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Lawmaking for Leverage

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LAWMAKING FOR LEVERAGE*

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What's good for the goose is good for the gander. Whatever its wisdom as an organizing principle for human affairs, this intuitive maxim has become a rallying cry for state lawmaking. When the Supreme Court greenlighted the infamous Texas Heartbeat Bill commonly known as S.B. 8, allowing the abortion prohibition to go into effect despite its clear conflict with governing precedent, California wasted little time repurposing the key elements of the Texas scheme to further its own—very different—regulatory aims. In California's version, individuals can obtain a significant bounty for bringing private causes of action against anyone violating the state's ban on assault weapons and other prohibited firearms. Just as Texas had done in its abortion ban, California also implemented an unprecedented (and unconstitutional) attorney fee regime designed to deter challenges to the law. California revealed the ease with which private enforcement and weaponized fee shifting can be deployed to serve progressive rather than conservative ends.

This Article shows that California did more than just demonstrate the ideological versatility of these mechanisms: it impugned the integrity of the Supreme Court and signaled its intention to serve as a check on the constitutional offenses of other states where the Supreme Court cannot be trusted to do so impartially. I rely not only on the statements of purpose made repeatedly by the bill's architects and proponents, but also on an extraordinary "self-destruct" provision in California's S.B. 1327 that automatically renders it inoperative if the United States Supreme Court or the Texas Supreme Court invalidates the Texas law. The Article explains why S.B. 1327, to whatever extent it may be simultaneously advancing authentic gun control policy goals, should be understood as a statement of no confidence in the Supreme Court's willingness to fairly consider the constitutionality of review-impairing mechanisms without being influenced by the esteem in which it holds the underlying rights at issue. California designed a law to test the Court's self-proclaimed "neutrality" on matters relating to guns

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and abortion, and this experiment in lawmaking for leverage is worth our sustained attention.

INTRODUCTION

When California enacted S.B. 1327 in July 2022,[1] authorizing private individuals to enforce the state's ban on assault weapons and other prohibited firearms, it was possible to treat the law as simply part of the state's broader gun safety agenda.[2] California is ranked first in the country for the strength of

1. Act of July 22, 2022, ch. 146, 2022 Cal. Stat. 3551 (codified at CAL. BUS. & PROF. CODE §§ 22949.60–.71; CAL. CIV. PROC. CODE § 1021.11).

2. *See* Owen Tucker-Smith, *California Is Working Hard To Pass Gun Laws—and Even Harder To Defend Them*, POLITICO (Jan. 6, 2023, 4:48 PM), https://www.politico.com/news/2023/01/06/california-is-working-hard-to-pass-gun-laws-and-even-harder-to-defend-them-00076835 [https://perma.cc/2MRG-ZV8A (staff-uploaded archive)] (reporting on S.B. 1327 in exactly this way); *see also Victory for Gun Safety: Following Tireless Advocacy from Moms Demand Action and Students Demand Action, Governor Newsom Signs First-of-Its-Kind Gun Safety Bill*, EVERYTOWN FOR GUN SAFETY (July 22, 2022), https://www.everytown.org/press/victory-for-gun-safety-following-tireless-advocacy-from-moms-demand-action-and-students-demand-action-governor-newsom-signs-first-of-its-kind-gun-safety-bill/ [https://perma.cc/5GCB-FQ9N] (applauding S.B. 1327 as a significant milestone in sensible gun regulation).

its gun control laws by the Everytown for Gun Safety advocacy group,[3] and "has the strongest system in the nation for removing firearms from people who become prohibited from having them."[4] As the state's attorney general observed at the bill's signing, California's commitment to firearm regulation is a longstanding one: "decades of work to build the strongest gun safety laws in the nation have led to California having one of the lowest firearm mortality rates in the country—37% lower than the national average."[5] S.B. 1327 was signed into law in Santa Monica, at the site of a deadly mass shooting where the gunman used a "ghost gun," a firearm put together at home with pre-manufactured parts that can be ordered on the internet.[6] Ghost guns are untraceable because they do not have serial numbers, and because of the difficulty they pose for law enforcement, they were among the weapons targeted by the new bill.[7] At the signing, the Governor was introduced by a high school student who had been severely injured in a shooting at her school that claimed the lives of her best friend and another classmate, also with the use of a ghost gun.[8]

3. *Gun Laws in California*, EVERYTOWN RSCH. & POL'Y, https://everytownresearch.org/rankings/state/california/ [https://perma.cc/7H3P-4NC9] (last updated Jan. 4, 2024).

4. Emma Tucker, *These Are the Gun Control Laws Passed in 2022*, ABC 7 CHI. (Dec. 31, 2022), https://abc7chicago.com/gun-laws-passed-in-2022-new-control-us/12635702/ [https://perma.cc/9E89-2YYY] (attributing this assessment to the Giffords Law Center to Prevent Gun Violence).

5. Marilyn Bechtel, *New California Bill Creates Private Right of Action Against Illegal Weapons*, PEOPLE'S WORLD (July 28, 2022, 9:54 AM), https://peoplesworld.org/article/new-california-bill-creates-private-right-of-action-against-illegal-weapons/ [https://perma.cc/8MS5-AA29] (paraphrasing the state attorney general's statements).

6. Meredith Deliso, *California Governor Signs Bill Modeled After Texas Abortion Law*, ABC NEWS (July 22, 2022, 2:55 PM), https://abcnews.go.com/Politics/california-governor-signs-gun-bill-modeled-texas-abortion/story?id=87253528 [https://perma.cc/CTW8-EWW2]. As described by Sgt. Christian Camarillo of the San Jose Police Department, a ghost gun is a "privately made firearm . . . that can be made at home with pre-manufactured parts . . . . You can order these on the internet, it takes some very simple machining and you put it together and it works just like a firearm." Zach Fuentes, *California Citizens Would Be Empowered To Sue over Illegal Firearms Under Proposed Bill*, ABC 7 NEWS (Apr. 5, 2022), https://abc7news.com/sacramento-mass-shooting-gun-violence-bills-ca-lawmakers/11712858/ [https://perma.cc/K65C-NW82] (explaining that ghost guns are untraceable because they are not registered and do not have a serial number). When the bill passed out of committee the previous month, the Governor's statement referenced the mass shooting in Uvalde, Texas, that killed nineteen children and left two teachers dead. Elizabeth Larson, *California Assembly and Senate Advance Bills in Gun Safety Legislative Package*, LAKE CNTY. NEWS (June 15, 2022, 2:25 PM), https://www.lakeconews.com/news/72852-california-assembly-and-senate-advance-bills-in-gun-safety-legislative-package [https://perma.cc/LVD5-C5L2 (staff-uploaded archive)]. As California Governor Gavin Newsom put it, "California has led the nation in reforming our laws to protect communities from gun violence." *Id.*

7. Fuentes, *supra* note 6 (explaining why ghost guns are untraceable).

8. Bechtel, *supra* note 5.

S.B. 1327 itself was just one of five gun control bills passed in California in July 2022 and one of a dozen passed in the state over the course of 2022.[9] The enactment of gun control initiatives in California continued actively through 2023,[10] with one commentator querying, "Can California go any stronger on gun laws?"[11] Seen in this light, S.B. 1327 fits seamlessly into California's sustained effort to pursue rigorous gun control policy preferences, up to the limits imposed by the Second Amendment as currently interpreted by the Supreme Court.[12]

But a bit of context provides a much more complicated picture—one that is both more interesting and more troubling for our understanding of federalism and the experiments that states are running in their laboratories of democracy.[13] California may be the nation's leader on gun control, but it was not the original source of the procedural mechanisms that make S.B. 1327 difficult to challenge. The bill relies exclusively on private enforcement, spurred by the promise of significant bounty payments for successful plaintiffs, and contains a set of punitive and unprecedented attorney fee provisions that make it prohibitively risky for anyone to challenge the law, even if its substantive provisions are demonstrably unconstitutional.[14] These components work together to shield

9. Tucker, *supra* note 4; Katy Grimes, *Two Gun Control Bills Fail on Final Day of 2022 California Legislative Session*, CAL. GLOBE (Sept. 2, 2022), https://californiaglobe.com/fr/two-gun-control-bills-fail-on-final-day-of-2022-california-legislative-session/ [https://perma.cc/K6DU-64YP].

10. *Governor Newsom Takes Action To Strengthen California's Gun Safety Laws*, OFF. OF GOVERNOR GAVIN NEWSOM (Feb. 1, 2023), https://www.gov.ca.gov/2023/02/01/governor-newsom-takes-action-to-strengthen-californias-gun-safety-laws [https://perma.cc/KH8H-4RW3]. Announcing a series of gun control bills in February 2023, Governor Newsom expressed the goal to "advance the national conversation on gun safety. California takes that role and responsibility seriously." California Governor Gavin Newsom, *Governor Newsom Highlights New Efforts to Advance California's Nation-Leading Gun Safety Measures*, YOUTUBE, at 17:45 (Feb. 18, 2022), https://www.youtube.com/watch?v=2Ukr8SKNWdY&t=821s [https://perma.cc/9D9B-LYJQ] (on file with the North Carolina Law Review) [hereinafter *Governor Newsom Highlights*] (statement of Governor Gavin Newsom); *see also* Andrew Chamings, *These New California Laws Go into Effect July 1*, SFGATE (July 1, 2023), https://www.sfgate.com/politics/article/new-california-laws-take-effect-july-2023-18165753.php [https://perma.cc/8PJF-GQA9 (staff-uploaded archive)].

