estate actors "continued to reference unenforceable covenants").

193. *See id.* ("None of this is to say that legal enforceability or the Court's change of heart were irrelevant . . . .").

194. Gotham, *supra* note 184, at 630.

195. *See generally* KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP (2019) (exploring how HUD and FHA housing policies contributed to enduring racial segregation through "predatory inclusion"); *see also* Kevin Fox Gotham, *Separate and Unequal: The Housing Act of 1968 and the Section 235 Program*, 15 SOCIO. F. 13, 32–33 (2000) (analyzing the application of the 1968 HUD Act in Kansas City, Missouri and reaching similar conclusions).

196. *See* TAYLOR, *supra* note 195, at 5 (stating that large banks often rejected government-backed housing loans, funneling Black buyers to smaller, unregulated mortgage banks).

197. Government, to be sure, stands behind the provision of credit more broadly. *See* Robert C. Hockett, *Finance Without Financiers*, 47 POL. & SOC'Y 491, 497–98 (2019) (exploring the public role in credit creation in the twentieth century).

198. Even before 1968, "government took an active hand not merely in reinforcing prevailing patterns of segregation but also in lending them a permanence never seen before." ARNOLD R. HIRSCH, MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO, 1940–1960, at 254 (Univ. Chi. Press ed. 1998). The 1968 HUD Act built on that history.

mortgage loans to between one and five percent.[199] The law also authorized the Federal National Mortgage Association (Fannie Mae) to issue mortgage-backed securities, thereby increasing the flow of federal funds channeled by the private sector.[200] Signing the measure into law, President Lyndon B. Johnson explained that the 1968 Act would bring "the talents and energies of private enterprise to the task of housing low-income families through the creation of a federally chartered private, profit-making housing partnership."[201]

With the "talents and energies" of the private real estate sector, predictably came its prejudices and blind spots. According to Taylor, the HUD Act entrusted the availability of financing and the choice of where to locate impoverished minorities (especially Black women) to "an industry whose wealth was largely generated through racial discrimination."[202] Rather than using regular banks, the HUD Act relied on mortgage banks funded by high-interest loans from commercial banks.[203] Millions of dollars were channeled via these banks in the form of low-interest loans.[204] Banks earned a profit by charging "points" to sellers. They then received the full value of the loan when they sold it to the government.[205] As a result, "foreclosing a mortgage loan was as beneficial as having extended the loan in the first place."[206]

Black clients, especially women, were offered dilapidated properties in segregated urban cores at inflated prices only to slip into a predictable foreclosure.[207] Meanwhile, the same real estate agents channeled white participants to new suburbs,[208] and so "preserve[d] the allure of exclusivity" in a "'white housing market' [that] would have been unintelligible without

199. Housing and Urban Development Act of 1968, Pub. L. No. 90-448, §§ 235–236, 82 Stat. 476, 477–78, 481, 498–501 (codified as amended in scattered sections of 12 U.S.C. and 42 U.S.C.); *see also* Gotham, *supra* note 195, at 20–21 (describing the mortgage subsidy problem).

200. Brent J. Horton, *For the Protection of Investors and the Public: Why Fannie Mae's Mortgage-Backed Securities Should Be Subject to the Disclosure Requirements of the Securities Act of 1933*, 89 TUL. L. REV. 125, 128 (2014).

201. TAYLOR, *supra* note 195, at 88 (quoting Lyndon B. Johnson, 36th President of the U.S., Special Message to the Congress on Urban Problems: The Crisis of the Cities (Feb. 22, 1968)).

202. *See id.* at 13 ("Placing homeownership at the heart of the nation's low-income housing policies ceded outsized influence and control to the real estate industry over dwellings intended to serve a disproportionate number of African Americans.").

203. *Id.* at 153–54.

204. *Id.* at 155.

205. *Id.* at 154.

206. *Id.*; *see also id.* at 5 ("[T]he HUD-FHA guarantee to pay lenders in full for the mortgage of any home in foreclosure transformed risk from a reason for exclusion into an incentive for inclusion."); Gotham, *supra* note 195, at 26 (describing the program as a "risk-free venture for lenders").

207. TAYLOR, *supra* note 195, at 167–70; *see* Gotham, *supra* note 195, at 23 (noting that in Kansas City, African-American participants were "typically single females with children").

208. Gotham, *supra* note 195, at 32.

its Black counterpart."[209] As a result of the program, the "scale on which a segregated housing market . . . could flourish expanded significantly."[210]

It is relatively straightforward to see how racially restrictive covenants allowed the private suppression of constitutional rights: state contract law, enforced via injunction or damages, provided a range of reliable mechanisms for private homeowners to recreate the effect of racially exclusionary zoning struck down in 1917. The "predatory inclusion" enabled by the 1968 Act requires more explanation: By supplying mortgage banks with first a new source of credit and then insurance against losses upon foreclosure, and then by structuring fees to sharpen the incentive to treat Black owners as disposable instruments, the federal government directed funds to mortgage banks and realtors that "had so tightly bound [their] profit margin to racial discrimination that there was not a single moment in its history when racial discrimination had not prevailed as a defining industry practice."[211] The law's effect was exacerbated in some cities (e.g., Chicago) by state laws that first imposed disparately steep property tax assessments in Black neighborhoods and then facilitated "tax buying" in which realtors could acquire a property with overdue taxes simply by paying the tax.[212] This resulted in disproportionate eviction rates in Black neighborhoods.[213] Both the 1968 HUD Act and tax buyer statutes involved "private investors and large financial institutions . . . not merely benefiting from public policies they helped to write, but . . . actually turning the administrative apparatus of the state into a vehicle for accumulating personal and corporate wealth."[214]

The net result of these mechanisms was not just persistent racial segregation but also a mode of homeownership for Blacks that "rarely produce[d] the financial benefits typically enjoyed by middle-class white Americans,"[215] and that still materially dampens the "quality of life and life chances" of racial minorities.[216] Because differences in housing equity in the United States explain "overall level[s] of wealth inequality and concentration

209. TAYLOR, *supra* note 195, at 11.

210. *Id.* at 147; *see also id.* at 159 (noting "HUD's failure to employ any serious effort to combat racism in the dissemination of its programs"); Gotham, *supra* note 195, at 32 (finding that the Act had "segregative effects" in Kansas City).

211. TAYLOR, *supra* note 195, at 144, 147.

212. Andrew W. Kahrl, *Capitalizing on the Urban Fiscal Crisis: Predatory Tax Buyers in 1970s Chicago*, 44 J. URB. HIST. 382, 382–83 (2018).

213. *See id.* at 392–93 (discussing property tax discrimination in Evanston, Illinois, and providing an example of subsequent eviction).

214. *Id.* at 396.

215. TAYLOR, *supra* note 195, at 260.

216. Lincoln Quillian, *Segregation and Poverty Concentration: The Role of Three Segregations*, 77 AM. SOCIO. REV. 354, 355 (2012).

to a substantial degree,"[217] differential access to the wealth-generating effects of home ownership casts a wider shadow on Black progress.

G. The Persistence of Private Suppression

To see S.B. 8 as aberrant is to falsely elide American history. The Texas statute is instead just the most recent iteration of a familiar strategy in which private actors avail themselves of legal affordances in order to negate the constitutional rights of others. The private actor's power to suppress others' constitutional rights has been a recurrent feature of American history since the Founding. Across these five cases, there are differences as well as similarities. Most obviously, the cases presented here involve a mix of federal and state law. Both the national government as well as states and municipalities can cooperate with private actors in the negation of constitutional rights. It is telling, albeit not surprising, that racial minorities have been at the sharp end of these practices in all but one case.

Private suppression has also occurred through a variety of legal mechanisms over time. At the turn of the century, civil suits were used to enforce constraints on postbellum Black labor throughout the South, as well as to stifle organized labor in the North. Decades later, racially restrictive covenants were often enforced in state and federal courts. In contrast, the Fugitive Slave Act of 1850 deployed federal commissioners because of state judges' unwillingness to be complicit in slavery.[218] Neither Texas's white primary laws nor the 1968 HUD Act, in contrast, relied on an adjudicatory mechanism. The first simply allocated gatekeeping authority to private actors in ways that assured the suppression of constitutional rights.

It would be profoundly surprising if a legal technology used with such frequency, with such enthusiasm, and to the unjust benefit of so many vanished along with disco and bell-bottoms in the 1970s. Yet subsequent examples of private suppression are only partial correspondences to this history. It is possible to see a deliberate echo of these regimes in, to just offer one example, the 1986 Immigration Reform and Control Act. This required employers to verify, under civil and criminal penalties, that new employees could work lawfully under the immigration laws.[219] Nominally a legal duty on employers, this provision carried a "great potential for intentional discrimination."[220] Yet it is hard to see that federal statute as creating a *new*

217. Fabian T. Pfeffer & Nora Waitkus, *The Wealth Inequality of Nations*, 86 AM. SOCIO. REV. 567, 590 (2021).

218. This raised concerns about compliance with Article III's allocation of the judicial power to federal courts among some contemporaries. Jeffrey M. Schmitt, *The Antislavery Judge Reconsidered*, 29 LAW & HIST. REV. 797, 806–09 (2011).

219. 8 U.S.C. § 1324a(a)(1), (e)(4), (f)(1).

220. Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777, 781 (2008).

form of private power since employers in practice had ample discretion to discriminate in hiring before the law was passed. Nevertheless, as we will see in Part IV, the end of the history of private suppression remains to be written.

II. The Political Economy of Private Suppression

Private suppression, I have shown thus far, is a significant phenomenon in American constitutional history. It is frequently and extensively deployed to the detriment of constitutional rights. Its downstream effects on social ordering have been dramatic.[221] But why did private suppression happen at *these* times? What catalyzed the turn to private actors as instruments of constitutional suppression? Indeed, why wasn't the tactic more widely used?

This Part considers these questions through the lens of political economy. I offer three interlocking explanations for the emergence of private suppression regimes. Each one draws upon evidence from the historical case studies of Part I. But I do not claim that any one explanation fits all five case studies. Instead, I will suggest that taken together, these three causal dynamics will illuminate why a certain kind of legal entitlement—i.e., the ability to suppress a third-party's constitutional right that sometimes takes the form of a Hohfeldian power—emerges under some circumstances, but not more pervasively in American constitutional history.

To begin with, I set forth the canonical method, associated with the economist Harold Demsetz, for explaining how new entitlements come into being. I flag the ways in which my account will diverge from his argument. Then, working with the basic logic of Demsetz's argument, I flesh out three separate causal dynamics at work across the five case studies of private suppression.

A. On the Origins of Private Rights and Powers

A Hohfeldian power to suppress a constitutional right is an individual entitlement, akin to the right to abandon or the right to transfer a chattel.[222] The canonical explanatory model for the emergence of any legal entitlement, still taught in many first-year property courses, was developed by the economist Harold Demsetz.[223] His account offers a useful starting point here.

Demsetz pointed out that the creation of an entitlement had both costs (e.g., associated with crafting it, generating convergent understandings, and enforcement) and benefits. He argued that a new legal entitlement will

221. For instance, "[f]ugitives and their families fled in droves in the days and weeks after the [1850 Fugitive Slave Act]" was enacted. BLACKETT, *supra* note 55, at 46.

222. Hohfeld, *supra* note 40, at 45.

223. *See generally* Harold Demsetz, *Toward a Theory of Property Rights*, AM. ECON. REV.: PAPERS & PROC., Dec. 27–29, 1967, at 347 (discussing an economic theory of property rights).

emerge when it is efficient—i.e., "when the social benefits of establishing such rights exceed their social costs."[224] Yet his account had "virtually nothing" to say "about the precise mechanism by which a society determines that the benefits of property exceed the costs."[225] It did not explain, that is, *who* would go to the trouble of creating a new entitlement simply because net benefits would result. It neither recognized nor solved an implicit free-rider problem in creating law.

My account tracks Demsetz's insofar as it assigns causal force to the material and status gains realized when the law supplies to some a Hohfeldian power to suppress others' constitutional rights. But I do not assume along with Demsetz that such entitlements emerge merely because they are efficient in the sense of "produc[ing] net benefits to the relevant community."[226] Rather, I postulate that entitlements emerge when a dominant group that is *capable of effectual political action* is threatened by others' defections from their preferred social arrangement. They mobilize for the creation of a legal capacity to suppress constitutional rights so as to quell such destabilizing defections. Rather than net social welfare, that is, asymmetrical interest-group dynamics lie at the foundation of new entitlement creation.

Applying this analytic lens to the question of private suppression, 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. In contexts where the profits from a lucrative material economy are unexpectedly up for grabs, private suppression often emerges. *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.

224. Thomas W. Merrill, *Introduction: The Demsetz Thesis and the Evolution of Property Rights*, 31 J. LEGAL STUD. S331, S331 (2002).

225. *Id.* at S333.

226. *Id.* at S331.

B. The Primacy of Economic Motives for Private Suppression

A thread common to several of the case studies in Part I is the centrality of economic motives on the part of those who avail themselves of a private suppression mechanism. These private plaintiffs typically faced a threat to a profitable economic arrangement. This threat commonly took the form of individuals exercising a constitutional right to defect from the arrangement. Private suppression schemes sustained plaintiffs' ability to extract labor or rents from land at supracompetitive rates. The ensuing economic arrangements tended to track social hierarchies (e.g., of race and class) in mutually reinforcing ways.

Schemes of private suppression repeatedly emerge in direct reaction to a new threat to a previously stable, arguably monopsonistic, labor market.[227] Perhaps the best examples are the 1850 Fugitive Slave Act and the post-Civil War system of involuntary servitude. Both arose in direct response to a novel and unexpected threat to employers' near-total power to control the price of labor. The former was explained by its sponsor, Virginian James Mason, in terms of his Old Dominion compatriots' loss of "a hundred thousand annually" due to the inefficacy of the Fugitive Slave Act of 1793.[228] The latter, while formally race-neutral, was a direct response to Reconstruction Era changes to law and society that undermined planters' and industrialists' dominance over Black labor.[229]

Strikingly, the same dynamic—capital owners turning to law to maintain monopsony-like profits—can be seen in turn-of the-century labor law. The labor injunction and the yellow-dog contract responded to new labor agitation and the intimation of violence.[230] The effect of private suppression in this context was again to retrench the employer's "property" interest in specific contracting terms over which employees previously exerted no effectual influence.[231] Hence, white workers' efforts to improve their labor conditions through the exercise of constitutional rights provoked the same basic legal response as Black workers' exercise of (different) constitutional

227. "Labor market monopsony prevails when employers can pay workers wages below the competitive rate because of their high switch costs." Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 CORNELL L. REV. 1343, 1355 (2020).

228. BLACKETT, *supra* note 55, at 5.

229. *See* BLACKMON, *supra* note 89, at 66–67 (detailing a debt collection system that worked as a mechanism to maintain unpaid Black labor); *see supra* text accompanying notes 87–88.

230. For a contemporary recognition of this dynamic, see Georg Simmel, *The Sociology of Conflict I*, 9 AM. J. SOCIO. 490, 512 (1904).

231. *See* FORBATH, *supra* note 144, at 86–87, 87 n.112 (characterizing the employers' interest in terms of "property" protected by the Due Process Clause).

entitlements.[232] The turn to private suppression, therefore, is more plausibly understood in primarily economic rather than expressive terms.