11. Ben Christopher, *Can California Go Any Stronger on Gun Laws?*, CALMATTERS (Jan. 27, 2023), https://calmatters.org/newsletters/2023/01/california-gun-laws-upper-limit/ [https://perma.cc/S4VB-83NQ].

12. Ben Christopher, *Misfire: Behind the California Concealed Carry Bill's Big Fail*, CALMATTERS (Sept. 2, 2022), https://calmatters.org/politics/2022/09/california-concealed-carry-bill/ [https://perma.cc/TP52-ALNX] ("The California Legislature rarely passes up an opportunity to place new restrictions on firearms or stick a finger in the eye of the U.S. Supreme Court's conservative majority.").

13. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

14. *See generally* Rebecca Aviel & Wiley Kersh, *The Weaponization of Attorney's Fees in an Age of Constitutional Warfare*, 132 YALE L.J. 2048 (2023) (describing the one-sided fee-shifting provisions in Texas's S.B. 8).

state law from judicial review,[15] and California copied them exactly from a Texas abortion law: S.B. 8, the Texas Heartbeat Act, which prohibits abortions after six weeks of pregnancy.[16]

When Texas enacted S.B. 8 in 2021, the law clearly contravened then-governing Supreme Court precedent on the right to terminate a pregnancy prior to viability.[17] But this obvious constitutional defect was very difficult to remedy. There was no official responsible for enforcing the law, which made it nearly impossible for plaintiffs to satisfy the justiciability requirements that are prerequisites for federal court review.[18] In short, California took the mechanisms that Texas had used to keep reproductive rights advocates out of court and refashioned them to obstruct access to courts for gun rights advocates.[19]

15. *See id.* at 2051–52.

16. Texas Heartbeat Act, ch. 62, 2021 Tex. Gen. Laws 125, 126–27 (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–.212 and other scattered sections of the Tex. Code).

17. *See* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 543 (2021) (Roberts, C.J., concurring in part and dissenting in part).

18. *See* David A. Strauss, *Rights, Remedies, and Texas's S.B. 8*, 2022 SUP. CT. REV. 81, 87 (2022). Strauss explained that S.B. 8

> specifically provided that only private parties, not public officials, can enforce the prohibition on abortions. That limit—obviously drafted with Section 1983 and *Ex parte Young* in mind—created the obstacles to a pre-enforcement challenge. The state cannot be enjoined, because of sovereign immunity. There is no clear basis for enjoining a prosecutor or other state official, because only private parties have the power to enforce the statute. An injunction could not name every private party who could potentially enforce the statute. And, in any event, the plaintiff would have to show that the private enforcement of the statute somehow involved action under color of state law.

Id. (citation omitted). As Michael T. Morley noted,

> [i]f the statute had been an ordinary criminal or even administrative restriction enforceable by the government, outside groups could have brought a preenforcement challenge and obtained a preliminary injunction barring its enforcement based on its direct conflict with *Casey*. But because the statute's prohibitions are enforceable solely through a private right of action involving substantial statutory damages, there was no immediately apparent government official to sue for preenforcement relief.

Michael T. Morley, *Constitutional Tolling and Preenforcement Challenges to Private Rights of Action*, 97 NOTRE DAME L. REV. 1825, 1830 (2022) (citations omitted).

19. This was just as firearm rights advocates had predicted. *See* Brief of Firearms Policy Coalition as Amicus Curiae in Support of Petitioners at 1, Whole Woman's Health v. Jackson, 142 S. Ct. 522 (No. 21-463) (expressing concern that the S.B. 8 model could be used to restrict Second Amendment rights); *see also* Van Stean v. Tex. Right to Life, No. D-1-GN-21-4179, slip op. at 12 (Tex. 98th Dist. Ct. Travis Cnty. Dec. 9, 2021) (same). California was not alone in this idea. A bill in Illinois creating liability for firearms dealers said that it could be referred to as the "Protecting Heartbeats Act." H.B. 4156, 102nd Gen. Assemb. (Ill. 2022). Another Illinois bill, creating a private right of action to sue

For a state to borrow from a sister state is not particularly remarkable in itself—after all, copycat legislation is nothing new, and states have various ways of piggybacking off of each other's policy innovations.[20] This scenario adds a twist, because here California is repurposing Texas's review-impairing innovations across a different substantive domain and for progressive rather than conservative ends.[21] It was particularly bold given that California had joined an amicus brief arguing to the Supreme Court that S.B. 8's "unprecedented attack on the rule of law must be rejected."[22] Even so, we might be tempted to understand this as a situation in which California has merely offered its own take on the time-honored observation that what's good for the goose is good for the gander.[23] As scholars have noted, "ideological drift" is a

perpetrators of domestic violence or sexual assault, was titled "The Expanding Abortion Services Act"—or the "TEXAS Act" for short. Hannah Meisel, *Democrat-Sponsored 'TEXAS Act' Would Allow $10K Bounties on Sexual Abusers, Those Who Cause Unwanted Pregnancies*, NPR ILL. (Sept. 14, 2021, 3:57 PM), https://www.nprillinois.org/statehouse/2021-09-14/democrat-sponsored-texas-act-would-allow-10k-bounties-on-sexual-abusers-those-who-cause-unwanted-pregnancies [https://perma.cc/44U5-86QF].

20. *See* Daniel C. Vock, *The Problem with Copycat Legislation*, ROUTE FIFTY (May 12, 2022), https://www.route-fifty.com/management/2022/05/problem-copycat-legislation/366894/ [https://perma.cc/4CCG-VQRR]. For one mundane example, Connecticut adopted legislation requiring products to meet the energy efficiency standards set out in California regulation. *See* CONN. GEN. STAT. § 16a-48 (2024); *see also* William Magnuson, *The Race to the Middle*, 95 NOTRE DAME L. REV. 1183, 1200 (2020) ("Rather than differentiating their regulatory structures from other states, states often seek to assimilate their laws to the laws of other jurisdictions. This race to the middle pushes states to adopt laws that are similar or identical to the laws in place in a sufficiently large number of other jurisdictions."); Joshua M. Jansa, Eric R. Hansen & Virginia H. Gray, *Copy and Paste Lawmaking: Legislative Professionalism and Policy Reinvention in the States*, 47 AM. POL. RSCH. 739, 739 (2018).

21. In contrast, several other states, including Oklahoma, have copied the Texas law verbatim to promote the same anti-abortion purposes. Still another group of states have sought to neutralize the effect of privately enforced abortion prohibitions by enacting "claw-back" laws. *See* CONN. GEN. STAT. § 52-571m (2024) ("Action to recover damages for judgment entered against a person where liability is based on alleged provision, receipt, or assistance in provision or receipt of reproductive health care services."); DEL. CODE ANN. tit. 10, § 3929 (LEXIS through 84 Del. Laws, chapters 173, 175–76) ("Recouperation of out-of-state judgments related to reproductive health services."). These laws authorize "someone who lost a case under an SB8 style statute to return the favor—to sue their former suer, and to recover damages to make them whole." Carleen Zubrzycki, *Tort(?) Arms Races: Abortion and Beyond*, 73 DEPAUL L. REV. 705, 710–11 (2024). As Zubrzycki notes, these laws invite reflection "about the end-game. If Texas's statute is valid, and Connecticut's statute is valid, where does it end? Could Texas create its own new civil action, to recover the judgment amount-plus-costs awarded in Connecticut claw-back lawsuits? Could parties, in theory, enter into an infinite cross-state litigation loop, limited only by whoever runs out of time or money first?" *Id.* at 712.

22. Brief for Massachusetts et al. as Amici Curiae Supporting Petitioners at 5, Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021) (No. 21-463).

23. *See Governor Newsom Issues Statement After Court Strikes Down Provision of Gun Safety Law*, OFF. OF GOVERNOR GAVIN NEWSOM (Dec. 19, 2022), https://www.gov.ca.gov/2022/12/19/

pervasive phenomenon in the law, by which legal ideas change their normative and political valence over time as they are used in new contexts and situations.[24] The conservative legal movement that produced the Texas law had itself borrowed strategies and techniques from the civil rights movement that preceded it, and to which it was reacting.[25] California's repurposing of the Texas scheme, converting the ingenious mechanisms for evading judicial review from abortion prohibitions to gun control, would be an interesting and important story in its own right, one perfectly worth telling. But it still would not be the whole story.[26] With the enactment of S.B. 1327, California did more than just demonstrate the ideological versatility of procedural mechanisms designed to keep adversaries out of court.