In the twentieth century, the same logic can be discerned when plaintiffs sought to protect supracompetitive rents from real property. Racially restrictive covenants were again a response to an exogenous shock threatening the terms of a remunerative market. In his careful account of how covenants came first to be adopted, sociologist Michael Jones-Correa observed that the Supreme Court's decision in *Buchanan* only partly explains their diffusion.[233] Rather, the decision to adopt covenants, he explained, turned on whether "cities . . . were going through . . . rapid urbanization of immigrants and migrants of color."[234] On Jones-Correa's telling, the Great Migration unexpectedly destabilized the valuation of properties in urban housing markets.[235] An unexpected influx of minority bodies "rendered unstable the old geographic accommodation."[236] Covenants were promulgated not simply to cabin Blacks' housing choices for the sake of a racial ideology—there had been already minority communities in Northern cities before the Great Migration—but rather primarily to "maintain property values, real estate profits[,] and neighborhood stability."[237]

In a similar vein, the mortgage banks and realtors empowered by the 1968 HUD Act worked hard to "preserve the allure of exclusivity" in a "'white housing market' [that] would have actually been unintelligible without its Black counterpart."[238] Their suburban counterparts simultaneously pushed for "a proliferation of onerous requirements for building" to prevent outmigration from Black urban cores.[239] It seems likely that the commercial entities that served both urban and suburban markets benefited financially from the preservation of a "white housing market" in which prices (and hence profits) tended to be higher.[240] "Maintaining segregation," that is, tracked the goal of preserving "the power of white institutions and white residents to combine and dictate where Black residents

232. And not for the first time. For much of the seventeenth century, Virginia planters relied on white indentured servants under conditions akin to slavery. EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 114–30 (1975). When these servants started living long enough to secure their freedom, the Virginia assembly enacted measures extending their contractual terms. *Id.* at 215–16.

233. Jones-Correa, *supra* note 177, at 551.

234. *Id.*

235. *Id.* at 553–54.

236. HIRSCH, *supra* note 198, at 16.

237. Gotham, *supra* note 184, at 623.

238. TAYLOR, *supra* note 195, at 11.

239. *Id.* at 140.

240. *See id.* at 274 n.95 (discussing how commercial entities used contract-buying "to keep Blacks locked out of . . . white housing market[s and] . . . trapped in poor neighborhoods").

should live," and hence to stabilize property markets.[241] In the absence of pecuniary concerns, neither restrictive covenants nor predatory inclusion would likely have come to pass.

Economic profit, to be sure, did not exhaust the stakes of private suppression across the whole range of cases studied in Part I. Convict leasing had a material explanation but also emerged out of concerns about "relative [interracial] position."[242] The practice of convict leasing, according to sociologist Christopher Muller, arose in Georgia not simply as a result of "threats to the economic position of both poor whites and elite white landowners" but also because "African-Americans' migration to cities and acquisition of land . . . threatened to upend the status order ensuring their subordinate social position."[243] Muller shows that status threat, while in practice deeply entangled with economic worries, had independent force. Similarly, status-competition concerns were likely at work in the housing markets shaped by racially restrictive covenants and the 1968 HUD Act.[244] While neither mechanism can be plausibly explained *solely* in terms of status, it would be a mistake to rely purely on pecuniary interests for explanation.

The primacy of economic incentives in the origins of private suppression schemes operating along the race line raises important questions about how racial and economic dynamics interacted. Doubtless, a powerful ideology of racial hierarchy predated the 1850 Fugitive Slave Act.[245] Nevertheless, we observe private suppression schemes emerging only when an economic motive comes to the fore. One way to understand this would be to posit that pecuniary motives could spur legal reform to insulate economic arrangements with racially disparate economic effects. These legal arrangements foreclosed Blacks' economic gains. In consequence, they

241. *Id.* at 79.

242. *Cf.* Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1, 3 (1992) (defining "relative position" as when people "generally gain or lose satisfaction according to how well they do compared to others").

243. Muller, *supra* note 105, at 369–70.

244. Empirical evidence suggests that "school segregation is higher when and where race/ethnicity is more salient to group formation." Jeremy Fiel, *Closing Ranks: Closure, Status Competition, and School Segregation*, 121 AM. J. SOCIO. 126, 158 (2015). At least since the 1960s, school and housing segregation have been closely linked. *See* Gary Orfield, *Housing and the Justification of School Segregation*, 143 U. PA. L. REV. 1397, 1398 (1995) ("Segregated urban school systems are built on a base of housing segregation."). The gap between neighborhoods with respect to the quality of primary and secondary education is, by any measure, exceedingly large. *See* Sarah Mervosh, *How Much Wealthier Are White School Districts than Nonwhite Ones? $23 Billion, Report Says*, N.Y. TIMES (Feb. 27, 2019), https://www.nytimes.com/2019/02/27/education/school-districts-funding-white-minorities.html [https://perma.cc/A59W-SQMJ] (discussing a report that found that "[s]chool districts that predominantly serve students of color received $23 billion less in funding than mostly white school districts").

245. *See, e.g.*, A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 32 (1978) (discussing the "codification of prejudice" in colonial Virginia).

locked in place the material predicates for racialist (and racist) ideas. Economic motives, operating on a social field already marked by race, thus entrenched the institutional foundations of racial hierarchy.

This sort of interaction between economic and status motives echoes a dynamic developed by the great Trinidadian historian and politician Eric Williams.[246] According to Williams, "[s]lavery was not born of racism," but a "racial twist [was] given to what is basically an economic phenomenon."[247] Ideologies of race and racial hierarchy, the historian Barbara Fields concurred later, "did not spring into being simultaneously with slavery, but took even more time to become systematic."[248] Neither Williams nor Fields sought to deny the moral or causal implications of racial categories. Quite the opposite. Both drew attention to the material circumstances in which those categories are forged.[249]

Hence, it would be a mistake to think that economically motivated policies lacked important expressive effects on race. In particular, it seems likely that the contours of racial categories have been influenced, and reinforced, over time by private suppression.[250] Consider the latter's influence on racial categories. Race has persisting semantic and moral content as a social category not because it has a biological or genetic basis—of course, it doesn't—but rather because it tracks material arrangements in the world. At times, these arrangements are protected against change by private suppression schemes. The latter, in other words, stabilize the material predicates of racial meaning.

Racial residential segregation provides a case in point. In 1917, the Chicago Real Estate Board would call for legally enforced residential segregation by pointing to Black "lawlessness."[251] Yet, it was the pro-segregation policies successfully pursued by the Board, aided by realtors around the country, that over time generated and sustained housing patterns in which Blacks' economic and social choices were highly constrained, generating pockets of desperately concentrated poverty.[252] A rhetoric of criminality thus justified the creation of criminogenic conditions.

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246. *See* C. Gerald Fraser, *Eric Williams, Leader of Trinidad and Tobago, Is Dead*, N.Y. TIMES (Mar. 31, 1981), https://www.nytimes.com/1981/03/31/obituaries/eric-williamsleader-of-trinidad-and-tobago-is-dead.html [https://perma.cc/57YQ-5UPA] (describing Williams as a historian–politician who led Trinidad and Tobago to independence).

247. ERIC WILLIAMS, CAPITALISM & SLAVERY 4 (3d ed. 2021).

248. Barbara Jeanne Fields, *Slavery, Race and Ideology in the United States of America*, NEW LEFT REV., May/June 1990, at 95, 106.

249. *See id.* at 117 ("If race lives on today, it does [so] . . . because we continue to create it today.").

250. *See infra* notes 335–339 and accompanying text.

251. Jones-Correa, *supra* note 177, at 559.

252. William Julius Wilson, *The Political and Economic Forces Shaping Concentrated Poverty*, 123 POL. SCI. Q. 555, 561 (2008–2009).

The moral connotations of racial categories were also refracted and reinforced through economic and social arrangements created by private suppression schemes. For example, sociologists Robert Sampson and Stephen Raudenbush have demonstrated that people perceive a neighborhood as "disorder[ed]" as a result of its minority racial composition, independently of how frequently they see objective evidence of disorder.[253] Similarly, Ben Grunwald and Jeffrey Fagan have recently shown that police are more prone to see a neighborhood crime problem when the Black proportion of residents increases.[254] Both findings reflect ways in which moralized inferences bubble up from the racial residential segregation sustained via private segregation. Indeed, as Taylor pointedly explains, during the implementation of the 1968 HUD Act, "Black hygiene and moral fitness overlapped with the obsession of white property owners in protecting their investments."[255] The Act's failure was also (erroneously) chalked up to Black families being "too lazy or too indifferent" to maintain their homes.[256] Racial stereotypes, that is, do not come from nowhere: They are produced and sustained, in part, through law.

To summarize, legal systems of private suppression typically are a dominant group's response to new, exogenous threats to economic interests and status hierarchies. In many of the cases detailed in Part I, that risk took a parallel form: Individuals who were subject to exploitative relations suddenly had an opportunity to exit. Former slaves might flee the plantation; postbellum Blacks could track north; city-dwelling minorities in the twentieth century might seek better housing in the suburbs. The legal instruments created to suppress constitutional rights allowed individual beneficiaries of the status quo to act against the discrete, dispersed, and hard-to-track threats of "exit."[257] In this way, schemes of private suppression leveraged the information broadly diffused among the public, which the state does not have access to, in order to stabilize extant economic relations.[258] In

253. Robert J. Sampson & Stephen W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of "Broken Windows*," 67 SOC. PSYCH. Q. 319, 320–21 (2004).

254. Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas*, 107 CALIF. L. REV. 345, 351 (2019).

255. TAYLOR, *supra* note 195, at 259.

256. *Id.* at 191 (noting also that the federal government "placed the entirety of the blame [for the program's failure] on the new homeowners' bad habits"); *id.* at 175 (juxtaposing the idealization of "the 'market' as a space impervious to race" and the tendency to blame "Black families and, in particular, . . . Black women" for continued urban poverty).

257. *Cf.* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 21 (1970) (noting the connection between exit and the loss of revenues).

258. The white primary cases, which I have not addressed here, are an exception: They can be understood as a complementary action to prevent Blacks from claiming politically what they had been denied by contract, fraud, and criminal law. They are examples of what Hirschman called "voice," rather than "exit," being constrained. *See id.* at 34 (discussing voice and exit as substitutes).

so doing, they preserved and entrenched the material correlates of existing racial categories and so kept alive the malign connotations of race.

C. Legal and Constitutional Change as a Driver for Private Suppression Systems

I have suggested that economic motives explain the timing of private suppression schemes and have pointed to the frequency of exogenous shocks as a catalyst for their conception and birth. The second dynamic to underscore concerns the legal, even constitutional, character of those exogenous shocks. Public law, in other words, catalyzes its own private-law counteraction.

This dynamic can be seen at work first with respect to the Fugitive Slave Act of 1850. In its 1842 decision of *Prigg v. Pennsylvania*,[259] the Supreme Court had not just upheld the earlier federal fugitive-slave law and invalidated state personal freedom laws that "interfere[d] with" or "obstruct[ed] the just rights of the owner to reclaim his slave."[260] It had also ruled that "states cannot . . . be compelled to enforce" federal law since "it might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government."[261] Provisions of the 1793 Act that imposed obligations on state officials were therefore unconstitutional.[262]

This element of *Prigg* prefigures what is now called the anticommandeering doctrine, which is said to be an implication of constitutional federalism.[263] At the time, it immediately prompted a wave of resistance to the rendition of fugitive slaves.[264] Responding to *Prigg*, that is, states such as Massachusetts forbade state officers from participating in arrests and eliminated state court jurisdiction over fugitive-slave cases; other states, such as Pennsylvania, further barred the use of state property to detain fugitive slaves.[265] Not surprisingly, such measures "came to be seen in the

259. 41 U.S. (16 Pet.) 539 (1842).

260. *Id.* at 625–26.

261. *Id.* at 615–16; *see also* Basinger, *supra* note 75, at 319 ("Story's opinion states that the federal government could not mandate state aid in enforcing the federal Fugitive Slave Law . . . .").

262. *See, e.g.*, Fugitive Slave Act of 1793, ch. 7, § 1, 1 Stat. 302, 302 (repealed 1864) ("[I]t shall be the duty of the executive authority of the state or territory to which such person shall have fled, to cause him or her to be arrested and secured . . . .").

263. *See, e.g.*, New York v. United States, 505 U.S. 144, 161 (1992) ("Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981))).

264. There had been a "shift in views about commandeering between the late 1780s and the early nineteenth century," such that by *Prigg*, it was seen as constitutionally problematic. Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104, 1111 (2013).

265. Basinger, *supra* note 75, at 320–21.

South as a thinly disguised effort to impede efforts to retake fugitive slaves."[266] Calling for fresh federal action in an 1849 "Address of the Southern Delegates in Congress to their Constituents," South Carolina Senator John Calhoun pointed to these state laws as "hostile acts" that evinced a "spirit of discord" imperiling the constitutional order.[267] Provisions in the 1850 Fugitive Slave Act that created new forums for slave renditions responded precisely to Calhoun's concern about recalcitrant Northern state courts.[268] So it is apt to say that the 1850 statute was a response to—and an attempt to negate the practical force of—the sole constitutional element of *Prigg* that advanced the antislavery cause.

A parallel logic of reaction to a new constitutional intervention can also be seen clearly in three other cases described in Part I: the elaboration of the postbellum Southern involuntary servitude system; the emergence of its political counterpart in the Texas white primaries; and (more weakly) in the diffusion of racially restrictive covenants. It is not present, however, in the etiology of regressive labor laws at the turn of the twentieth century or in respect to the 1968 HUD Act. The latter, indeed, was initially "hailed as a dream come true" by Black communities and advocacy groups.[269] The causal logic of reaction is obvious in the white primary cases—with Texas responding immediately and explicitly to the Supreme Court's rulings as they were handed down.[270] Similarly, racially restrictive covenants emerged in reaction to the Great Migration and the decision in *Buchanan*.[271] Hence, I focus here on the example of labor law in the post-Civil War South to flesh out the second claim of this Part.

Recall that the network of "[e]nticement laws, emigrant agent restrictions, contract laws, vagrancy statutes, the criminal-surety system, and convict labor laws" emerged first in 1865 in direct response to the Thirteenth Amendment and was then renewed in the wake of the 1877 national retreat from Reconstruction.[272] That is, these measures responded directly to rights-bearing branches of the Reconstruction Amendments. More subtly, they also

266. BLACKETT, *supra* note 55, at 451.

267. Basinger, *supra* note 75, at 321–22.

268. *See* Fugitive Slave Act of 1850, ch. 60, § 6, 9 Stat. 462, 463 (repealed 1864) (providing that an individual "may pursue and reclaim such fugitive person, either by procuring a warrant from some one of the courts, judges, or commissioners aforesaid, of the proper circuit, district, or county"); *see supra* text accompanying notes 59–68.

269. TAYLOR, *supra* note 195, at 89.

270. *See* Klarman, *supra* note 129, at 59 (discussing the Texas State Democratic Party's passing of a resolution barring Blacks from membership following the Supreme Court's opinion in *Nixon v. Condon*).

271. Jones-Correa, *supra* note 177, at 551.

272. Daniel, *supra* note 22, at 95–96; Cohen, *supra* note 96, at 36 ("Some of the enticement acts . . . disappeared for a time, only to surface again after Reconstruction.").

responded to opportunities created by the judicial or political pruning of those rights.