To fully understand what California did, and the implications it has for interstate relationships and our constitutional democracy as a whole, we must focus on the fact that California designed and enacted a law with a shelf life lasting only as long as its Texas counterpart. S.B. 1327 contains an extraordinary "self-destruct" provision that automatically renders the bill inoperative if the United States Supreme Court or the Texas Supreme Court invalidates the

governor-newsom-issues-statement-after-court-strikes-down-provision-of-gun-safety-law/ [https://perma.cc/3UEA-9779] [hereinafter *Governor Newsom Issues Statement*]. The legislative history contains exactly this phrase. STAFF OF S. JUDICIARY COMM., 2021-22 REG. SESS., SB-1327 (HERTZBERG), at 1–2 (Cal. Apr. 1, 2022), [hereinafter S. JUDICIARY COMM. BILL ANALYSIS], https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220SB1327 [https://perma.cc/9EDN-86PE (staff-uploaded archive)].

24. *E.g.*, J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869, 869–75 (1993) [hereinafter Balkin, *Ideological Drift*]; Katie R. Eyer, *Ideological Drift and the Forgotten History of Intent*, 51 HARV. C.R.-C.L. L. REV. 1, 7 (2016) (noting that "[s]cholars have long observed that constitutional doctrines may be subject to 'ideological drift,' wherein a doctrine may become unmoored from its original normative underpinnings and may even come to serve opposing aims." (quoting Balkin, *Ideological Drift*, *supra*, at 870)).

25. *See* Roy B. Flemming, *Rise of the Conservative Legal Movement*, 18 LAW & POLS. BOOK REV. 632, 632–36 (2008) (reviewing STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008)) ("The American Civil Liberties Union, civil rights groups, and liberal public interest law outfits like those created by Ralph Nader, offered off-the-shelf templates that conservatives could use to organize their counter-mobilization."); *see also* Amanda Hollis-Brusky, *Support Structures and Constitutional Change: Teles, Southworth, and the Conservative Legal Movement*, 36 LAW & SOC. INQUIRY 516, 520 (2011) (reviewing TELES, *supra*, and ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION (2008)) (explaining how Teles and Southworth revealed the ways in which the conservative legal movement modeled "their efforts upon those on the legal left").

26. *See* Gavin Newsom, *The Supreme Court Opened the Door to Legal Vigilantism in Texas. California Will Use the Same Tool To Save Lives*, WASH. POST (Dec. 20, 2021, 4:55 PM), https://www.washingtonpost.com/opinions/2021/12/20/newsom-california-ghost-guns-vigilante-justice/ [https://perma.cc/D8MS-A4QE (staff-uploaded, dark archive)] [hereinafter Newsom, *Supreme Court Opened the Door*].

Texas law.[27] This provision, especially when viewed in combination with a close examination of deliberations over the bill, reveals that the bill's proponents were motivated as much by a desire to bring down the Texas law as they were interested in adopting the framework for California's purposes.[28] As this Article will show, California used S.B. 1327 more as a mechanism to exert leverage over the viability of another state's lawmaking than to govern the affairs and conduct of its own people. To whatever extent California may have also been using S.B. 1327 to advance authentic gun control policy goals, the self-destruct provision reflects a perplexing advance commitment to abandon those goals at whatever time S.B. 8 meets its end. It reveals the law's true primary rationale: to influence the outcome of Supreme Court review of a sister state's law.

An op-ed lambasting S.B. 1327 as "political one-upmanship" derisively described it as a law passed "with the declared intent of shaming a law in Texas."[29] But the real target of its shaming is the Supreme Court. Regardless of whether the underlying issue is the termination of pregnancy or the distribution of assault weapons, several of the procedural mechanisms that S.B. 8 and S.B. 1327 use to insulate state law from judicial review are constitutionally defective in a number of ways, implicating a range of due process, equal protection, and First Amendment principles. These principles protect the right to access the courts, and they stand on their own footing—they do not rely on the constitutional status of the underlying conduct that petitioners ultimately wish to protect.[30] A Supreme Court worthy of the name should be able to enforce the First Amendment right to petition or the due process right to civil counsel regardless of whether the targeted petitioners are seeking to challenge gun laws or abortion laws. California, in its laboratory of democracy, designed a law grounded firmly on the hypothesis that this is not the Court that we have.[31]

In the days following *Dobbs v. Jackson Women's Health Organization*[32] and *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*,[33] California enacted a law to

27. *See* CAL. BUS. & PROF. CODE § 22949.71 (Westlaw through Ch. 39 of 2024 Reg. Sess.); Veronica Stracqualursi, *Newsom Signs California Gun Bill Modeled After Texas Abortion Law*, CNN (July 22, 2022), https://www.cnn.com/2022/07/22/politics/california-newsom-gun-bill-texas-abortion-law/index.html [https://perma.cc/G8PZ-W8JA].

28. *See* Dan Walters, *Federal Judge Blocks Newsom's Foolish Gun Law*, CALMATTERS (Dec. 21, 2022), https://calmatters.org/commentary/2022/12/federal-judge-blocks-newsoms-foolish-gun-law/ [https://perma.cc/NLJ2-S2NF] [hereinafter Walters, *Federal Judge*].

29. *Id.*

30. *See* Aviel & Kersh, *supra* note 14, at 2096.

31. *Cf.* Charles W. Tyler & Heather K. Gerken, *The Myth of the Laboratories of Democracy*, 122 COLUM. L. REV. 2187, 2190 (2022) ("The laboratories account has had a remarkable run, but it is little more than a campfire story.").

32. 142 S. Ct. 2228 (2022).

33. 142 S. Ct. 2111 (2022).

serve primarily as a vehicle for neutralizing the Court's disfavor for abortion rights.[34] The goal was to allow the review-impairing mechanisms of the bounty hunter model to be examined in a context where the petitioners excluded from court would be more sympathetic to the Court's current majority.[35] By openly hypothesizing that the Court might step in to protect gun rights plaintiffs from exactly the same court-obstruction mechanisms that it had been willing to tolerate for abortion rights plaintiffs, California publicly impugned the Court's integrity. By enacting a law designed to test that hypothesis, California signaled its intention to serve as a check on the lawmaking of other states where the Supreme Court cannot be trusted to do so impartially.[36]

California is engaging in lawmaking for leverage: the knowing and open deployment of constitutionally questionable procedural mechanisms to force the hand of other actors. California has no direct control over Texas or the Supreme Court, and so it used the Court's solicitude for gun rights litigants in an effort to obtain what engineers might describe as a mechanical advantage. And it ushered in a truly new era of state lawmaking; an original fifty-state survey conducted for this Article reveals that no other state has language anywhere in its code creating a linkage of this nature to another state's law.[37] This Article describes this new form of lawmaking and considers its implications, arguing that special attention to S.B. 1327 reveals profoundly complex and difficult questions about the role of state legislatures in our constitutional democracy and the range of objectives we are willing to treat as appropriate matters for state concern.

Part I identifies the parallel provisions in S.B. 8 and S.B. 1327, as well as the self-destruct provision that both links and distinguishes the two regimes. It then elucidates the extraordinary novelty of this mechanism, reporting the results of a fifty-state survey designed to capture every instance in which the duration of a state law is made contingent on the validity of a law in another state. While there are many different ways that state lawmakers reference the laws of other states in enacting their own legislation, California's self-destruct

34. *Dobbs* was decided on June 24, 2022, and *Bruen* on June 23, 2022. *See Dobbs*, 142 S. Ct. at 2228; *Bruen*, 142 S. Ct. at 2111. S.B. 1327 passed the California Assembly on June 27, 2022, and the Senate on June 29, 2022. *SB-1327 Firearms: Private Rights of Action*, CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=202120220SB1327 [https://perma.cc/R7HA-PMZ2].

35. *See infra* Part II.

36. *See* Gabrielle Appleby & Erin F. Delaney, *Judicial Legitimacy and Federal Judicial Design: Managing Integrity and Autochthony*, 132 YALE L.J. 2419, 2438 (2023) (defining integrity as a concept that "requires minimum protections for judicial independence; predictability and consistency in legal decision-making; standards of judicial impartiality; and fair and consistent judicial processes").

37. For an understanding of the methodology used to conduct this survey, see *infra* Appendix A.

provision is materially different than the forms of interstate linkage we see in other regimes. While this is apparent just by comparing S.B. 1327 to other state laws with some kind of interstate linkage mechanism, the differences become even more striking when we look beyond the four corners of statutory text and consider the lawmaking process.