Initially, federal judges glossed congressional power under the Fourteenth and Fifteenth Amendments broadly, finding that "[d]enying [rights] includes inaction as well as action" and emphasizing that in the face of "state inaction," Congress had power to "operate directly" on private individuals.[273] Had these interpretations stuck, Black labor could not have been subject to a legal yoke of involuntary servitude. But the Supreme Court's 1876 decision in *United States v. Cruikshank*[274] provided an off-ramp for Southern agriculturalists and industrialists seeking cheap or free labor.[275] *Cruikshank* voided indictments under the Enforcement Act of 1870 of white Democrats who had murdered Blacks defending their right to vote in Colfax, Louisiana.[276] Quite apart from its crass winking at white-supremacist violence, *Cruikshank* imposed a rigid, narrow, and novel "state action" requirement.[277] This would subsequently be entrenched in the *Civil Rights Cases*.[278] *Cruikshank* further encumbered the Equal Protection Clause of the Fourteen Amendment and the Fifteenth Amendment alike with a demanding intent element.[279] The Court did not find this intent element satisfied when even confronted with evidence of overtly racist mob violence manifestly acting to advance the reign of white supremacy.[280] This combination of doctrinal guiderails offered a path to Southern legislatures seeking to reinstall pre-Civil War economic conditions. In particular, the demanding version of the state action requirement set forth by *Cruikshank* and the *Civil Rights*

273. *E.g.*, United States v. Hall, 26 F. Cas. 79, 81 (C.C.S.D. Ala. 1871) (No. 15,282); *see also* Laurent B. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353, 1357 (1964) ("[F]or the first seven years after the fourteenth amendment was ratified, Congress believed it possessed, and actually exercised a power to protect the newly-freed Negro from private aggression, as well as from 'state action.'").

274. 92 U.S. 542 (1875).

275. *See id.* at 553–54 (interpreting the Fourteenth Amendment as neither taking away sovereignty from the states nor creating any additional individual rights).

276. *Id.* at 559; Wilson R. Huhn, *The Legacy of* Slaughterhouse*,* Bradwell*, and* Cruikshank *in Constitutional Interpretation*, 42 AKRON L. REV. 1051, 1071 (2009) ("On April 13, 1873, a large mob of whites attacked the courthouse and killed over 60 persons, mostly African-Americans, in cold blood . . . ."). The indictments at issue were filed under the Enforcement Act of 1870, ch. 114, 16 Stat. 140, which was one of the most important tools of Reconstruction. On details of the Colfax massacre, see CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION 96–109 (2008).

277. James Gray Pope, *Snubbed Landmark: Why* United States v. Cruikshank *(1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385, 388 (2014); *see also Cruikshank*, 92 U.S. at 554 ("The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another.").

278. 109 U.S. 3, 13, 19 (1883).

279. *Cruikshank*, 92 U.S. at 556.

280. *Id.* at 554–56.

Cases opened the door to the state laws that aimed at recreating economic conditions akin to slavery via private suppression schemes.[281]

In sum, a historical account of private suppression schemes would be incomplete without a recognition of the threshold, catalytic role of law. Constitutional amendments and statutes provided not just a spur to legislative action: Their contours shaped the kind of private-law suppression mechanisms that were feasible. Constitutional and legal restraints on the state, in this way, became "resources to exploit and obstacles to overcome."[282] The end result was not simply "evasion": wielding private suppression, actors could understand themselves to be in good-faith compliance with constitutional rules at odds with their "programmatic ambitions."[283] A better metaphor is that of a "hydraulic" system[284] in which public law works as a dam around which private law offers a convenient channel.

D. Limited State Capacity and Private Suppression

A third commonality cutting across the historical examples in Part I is the existence of limited state capacity for those seeking to defend a profitable status quo against legal change. As a result, in some (although not all) of the case studies outlined in Part I, state weakness leads to the adoption of a private suppression scheme. That is, private suppression offers a legal avenue for private actors to leverage law without strengthening the state. These private actors, of course, rely on commissioners or judges (both state actors) to achieve their ends. But they do not depend on a more extensive information-gathering and enforcement apparatus associated with a deeply rooted, formalized, and bureaucratically empowered state.

Both the national and the subnational "state" in America have been described as weak, at least in terms of nonmilitary administrative and

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281. For a recapitulation and partial challenge to this view, see generally Pamela Brandwein, *A Judicial Abandonment of Blacks? Rethinking the "State Action" Cases of the Waite Court*, 41 LAW & SOC'Y REV. 343 (2007).

282. KAREN ORREN & STEPHEN SKOWRONEK, THE POLICY STATE: AN AMERICAN PREDICAMENT 17 (2017).

283. *See id.* (describing the shift in the Constitution's role from that of a "containment structure" to that of an "opportunity structure"). On the "evasion" framing, see generally Brannon P. Denning & Michael B. Kent, Jr., *Anti-Evasion Doctrines in Constitutional Law*, 2012 UTAH L. REV. 1773.

284. *See* David Landau, *Political Support and Structural Constitutional Law*, 67 ALA. L. REV. 1069, 1075 (2016) (arguing that complex institutions can shift resources "from part of the system to another in response to a judicial decision"); *cf.* Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131, 134 (2005) (discussing this concept in the context of electoral law).

bureaucratic capacity, up to the beginning of the twentieth century.[285] In his well-known history of federal administration, political scientist Stephen Skowronek described the nineteenth-century national state as one of "courts and parties," not endogenous administrative capacity.[286] Complementing Skowronek, the historian William Novak explained that "nineteenth-century American governance remained decidedly *local*. Towns, local courts, common councils, and state legislatures were the basic institutions of governance . . . ."[287] There was plenty of state power in the eighteenth and nineteenth centuries, Skowroneck and Novak alike suggest, but little was centralized either at the federal or even the state level.[288] This tendency toward dispersed state power was especially acute in the nineteenth-century South.[289] There, large plantation owners in the antebellum period cultivated a political rhetoric that styled taxation as antidemocratic to protect their land and slaveholding interests from a less wealthy, non-slaveholding majority.[290] Southern state legislators, importantly, adopted mandatory land-classification schemes to prevent tax assessors from trying to gather information about individual plantations.[291] The result was a substantially smaller state footprint than might otherwise have been the case.

This relative lack of administrative capacity on the part of the national state and Southern states helps explain the appeal of private suppression. The

285. A "state" is "the institution to which human communities have entrusted the coercive power they find necessary for the legal regulation of collective life." CHARLES S. MAIER, LEVIATHAN 2.0: INVENTING MODERN STATEHOOD 6–7 (2012). On the complexity of the idea of "state weakness," see STEPHEN SKOWRONEK, JOHN A. DEARBORN & DESMOND KING, PHANTOMS OF A BELEAGUERED REPUBLIC 13–17 (2021).

286. STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920, at 24 (1982); *see also id.* at 19, 29 (describing the early federal state as "innocuous" and "evanescent"); WILLIAM E. NELSON, THE ROOTS OF AMERICAN BUREAUCRACY, 1830–1900, at 4 (1982) (dating the rise of bureaucracy to the late nineteenth century). For an effort to complicate but not dislodge Skowronek's claim, see Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1260 (2006). For a defense of Skowronek's account, see generally Daniel P. Carpenter, *The Multiple and Material Legacies of Stephen Skowronek*, 27 SOC. SCI. HIST. 465 (2003).

287. WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 10 (1996) (emphasis added).

288. *See* William J. Novak, *The Myth of the "Weak" American* State, 113 AM. HIST. REV. 752, 765 (2008) ("A primary reason that American state power remains so hidden is that it is so widely distributed among an exceedingly complex welter of institutions, jurisdictions, branches, offices, programs, rules, customs, laws, and regulations.").

289. *See* Robert C. Lieberman, *Weak State, Strong Policy: Paradoxes of Race Policy in the United States, Great Britain, and France*, 16 STUD. AM. POL. DEV. 138, 138 (2002) (noting that "race is most commonly associated with state weakness through its effects on such processes as regional differentiation, class formation, and welfare state building").

290. ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY 202–04 (2006).

291. *See id.* at 106 (illustrating how South Carolina's flat-rate tax on plantations reflected a refusal to invite tax assessors to determine the actual value of the property).

first of such schemes arose in the absence of a rich ecosystem of governance instruments, coercive or otherwise. The interest groups motivated to create and use new legal tools could instead leverage only courts toward the achievement of their larger economic projects. The Fugitive Slave Act of 1850 can hence be understood as an innovative response to the prohibitory effect of *Prigg* upon the availability of Northern states' and localities' administrative capacities for slave rendition.[292] That 1850 Act leveraged and amplified previously exiguous federal governance capacity (i.e., the previous insignificant office of commissioners) in an effort to plug a new regulatory "gap." After the Civil War, industrial employers needing to repress labor-organizing turned to the federal courts rather than an agency or bureau since there were only courts, and increasing governmental capacity was likely perceived as adverse to industrialists' interests. Between 1880 and 1930, the characteristic form of judicial intervention in labor disputes shifted from the criminal prosecution (which required a U.S. or state attorney) to the privately initiated labor injunction.[293] That is, Progressive Era employers found a legal pathway to squeeze more out of less federal governance capacity.

In the South, where the subnational state was also weak, agriculturalists and industrialists drew on a fluid mix of "legal and social tools"[294] depending on the exact topology of state capacity. For instance, convict leasing first emerged because "state governments lacked the financial resources to build new facilities."[295] Convict leasing allowed the criminal trial to become a mere staging post, or revolving door, between two zones of private dominance.[296] It also mitigated the need to create an extensive state apparatus of jails and prisons. On the other hand, states such as Mississippi made "extensive" use of their criminal enticement laws.[297] These laws took advantage of prosecutorial as well as judicial capacity, but they targeted a smaller group.

In the twentieth century, and especially after World War II, the dynamic changed. Now the question was not so much the absence of state capacity as the unwillingness to deploy that capacity, particularly for racially progressive ends. The 1968 HUD Act, for example, was enacted out of a belief that "only the market, as opposed to government, could handle the gargantuan problems rooted in American cities."[298] This preference for market rather than state solutions to housing shortages reflected the experience of white urban

292. Basinger, *supra* note 75, at 320–22; *see supra* text accompanying notes 263–268.

293. FORBATH, *supra* note 144, at 61.

294. Cohen, *supra* note 96, at 33.

295. Adamson, *supra* note 103, at 560.

296. For a description of a typical trial completed in minutes, see Ethan Blue, *A Parody on the Law: Organized Labor, the Convict Lease, and Immigration in the Making of the Texas State Capitol*, 43 J. SOC. HIST. & CULTURES 1021, 1024 (2010).

297. Cohen, *supra* note 96, at 36.

298. TAYLOR, *supra* note 195, at 21.

residents in the 1950s and 1960s. They had opposed public housing and were "discomfited by growing government power and its impact on racial affairs."[299] Since the Act involved distributing large volumes of state-supplied credit, of course, its purported reliance on the market was at best superficial. Nevertheless, it could still be sold to the public as a free-market program.

Subsequently, the 1968 HUD Act's failure, Taylor argues, enabled the political attack on the "social contract" of the Great Society with the aim of "restoring the profitability of business and capital by undermining the social obstacles that had destabilized its primacy."[300] This retreat from the Great Society's commitment to adequate housing was followed in the 1980s by President Reagan's extensive efforts to undermine New Deal programs that necessitated a bigger bureaucratic footprint, including workplace-safety and environmental regulation.[301] In a sense, therefore, the 1968 Act anticipated a deeper and more aggressive form of skepticism of bureaucratic power that was to follow.

E. Conclusion

This Part has offered a positive, descriptive account of how private suppression schemes come into being. Drawing on and modifying the canonical explanation for how property rights arise, I have underscored pecuniary and economic motives, but also suggested that status competition around race or class played a secondary role. I hence resist Demsetz's claim that a new entitlement will be recognized because it creates *net* social benefits. Instead, I have pointed out how the creation of new instruments to suppress constitutional rights benefited those who wished to preserve an unequal, arguably unjust, distribution of profits and rents.

I have also suggested a more specific etiology. Interest groups already reaping disproportionate gains from status quo economic arrangements respond to exogenous challenges by eliciting new private suppression schemes. External shocks often hinge on a constitutional change that destabilizes and scrambles an exploitative economic arrangement. The effect of a suppressive instrument in respect to constitutional rights here is not incidental. Rather, it is central to the distributive goals of the legislative

299. HIRSCH, *supra* note 198, at 213.

300. TAYLOR, *supra* note 195, at 232, 248; *see also* JENKINS, *supra* note 171, at 202 (noting that this was a moment at which "local, state, and federal retrenchment pushed cities deeper into an extractive, punitive market"). For a description of the shift in Western countries from state to market provision of housing in the 1970s, see Raquel Rolnik, *Late Neoliberalism: The Financialization of Homeownership and Housing Rights*, 37 INT'L J. URB. & REG'L RSCH. 1058, 1060 (2013).

301. *See* DAVID M. KOTZ, THE RISE AND FALL OF NEOLIBERAL CAPITALISM 72, 82 (2015) (discussing the policies implemented by the Reagan Administration as part of a larger ideological shift).

scheme because it negates the exogenous legal shock to the economic status quo. In addition, these schemes often occur in the context of weak administrative capacity on the part of the relevant state, or skepticism about the value of state intervention. Hence, they rely on the state less as a brute-force instrument and more as a platform for amplifying private information, incentives, and power.

If constitutional scholars have failed to connect these moments or observe the large pattern they etch across American history, it is evidence that they have become too enraptured by a myth of unfolding progress and greater equality since the Founding. They have failed to attend, that is, to the ways in which power reproduces itself even under conditions of adversity.

III. The Moral Economy of Private Suppression

This Part turns from the positive questions raised by private suppression to its puzzles and normative challenges. In this Part, I use the term "moral economy" to reference the "essentially noneconomic norms and obligations (e.g., reciprocity) that mediate the central social, political, and/or economic relations."[302] To focus on the idea of moral economy is to draw attention to the way that the law shapes or snaps normative bonds that tie together a state to its subjects. It also invites inquiry into whether private suppression can be defended or critiqued, as an ethical matter, by asking us to consider whether the sort of communal life that such law induces is worth embracing or resisting.

Even though private suppression frequently has pecuniary purposes at its root, its implementation has repercussions beyond the economic. These schemes change the relation of the state to those it regulates, shift relations between individuals within a jurisdiction, and often strip individuals of the dignity that comes from "being on a par with others, of standing on an equal footing."[303]

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302. ARNOLD, *supra* note 28, at 85; *see also* Andrew Sayer, *Moral Economy as Critique*, 12 NEW POL. ECON. 261, 261 (2007) (defining a moral economy as the "norms defining rights and responsibilities that . . . require some moral behaviour of actors, and generate effects that have ethical implications" that necessarily exist within any socioeconomic arrangement). The seminal use of the term was by the historian Edward Thompson, who used it to capture a "consistent traditional view of social norms and obligations, of the proper economic functions of several parties within the community, which, taken together, can be said to constitute the moral economy of the poor." E.P. Thompson, *The Moral Economy of the English Crowd in the Eighteenth Century*, 50 PAST & PRESENT 76, 79 (1971). For a narrower conceptualization of the same term (which I do not adopt) as capturing "when people engage in economic transactions with others, those transactions can generate a relationship with those others and an obligation to transact again in the future," see James G. Carrier, *Moral Economy: What's in a Name*, 18 ANTHROPOLOGICAL THEORY 18, 32 (2018).

303. *Cf.* Fraser, *supra* note 29, at 40 n.11 (emphasis omitted) (defining the term parity).

In this Part, I pick out three analytic lenses commonly used in public-law scholarship to capture, describe, and critique these effects. These are the conceptual frames developed in rich recent literatures addressing (i) popular constitutionalism, (ii) privatization, and (iii) the rule of law. Each of these conceptual frames picks out a different knot of relationships between citizens and the state. Each has normative, as well as analytic, heft. Taking up each in turn, I deploy them to illustrate the distinctive qualities of private suppression. From this analysis, I develop several normative critiques of private suppression based on its effects upon state-individual and peer-to-peer relationships. Relevant to the analysis of S.B. 8 in Part IV, these train on the *means* of private suppression as much as on the ways it affects specific constitutional rights.

A. Private Suppression as Popular Constitutionalism

The private suppression of constitutional rights can be interpreted as a species of "popular constitutionalism." A wave of legal scholarship in the early 2000s used this term to capture the idea that "the people" can exercise an "active and ongoing control over the interpretation and enforcement of constitutional law."[304] The case studies presented in Part I all capture a kind of popular constitutionalism that to date has escaped scholars' attention—one that usefully complicates the standard view of that phenomenon. Specifically, an appreciation of private suppression as a form of popular constitutionalism not only blurs the hard-edged distinction drawn in the literature between "juricentric"[305] and popular constitutionalism but also suggests that leading accounts are too optimistic as to its redistributive and emancipatory potential. Further, a close look at historical experience with private suppression suggests a subtle dynamic that previous studies of popular constitutionalism have missed: Private action does not merely shape the expression of constitutional rights; it also generates the social conditions and implicit taxonomies in which constitutionally relevant inequalities arise and then persist.

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304. Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 959 (2004). Popular constitutionalism can have a *descriptive* and a *normative* register, which can be sharply distinguished. Tom Donnelly, *Popular Constitutional Argument*, 73 VAND. L. REV. 73, 81 (2020). But much of the literature modulates between the descriptive and the normative, i.e., offering a positive account of popular constitutionalism as a proof of its normative desirability.

305. An account of constitutional law is "juricentric" to the extent that it "reflects a vision of the Constitution in which interpretive authority is concentrated exclusively in the judiciary." Kevin S. Schwartz, Note, *Applying Section 5:* Tennessee v. Lane *and Judicial Conditions on the Congressional Enforcement Power*, 114 YALE L.J. 1133, 1134–35 (2005); *accord* Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 2 (2003) (using the term in that sense).

1. Popular Constitutionalism Reconsidered.—The earliest, and still most prominent, account of popular constitutionalism was offered by Larry Kramer. Writing against the grain of late-twentieth-century constitutional scholarship, he claimed that "in its origins and for most of our history, American constitutionalism assigned ordinary citizens a central and pivotal role in implementing their Constitution."[306] In a series of influential articles and ultimately a powerful book, he drew attention first to voting, petitioning, and assembly as instruments with constitutional ends.[307] On Kramer's account, the people protested, loudly and in print, against the early exercise of judicial review,[308] but today have slowly acquiesced to "judicial supremacy."[309] To Kramer, this is a matter of profound regret.[310] Other scholars writing in the same methodological vein have struck a similar normative note as Kramer. Robert Post and Reva Siegel, for example, have called for the power to decide on constitutional meaning to be distributed, in one way or another, away from federal courts and toward more democratic bodies.[311]

Of course, popular constitutionalism has not been without its critics.[312] One common complaint is that the advocates of popular constitutionalism are strident about what they are against (judicial review) but murky as to what they celebrate.[313] In response to such objections, advocates of popular constitutionalism have pointed to a hodgepodge of mechanisms, including

306. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 8 (2004).

307. *Id.* at 25.

308. *Id.* at 66–67.

309. *Id.* at 233–34.

310. *See id.* at 247–48 (demanding that the people "lay claim to the Constitution" and "publicly repudiat[e] Justices who [claim] . . . ultimate authority to say what the Constitution means").

311. Post & Siegel, *supra* note 305, at 1947 (calling for greater deference to Congress on constitutional meaning); *see also* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 154 (1999) ("Doing away with judicial review would have one clear effect: It would return all constitutional decision-making to the people acting politically. It would make populist constitutional law the only constitutional law there is."). Post and Siegel favor a variant of popular constitutionalism, which they call "[d]emocratic constitutionalism," that assumes a dialectic in which "citizens and government officials . . . reconcile these potentially conflicting commitments" via "multiple channels, some explicit and others implicit." Robert Post & Reva Siegel, Essay, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 375 (2007).

312. *See, e.g.*, Neal Devins, *The D'oh! of Popular Constitutionalism*, 105 MICH. L. REV. 1333, 1340 (2007) ("How Much Does the Public Know about the Constitution? Next-to-nothing." (emphasis omitted)).

313. *See, e.g.*, Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2598 (2003) (stating that "the particulars" of popular constitutionalism "have not been worked out"); Suzanna Sherry, *Putting the Law Back in Constitutional Law*, 25 CONST. COMMENT. 461, 463 (2009) (complaining that "few (if any) of its advocates make any concrete suggestions about how to implement popular constitutional interpretation").

"social movements, elected officials, political parties, and the general public," as instruments for constitutional lawmaking.[314]

Most advocates of popular constitutionalism have struck a liberal or a progressive note. A minority, however, have observed that democratic mobilization in the name of the Constitution can also have a politically conservative valence. Christopher Schmidt, for example, points to the Tea Party movement of the Obama era as evidence that "popular constitutionalism serves insurgent conservatism remarkably well."[315] Robert Post and Reva Siegel have described the constitutional claims against abortion as a "broad-based social movement hostile to legal efforts to secure the equality of women and the separation of church and state."[316] And writing alone, Siegel has explored how "decades of social movement . . . forge[d] and discipline[d] new understandings" that coalesced into a judicial endorsement of a Second Amendment right.[317]

Private suppression of constitutional rights is a significant, and until now largely ignored, mechanism of popular constitutionalism. In each of the five case studies offered in Part I, either the federal or state government offered private citizens a legal instrument to change the way in which others' constitutional rights could be expressed on the ground. These instruments in practice often had spillover effects beyond their direct application because they sparked fear of even wider use of private suppression instruments.[318] Union leaders in the mid-1890s,[319] for example, urged "moderation" for fear that a federal judge would call out the "cavalry and infantry" to "crush" even a lawful strike.[320] Private suppression mechanisms can induce a wide penumbra of constitutional inactivity and stasis—a zone of fearful uncertainty in which rights holders can no longer exercise legal entitlements for fear of costly or violent counteraction sanctioned by law. In these dark zones, it has been as if a constitutional right did not exist in the first instance.

Part I's case studies also suggest that the hard-edged bound between juricentric and popular constitutionalism is misconceived. They show how

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314. Donnelly, *supra* note 304, at 81; *see also* David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2052 (2010) (arguing that "judicial elections have the capacity to serve . . . as highly consequential vehicles of popular constitutionalism").

315. Christopher W. Schmidt, *Popular Constitutionalism on the Right: Lessons from the Tea Party*, 88 DENV. U. L. REV. 523, 548 (2011).

316. Post & Siegel, *supra* note 311, at 377.

317. Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 193 (2008).

318. Consider, for example, the panicked Black responses to the 1850 Fugitive Slave Act. DELBANCO, *supra* note 71, at 5; *see also* BLACKETT, *supra* note 55, at 15 (describing a meeting in which Black community members committed to resisting the 1850 Fugitive Slave Act because it was "disastrous . . . for 'every free colored person'").

319. *See supra* notes 148–150 and accompanying text.

320. FORBATH, *supra* note 144, at 95.

courts and private actors can collaborate in a coproduction of a new constitutional dispensation. Moreover, since private suppression involves either the threat or the reality of violence to limit others' actions, private suppression tends to have a regressive orientation. It is a tool for preserving a status quo characterized by concentrations of wealth or power. Hence, as Post, Siegel, and Schmidt anticipated, the availability of private suppression suggests that popular constitutionalism will often have a distinctly regressive cast.

Private suppression is, further, a frequently employed instrument of popular constitutionalism for the simple reason that it is a very effective way of realizing its users' normative vision for the polity. It deals with facts on the ground quite directly. Other mechanisms for popular constitutionalism enumerated in the scholarship all achieve their ends indirectly: The Tea Party elects candidates who share its constitutional vision and must then legislate.[321] Activism over gun rights ultimately homed in upon the Supreme Court as its target, in the hope that the Justices would act for them.[322] Even the elective judiciary, which has been described as "a systematic and pervasive mechanism for popular constitutionalism," has only indirect material effects on the ground.[323] It cannot be assumed that any of these institutional actors will have the power to impose their mandates in practice.[324]

By contrast, private suppression schemes offer a more direct, and hence far more powerful, instrument for changing law on the ground as well as law on the books.[325] They do not hinge on the power of intermediate institutions.

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321. Schmidt, *supra* note 315, at 537 (noting that the "2010 congressional elections . . . provided the Tea Party a platform for pursuing its constitutional vision").

322. *See* Siegel, *supra* note 317, at 242–44 (describing the ways in which social mobilizations have infused the Court's approach to the Second Amendment).

323. *See* Pozen, *supra* note 314, at 2050 (describing elective judiciaries as a means of checking "judges' interpretative outputs").

324. Perhaps the most well-known example of this point, offered by Gerald Rosenberg, is the inability of the Supreme Court to quickly end school segregation. GERALD N. ROSENBERG, THE HOLLOW HOPE 70–71 (2d ed. 2008).

325. On the history of studies since the 1960s of the "gap" between the law as articulated on the books and the lived experience of those being regulated, see Jon B. Gould & Scott Barclay, *Mind the Gap: The Place of Gap Studies in Sociolegal Scholarship*, 8 ANN. REV. L. & SOC. SCI. 323, 324–25 (2012). The creation of "facts on the ground" is not always an end in itself. It might be a staging post in a broader effort to obtain a change in the law. During the back-and-forth over the white primaries, however, Texas did succeed between 1935 and 1944 in changing the formal Equal Protection regime that covered the state's primary elections by allowing the Democratic Party to exercise a predictably racially exclusive choice independent of law in a fashion consistent with the Equal Protection Clause as then understood. *Compare* Grovey v. Townsend, 295 U.S. 45, 49–53 (1935) (holding that the Texas Democratic Party's ban on Black voting in its primary was not a state action and thus constitutional), *with* Smith v. Allwright, 321 U.S. 649, 664–66 (1944) (ruling that it is unconstitutional for a state to delegate election procedures to private parties for the purposes of racial discrimination).

Even given the pervasive presence of economic motives in all of Part I's examples,[326] private suppression also has the downstream effect of refashioning the living constitutional "*nomos*" by directly altering the possibility of exercising constitutional rights on the ground.[327]

2. The Production of Subordinate Identity Categories.—Private suppression is also distinct in that it does not just titrate constitutional rights but carves up the social ground upon which constitutional claim-making is possible in the first place. Subpart II(B) pointed to these schemes' expressive effects.[328] The related point here is that private suppression is plausibly understood as an instrument through which suspect classifications such as race acquire and maintain a degraded or subordinate social meaning. By shaping the social meanings of racial and class categories, private law keeps in place a malign variation in social status that motivates the equality-law project in the first instance.

A recent body of historical scholarship has underscored "the contingent nature of racial classifications, the role of law in creating racial meanings, and the collaboration as well as conflict among many actors in producing racial knowledge."[329] A first premise of this work is that the meaning of "race" is neither a matter of genetics nor culture. Rather, it "must be summoned to consciousness by [people's] encounters in social space and historical time."[330] Racial discourses are hence not organized by visual, phenotypical cues but instead rely on a "malleab[le]" set of "psychological dispositions and moral sensibilities that the visual could neither definitely secure nor explain."[331] The social meanings of racial categories are also not fixed or stable. They must be actively elicited and maintained, often with law pulling the laboring oar.[332]

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326. *See supra* subpart II(B).

327. *See* Robert M. Cover, Foreword, Nomos *and Narrative*, 97 HARV. L. REV. 4, 4, 44 (1983) (arguing that law signifies "a world of right and wrong" and that a "legal interpretation cannot be valid if no one is prepared to live by it").

328. *See supra* notes 250–255 and accompanying text.

329. Alejandro de la Fuente & Ariela Gross, *Comparative Studies of Law, Slavery, and Race in the Americas*, 6 ANN. REV. L. & SOC. SCI. 469, 479 (2010).

330. Thomas C. Holt, *Marking: Race, Race-Making, and the Writing of History*, 100 AM. HIST. REV. 1, 1 (1995).

331. Ann Laura Stoler, *Racial Histories and Their Regimes of Truth*, 11 POL. POWER & SOC. THEORY 183, 200 (1997) (emphasis omitted).

332. *See, e.g.*, Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 123 (1998) (exploring how "lawyers and litigants drew upon a variety of criteria and flexible definitions of 'race' to explain someone's essential blackness or whiteness" (emphasis omitted)); Daniel J. Sharfstein, Essay, *The Secret History of Race in the United States*, 112 YALE L.J. 1473, 1479 (2003) (tracking "the construction of race in how courts reified certain metaphors into notions that now seem natural and absolute").

For instance, the law can generate the content of racial categories in the form of "unconsidered understandings of race" that are "taken-for-granted, consistently relied on, and disrupted, if at all, with great difficulty."[333] The law can also play a part in the process by which "dishonorable meanings [are] socially inscribed on arbitrary bodily marks" so as to create what economist Glenn Loury piercingly labels "spoiled collective identities."[334]

In the historical cases canvassed in Part I, private suppression is often a mechanism for the production of spoiled identity categories of race.[335] Those adopting and operating private suppression schemes may be motivated primarily by pecuniary incentives. But still, their actions often have the effect of reproducing material circumstances under which minority racial status comes to be readily associated with stigmatized traits. Thus, the Fugitive Slave Act inevitably underscored the connection between Black identity and enslavement.[336] Involuntary servitude after the Civil War reprised the material conditions of dependency and apparent inferiority that had characterized slavery.[337] Racially restrictive covenants and the 1968 HUD Act ensured that material differentials between majority Black and non-Black neighborhoods would linger.[338] And indeed, in respect to housing segregation at least, there is some reason to think that Black identity has come to be associated with impoverished, neglected, and crime-ridden residential conditions.[339]

In all these cases, it seems likely that private suppression played an important part in the social processes whereby minority racial identity—and Black identity in particular—came to be associated with a marginalized and inferior status.

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333. Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1806 (2000).

334. GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 59 (2002); *see also* R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 809 (2004) (discussing the creation of "racial stigma," as entailing a process of "becoming a disfavored or dishonored individual in the eyes of society, a kind of social outcast whose stigmatized attribute stands as a barrier to full acceptance into the wider community"). The idea of a spoiled identity was first posited in ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 19 (1st Touchstone ed. 1986).

335. This claim, to be sure, is hard to substantiate with empirical evidence because of the difficulty of disentangling other causal forces: I offer it here as a hypothesis, albeit one that seems fairly likely to be true.

336. *See, e.g.*, JONES, *supra* note 72, at 130 (noting the 1850 Fugitive Slave Act's effect on free Blacks in Baltimore).

337. *See* Daniel, *supra* note 22, at 96 (describing how "many contracts" in the post-Reconstruction labor system "resembled slavery").

338. TAYLOR, *supra* note 195, at 91, 261.

339. *See* Sampson & Raudenbush, *supra* note 253, at 320 ("Research . . . suggests that Americans hold persistent beliefs linking blacks and disadvantaged minority groups to many social images, including but not limited to crime, violence, disorder, welfare, and undesirability as neighbors." (citation omitted)).

Consistent with feminist theorist Nancy Fraser's analysis, this suggests that questions of identity and distribution "are not neatly separated," but instead are "interimbricated and interact causally with each other."[340] Indeed, it may well be that epistemic effects of identity spoilage are as important in the long term as the material consequences of private suppression. Spoiled collective identities are, after all, the ideological infrastructure around which the social practice of racial discrimination is organized.[341] They help produce and stabilize the social "facts" of marginalized and disdained groups within a constitutional system notionally committed to equality.[342] Without such categories, systematic inequalities between groups are far less likely to arise at first or to persist because the social cues for allocating resources and status differentially between groups are likely to be far weaker, and the costs of domination commensurately steeper.