Part II chronicles S.B. 1327's progress into law, with a special focus on communications made to the public and deliberations within the legislature. The bill's reactionary provenance was prominent in every discussion, from committee hearings to press conferences to an advertisement that California Governor Gavin Newsom took out in three *Texas* newspapers on the day the bill was signed.[38] Part II's first contribution is thus a descriptive one: it provides an observational account of state government leaders thinking out loud about how best to navigate the terrain created by the Court's refusal to restrain another state's act of defiance. The fact that the bill was patterned directly on S.B. 8 was treated by lawmakers as both a strength and a weakness—a reason for confidence (perhaps merely feigned) that the bill would survive constitutional challenge given the Court's approval of S.B. 8, and a reason to fear that California would be replicating precisely the norm-destroying moves it had condemned in Texas. For all this self-consciousness about the wisdom of refashioning a problematic bounty-hunter regime into a tool for combatting gun violence, however, there was scant attention paid to the provision that actually linked the fate of the two laws. Neither the bill's proponents nor its detractors offered much insight on the possible scope and meanings of the self-destruct provision, leaving us to puzzle over the sheer complexity of the legal and constitutional questions created by this novel tool. Part II's second contribution is to do just that, working through the possible interests one can discern in a state's decision to hinge the validity of its own law on the litigation outcomes of a controversial law in another state. The analysis reveals that the self-destruct provision expresses a very particular type of policy preference that we are unaccustomed to seeing in state lawmaking—not pertaining to first-order questions about how primary conduct should be regulated, but about the relationships that states have to each other and to the federalist system at large. The policy of the state of California, one might discern from the self-destruct provision, is to promote shared responsibility across state borders and partisan lines for the preservation of constitutional norms.

38. Tom Tapp, *Newsom Trolls Texas Gov. Greg Abbott on Guns and Abortion with Full Page Ads in Lone Star State Newspapers*, DEADLINE (July 22, 2022, 1:23 PM), https://deadline.com/2022/07/newsom-texas-newspaper-ads-greg-abbott-1235075159/ [https://perma.cc/8BB9-YE4P].

Part III considers whether California's endeavor is a permissible one for state lawmakers to undertake, either in the abstract or in the precise circumstances that confront us—hyper-polarization, increasingly aggressive use of state legislative power to prosecute culture wars, and a Supreme Court whose handling of these issues has given rise to a legitimacy crisis of historic dimensions.[39] As we will see, that is not an easy question to answer. Part III draws on various conceptual resources to help develop a normative calculus for California's self-appointment as constitutional compliance monitor. Because we seek to understand whether California has transgressed some kind of boundary on its power as a state in our constitutional system, it seems that the federalism literature might offer some guidance. It turns out, however, that California's interest in cross-ideological parity is of an entirely different nature than the kinds of state interests that have driven scholarly understandings of either interstate or federal-state relationships. The federalism literature will need new theoretical tools to gauge whether California should be celebrated or chastised for its attempt to intervene in the constitutional defiance of another state where the Court was unwilling to do so. And even if we were willing to accept as an abstract matter that states may have a role to play in ensuring that a sister state's constitutional defiance does not go unchecked, we would still need to grapple with the fact that California used a scheme with constitutional defects to achieve its objective. Part III considers whether the insights of role morality can provide any possible justification for this kind of instrumentalism. Lastly, Part III maps out a simple cost-benefit analysis, querying whether California's gambit might be criticized simply because it was unlikely to succeed in achieving any meaningful positive effects while potentially contributing to the proliferation of court obstruction regimes. Having illustrated the breadth and complexity of the various questions bound up in a normative assessment of California's experiment, Part III ultimately serves as a research agenda for further study. This Article concludes by observing that California's effort to develop an accountability mechanism for a powerful, partisan, and seemingly unrestrainable Court is a rule of law experiment worthy of our sustained attention.

39. *See* Kaia Hubbard, *Historically Low Public Trust, Legitimacy Questions Mar Supreme Court's Return*, U.S. NEWS & WORLD REP. (Sept. 30, 2022, 6:00 AM), https://www.usnews.com/news/the-report/articles/2022-09-30/historically-low-public-trust-legitimacy-questions-mar-supreme-courts-return [https://perma.cc/4PYT-NVJ5 (staff-uploaded archive)]; Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2240 (2019) (reviewing RICHARD H. FALLON JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018)) (noting "how many commentators—including prominent constitutional scholars, a former Attorney General, and current members of Congress—have recently questioned the legitimacy of the United States Supreme Court").

I. S.B. 1327'S KEY PROVISIONS AND THEIR GENESIS IN TEXAS LAW

Upon its enactment, the Texas Heartbeat Law "instantly became one of the most widely discussed statutes in the United States."[40] What captured everyone's attention was the brazen imposition of a prohibition that clearly violated governing precedent on the right to obtain an abortion, combined with an extensive set of review-impairing mechanisms that insulated the constitutionally defective law from judicial review.[41] The most well-known of these mechanisms has been the law's exclusive reliance on private enforcement.[42] Because the law specifies that it is enforceable only by private citizens, reproductive rights advocates have had difficulty finding a suitable defendant.[43] Garnering much less attention—but even more troubling—is a set of attorney's fee provisions that make it prohibitively risky to challenge *any* Texas abortion law.[44] Both the private enforcement mechanism and the weaponized attorney fee provisions have been examined in detail elsewhere.[45] Nonetheless, to lay the groundwork for what follows, this part offers a brief discussion of the key provisions and sketches the trajectory from the Texas law to the California version.

A. *Exclusive Private Enforcement*

At the center of the "maelstrom," as one scholar puts it,[46] is the law's exclusive reliance on private enforcement. While other regimes have used

40. Scott W. Stern, *Moral Nuisance Abatement Statutes*, 117 NW. U. L. Rev. 613, 615 (2022).

41. *See, e.g.*, Charles W. "Rocky" Rhodes & Howard M. Wasserman, *Solving the Procedural Puzzles of the Texas Heartbeat Act and Its Imitators: The Potential for Defensive Litigation*, 75 SMU L. REV. 187, 193 (2022) [hereinafter Rhodes & Wasserman, *Defensive Litigation*] (noting that S.B. 8's "substantive rule blatantly contradicts prevailing judicial precedent"); Randy Beck, *Popular Enforcement of Controversial Legislation*, 57 WAKE FOREST L. REV. 553, 558 (2022) (explaining that "Texas resorted to popular enforcement of S.B. 8 in an effort to limit pre-enforcement judicial review of its fetal heartbeat legislation").

42. *See* Aviel & Kersh, *supra* note 14, at 2053 n.14 (canvassing scholarly work focused on the private enforcement mechanism of S.B. 8).

43. *See* Strauss, *supra* note 18, at 87.

44. *See* Aviel & Kersh, *supra* note 14, at 2054. The justiciability difficulties presented by exclusive private enforcement make it nearly impossible for challengers to obtain pre-enforcement review, but they can still litigate the constitutionality of state law in a defensive posture. The attorney fee regime chills challenges to abortion law in any posture by imposing the fear of having to pay the opponent's legal fees, and impairs access to counsel by deterring attorney participation.

45. *See generally* Strauss, *supra* note 18 (examining private enforcement mechanism); Morley, *supra* note 18 (examining private enforcement mechanism); Rhodes & Wasserman, *Defensive Litigation*, *supra* note 41 (examining private enforcement mechanism); Aviel & Kersh, *supra* note 14 (examining weaponized fee shifting provisions).

46. Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L. REV. 1483, 1486 (2022) [hereinafter Norris, *Promise and Perils*].

citizen enforcement mechanisms to remedy a host of supposed social ills,[47] S.B. 8 dispenses entirely with public enforcement, a feature that is repeatedly emphasized throughout the text of the law.[48] The operative provision creating the cause of action specifies that "any person, other than an officer or employee of a state or local governmental entity in this state, may bring a civil action" against anyone performing or aiding and abetting an abortion in violation of the law.[49] The law additionally specifies that its requirements "shall be enforced exclusively through the private civil actions" and that no enforcement "may be taken or threatened by this state, a political subdivision, a district or county attorney, or an executive or administrative officer or employee of this state or a political subdivision."[50]

Because the abortion prohibition in S.B. 8 is only enforceable by private parties, doctors and reproductive rights advocates have had trouble finding an appropriate defendant to sue, impeding their ability to obtain pre-enforcement review of the law's constitutionality.[51] They cannot bring suit directly against the State because of sovereign immunity, and while *Ex parte Young*[52] allows plaintiffs to sue the state officials responsible for enforcing the law in question,[53] there are no such officials in this unique situation due to the law's complete and explicit reliance on private enforcement.[54] Bringing suit against any of the millions of private citizens who might one day bring a suit under S.B. 8 would fall short of the standing and ripeness requirements that have long been

47. *See* Stern, *supra* note 40, at 618–19.

48. Texas Heartbeat Act, ch. 62, 2021 Tex. Gen. Laws 125, 127 (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–.212 and other scattered sections of the Texas Code).

49. *Id.*

50. *Id.*

51. Morley, *supra* note 18, at 1827–28. He explains that

> [p]reenforcement litigation allows people to obtain judicial determinations of their rights without exposing themselves to the risk of potentially substantial penalties or imprisonment. When plaintiffs seek such preenforcement relief against a statute or regulation that is enforceable by the government, they sue either the particular official or the head of the agency empowered to enforce that provision, in that person's official capacity.