B. Private Suppression as Privatization

Private suppression is also a novel, again previously unnoticed, form of privatization. Construed as such, it illuminates claims advanced in the literature about the normative valence of privatization, in particular confirming the worry that substituting private for public actors can circumvent constitutional norms. On the other hand, histories of private suppression also suggest that these workarounds have unexpected, generative doctrinal effects, stimulating particularly new understandings of state action.

The practice of privatization typically involves either "removing certain responsibilities, activities, or assets from the collective realm" or "retaining collective financing but delegating delivery to the private sector."[343] Under both these definitions, a public function of some sort is performed by a private actor. The difficulty of bounding privatization follows from the pervasive disagreement about what is a public as opposed to a private function. Private actors, moreover, are pervasively involved in governance even absent any conscious effort to outsource.

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340. Nancy Fraser, *Rethinking Recognition*, NEW LEFT REV., May/June 2000, at 107, 118.

341. LOURY, *supra* note 334, at 59.

342. This commitment has been in some instances construed as an "anticaste" principle. Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2411 (1994) (arguing for an "anticaste principle [that] forbids social and legal practices from translating highly visible and morally irrelevant differences into systemic social disadvantage, unless there is a very good reason for society to do so").

343. JOHN D. DONAHUE, THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS 215 (1989). Other definitions entail a similar idea. *See, e.g.*, Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1230 (2003) ("[A] useful definition encompasses the range of efforts by governments to move public functions into private hands and to use market-style competition."); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1377 (2003) ("In the context of government, [privatization] is conventionally understood to signify a transfer of public responsibilities to private hands.").

Privatization, nevertheless, can be identified with a wide variety of forms and legal mechanisms. These include "creating school voucher programs, contracting out the delivery of services, selling off governmental assets such as public housing and hospitals, replacing the Social Security system with individual retirement accounts, and creating private entities, such as homeowners' associations or business improvement districts, endowed with powers traditionally associated with local government."[344] Common to many (but not all) of these disparate varieties of privatization is the employment of contract as both "a vehicle for the exercise of authority and as an instrument of regulation."[345]

In recent public-law scholarship, privatization is alternatively embraced and resisted. On one side are those who point to a potential for efficiency gains when costly governmental action is displaced by less expensive, more flexible private action.[346] On the other is a concern that governments will use it "to insulate decisions from constitutional scrutiny."[347] The extent to which constitutional norms directly regulate private actors performing public functions hinges on the state action doctrine. Critics worry that the latter is "ill-suited to this task, because it ignores the way that privatization gives [non-state] actors control over government programs and resources, focusing instead on identifying government involvement in specific private acts."[348] As a result, they say, privatization facilitates "workarounds," i.e., pathways for "achieving distinct public policy goals that . . . would be impossible or much more difficult to attain."[349] In a recent book, political theorist Chiara Cordelli adds a novel, and more piercing, condemnation of privatization. Drawing on social contract theory and Kantian reasoning, she argues that privatization denies individuals their "equal freedom, understood not as mere noninterference, but rather as a relationship of reciprocal independence" to

344. Matthew Diller, *Form and Substance in the Privatization of Poverty Programs*, 49 UCLA L. REV. 1739, 1741 (2002); *see also* Metzger, *supra* note 343, at 1377–1400 (detailing several case studies of privatization in the federal and state contexts); Daniel Guttman, *Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty*, 52 ADMIN. L. REV. 859, 875–76 (2000) (summarizing "the growth of a contract bureaucracy as an adjunct to social and regulatory programs").

345. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 549 (2000).

346. For summaries of these arguments, see *id.* at 663–64 and Diller, *supra* note 344, at 1744. For an empirical proof of efficiency gains from privatization under certain circumstances, see Shinichi Nishiyama & Kent Smetters, *Does Social Security Privatization Produce Efficiency Gains?*, 122 Q.J. ECON. 1677, 1677–78 (2007).

347. Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 156 (2000).

348. Metzger, *supra* note 343, at 1410–11.

349. Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 719 (2010); *see also id.* at 735 ("When courts do not impute state action, opportunities abound for engineering workarounds.").

the extent that it renders them "systematically dependent on the merely unilateral will of private actors."[350]

The schemes described in Part I, as a threshold matter, fit within the scope of privatization as conventionally defined. To be sure, none involve contracts made by the government with private actors to perform a public service.[351] Nevertheless, all lead to a delegation of authority to a private actor to initiate an action that might have been thought the province of the state. It is telling that legislative proponents of private suppression have oscillated between state and private instrumentalities. One early version of the Fugitive Slave Act proposed by Senator James Mason of Virginia, for example, would have created a "massive legal bureaucracy backed by an enforcement mechanism of marshals and deputy marshals."[352] Private enforcement before commissioners was a cheaper path to the same end. Similarly, regulating access to a primary election was a state function until the Supreme Court invalidated Texas's discriminatory rule, whereupon the state pivoted to a private alternative.[353] The 1968 HUD Act was also conceived as an alternative to the public provision of low-income housing that had dominated postwar federal policy until the late 1960s.[354] Private suppression hence falls securely within the category of privatization because it is often a conscious substitute for a state instrumentality.

Private suppression can be both defended and attacked in terms familiar from the debates on privatization. It also suggests a new angle on those debates. I first develop an efficiency defense and then a critique focused on the risk of constitutional circumvention. Finally, building on Cordelli's theoretical work, I suggest that private suppression creates a distinct kind of harm absent from other forms of privatization.

To begin with, it is no surprise that private suppression can be viewed in efficiency terms. I have emphasized that pecuniary motives loom large in private suppression schemes. In some cases, government sought to leverage such motives to achieve a policy goal that officials had failed to execute. The 1968 HUD Act, justified by President Johnson as a means of tapping market expertise where the cumbersome federal government had failed, is one example of a private suppression scheme justified as an efficient way of

350. CORDELLI, *supra* note 30, at 9; *see also id.* at 121–22 (arguing that privatization involves "transferring to private actors . . . powers that cannot be validly transferred to them").

351. This may be why they have escaped notice by privatization scholars before. Professor Jon Michaels's discussion of "coercive bounties" is the closest I have found in the literature. Michaels, *supra* note 46, at 1077–78.

352. BLACKETT, *supra* note 55, at 51.

353. *See supra* notes 131–133 and accompanying text.

354. *See* TAYLOR, *supra* note 195, at 12–13 (documenting reasons for the Act's passage).

harnessing private actors' selfish motives.[355] This rhetoric is consistent with the logic of efficiency offered in defense of privatization, even though the underlying reality is that private suppression frequently has distributional rather than efficiency effects.

On the other hand, private suppression schemes affirm scholars' concern about the risk that substituting between public and private action enables a "workaround" to negate the force of a constitutional rule. Private suppression schemes, indeed, are "more expedient" than making a futile direct assault on a constitutional rule.[356] The provision of a legal affordance to a private actor facilitates realization of a goal that the state cannot achieve directly. For instance, the network of laws creating the Southern system of involuntary servitude deliberately recreated labor conditions akin to slavery.[357] The Thirteenth Amendment, of course, installed a clear roadblock to the direct state implementation of this goal. Later in the same Jim Crow era, Texas's open-ended delegation of authority to determine primary-election eligibility to the Democratic Party executive committee was an (initially successful) effort to evade the force of earlier Supreme Court rulings.[358] In the twentieth century, racially restrictive covenants were a substitute for (unconstitutional) race-specific zoning ordinances as well as a response to Black migration from the South.[359] Where a legislative body is directly constrained by the Constitution,[360] in short, private suppression often provides a substitute for otherwise forbidden state action.

Further, the case studies in Part I suggest that private suppression has a larger effect of unraveling constitutional constraints on the state more generally. To see this, consider an argument offered by Jody Freeman. She contends that familiar forms of privatization, "far from weakening democratic norms of due process, rationality, equality, and accountability,

355. *See id.* ("Private sector actors welcomed the pioneering role of HUD and the FHA in forging a risk-free venture in the new urban housing market.").

356. Michaels, *supra* note 349, at 734–35.

357. *See* ROSENTHAL, *supra* note 91, at 162 (noting that postwar planters "went to great lengths to replicate . . . labor patterns that had existed under slavery"); *see also supra* subpart I(C).

358. *Compare* Nixon v. Condon, 286 U.S. 73, 85 (1932) ("Whatever power of exclusion has been exercised by the members of the committee has come to them, therefore, not as the delegates of the party, but as the delegates of the State."), *with* Grovey v. Townsend, 295 U.S. 45, 48 (1935) (noting that after *Condon*, "the qualifications of citizens to participate in party counsels and to vote at party primaries have been declared by the representatives of the party in convention assembled, and this action upon its face is not state action").

359. *See supra* notes 178–179 and accompanying text.

360. The 1850 Fugitive Slave Act is an awkward example here insofar as it was a federal workaround of the state's entitlement under *Prigg v. Pennsylvania*. *See* 41 U.S. (16 Pet.) 539, 616 (1842) ("[W]here a claim is made by the owner, out of possession, for the delivery of a slave, . . . and inasmuch as the right is a right of property capable of being recognised[,] . . . Congress, then, may call that power into activity for the very purpose of giving effect to that right . . . .").

could instead extend those norms to private actors."[361] She points to the use of conditional federal grants and the heavy regulation of charter schools as examples.[362] Private suppression illustrates the inverse mechanism. The state delegates a task to third parties by creating a private-law affordance. This is used to negate others' constitutional rights. But these specific applications have more general spillover effects. They result in a larger zone of constitutional darkness, wherein no one can exercise the constitutional right because of the expectation of private liability. In other words, the specific application of private suppression results in a larger domain in which the state acts free of constitutional bindings.

There is, however, a converse effect that privatization scholars have not yet flagged: an unexpected correlative to the workaround effect of private suppression, history suggests, is doctrinal innovation to squelch circumvention. Private suppression has in the past generated Supreme Court opinions at the high watermarks of judicial understandings of state action. Cases such as *Terry v. Adams*[363] and *Shelley v. Kraemer*[364] are instructive here. It is plausible to understand both *Terry* and *Shelley* as defining state action broadly *as a result of* the Justices' concern that their Article III authority as constitutional rule makers, as well as a particular constitutional rule that they favored, would be compromised by a privatization-powered workaround.[365] The resulting case law is often condemned for its conceptual incoherence.[366] But it is worth considering the possibility that doctrinal pluralism preserves courts' ability to stymie intentional workarounds intended to flatten constitutional rights.

Indeed, *Terry* and *Shelley* might be read to suggest that an intent to circumvent a constitutional rule, even by formally permissible means, itself constitutes a constitutionally forbidden motive. The argument for this reading would not lean on language in the actual opinions (which are opaque and a bit evasive), but might go as follows: In an important article on constitutionally impermissible intent, Richard Fallon has suggested that the Court's understanding of a state actor's relevant intent "presuppose[s] that statutes have social meanings from which the intent of the legislature can be

361. Freeman, *supra* note 44, at 1351.

362. *See id.* at 1317, 1322 (discussing conditional federal grants and charter schools as examples of regulation constraining privatization).

363. 345 U.S. 461 (1953).

364. On the limited effect of *Shelley* as a state action precedent, see Mark D. Rosen, *Was* Shelley v. Kraemer *Incorrectly Decided? Some New Answers*, 95 CALIF. L. REV. 451, 461 (2007).

365. For a suggestion to this end, see Christopher W. Schmidt, *On Doctrinal Confusion: The Case of the State Action Doctrine*, 2016 BYU L. REV. 575, 585.

366. *See, e.g.*, Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 378 (1995) ("It is fair to say that 'our cases deciding when private action might be deemed that of the state have not been a model of consistency.'" (quoting Edmonson v. Leesville Concrete Co., 500 U.S. 614, 632 (1991) (O'Connor, J., dissenting))).

inferred, largely without reference to the actual motivations of those who enacted the statutes in the first instance."[367] Where a statute or rule is enacted for the obvious purpose of duplicating the effect of another enactment that has recently been invalidated on constitutional grounds, its social meaning tracks that of the first measure. It is state action with both the intention—and effect—of violating the Constitution.[368] Fallon's argument suggests that the measures challenged in both cases are hence unconstitutional. Although they do not endorse this idea on their face, both *Terry* and *Shelley* can be understood as resting on the notion that intentional, manifest circumventions of constitutional rules are themselves unconstitutional.

Finally, the case studies in Part I draw attention to a harm from privatization that legal scholars have to date ignored: Under a private suppression scheme, constitutional rights exist at the mercy of private actors. The latter can choose whether or not to use a legal instrument of suppression. This created a condition of uncertainty, vulnerability, and dependency for free Blacks in the antebellum North, laborers in the post-Reconstruction South, factory workers of the Progressive Era, and Black homeowners through the twentieth century. Using a vocabulary drawn from Kantian moral theory, Cordelli aptly captures the ensuing harm. She observes that a plausible account of freedom requires not just absence of impediment but also a respect for a person's "ability to act for reasons they can appropriately respond to."[369] When law makes people's rights wholly contingent on the whims of third parties, it puts them at the mercy of impulses that they have no reason to acknowledge. Instead, it eliminates their "capacity to set and pursue ends" on important matters.[370] It reduces them, in other words, to the "mere means" of another's will.[371]

C. Private Suppression and the Rule of Law

The third analytic lens through which private suppression can be evaluated relates to widely shared ambitions of restraining government power and maintaining the rule of law. Attention to the effect of private suppression destabilizes two core assumptions of American constitutional law: that the greatest risk to liberty from governmental overreach comes from concentrated government power, and further that the rule of law is necessarily advanced by entrusting the enforcement of legal norms to courts.

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367. Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 552–53 (2016).

368. For a hint of this idea, see Martha Minow, *Alternatives to the State Action Doctrine in the Era of Privatization, Mandatory Arbitration, and the Internet: Directing Law to Serve Human Needs*, 52 HARV. C.R.-C.L. L. REV. 145, 148 (2017).

369. CORDELLI, *supra* note 30, at 60.

370. *Id.* at 64.

371. *Id.*

1. Concentrated Power and the Risk to Individual Liberty.—The idea that a concentration of power in a small number of individual hands presents a hazard to individual liberty goes back to the beginning of the Republic. It is reflected in James Madison's well-trodden dictum that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny."[372] Conversely, the dispersion of power within the federal government is thought to be correlated with "the preservation of liberty."[373] Such a dispersion of power within the Executive in particular "allows for multiple actors to wield authority[,] . . . spreading power within the executive branch."[374] Similarly, the "vertical dispersion" of power across federal and state governments is taken as "a mechanism by which the state polity may protect itself from centralized state abuses of power during statewide elections.[375] Across different institutional settings, in short, "dispersion of power across government bodies" is consistently styled as a good.[376] An echo of the same concern with concentrated actors is found in public-choice theory, which posits that concentrated interest groups will tend to wield power more effectively than dispersed ones and hence are more apt to abuse the legislative process.[377]

The association of concentrated power with undesirable outcomes has, to be sure, been sharply questioned. For instance, Daryl Levinson criticizes the existing scholarship for failing to query "why institutionally concentrated

372. THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961); *see also* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 150–51 (2d ed. 1998) (collecting evidence that this was a general concern during the Founding period).

373. Mistretta v. United States, 488 U.S. 361, 380 (1989); *see also* William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1529 (1998) (book review) ("The framers created separate branches within the federal government, in part to ensure that no one branch would create law and control policy by itself."); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 577 (1984) ("[The legislative, executive, and judicial] powers of government are kept radically separate, because if the same body exercised all three of them, or even two, it might no longer be possible to keep it within the constraints of law.").

374. Leslie B. Arffa, Note, *Separation of Prosecutors*, 128 YALE L.J. 1078, 1115 (2019). For defenses of "internal" separations, see Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2319–22 (2006), and Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 437–42 (2009).

375. James A. Gardner, *The Regulatory Role of State Constitutional Structural Constraints in Presidential Elections*, 29 FLA. ST. U. L. REV. 625, 627 (2001).

376. *See, e.g.*, Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1449–50 (2018) (identifying "dispersion of power across government bodies" as support for the argument that "democratic institutions are in reasonably good working order").

377. *See* Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 212 (1976) (discussing "small group dominance" in the political process); Matthew Wansley, *Virtuous Capture*, 67 ADMIN. L. REV. 419, 421 (2015) ("The strongest interest groups are concentrated, wealthy repeat players.").

power is so dangerous."[378] Pointing to the importance of partisan and interest-group coalitions operating beneath the formal institutional surface of the branches, states, and agencies, he "calls into question constitutional law's preoccupation with balancing or diffusing power at the level of branches and units of government."[379] Yet even Levinson does not repudiate the notion that concentrations of power per se are troubling. He rather adds the point that legal authority and de facto power can come apart because of informal, political dynamics.

An examination of private suppression schemes, however, suggests that we should follow thinkers like Mill in resisting a tight linkage between the concentration of authority and the loss of some sort of liberty. The systems of private suppression described in Part I, to be sure, all start with a centralized legislative decision to create a new legal affordance. But a distinctive feature of the ensuing legal mechanism is that, in most cases, it can be picked up and used by a widely dispersed set of private actors—e.g., slaveowners, Southern capital holders, industrialists seeking to stymie labor organization, or white homeowners wishing to protect the investment in their homes.[380] The dispersion of this legal power to act is, at least superficially, associated with a loss of control on the part of the Executive to decide when to invoke judicial intervention to change formal legal relations.[381] But more profoundly, such schemes allow the state to pursue a policy not merely through the limited instrumentalities of governmental attorneys: they tap into a "force multiplier" of private actors. Through the lure of immediate pecuniary rewards (in the case of fugitive slaves or involuntary servitude) or the promise of future profits (in the case of the 1968 HUD Act), these schemes draw in private actors who might otherwise be indifferent or remain on the sidelines. Individuals might participate in a suppressive scheme even if they have no ideological ax to grind. As a result, private suppression schemes enable a policy to be pursued notwithstanding limited state capacity and the fact that direct implementation via state action would likely be thwarted as unlawful.

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378. Daryl J. Levinson, Foreword, *Looking for Power in Public Law*, 130 HARV. L. REV. 31, 37 (2016); *see also* JEREMY WALDRON, POLITICAL POLITICAL THEORY 55–62 (2016) (noting that theorists of the separation of powers also offer no explanation of why concentration is undesirable).

379. Levinson, *supra* note 378, at 40.

380. The white primary cases are an exception to this regularity. *See supra* text accompanying notes 130–138.

381. The Supreme Court has occasionally expressed concern that the legislative creation of private rights of action in respect to statutes dilutes the President's power to "take [c]are" that the laws are enforced. *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992) (casting doubt on Congress's ability "to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts").

2. The Rule of Law After Private Suppression.—The Constitution does not appeal directly to the idea of the rule of law.[382] Yet, the idea has become a powerful lodestar for constitutional theory and practice in the United States: Chief Justice Roberts even recently described it as a "constitutional ideal."[383] Yet jurists and commentators are not always precise about what they mean when they refer to the rule of law. One important strand of doctrine and analysis associates the rule of law with the availability of judicial oversight.[384] As Professor Lon Fuller observed almost fifty years ago, "[a]ll are agreed that courts are essential to 'the rule of law.'"[385]

This association between judicial involvement and the rule of law appears to be grounded in the empirical assumption that courts will reliably enforce legal rules in a predictable, stable way.[386] The phenomenon of private suppression, though, casts doubt on the positive correlation between judicial intervention and legality. It suggests that judicial power, under certain conditions, can dissolve the rule of law by undermining reasonable, widely shared expectations of stable legality and enabling problematic forms of dominance.

On numerous occasions, Justices of the Supreme Court have explicitly aligned federal judicial oversight with the rule of law. Perhaps the most famous example is Chief Justice Marshall's insistence in *Marbury v. Madison*[387] that having "a government of laws, and not of men" required that the law contain a "remedy for the violation of a vested legal right."[388] In litigation over President Nixon's secret White House tapes 170 years later,

382. The phrase "rule of law" in something like the contemporary sense emerged only in the late nineteenth century. BRIAN Z. TAMANAHA, ON THE RULE OF LAW 63 (2004) (dating the "first prominent modern formulation and analysis of the rule of law in a liberal, democratic system" to 1888). Of course, there are precursor ideas, such as the Classical Greek idea of isonomia, which have a "narrower and less robust" meaning than the rule of law now. Adriaan Lanni, *Classical Athens' Radical Democratic "Rule of Law"*, *in* THE CAMBRIDGE COMPANION TO THE RULE OF LAW 25, 26 (Jens Meierhenrich & Martin Loughlin eds., 2021).

383. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring).

384. *See* Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEXAS L. REV. 487, 492 (2018) (observing that the United States has "a judge-based conception of the rule of law"). The link between the rule of law and courts goes back to the Victorian theorist of British constitutional law Albert Dicey, who defined the first in terms of citizens' ability to challenge official action in the ordinary courts. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 180–81, 205 (3d ed. 1889).

385. Fuller, *supra* note 14, at 372.

386. *Cf.* LON L. FULLER, THE MORALITY OF LAW 42–44 (rev. ed., 13th prtg. 1976) (offering an influential definition of the rule of law that hinged in part on publicly promulgated rules, which have been laid down in advance).

387. 5 U.S. (1 Cranch) 137 (1803).

388. *Id.* at 163. Of course, *Marbury* ends in the plaintiff being denied a remedy. *See id.* at 175–76, 180 (holding that the law allowing the Supreme Court to issue a mandamus is "repugnant to the constitution" and "void").

Chief Justice Burger also pointed to a "historic commitment to the rule of law" to justify an order to the President commanding the tapes' disclosure.[389] More recently, Justice Gorsuch has appealed to the rule of law as the reason for denying administrative agencies deference in respect to their interpretations of their own regulations, and for instead allowing plenary judicial review of such regulations' application.[390] While these arguments differ in form and occasion, they align insofar as they trace a connection between the rule of law and the courts.

But why? The association of the rule of law with judicial involvement implicitly assumes some empirical regularity in how courts act. It assumes that these regularities distinguish courts from other government actors.[391] It is not at all clear, even from the canonical cases such as *Marbury* or *Nixon*, what particular quality of judicial action provides this necessary linkage to the rule of law. Judges have attempted to fill this gap, but their efforts remain partial and implausible. Justice Scalia, for example, argued in an influential article that the rule of law is synonymous with a formalist preference for rules over standards, a preference that (on the late Justice's view) yielded predictable outcomes and allegedly restrained judicial discretion.[392] Set aside the problem that rules do not always yield predictable answers (it depends on the facts at bar). Justice Scalia's view still limits the judicial role to a narrow subset of imaginable cases in a way that saps the rule of law of normative appeal. Elsewhere, other Justices have invoked the rule of law in defense of, and also as a weapon against, the power of precedent and the principle of stare decisis.[393] Again, this conflates a contingent, local feature of American judicial practice with the very idea of a court. Worse, none of these arguments, any more than the more general claims tendered in *Marbury* and *Nixon*, offer grounds for concluding that courts use rules (not standards) or follow (or deviate from) precedent with more frequency than other branches as an empirical matter. The relationship of legality and judicial action is

389. United States v. Nixon, 418 U.S. 683, 708 (1974). For more general paeans to the rule of law, see, e.g., Bell v. Maryland, 378 U.S. 226, 346 (1964) (Black, J., dissenting), and Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972).

390. Kisor v. Wilkie, 139 S. Ct. 2400, 2425, 2437–38 (2019) (Gorsuch, J., concurring in the judgment).

391. Few scholars have interrogated the relationship between courts and the rule of law. A limited exception is Jeremy Waldron's argument against judicial review of legislation. Jeremy Waldron, *The Rule of Law and the Role of Courts*, 10 GLOB. CONSTITUTIONALISM 91, 93 (2021). But even Waldron admits that his "objections to judicial review do not really deny that judicial review is required by the rule of law." *Id.* at 94.

392. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–80 (1989).

393. *Compare* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865 (1992) (plurality op.) (invoking the rule of law and stare decisis to justify not overruling *Roe v. Wade*), *with id.* at 993–96 (Scalia, J., concurring in the judgment in part and dissenting in part) (criticizing the majority's use of the rule of law and stare decisis in upholding *Roe*).

assumed rather than demonstrated. Hence, the conceptual and empirical basis for linking the rule of law to judicial action, in other words, remains murky at best.

Private suppression schemes invert the assumed linkage of courts and the rule of law in two crucial ways—one that undermines the rule of law as an ideal, and a second that compromises it as a lived reality. To begin with, such schemes subvert a set of important, shared expectations about the state's role in maintaining the rule of law. Most simply, the intended and actual effect of most of the mechanisms described in Part I is to negate or weaken a constitutional right. In several of the historical cases canvassed above, this is achieved through judicial action (or through the quasi-judicial actions of a commissioner under the 1850 Fugitive Slave Act). Rather than advancing and ratifying the fundamental law, the judicial office is turned against elements of the fundamental law. This seems prima facie incompatible with any but the thinnest conception of the rule of law. Yet it happens—time and again.

A second, related effect is substantive:[394] private suppression turns courts into instruments for unraveling rights to due process, equality, and freedom from involuntary servitude. It thereby renders people "unable to assert their own worth and equal standing vis-à-vis each other" because they are made dependent on the unilateral will of others.[395] A Black person in the antebellum North or the postbellum South, a wage laborer in the Progressive Era, and a Black homeowner for much of the twentieth century all stood in a position of vulnerability, dependency, and fear in relation to those wielding a legal instrumentality against them. They were, in Cordelli's terms, placed by the law into a "state of nature" in relation to their oppressors.[396] On her accounting, this is "nothing other than a normative condition of provisional justice, and thus of unfreedom."[397] The law denied them recognition as "full member[s] of society, capable of participating on a par with the rest."[398] The role that law plays in maintaining the rough parity between citizens needed for ordinary, democratic life is here inverted. Law instead becomes an instrument for systematic domination of a specific group.

D. Conclusion: The Moral Case Against Private Suppression

I have suggested here that reflection on histories of private suppression illuminates the conceptual terrain of constitutional theory. Most commonly,

394. The rule of law can be understood in both "legalistic" and "non-legalistic," substantive terms. N.W. Barber, *Must Legalistic Conceptions of the Rule of Law Have a Social Dimension?*, 17 RATIO JURIS. 474, 475 (2004).

395. CORDELLI, *supra* note 30, at 64–65.

396. *Id.*

397. *Id.* at 72.

398. Fraser, *supra* note 340, at 113.

private suppression has been used to empower private citizens to maintain the material correlates of a racial caste system. In this capacity, it is a malign and potent species of popular constitutionalism. Further, it operates as a workaround of disfavored constitutional amendments or decisions. While federal courts have responded with anti-evasion doctrines of their own, their interventions have rarely been timely or fully effective. The result is not just a regressive and status quo-oriented effect. For private suppression also destabilizes expectations about the relationship of the courts to the rule of law. Rather than upholding that value, judges become instruments for its subversion. They instead help fashion a social system in which some are durably vulnerable and hence predictably subordinated to others. The purpose of law and legal institutions is, in a sense, compromised.

IV. S.B. 8 as Private Suppression

This Part evaluates Texas's 2021 abortion ban, S.B. 8, in light of historical experiences with private suppression. I focus on the moment of its enactment, and its immediate effect prior to the Supreme Court's repudiation of abortion rights[399] because this is the period in which it is plausible to talk of constitutional rights being suppressed. I bracket the question of how S.B. 8 will be employed in a context in which there is no longer a federal constitutional right to abortion.[400]

To begin, my aim is to demonstrate the historical continuity between the forms and ends of private suppression, as explored respectively in Parts I and II. Rather than an innovation, this analysis shows S.B. 8 has profound continuities with legal strategies for suppressing constitutional rights over the past two centuries. This Part's second ambition is to draw on moral economy frames developed in Part III to show that their normative critiques apply here. Further, I identify ways in which S.B. 8 innovates and so poses new normative concerns distinct from its historical antecedents.

By placing S.B. 8 in the context of history and theory, I hope to show that its harm is not reducible to the law's effect upon reproductive choice—although nothing I say here should be understood to derogate from the moral and legal importance of such rights. Like the Fugitive Slave Act of 1850, the network of state involuntary labor measures, and anti-union injunctions, S.B. 8 generates a set of harms that overflow and radiate out from particular instances of its application. These effects damage state-individual relations and compromise individual-to-individual bonds, producing a patchwork of

399. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022).

400. It is worth noting that interesting and difficult issues arise post-*Dobbs* if S.B. 8 is used to prevent the exercise of a state statutory or constitutional right to abortion in a jurisdiction that embraces reproductive choice—as will be the case in several states as a consequence of referendums in November 2022. These issues sound in the choice-of-laws register and are sufficiently distinct to be bracketed here.

state protection and vulnerability, a systematic subordination of one group to another, and a reiteration of oppressive and hierarchical understandings of gender norms.

I open this Part by describing S.B. 8's structure and function as a private suppression scheme in the lineage of the case studies presented in Part I. I then explore the ways in which the Texas statute echoes harms inflicted by earlier statutory schemes. Finally, I identify ways in which S.B. 8 innovates, imposing new harms over and above its effect on reproductive choice.

A. S.B. 8 as Private Suppression

On May 19, 2021, Texas Governor Greg Abbott surrounded himself with a smiling crowd of state legislators and signed into law S.B. 8.[401] In structure, function, and intended effect, the measure is a private suppression mechanism akin to those examined in Part I. While S.B. 8 contains many ambiguities, it is clear that the Texas law (1) invites a sustained campaign by private individuals or organizations; (2) using a private right of action created by state law;[402] (3) with the anticipated (as well as actual and intended) effect of preventing women from securing an abortion six weeks or more after conception, contrary to the holdings of *Roe v. Wade*[403] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[404] At the moment S.B. 8 went into effect, in September 2021, those decisions remained formally binding law—and the Texas statute recognized as much explicitly.[405] My analysis focuses on that moment.

As discussed briefly in the Introduction, the Texas law prohibits abortions if there is a "fetal heartbeat" or if a physician fails to "perform a test to detect a fetal heartbeat."[406] The law creates an exception for an undefined class of "medical emergenc[ies]" but has no exception for cases of rape, statutory rape, or incest.[407] There is no doubt that the aim of S.B. 8 at the time of its enactment, therefore, was to negate an otherwise valid and

401. Shannon Najmabadi, *Gov. Greg Abbott Signs into Law One of Nation's Strictest Abortion Measures, Banning Procedure as Early as Six Weeks into a Pregnancy*, TEX. TRIB. (May 19, 2021, 11:00 AM), https://www.texastribune.org/2021/05/18/texas-heartbeat-bill-abortions-law/ [https://perma.cc/3HRK-YCDC]. A subsequent measure bans abortion after seven to ten weeks without the private enforcement mechanism of S.B. 8. Kevin Reynolds, *Texas Law Restricting Access to Abortion Medications Goes into Effect Dec. 2 After Governor Signs Bill*, TEX. TRIB. (Sept. 24, 2021, 4:00 PM), https://www.texastribune.org/2021/09/24/texas-abortion-medication-law-abbott/ [https://perma.cc/89NV-NW48].