Id. For an overview of S.B. 8 litigation in state court, see George Christian, *Trial Court Rules That S.B. 8 Is Unconstitutional*, TEX. CIV. JUST. LEAGUE (Sept. 14, 2022), https://tcjl.com/trial-court-rules-that-sb-8-is-unconstitutional/ [https://perma.cc/3MKM-MVUX].

52. 209 U.S. 123 (1908).

53. *Id.* at 155–56 (finding "ample justification for the assertion that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action").

54. Morley, *supra* note 18, at 1830 and accompanying text.

thresholds for judicial review.[55] And that was exactly by design: Jonathan Mitchell, one of the bill's authors, openly stated that "the entire point of S.B. 8 . . . was to prevent the judiciary from ruling on the constitutionality of the statute. . . . There is nothing wrong with a state enacting a law to evade judicial review."[56]

B. *Weaponized Fee Shifting*

In addition to the private enforcement mechanism, S.B. 8 contains an unprecedented fee-shifting regime with three components that work together to impair access to courts for reproductive rights advocates: (1) anyone seeking declaratory or injunctive relief against *any* Texas abortion law must pay the attorney fees of the prevailing party, with no corresponding liability for anyone defending the validity of Texas abortion law;[57] (2) this one-sided fee liability is borne jointly and severally by *attorneys* for abortion law challengers, so that any lawyer participating in such a matter subjects themselves to personal liability simply for representing someone seeking relief against a Texas abortion law;[58] (3) an incomparably broad definition of "prevailing party" means that this shared fee liability is triggered by the dismissal of even a single claim for any reason.[59] As I have explained in previous work, these provisions work together to impose catastrophic fee liability upon attorneys who represent reproductive

55. Standing doctrine requires the plaintiff to show that she suffered an "injury in fact" that is "actual or imminent, not 'conjectural' or 'hypothetical.'" Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992). She must also show a "causal connection" between the injury and the defendant's conduct and establish that the injury will be "redressed by a favorable decision." *Id.* at 560–61. As Professor Fallon explains, "[i]n the case of a future, threatened injury such as being sued to enforce an allegedly unconstitutional statute, the harm-causing action must be 'certainly impending' or at least substantially likely." Richard H. Fallon, Jr., *Constitutional Remedies: In One Era and Out the Other*, 136 HARV. L. REV. 1300, 1303–04 n.18 (2023) [hereinafter Fallon, *Constitutional Remedies*]. "Under this formula, it may be difficult to establish that any particular private citizen is sufficiently likely to bring an enforcement action against any particular plaintiff to be causally responsible for the plaintiff's injury and to show that an injunction against particular defendants would remedy the injury." *Id.*; *see also* Ilya Somin, *California Enacts Gun Control Law Modeled on Texas' S.B. 8 Anti-Abortion Law*, VOLOKH CONSPIRACY (July 23, 2022, 10:35 AM), https://reason.com/volokh/2022/07/23/california-enacts-gun-control-law-modeled-on-texas-SB-8-anti-abortion-law [https://perma.cc/P2XR-8LVV] (explaining how the private enforcement mechanism makes it difficult for those burdened by the law to obtain pre-enforcement review of the law's constitutionality).

56. Stephen Paulsen, *The Legal Loophole that Helped End Abortion Rights*, COURTHOUSE NEWS SERV. (July 30, 2022), https://www.courthousenews.com/the-legal-loophole-that-helped-end-abortion-rights [https://perma.cc/4M8T-WANW].

57. TEX. CIV. PRAC. & REM. CODE ANN. § 30.022(a) (Westlaw through legislation effective July 1, 2023, of the 2023 Reg. Sess. of the 88th Leg.).

58. *Id.*

59. *Id.* § 30.022(b).

rights litigants.[60] They were clearly designed to deter lawyers from taking on such matters, further insulating state law from judicial review.[61]

C. *The Court Signs Off, and California Jumps into Action*

Determined to obtain judicial review of S.B. 8 in spite of the formidable obstacles created by this regime, a group of doctors and reproductive rights advocates brought suit to enjoin S.B. 8, naming a range of state officials who could be considered part of the state's enforcement machinery.[62] The Court refused to grant a preliminary injunction to prevent the law from going into effect,[63] and in December 2021 dismissed the plaintiffs' claims against all of the defendants except the state officials with "specific disciplinary authority over medical licensees."[64] The ruling was predicated on sovereign immunity and justiciability principles, and the Court noted that "the ultimate merits question—whether S. B. 8 is consistent with the Federal Constitution—is not before the Court."[65]

60. *See* Aviel & Kersh, *supra* note 14, at 2059–79.

61. *Id.*

62. The clerks who would file the bounty hunter lawsuits, for example, and the medical licensing authorities who would be responsible for imposing professional discipline on the doctors might be sued under S.B. 8. *See* Complaint for Declaratory and Injunctive Relief at 33, Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2494 (2021) (No. 21-463).

63. Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2494 (2021) (rejecting the challengers' application for injunctive relief against S.B. 8 because it "presents complex and novel antecedent procedural questions on which they have not carried their burden"). A vigorous dissent protested that the "Court thus rewards Texas's scheme to insulate its law from judicial review by deputizing private parties to carry out unconstitutional restrictions on the State's behalf." *Id.* at 2500 (Kagan, J., dissenting).

64. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 529 (2021). The Texas Supreme Court, receiving the question from the Fifth Circuit on remand, would ultimately hold that state licensing officials did not have the authority over providers that the Court's opinion had postulated. *See* Whole Woman's Health v. Jackson, 23 F.4th 380, 389 (5th Cir. 2022) (certifying question); Whole Woman's Health v. Jackson, 642 S.W.3d 569, 583 (Tex. 2022) (answering certified question). The Fifth Circuit then remanded the case with instructions to dismiss the challenges, and the Supreme Court refused to intervene. *In re* Whole Woman's Health, 142 S. Ct. 701, 701 (2022) (mem.).

65. *Whole Woman's Health*, 142 S. Ct. at 531. Newsom and the S.B. 1327 leadership team repeatedly referred to this decision as having held that the gambit was constitutional, but the majority's more grievous flaw is that it dodged that central and urgently important question. As cogently captured by Professor David Strauss:

> Whole Woman's Health presented the question whether a state can enact a law that is plainly inconsistent with the Supreme Court's decisions and then devise an enforcement scheme that serves no purpose other than to make it difficult or impossible, as a practical matter, for anyone to challenge that law. The dissenting opinions explicitly cast the case in those terms. But the Court never acknowledged that that was the question.

The very next day, California Governor Gavin Newsom directed his staff to "work with the legislature and California Attorney General Rob Bonta to draft California's own version of S.B. 8 that would authorize private citizen suits against manufacturers, distributors and sellers of assault weapons, or ghost gun kits or parts."[66] Both the timing and the Governor's explicit statements demonstrate that this request was a reaction against the Supreme Court's failure to strike down S.B. 8.[67] As the Governor's press release stated:

> I am outraged by yesterday's U.S. Supreme Court decision allowing Texas's ban on most abortion services to remain in place, and largely endorsing Texas's scheme to insulate its law from the fundamental protections of Roe v. Wade. But if states can now shield their laws from review by the federal courts that compare assault weapons to Swiss Army knives, then California will use that authority to protect people's lives, where Texas used it to put women in harm's way.[68]

> If the Court agreed that it was consistent with the basic presuppositions of our constitutional system to allow a state to do what Texas did, it could have said so, and explained why. Or perhaps the Court believed that that characterization of the case was mistaken, and that no fundamental issue was presented because Texas had legitimate reasons to limit remedies in the way it did and was not just evading the Court's decisions. If so, the Court could have identified what those reasons were and, in that way, provided some guidance about what the Court thought were acceptable reasons to limit remedies for constitutional violations. Or, finally, if the Court thought that what Texas had done was on some basic level unacceptable but that the state had managed to find a gap in the rules governing constitutional remedies that left the Court with no choice but to accept a problematic law, it could have said that. That would have invited efforts to find ways around the unjustified limits on remedies in the way that courts have in the past.

Strauss, *supra* note 18, at 109–10. Professor Fallon explains that

> *Jackson* arose from Texas's attempt to defeat suits for injunctions against an antiabortion law. In a ruling that epitomizes a sea change in the law of constitutional remedies, the Court, with Justice Gorsuch writing for the majority, allowed Texas largely to succeed in its ambition, even as the majority assumed that the Constitution guaranteed rights of abortion access.

Fallon, Jr., *supra* note 55, at 1302.

66. *See* Ram Eachambadi, *California Dispatches: Newsom 'Pulls a Texas' on Guns in Response to Supreme Court Stance on SB8 Heartbeat Bill*, JURIST (Dec. 16, 2021, 5:44 PM), https://www.jurist.org/news/2021/12/california-dispatches-newsom-pulls-a-texas-on-guns-in-response-to-supreme-court-stance-on-SB8-heartbeat-bill/ [https://perma.cc/ZQR4-6ZPL].