402. TEX. HEALTH & SAFETY CODE ANN. § 171.2079(a) (West 2021).

403. 410 U.S. 113, 153 (1973) (holding that the right to privacy encompasses the right to an abortion).

404. 505 U.S. 833, 869 (1992) (reaffirming *Roe*).

405. *See* HEALTH & SAFETY § 171.209(e) (regulating affirmative defenses).

406. *Id.* § 171.204(a); *see also id.* § 171.203(c) (providing that such test must be "appropriate for the estimated gestational age of the unborn child").

407. *Id.* § 171.205.

applicable constitutional right, per condition (3).[408] Further, per condition (2), the law is "enforced exclusively through [a] private civil action[]."[409] This private right of action can be lodged against anyone. This makes S.B. 8 fundamentally different from ordinary tort and contract regimes,[410] where the universe of potential plaintiffs is bound by the rules of proximate cause or privity. For the same reason, S.B. 8 is also dissimilar from qui tam actions, which are also available to only a limited class of plaintiffs.[411]

This private right of action is not available against the pregnant woman but rather against anyone who "performs or induces" a covered abortion or "aids or abets the performance or inducement of an abortion, including paying . . . through insurance or otherwise" and regardless of whether "the person knew or should have known that the abortion would be performed or induced."[412] Strikingly, excluded from S.B. 8's range is any "person who impregnated the abortion patient through an act of rape."[413] In other words, S.B. 8 allows private actors to bring suits against insurance companies that help fund a woman's abortion but may not allow suits against a rapist who impregnated that woman, and hence was a proximate cause of an unwanted pregnancy. The penalty for violating this strict liability legal regime is either injunctive relief or "damages in an amount not less than $10,000 for each abortion."[414]

The Texas statute was challenged unsuccessfully by private plaintiffs immediately upon enactment.[415] On October 6, 2021, Judge Robert Pitman of the Western District of Texas issued a preliminary injunction of the measure, labeling it "an unprecedented and aggressive scheme to deprive its citizens of a significant and well-established constitutional right."[416] This was

408. *See* Reese Oxner, *Texas Lawmakers' Novel Approach to Skirting* Roe v. Wade *Leaves Abortion Rights Advocates Without a Legal Playbook*, TEX. TRIB. (Sept. 10, 2021, 5:00 AM), https://www.texastribune.org/2021/09/10/texas-abortion-ban-legal-challenges/ [https://perma.cc/7MZ8-63DD] (describing the measure as "successfully flout[ing]" the constitutional right to choice).

409. HEALTH & SAFETY § 171.207(a).

410. On the difference between these concepts, see Apple Inc. v. Pepper, 139 S. Ct. 1514, 1526 (2019) (Gorsuch, J., dissenting).

411. *See* David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1257 (2012) (describing the way in which qui tam provisions select for "expertise and specialization").

412. HEALTH & SAFETY § 171.208(a)(1)–(2).

413. *Id.* § 171.208(j).

414. *Id.* § 171.208(b). "[A] court may not award relief" if a defendant has "previously paid the full amount of statutory damages" in a "previous action." *Id.* § 171.208(c). Nor can liability be imposed on "any speech or conduct protected by the First Amendment." *Id.* § 171.208(g).

415. *See* Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021) (denying injunctive relief because of the "complex and novel antecedent procedural questions on which [the plaintiffs] have not carried their burden").

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

later suspended by the Supreme Court.[417] Before Judge Pitman's order was issued, two out-of-state plaintiffs filed suit under S.B. 8 against Dr. Alan Braid, a Texas physician who had written publicly that he had performed a covered procedure.[418]

After S.B. 8 was enacted, most clinics offering abortions ceased to perform the procedure.[419] Those clinics also reported "more fake calls and request[s]" from people "trying to trick [the clinic] in a lie."[420] Barring abortion in the state has a predictable asymmetrical effect by race and ethnicity. In 2020, some 56,300 abortions were performed in Texas.[421] Of these, 66% were for Black, Hispanic, or Native Americans.[422] (Non-whites make up 22.1% of the state's population.[423]) Because Medicaid and most private insurers in Texas do not cover abortion,[424] financial constraints as well as scheduling difficulties meant that many Texas residents, in particular racial minorities, experienced delayed abortion procedures.[425] Experience under a pandemic-era executive order that constrained abortions suggests that there is elasticity in demand and that restrictions generate a shift to out-of-state providers.[426]

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

418. Reese Oxner, *Texas Doctor Who Admitted to Violating the State's Near-Total Abortion Ban Sued Under New Law*, TEX. TRIB. (Sept. 20, 2021, 6:00 PM), https://www.texastribune.org/2021/09/20/texas-abortion-ban-doctor-alan-braid/ [https://perma.cc/VR7W-SWQN].

419. *E.g.*, Nicole Chavez, Dianne Gallagher & Jade Gordon, *Abortion Funds and Providers Are Seeing an Uptick in 'Vigilante' Calls After Texas Ban*, CNN (Sept. 10, 2021, 1:52 PM), https://www.cnn.com/2021/09/10/us/texas-abortion-ban-impact-calls/index.html [https://perma.cc/8GZ8-BM2Y] (reporting that "Planned Parenthood South Texas . . . has stopped offering [abortions] due to [S.B. 8]").

420. *Id.*

421. TEX. DEP'T OF HEALTH & HUM. SERVS., *Induced Terminations of Pregnancy* (2021), https://www.hhs.texas.gov/about-hhs/records-statistics/data-statistics/itop-statistics [https://perma.cc/Z5Z4-AHAW].

422. *Id.*

423. *See* U.S. CENSUS, *Quick Facts: Texas* (2021), https://www.census.gov/quickfacts/TX [https://perma.cc/JY2J-NQY5] (reporting that 77.9% of the population identifies as "[w]hite alone").

424. Alexandra Sifferlin, *Texas Passes Law Significantly Limiting Coverage for Abortion Procedures*, TIME (Aug. 16, 2017, 10:05 AM), https://time.com/4901883/texas-abortion-law/ [https://perma.cc/JTU6-M47R].

425. D. Grossman, G. Sierra, S. Baum, K. Hopkins, J. Potter & K. White, *Factors Associated with Delays Obtaining Abortion Care in Texas*, 102 CONTRACEPTION 288, 288 (2020).

426. *See* Kari White, Bhavik White, Vinita Goyal, Robin Wallace, Sarah C.M. Roberts & Daniel Grossman, *Changes in Abortion in Texas Following an Executive Order Ban During the Coronavirus Pandemic*, 325 J. AM. MED. ASS'N. 691, 692 (2021) (suggesting that patients traveling out of state to receive abortions may have contributed to the decline in abortions following S.B. 8).

B. S.B. 8 and the History of Private Suppression

The Texas statute contains a number of striking structural parallels in purpose and operation to earlier private enforcement regimes.[427] I highlight five main points of correspondence.

1. S.B. 8 as Popular Constitutionalism.—First, and most obviously, the ambition of the Texas law is not just to prevent individuals from exercising a constitutional right but also to alter judge-wrought constitutional doctrine. It "dropped the charade" of previous, indirect efforts to repudiate *Roe*, in favor of a frontal attack.[428] Strikingly, S.B. 8 acknowledged that, at least at the time of its enactment into law, *Roe* and *Casey* remained valid (and hence presumably binding) law even as it overtly aimed to prevent those rights from being exercised.[429] In taking this approach, S.B. 8 was again a response to an exogenous institutional change[430]—not a change in the law this time, but a conservative shift in the Supreme Court that Texas's lawmakers hoped to harness and drive toward their policy goals. Sympathetically glossed in this light, S.B 8 is an instance of popular constitutionalism through a vector that might influence the Supreme Court. By eliminating the provision of abortion on the ground, at least in Texas, the statute demonstrated directly and graphically the possibility (soon thereafter realized) of overturning *Roe*.[431] Corroborating an intuition first articulated by Schmitt and Siegel,[432] S.B. 8 therefore demonstrates the enduring potency of conservative popular constitutionalism. It further illustrates how popular constitutionalism can involve a blend of private, legislative, and judicial action. In its most potent form, that is, popular constitutionalism is deeply imbricated with state action.

2. S.B. 8 as Deck-Stacking.—Second, S.B. 8 engages in deck-stacking in the same vein as the 1850 Fugitive Slave Act. The latter created a new

427. An earlier generation of anti-abortion activists tried to use medical malpractice suits to the same end. *See* Mary Ziegler, *The Deviousness of Texas's New Abortion Law*, THE ATLANTIC (Sept. 1, 2021), https://www.theatlantic.com/ideas/archive/2021/09/deviousness-texass-new-abortion-law/619945/ [https://perma.cc/6PWU-SUHQ] (describing how anti-abortion activists used medical malpractice suits in the 1990s to discourage doctors from providing abortions).

428. Julia Kaye & Marc Hearron, *Even People Who Oppose Abortion Should Fear Texas's New Ban*, WASH. POST (July 19, 2021, 8:56 AM), https://www.washingtonpost.com/outlook/2021/07/19/texas-sb8-abortion-lawsuits/ [https://perma.cc/6K68-6PWD].

429. One of the affirmative defenses under the statute is eliminated retroactively if *Roe* is overruled after the statute is enacted. TEX. HEALTH & SAFETY CODE ANN. § 171.209(e) (West 2021).

430. *See supra* subpart II(C).

431. On the other hand, the prospect that third-party tort liability could be used to suppress other rights, and the sense that Texas is defying the Court's supremacy as to law declaration, might cut the other way. Even accounting for those concerns, the state's gamble is likely a rational one given its goals.

432. *See supra* notes 315–316 and accompanying text.

forum (newly minted federal commissioners) and nudged adjudicators toward pro-slavery outcomes by assigning higher payments when the putative slave owner prevailed.[433] S.B. 8 takes several steps in the same direction: it (i) disdains an intent requirement;[434] (ii) creates a floor, but not a ceiling, for damages;[435] (iii) awards costs and attorney's fees to a prevailing plaintiff, but not a prevailing defendant;[436] (iv) makes the assertion of a constitutional privilege by a defendant into an affirmative defense governed by a preponderance of the evidence standard;[437] and (v) allows suit in any Texas county, even one with which the defendant has no ties.[438] The latter provision enables plaintiffs to shop for a favorable forum. It seems likely that were the statute to be in operation for some time, plaintiffs would be able to identify one or two very favorable venues, staffed with judges ideologically opposed to abortion. The result would be to further stack the deck in plaintiffs' favor. As in the case of the Fugitive Slave Act of 1850, this suggests an ambition to create a semblance of adjudicative neutrality while ensuring a predictably asymmetrical set of outcomes. As subpart III(C)'s discussion of the rule of law suggested, courts operate herein as mere instrumentalities, not mediators, of raw political power.

3. S.B. 8 as Third-Party Regulation.—Third, S.B. 8 does not impose liability on a woman attempting to exercise her reproductive choices—it extends a vast and tenebrous specter of liability over those around that woman. This creates the same kind of zone of darkness as earlier private suppression schemes. Hence, actions for enticement could be used against other Southern employers to keep Black labor locked in place,[439] and racially restrictive covenants could be enforced against a non-Black seller as much as against the Black purchaser.[440]

Perhaps the most pertinent parallel here is the slave-rendition regime. Recall that the 1793 Fugitive Slave Act contained a civil damages provision

433. Fugitive Slave Act of 1850, ch. 60, § 8, 9 Stat. 462, 464 (repealed 1864); *see also supra* note 65 and accompanying text.

434. *See* HEALTH & SAFETY § 171.208(a)(1)–(2) (allowing a civil action to be brought against an individual who performs, induces, or aids or abets an abortion, regardless of whether that person "knew or should have known" that the abortion violates the law).

435. *Id.* § 171.208(b)(2).

436. *Id.* § 171.208(b)(3), (i).

437. *Id.* § 171.209(b). The affirmative defense is also eliminated retroactively if *Roe* is subsequently overruled. *Id.* § 171.209(e).

438. *Id.* § 171.210(a).

439. Cohen, *supra* note 96, at 33.

440. *See, e.g.*, Gotham, *supra* note 184, at 626–27 ("[R]acially restrictive covenant suits often did not include black litigants but white litigants who wanted to stop a white homeowner from selling a home to a black resident." (citation omitted)). This ceased to be true once covenants were no longer enforceable. Barrows v. Jackson, 346 U.S. 249, 251–52 (1953).

to be deployed against those who aided and abetted fleeing Blacks.[441] This was reiterated in the 1850 Act.[442] Under the earlier provision, an Ohio farmer was found liable for giving a ride in his wagon to nine Black men and women walking along a road, even though he did not know that they had been slaves and even though under Ohio law all people were presumptively free.[443] Despite the fact that more than 150,000 free Blacks lived in the North, the Act "literally enforced" meant that "a farmer could be fined, sued, or jailed for giving a cup of water to a black person walking down the road."[444]

However far the reach of the Fugitive Slave Act, the grasp of S.B. 8's strict liability regime seems to go further. It would seem to cover, for example, taxi or ride-share drivers who unwittingly transport a pregnant person on part of a journey toward an abortion.[445] It would seem to attach liability to an employer whose paycheck covers the costs of an abortion, say through their health care coverage, or who allows time off work to have an abortion performed. And it would seem to cover parents counseling their children or spouses comforting their partners with expressions of affection or support. Like the Fugitive Slave Acts, S.B. 8 casts its minatory net not just over ordinary commercial transactions. It also cuts against ordinary acts of decency or compassion and slices with ruthless indifference through the bonds of both family and marriage. In targeting these relationships while excluding rapists, S.B. 8 sets its aim upon the bonds of compassion and altruism that knit together ordinary society—again, much as the Fugitive Slave Acts did.[446]

4. S.B. 8's Penumbra.—Beyond its suppressive impact on constitutional rights to reproductive choice, S.B. 8 has a penumbral effect that echoes several of the historical examples offered in Part I. The Fugitive Slave Act of 1850, of course, struck fear in both free Blacks and fleeing slaves.[447] In operation, its deck-stacking features meant that free Blacks had good cause

441. Fugitive Slave Act of 1793, ch. 7, § 4, 1 Stat. 302, 305 (repealed 1864).

442. Fugitive Slave Act of 1850, ch. 60, § 7, 9 Stat. 462, 464 (repealed 1864); *see also supra* notes 69–70 and accompanying text.

443. Jones v. Van Zandt, 46 U.S. (5 How.) 215, 216, 218–19, 230 (1847).

444. Paul Finkelman, *The Cost of Compromise and the Covenant with Death*, 38 PEPP. L. REV. 845, 880 (2011).

445. Shannon Bond, *Lyft and Uber Will Pay Drivers' Legal Fees If They're Sued Under Texas Abortion Law*, NPR (Sept. 3, 2021, 5:11 PM), https://www.npr.org/2021/09/03/1034140480/lyft-and-uber-will-pay-drivers-legal-fees-if-theyre-sued-under-texas-abortion-law [https://perma.cc/K6XK-J7H6].

446. *See* Basinger, *supra* note 75, at 323–24 (discussing how the Fugitive Slave Act of 1850 deputized citizens to assist with capturing fugitive slaves and imposed civil and criminal liability on anyone who interfered with capture).

447. *See* JONES, *supra* note 72, at 130 (explaining how the 1850 Fugitive Slave Act "muddied" the "legal distinction between free people of color and slaves," leaving them in a precarious situation).

for trepidation. The Act almost seemed designed to elicit false positives (and at minimum evinced indifference to that risk). Similarly, the labor injunction had a chilling effect beyond instances in which it might directly be applied. It helped legitimate extralegal violence by employers while suppressing union activity that technically benefited from free speech protections.[448] Racially restrictive covenants and the 1968 HUD Act also operated as important supports of a wider system of residential and economic suppression that shaped the lives of households beyond those directly affected.[449]

The spillover effects of S.B. 8 can be divided into two elements. Consider first the consequences to third parties with whom potential abortion patients have solely commercial relations—cascading effects that would not have been achieved with a simple ban on abortion. Most straightforwardly, some of the reporting on the statute's operation suggests that clinics have rolled back not just their provision of interventions covered by S.B. 8 but also similar medical procedures because of surveillance by those seeking to benefit from S.B. 8's remedy.[450]

Such surveillance is likely to extend also to potential (not just actual) abortion patients. They will be queried about their activities, intentions, and plans—including interrogation into the personal details of their intimate lives—by employers, insurance plans, taxi drivers, and anyone else who fears liability. The result will be a dramatic increase in "the extent to which others have access to and information about people's . . . sexual desires, fantasies, and thoughts; communications related to their sex, sexuality, and gender; and intimate activities (including, but not limited, to sexual intercourse)."[451] The law hence compromises a distinctive form of women's privacy related to sexuality.

And further in this vein, consider the way that S.B. 8 will interact with new technologies of surveillance and prediction.[452] There is an increasingly pervasive use of workplace wellness programs that collect data on body mass index and other health parameters with the aim of advancing workers' health

448. FORBATH, *supra* note 144, at 116.

449. *See supra* note 338 and accompanying text.

450. *See* Chavez et al., *supra* note 419 (describing the multiple ways in which S.B. 8 has affected the services that abortion providers are willing to provide).

451. *See* Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1880 (2019) (defining sexual privacy).

452. For an extended analysis of the statutory and constitutional implications of new abortion regulation for digital privacy, see generally Aziz Huq & Rebecca Wexler, *Digital Privacy for Reproductive Choice in the Post*-Roe *Era*, 98 N.Y.U. L. REV. (forthcoming 2023), https://ssrn.com/abstract=4191990 [https://perma.cc/663S-ZVGQ].

(and hence productivity).[453] That data might be used to identify pregnant workers or those who have had abortions. It is not much of a stretch to ask whether S.B. 8 might be used to impose liabilities on companies that fail to act on that data, or to consider the possibility that Texas might build on S.B. 8 by requiring reporting of that data (which is largely beyond the purview of federal data-protection law)[454] to the state. At the very least, S.B. 8 raises the specter of the systems for collecting and analyzing data about our behavior and bodies being used for its enforcement.

A second class of effects concerns the intimate social relations of a potential abortion patient. It seems likely that over time S.B. 8 would chill interactions in familial, employment, and casual settings as those subject to the statute are refrained from disclosing details about their lives that could be used to infer (rightly or wrongly) that they had obtained or were likely to obtain an abortion. That is, S.B. 8 stifles intimate bonds of affection and altruism both within and beyond the family.

At the same time, the statute likely increases women's vulnerability to rape and sexual violence by men. Recall that the statute contains no exception for rape, statutory rape, or incest. Texas's governor justified this coverage by claiming that Texas would "eliminate all rapists" in the state.[455] This claim is, to be clear, implausible (even irresponsible) on its face. Nationally, a "majority of sexual assault victims never relate the occurrence of the crime to law enforcement officials."[456] It is absurd to suggest that Texas is any different. S.B. 8 will predictably and perhaps substantially increase this under-enforcement problem. A victim of sexual assault who is concerned about an unwanted pregnancy has additional reasons under S.B. 8 to refrain from reporting the crime. Reporting will make it more difficult to obtain aid for an abortion and harder to escape surveillance by those seeking to benefit

453. Ifeoma Ajunwa, Kate Crawford & Joel S. Ford, *Health and Big Data: An Ethical Framework for Health Information Collection by Corporate Wellness Programs*, 44 J.L. MED. & ETH. 474, 474, 477 (2016).

454. *See id.* at 478 (noting that some types of data may increase health-based discrimination against employees who fall into certain groups that are not federally protected). I explore these issues further in a forthcoming paper on the aftermath of *Dobbs* for electronic privacy. *See* Huq & Wexler, *supra* note 452.

455. Alison Durkee, *Gov. Abbott Claims Texas Will 'Eliminate' Rapists in Defending Abortion Ban*, FORBES (Sept. 7, 2021, 4:46 PM), https://www.forbes.com/sites/alisondurkee/2021/09/07/gov-abbott-claims-texas-will-eliminate-rapists-in-defending-abortion-ban/ [https://perma.cc/K4B4-DD59]. Subsequently, Governor Abbott contended that rape victims could just take Plan B contraception to prevent pregnancy—even though "emergency contraception isn't widely accessible" due to "the significant number of people of childbearing age who are uninsured and the state's lack of programs that provide access to treatment like Plan B." William Melhado, *Gov. Greg Abbott Said Rape Victims Can Take Plan B. But Emergency Contraception Isn't Widely Available for the State's Poorest People*, TEX. TRIB. (Sept. 3, 2022, 7:00 PM), https://www.texastribune.org/2022/09/03/emergency-contraception-access-rape-victim-abbott/ [https://perma.cc/6Z36-79JQ].

456. Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1292 (2016).

from S.B. 8's civil liability regime. Under Texas's law, victims of sexual assault are not just put to a choice between retributive justice (and perhaps ongoing personal safety) and the capacity to make an autonomous decision about reproduction.[457] They are unable to even share the fact of the rape and seek comfort if they plan to seek an abortion.

S.B. 8 thus enlarges the risk of sexual violence even as it winnows the sphere of affection and altruism upon which families and partnerships depend. In this regard, it poses an equal or greater challenge to the rule of law than earlier iterations of private suppression.[458]

5. S.B. 8 and Spoiled Identity.—Finally, I have suggested that private suppression schemes channel the production of spoiled identities.[459] The Fugitive Slave Acts, involuntary servitude laws, white primaries, restrictive covenants, and the 1968 HUD Act all reproduced material correlates of the negative stereotypes historically assigned to Black identity. In this way, the negative connotations of such classifications were reproduced and deepened. A similar effect, albeit with respect to gender, will likely play out under S.B. 8.

Even as it is likely to impose a disparate burden on minorities,[460] S.B. 8 also has the greatest stigmatic effect on women.[461] I focus here on a gender-related effect that manifests through a tangle of causal threads. To begin with, the law makes women the objects of private surveillance of a potentially intrusive and burdensome kind. It is female employees who will be subject to more intrusive attention if they take time off work or manifest signs that might be taken to indicate pregnancy. It is women customers who will be scrutinized more closely by taxi and ride-share drivers worried about their exposure to liability. And it is women who will be forced into a purdah of secrecy that excludes from their intimate decision-making the loved ones whom they wish to shield from potential liability.[462] It is, in short, women

457. Notice further that S.B. 8 might have the perverse effect of encouraging perpetrators of sexual assault and rape to induce a risk of pregnancy as a means of deterring reporting. It is hard to know how large this risk is—it depends on a certain model of perpetrators as rational actors that might not hold true on the ground—but it is impossible to dismiss.

458. *See supra* section III(C)(2).

459. *See supra* notes 334–339 and accompanying text.

460. *See supra* text accompanying notes 421–425.

461. I bracket for the purpose of this discussion distinctions between cis and trans women. Mary Ziegler has noted that the abortion rights movement used a "war on women" framing in the early 2000s. MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA 191–92 (2020). My argument here is consistent with that framing, but I make no claim to address the complex issues raised by trans persons' access to reproductive care.

462. The critic Jacqueline Rose once noted that the aim of harassment "isn't just to control women's bodies but also to invade their minds." Jacqueline Rose, *I Am a Knife*, LONDON REV. BOOKS (Feb. 22, 2018), https://www.lrb.co.uk/the-paper/v40/n04/jacqueline-rose/i-am-a-knife [https://perma.cc/LF24-3EVZ]. Her observation seems apt here.

who are cast into a "state of nature" because they are vulnerable to "unilateral subjection" by (literally) anyone other than a state agent.[463]

As a result of these convergent social pressures imposed by third-party surveillance and intrusions, women are forced by S.B. 8 into what the philosopher Sukaina Hirji calls an "oppressive double bind": a situation in which they are selecting voluntarily from a range of options but are nonetheless forced to "act against themsel[ves] no matter what they do or how they understand their own action."[464] Under S.B. 8, that is, pregnant women face a "self-undermining" choice either to derogate from their own autonomous wishes respecting their body, or to expose those close to them to disabling liability.[465] Either way, what they do "reinforces to some degree the oppressive structure that constrains their [action]."[466] In this way, S.B. 8 conscripts women into larger "institutionalized value patterns" that deny them recognition as "a full partner in social life, able to interact with others as a peer."[467] They are actively constructed as second-class citizens.

6. Conclusion.—The histories of private suppression, in sum, draw attention to the complex effects that S.B. 8 has on constitutional law, affective bonds, and the risk of criminal violence. These continuities, in my judgment, suggest reasons—quite independently of views on abortion in particular—to hesitate before embracing a measure such as S.B. 8.

C. S.B. 8 as Innovation in Private Suppression

At the same time that it tracks and reproduces many of the normative concerns raised by earlier private suppression schemes, S.B. 8 diverges from those antecedents. Specifically, it maps a new and distinct relationship to market ordering from previous private suppression schemes.

S.B. 8 has a more complex relationship with *ex ante* economic arrangements than earlier private suppression arrangements. The schemes canvassed in Part I, as I have emphasized, were generally motivated by the economic gains to be had from maintaining status quo labor or residential arrangements.[468] In contrast, S.B. 8 derogates from a legal status quo. But it does not do so to protect an interest group's supracompetitive returns. That

463. CORDELLI, *supra* note 30, at 72; *id.* at 70 (tracing this risk to the exercise of "unconstrained and unaccountable discretion").

464. *Cf.* Sukaina Hirji, *Oppressive Double Binds*, 131 ETHICS 643, 667 (2021) (defining the term "double bind").

465. *Cf. id.* at 658 (explaining how oppressive double binds create a "self-undermining character of the agent's choice").

466. *Cf. id.* (noting how oppressive double binds force agents to make choices that reinforce this oppressive structure).

467. *Cf.* Fraser, *supra* note 340, at 114–15 (discussing how misrecognition can affect parity).

468. *See supra* subpart II(A).

is, S.B. 8 shows that private suppression can be exported beyond its historical harnessing for primarily economic ends.

Instead, S.B. 8 seeds an economic interest in a widely diffused group—i.e., people willing to invoke its private remedy—where previously it had only ideological interests or indifference toward abortion. That group benefits materially but also arguably gains in status: The statute assigns it the role of moral censors, supervising its fellow citizens for compliance with a moral norm that is divisive rather than widely shared. It seems likely that the psychological payoffs of feeling moral superiority to those regulated and controlled by the law are just as important as the pecuniary payoffs. The statute, in other words, is a policy with powerful entrenchment effects because it creates a new constituency that benefits materially and psychologically from its existence and so is willing to flex political power in its defense.[469] In creating a new interest group, rather than merely protecting an existing one, S.B. 8 breaks new ground.

Unlike earlier private suppression schemes, S.B. 8 also reconfigures the relationship between gender norms and dominant forms of market ordering. Feminist scholars have underscored how "capitalism's economic subsystem depends on social reproductive activities external to it" such as the "work of birthing and socializing the young."[470] This dependency generates a sharp contradiction: between "social reproduction [as] a condition of possibility" for market-oriented societies and "capitalism's orientation to unlimited accumulation."[471] Over time, the tension between the demands of economic production and social reproduction have been mediated by different norms. Between the early nineteenth century and the rise of women's movements in the 1970s, for example, a "cult of motherhood" dominated Americans' understanding of women's appropriate roles in both the home and the labor force.[472] Through the 1980s, employment law, tax incentives, and welfare reform aimed to move women into the workforce—without reducing their expected contribution to childcare.[473]

Against this trend, S.B. 8 forcefully reiterates the older understanding of gendered market participation by coercing women, through communal

469. *Cf.* Paul Pierson, *The New Politics of the Welfare State*, 48 WORLD POL. 143, 145 (1996) (discussing the politics of retrenchment).

470. Nancy Fraser, *Contradictions of Capital and Care*, NEW LEFT REV., July/Aug. 2016, at 99, 101.

471. *Id.* at 100.

472. *Compare* MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS 51 (1994) (describing the emergence of the "cult of motherhood" in the early 1800s), *with* JUDITH SEALANDER, THE FAILED CENTURY OF THE CHILD: GOVERNING AMERICA'S YOUNG IN THE TWENTIETH CENTURY 12 n.31 (2003) (describing a "1970s organized opposition to a cult of motherhood in the United States").

473. Adrienne Roberts, *Financing Social Reproduction: The Gendered Relations of Debt and Mortgage Finance in Twenty-First-Century America*, 18 NEW POL. ECON. 21, 25 (2013).

surveillance and law, into a mothering role without regard to their other economic responsibilities. Because S.B. 8 is likely to affect impoverished and racial minority groups more acutely, this compulsion toward motherhood will create competing financial and ethical pressures. Not for the first time, working class and economically marginalized women will be subject to competing moral and economic edicts that cannot both be fulfilled.[474] The resulting moral and economic insecurity, concentrated among Black and Hispanic women, is simply how the internal contradictions of early-twentieth-century market ordering are externalized onto those least able to resist and least able to bear them. S.B. 8 is thus properly understood as an instance of "motherhood" operating as "the place in our culture where we lodge, or rather bury, the reality of our own conflicts.[475]

Conclusion

Our conventional view of constitutional rights centers on the Supreme Court as a forum in which law is forged through the clash of principle and logic. This Article has brought light to a very different way in which constitutional understandings can be crafted. Looking beyond the Supreme Court to the way that private individuals can take up affordances created by state and federal legislature, this Article has highlighted the possibility of legal institutions being used to suppress—rather than enable—constitutional rights. Indeed, I have demonstrated that, throughout American history, private law of one sort or another has been made available for this end—from the Fugitive Slave Act of 1850 to the 1968 HUD Act. Private suppression cuts across the conventional borders of federalism. It can deploy courts or commissioners, or even federally funded mortgages, as its instruments. Yet its ends have time and again been dismayingly familiar: the continued stigmatization and marginalization of an already marginalized group. Far from being unique, then, S.B. 8 is merely the most recent iteration of a long litany of historical examples—albeit one that damns rather than vindicates.

To recognize private suppression as part of our constitutional heritage is not to bless or embrace it. Instead, it is to gain a better appreciation of the complex conditions under which that legal heritage is produced. It has been, and continues to be, a context in which the relationship of law and courts to the rule of law, to popular constitutionalism, and to malign hierarchies of power and status is far thornier and more controversial than has until now been appreciated.

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474. Barbara Laslett & Johanna Brenner, *Gender and Social Reproduction: Historical Perspectives*, 15 ANN. REV. SOCIO. 381, 389 (1989) (describing conflicting pressures on working-class women in the nineteenth century).

475. *See* JACQUELINE ROSE, MOTHERS: AN ESSAY ON LOVE AND CRUELTY 1 (2018) (discussing motherhood in Western discourse).