67. *See id.*

68. *Governor Newsom Statement on Supreme Court Decision*, OFF. OF GOVERNOR NEWSOM (Dec. 11, 2021), https://www.gov.ca.gov/2021/12/11/governor-newsom-statement-on-supreme-court-decision/ [https://perma.cc/M6XP-YT2C]. The "Swiss Army knives" comment was a reference to a

To be sure, subsequent statements about the bill pointed to particular episodes of gun violence and emphasized the role that S.B. 1327 would play in "holding the gun industry accountable for mass shootings in our communities involving illegal firearms."[69] But Newsom never shied away from pointing to the Court's S.B. 8 decision as the impetus for using the private suit model, and this aspect of the bill's genesis was a consistent aspect of media coverage.[70] "This tit-for-tat directive against Texas S.B. 8," as one commentator described the California bill, "responds directly to the Supreme Court decision last week. It

ruling by federal district court Judge Benitez in June 2021 that struck down the state's assault rifle ban. Miller v. Bonta, 542 F. Supp. 3d 1009, 1009 (S.D. Cal. 2021). Judge Benitez wrote:

> Like the Swiss Army Knife, the popular AR-15 rifle is a perfect combination of home defense weapon and homeland defense equipment. Good for both home and battle, the AR-15 is the kind of versatile gun that lies at the intersection of the kinds of firearms protected under *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *United States v Miller*, 307 U.S. 174 (1939). Yet, the State of California makes it a crime to have an AR-15 type rifle. Therefore, this Court declares the California statutes to be unconstitutional.

Id. On appeal, the Ninth Circuit remanded the case to the district court for reconsideration in light of *Bruen*, along with multiple other cases challenging various California gun laws. Miller v. Bonta, No. 21-55608, 2022 WL 3095986, at *1 (9th Cir. Aug. 1, 2022); Kevin Rector, *War on California Gun Laws Revs Up After Supreme Court's 'Right to Carry' Decision*, L.A. TIMES (July 17, 2022, 5:00 AM), https://www.latimes.com/california/story/2022-07-17/supreme-court-ruling-in-new-york-reshaping-trajectory-of-california-gun-law-cases [https://perma.cc/33CP-WAN6]. On remand, the district court again entered a permanent injunction. Miller v. Bonta, No. 19-cv-1537, 2023 WL 6929336, at *39 (S.D. Cal. Oct. 19, 2023).

69. Olafimihan Oshin, *Bill Allowing Citizens To Sue over Illegal Firearms Advances in California*, HILL (Apr. 6, 2022, 12:08 PM), https://thehill.com/homenews/3260463-bill-allowing-citizens-to-sue-over-illegal-firearms-advances-in-california/ [https://perma.cc/D56F-JHWZ] (noting that in applauding the bill's progress out of committee, Governor Newsom referenced a mass shooting that happened that week in Sacramento, leaving six dead and twelve wounded: "This week's unconscionable act of gun violence is a tragic reminder of the lives that are at stake in this crisis that endangers communities across the country"); *see also* Evan Symon, *Firearm Bill Modeled After Texas Heartbeat Abortion Bill Passes Sen. Judiciary Committee*, CAL. GLOBE (Apr. 6, 2022, 5:44 PM), https://californiaglobe.com/fr/firearm-bill-modeled-after-texas-heartbeat-abortion-bill-passes-sen-judiciary-committee/ [https://perma.cc/5EYR-AK9U]. Although the bill was initially

> expected to face much opposition due to questions about the bills [sic] legality and constitutionality, Sunday's shooting in Sacramento softened attitudes toward the bill going into the vote . . . . Speeches and arguments had to be changed or altered. No one can risk looking insensitive to a mass shooting, especially one where innocent people died within walking distance of the Capitol.

Id.; *see also* Dolores Quintana, *Governor Newsom Signs Gun Legislation at Santa Monica College*, SANTA MONICA MIRROR (July 29, 2022), https://smmirror.com/2022/07/governor-newsom-signs-gun-legislation-at-santa-monica-college/ [https://perma.cc/G993-UDM5] (emphasizing the gun safety aspects of S.B. 1327, rather than the reprisal aspects, albeit also describing the Texas law as "appalling" and suggesting that "turnabout is fair play").

70. Eachambadi, *supra* note 66; Deliso, *supra* note 6; Stracqualursi, *supra* note 27; Somin, *supra* note 55.

seems the governor is looking to test the consistency of the Supreme Court in its quest to limit constitutional rights and is daring the Court to issue a hypocritical decision here insofar as guns are concerned."[71]

Governor Newsom said exactly that for a national audience, publishing an op-ed in *The Washington Post* announcing that he had called on the California legislature "to send me a bill creating a similar way to take action against those who produce or sell assault weapons and 'ghost guns' in California."[72] Governor Newsom acknowledged that California had opposed S.B. 8 in an amicus brief to the Supreme Court and continued to take the position that it was unconstitutional.[73] But, he said, "so long as this door is open to states, we're going to walk through it, too, to protect Californians and bolster our common-sense gun laws that have come under attack."[74]

Governor Newsom made clear that he was not just taking advantage of the opening that the Court had created but was speaking directly to the Court in an effort to shape future decision making. He expressed the hope that "[m]aybe California's move will lead the court to change its mind about allowing Texas's bounty-hunter scheme."[75] Newsom used the Justices' own words to assert that there was "no principled way" for the Court to distinguish between a bounty hunter scheme burdening abortion rights and one that burdens firearm rights.[76] Newsom noted that Justice Gorsuch, in his opinion allowing the Texas law to remain in place, claimed that Texas abortion providers were simply being held

71. Eachambadi, *supra* note 66.

72. Newsom, *Supreme Court Opened the Door*, *supra* note 26.

73. *Id.*; *see also Attorney General Bonta: Texas Cannot Avoid Judicial Review of Its Unconstitutional Abortion Ban*, CAL. DEP'T OF JUST. (Oct. 27, 2021), https://oag.ca.gov/news/press-releases/attorney-general-bonta-texas-cannot-avoid-judicial-review-its-unconstitutional [https://perma.cc/SMN8-4YPN]. Perhaps foreshadowing the spread of the bounty hunter model, the amicus brief in *Whole Woman's Health v. Jackson* observes that

> *Amici* States recognize that state legislatures across the country have strongly held policy preferences in areas as diverse as gun rights, freedom of religion, marriage equality, and voting rights that may at times be in tension with, or even conflict with, constitutional principles. [They] likewise recognize the vital role that judicial review plays in resolving these tensions. And, where longstanding precedent clearly and unambiguously forecloses a particular policy as unconstitutional, a State cannot be permitted to disregard that precedent by passing an unconstitutional law and shielding it from federal judicial review.

Brief for Massachusetts et al. as Amici Curiae Supporting Petitioners, *supra* note 22, at 17.

74. Newsom, *Supreme Court Opened the Door*, *supra* note 26.

75. *Id.*

76. *Id.*

"to the same standard as those who would sue to vindicate 'the right to bear arms, or any other right.'"[77]

Governor Newsom's public statements surely made for some riveting political theater, but the timing raises a number of interesting questions about the deeper motivations underlying the project. Why pass a bill attempting to influence Supreme Court decision-making after S.B. 8 had already been allowed to go forward? To the extent that the gambit was motivated by the genuine hope that the Court would change course, we might wonder about its efficacy.[78] Was it not almost certain to fail? It certainly looks that way now, more than two years after *Dobbs* was decided: we now know that rather than bring Texas into line with abortion precedent, the Court brought abortion precedent into line with Texas.[79]

But the vantage point was different in December of 2021. While the Court had refused to enjoin S.B. 8 and had dismissed the claims against the vast majority of defendants, it had allowed the S.B. 8 challengers to proceed with their claims against the state licensing officials, and they were most certainly doing so.[80] When Newsom publicly called for a gun control version of S.B. 8 in the pages of *The Washington Post*, there was reason to think that S.B. 8 would be returning to the Court for further review, and that perhaps the Court would be more inclined to scrutinize its procedural obstacles with a skeptical eye knowing that gun rights advocates were facing the same constraints in California.

This was, of course, a rapidly shifting landscape. In May of 2022, the *Dobbs* draft opinion was leaked, revealing the likely end of *Roe v. Wade*[81] and the

77. *Id.* Newsom went on to note that

> [i]n a separate opinion, Chief Justice John G. Roberts Jr. recognized that Texas's scheme could be used by other states regardless "of the federal right infringed." And at a hearing last month, Justice Brett M. Kavanaugh asked Texas's lawyer whether the state's position would mean that gun laws could be insulated from review, too. Texas's answer: "Yes." The court knew what it was opening the door to when it affirmed Texas's procedural games.

Id.

78. As we will see when we examine the history of S.B. 1327's enactment in Part II, lawmakers repeatedly expressed the hope that a privately enforced assault weapons ban evading judicial review would cause the Court to reconsider its S.B. 8 decision. *See infra* Section II.A.

79. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2239 (2022) (concluding that "[t]he Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion.").

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

81. Roe v. Wade, 410 U.S. 113 (1973).

constitutional right to terminate a pregnancy.[82] By the end of June 2022, when S.B. 1327 was enacted, *Dobbs* had already been decided, eliminating the conflict between S.B. 8 and the Court's governing substantive due process precedent.[83] Whatever window of hope had initially existed to think that there was a plausible avenue to influence the Court's review of S.B. 8 had diminished to a vanishing point. But at least at the outset, it was not spurious for California lawmakers to think that S.B. 8 litigation would continue, and as we will see when we examine the bill's trajectory, proponents did repeatedly express the hope that S.B. 1327 would impel the Court to reconsider its S.B. 8 decision.[84]

Alternatively, we might infer that Newsom and the other proponents were primarily motivated by the desire to make the Court look bad.[85] Newsom acknowledged in his op-ed that

> it's always possible the court could find some way to gerrymander its ruling to allow Texas to use this plan for abortions but not California for assault weapons and ghost guns. But if the court is going to be that hypocritical, then at least we will be shining a spotlight on how the branch of the federal government charged with upholding the rule of law is trampling it instead. There's value in that, too.[86]

Whether and to what extent there is value in a state using its lawmaking apparatus to shame the Supreme Court and reveal the Justices as hypocrites is a serious and difficult normative question, one to which we return in Part III. But one thing is clear: with this salvo, Newsom was not only daring the Court to invalidate a burden on gun rights that it had been willing to tolerate for abortion rights, but also telling the rest of the country that California would be the one to bring that hypocrisy to light.

82. *See* Jodi Kantor & Adam Liptak, *Behind the Scenes at the Dismantling of Roe v. Wade*, N.Y. TIMES (Dec. 15, 2023), https://www.nytimes.com/2023/12/15/us/supreme-court-dobbs-roe-abortion.html [https://perma.cc/AV2Z-LQPG (dark archive)] (explaining that the draft opinion was leaked and published by *Politico* on May 2, 2022).

83. *See Dobbs*, 142 S. Ct. at 2284.

84. *See infra* Section II.A.

85. *See* Jeremy B. White, *Judge Strikes Down California Gun Law Modeled on Texas Abortion Measure*, POLITICO (Dec. 19, 2022, 10:17 PM), https://www.politico.com/news/2022/12/19/california-gun-law-texas-abortion-00074689 [https://perma.cc/9X7M-SX2L (staff-uploaded archive)] ("The question is whether they are complete and abject hypocrites and frauds if they reject our bill that's modeled after that abortion bill as it relates to private right of action to go after assault weapons.").

86. Newsom, *Supreme Court Opened the Door*, *supra* note 26.

Within seven months, Newsom was signing the bill he had requested and then sponsored.[87] Where Texas had sought to prohibit abortions after fetal cardiac activity, California set forth an extensive list of semiautomatic firearms that it defined as "assault weapons," and then prohibited the manufacture, distribution, transport, importation, or sale of either those weapons or unserialized firearms.[88] California's version contains exactly the same review-impairing mechanisms as the Texas original: the prohibitions are to be enforced exclusively by private parties seeking a bounty payment of $10,000 per violation,[89] and anyone seeking to challenge the law faces the same the one-sided fee shifting regime pioneered by Texas in S.B. 8.[90]

California's version, however, contains a significant additional provision:

> This chapter shall become inoperative upon invalidation of Subchapter H (commencing with Section 171.201) of Chapter 171 of the Texas

87. S. JUDICIARY COMM. BILL ANALYSIS, *supra* note 23, at 1 (noting Newsom as sponsor); *see also* Deliso, *supra* note 6 ("The governor signed the bill into law at Santa Monica College, which was the site of a deadly mass shooting in 2013 where six people, including the shooter, were killed. The gunman used an AR-15-style semi-automatic rifle he built using legally purchased components—a ghost gun that now would be subject to a lawsuit under S.B. 1327.").

88. Act of July 22, 2022, ch. 146, § 1, 2022 Cal. Stat. 3551, 3552–56 (codified at CAL. BUS. & PROF. CODE § 22949.62). The law also extends the same prohibition to any 50 BMG rifle that is not already defined as an assault weapon. *Id.* at 3553.

89. *Id.* § 1, 2022 Cal. Stat. at 3559–61 (codified at CAL. BUS. & PROF. CODE § 22949.65). Unlike the Texas original, the substantive prohibitions in S.B. 1327 replicated other prohibitions in California law that already existed, and that were enforceable by state officials S. JUDICIARY COMM. BILL ANALYSIS, *supra* note 23, at 2. The "exclusive private enforcement" was thus not quite as exclusive in California's version. Anyone who wanted to test the validity of California's ban on assault weapons was able to bring suit in the traditional way—and they most definitely had been doing that, even before S.B. 1327 was enacted. *See* David A. Carrillo & Stephen M. Duvernay, *Citizen Enforcement Laws Threaten Democracy*, 1 FORDHAM L. VOTING RTS. & DEMOCRACY F. 124, 125 (2023) ("California's law is different in that it does not offload enforcement entirely to private citizens; instead, state and local authorities still retain power to prosecute the same firearm regulations that citizens are now also incentivized to pursue."). Carrillo and Duvernay argue that nonetheless "it still shares the core problem of attempting to evade judicial review" because "the fee-shifting provisions in California's law are designed to discourage legal challenges." *Id.*

90. Act of July 22, 2022, ch. 146, § 2, 2022 Cal. Stat. 3551, 3563 (codified at CAL. CIV. PROC. CODE § 1021.11(a)). California fixed the drafting error that plagues S.B. 8, *see* Aviel & Kersh, *supra* note 14, at 2070 n.85, and inserted a provision clarifying that the law does not apply to common carriers "when acting in the course and scope of duties incident to the receipt, processing, transportation, or delivery of property." CAL. BUS. & PROF. CODE § 22949.62(b)(2)(C) (Westlaw through Ch. 39 of 2024 Reg. Sess.). California also provided for an alternative damages amount in the event that the $10,000 figure was "found by a court to be invalid or unconstitutional, in which case" courts are to award a "civil penalty in an appropriate amount to be determined by the court for each violation of this chapter," taking into account factors such as the number of firearms at issue and "whether the defendant has previously violated this chapter or any other federal, state, or local law concerning the regulation of firearms." CAL. BUS. & PROF. CODE § 22949.65(b)(2)(A)–(B) (Westlaw through Ch. 39 of 2024 Reg. Sess.).

> Health and Safety Code in its entirety by a final decision of the United States Supreme Court or Texas Supreme Court, and is repealed on January 1 of the following year.[91]

Bypassing the possibility of legislative repeal entirely, perhaps out of a sense that there was no plausible future in which the Texas state legislature would choose to repeal S.B. 8 of its own accord, the provision stakes the survival of California's law on what courts will do with the Texas original. As I explain in the next section, this provision is without analogue in any other state code.

D. *An Unprecedented Mechanism of Interstate Linkage*

Enacting a statute that will automatically terminate upon the invalidation of another state's law would seem to be an odd way for a state to conduct its affairs. An original fifty-state survey conducted for this Article attempted to test this intuition and provide some context for California's experiment. The survey was designed to capture every instance in which a state law (1) mentions another state by name and (2) announces that its own validity is dependent on the operational status of the other state's law.[92] The results reveal the extraordinary novelty of California's self-destruct provision. While there are numerous ways in which state lawmakers reference the laws of other states in their own legislation, these are different from California's maneuver in significant respects.

States routinely refer to other states in their own law because they are forming interstate compacts with those states—a collaborative endeavor clearly of a different nature than California's self-destruct provision. Across areas ranging from the management of joint fisheries[93] to the avoidance of pollution

91. CAL. BUS. & PROF. CODE § 22949.71 (Westlaw through Ch. 39 of 2024 Reg. Sess.). As we will explore in further detail, this provision is limited to Chapter 38, which contains the private enforcement provisions. The attorney fee provisions for all other challenges to firearm regulation were added to the Code of Civil Procedure. *See* CAL. CIV. PROC. CODE § 1021.11(a) (Westlaw through Ch. 39 of 2024 Reg. Sess.). The self-destruct provision leaves those intact.

92. For each state we ran five alternative searches in the Westlaw databases containing current state legislation. Each search had two main components: a set of terms and connectors designed to capture the contingent validity aspect of the self-destruct provision, such as "shall be repealed" or "has in force similar," combined with a string of all of the other states outside of the subject state being searched linked by the "OR" connector. We then ran the searches in the databases containing previous versions of state codes, going as far back as Westlaw's coverage of historical legislation—typically somewhere between 1986 and 1991. Next, we ran searches in HeinOnline to uncover historical state laws not available in the Westlaw databases. A detailed explanation of the survey methodology is available in Appendix A.

93. GA. CODE ANN. § 27-4-210 (LEXIS through Chapters 354 through 457, with the exception of Chapters 391 and 396, of the 2024 Reg. Sess. of the Gen. Assemb.).

in waterways[94] to the allocation of surplus capacity in mental health or correctional facilities,[95] states will regularly enter into agreements with other states and then codify those agreements in state legislation.[96] These can include reciprocal certification and licensing agreements, in which party states agree to honor professional licenses issued by other party states,[97] and to impose the same kind of suspensions.[98]

94. CONN. GEN. STAT. § 22a-294 (2024) ("The control of future pollution and the abatement of existing pollution in the waters in such area is of prime importance to the people living in such area and can best be accomplished through the cooperation of the states of New Jersey and New York and Connecticut by and through a joint or common agency.").

95. ALA. CODE § 14-13-2 (Westlaw through Act 2024–136, and includes Acts 2024–164 and 2024–168 of the 2024 Reg. Sess.) (correctional facilities); CONN. GEN. STAT. § 17b-56 (2024) (welfare services); CONN. GEN. STAT. § 17a-615 (2024) (mental health services and facilities); CONN. GEN. STAT. § 18-106 (2024) (correctional facilities); CONN. GEN. STAT. § 14-365 (2024) (registration and taxation of bus services).

96. *See, e.g.*, Midwestern Higher Education Compact, Pub. L. No. 195, 1990 Mich. Pub. Acts 878, 878 (codified at MICH. COMP. LAWS §§ 390.1531–.1532 (1990)) (forming a compact "to provide greater higher education opportunities and services in the Midwestern region, with the aim of furthering regional access to, research in and choice of higher education for the citizens residing in the several states which are parties to this Compact"); Interstate Compact for the Prevention and Control of Forest Fires, ch. 66, 2016 N.M. Laws 909, 909 (codified at N.M. STAT. ANN. § 68-3-1 (2016)) (forming a compact "to promote effective prevention and control of forest fires in the great plains region of the United States" and to provide "reciprocal aid in fighting forest fires among the compacting states"). According to one scholar there are more than two hundred formal compacts between states on a variety of matters. *See* Katherine Mims Crocker, *A Prophylactic Approach to Compact Constitutionality*, 98 NOTRE DAME L. REV. 1185, 1187 (2023). Crocker explains that some of these compacts "spring from politically contested terrain" rather than the anodyne examples offered here, and might reflect a group of states aligned with one party reacting to the unwelcome policy initiatives of an administration from the opposing party. *See id.* at 1187–88. Note that interstate agreements are not always codified in legislation. *See* Bridget A. Fahey, *Federalism by Contract*, 129 YALE L.J. 2326, 2329 (2020) (noting that "[p]ursuant to the Compacts Clause, states enter into written agreements with one another to oversee shared resources, police areas of mutual interest, and negotiate territorial boundaries").

97. ALA. CODE § 16-23A-1 (Westlaw through Act 2024–136, and includes Acts 2024–164, and 2024–168 of the 2024 Reg. Sess.) (forming interstate agreement regarding teaching licenses); *see also* CONN. GEN. STAT. § 20-187b (2024) (forming interstate compact between state psychology regulatory authorities).

98. GA. CODE ANN. § 52-7-30 (LEXIS through Chapters 354 through 457, with the exception of Chapters 391 and 396, of the 2024 Reg. Sess. of the Gen. Assemb.) ("A party state shall recognize a suspension of any person by any state, territory, or possession of the United States, including the District of Columbia and the Commonwealth of Puerto Rico, as if the violation on which the suspension is based occurred in such party state and could have been the basis for suspension in such party state."); *see also* ALA. CODE § 32-6-31 (Westlaw through Act 2024–136, and includes Acts 2024–164, and 2024–168 of the 2024 Reg. Sess.) ("The licensing authority in the state where application is made shall not issue a license to drive to the applicant if [t]he applicant has held such a license, but the same has been suspended . . . [or] revoked."). States can also unilaterally choose to honor another state's permit or license, without entering into an agreement ex ante. *See, e.g.*, COLO. REV. STAT. § 18-12-213 (LEXIS through Chapter 123 of the 2024 Reg. Sess., effective as of Apr. 22, 2024) (explaining the

Some of these cooperative agreements include terms that link one law's termination date to another state's law in a way that suggests some similarity to S.B. 1327's self-destruct mechanism. On inspection, however, these provisions just operationalize ordinary aspects of what we would expect to see in a cooperative interstate arrangement. Maryland and Virginia, for example, have in place a mutual aid agreement that allows law enforcement authorities in each state to pursue fleeing offenders across the border into the other state.[99] Maryland's law reflecting this arrangement specifies that "[t]his section shall be in effect for so long as the Commonwealth of Virginia has in force similar legislation."[100] It should be evident that when California made its privately enforced assault weapons ban inoperative upon the invalidation of Texas's privately enforced abortion ban, it was not forming anything like this kind of reciprocal agreement.[101]

States also sometimes engage in lawmaking that has a reciprocal—or retaliatory—quality to it without having formed an agreement with another

circumstances under which Colorado will honor another state's concealed carry permit); C. Timothy Gray, Comment, *Regional Reciprocal Banking Laws: Constitutional, but What Next?*, 14 FLA. ST. U. L. REV. 267, 267 (1986) (addressing the "ever-increasing number of state laws that establish regional reciprocal banking arrangements."). *See generally South Carolina Concealed Carry Reciprocity Map & Gun Laws*, US CONCEALED CARRY ASS'N (Mar. 7, 2024), https://www.usconcealedcarry.com/resources/ccw_reciprocity_map/sc-gun-laws/#recStates [https://perma.cc/6W3X-HCRH (staff-uploaded archive)] (showing all of the states with some version of concealed carry permit reciprocity with South Carolina).

99. MD. CODE ANN., NAT. RES. § 1-210 (LEXIS through Chapter 10 of the 2024 Reg. Sess. of the Gen. Assemb.).

100. *Id.* Virginia's version similarly links the duration of the two states' laws: "The provisions of this section shall be effective as long as the State of Maryland has in force similar provisions authorizing legally constituted authorities of Virginia to make pursuit and arrests in Maryland for violations of the laws of Virginia." VA. CODE ANN. § 28.2-904 (LEXIS through 2024 Acts effective Apr. 1, 2024). Numerous states have similar arrangements. *See* Act of Feb. 19, 2004, ch. 519, 2003 Me. Laws 1734, 1734 (codified as ME. STAT. tit. 12, § 6025-A (2004)) (creating a marine patrol agreement between Maine and New Hampshire); DEL. CODE ANN. tit. 7, § 903 (LEXIS through 84 Del. Laws, chapters 173, 175–76) (allowing Delaware's Department of Natural Resources and Environmental Control to adopt an interim fisheries management plan "provided that the State of New Jersey's Department of Environmental Protection adopts substantially similar interim regulations. Said interim regulations, in Delaware, shall become effective on the date substantially similar regulations become effective in the State of New Jersey."); N.C. GEN. STAT. § 77-118 (LEXIS through Sess. Laws 2023-151 of the 2023 Reg. Sess. of the Gen. Assemb.) (regarding the River Basin Advisory Commissions formed by the states of North Carolina and South Carolina and constituted by members of each state, "[t]he General Assembly of North Carolina may terminate the commissions by repealing this Article. The commissions shall terminate if the General Assembly of South Carolina repeals the provisions of the South Carolina Code of Laws that are comparable to this Article.").

101. *See* CAL. BUS. & PROF. CODE § 22949.71 (Westlaw through Ch. 39 of the 2024 Reg. Sess.).

state.[102] Many states have insurance taxation schemes that impose a "retaliatory" tax on out-of-state insurers when the insurer's state of incorporation inflicts more burdensome taxes on out-of-state insurers than what the retaliating state would ordinarily impose.[103] Notwithstanding the description of the tax as "retaliatory," this kind of arrangement was actually supported by the insurance industry "as a means of fostering uniform and moderate levels of taxation nationwide."[104] But more importantly, it is simply of a different nature than the self-destruct provision in S.B. 1327. Let's take Kansas, for example, one of the many states with such a scheme.[105] For any given insurance company doing business in Kansas, the scheme essentially levels up the tax rate to whatever the insurer's home state would impose on a Kansas insurance company doing business in the other state.[106] Whatever one thinks of the virtues of such an arrangement, it does not peg the validity of Kansas law to the duration of a law in any other state. The tax rate that Kansas imposes on out-of-state insurers will vary based on the tax rate chosen by the insurers' home states, but Kansas law remains the same, consistently providing the instruction to other states that "your insurance companies doing business in our state will pay tax rates that are as burdensome as what you impose on our insurance companies doing business in your state."[107] Another state can raise or lower its tax rate at will, resulting in higher or lower rates for its companies doing business in Kansas, but each law stands on its own footing.[108]

102. *See, e.g.*, MONT. CODE ANN. § 33-2-709 (Westlaw through chapters effective July 1, 2023 of the 2023 Sess.) (providing that whenever another state taxes a Montana insurance company at a higher rate than what Montana would impose on an out-of-state insurer, Montana's insurance commissioner shall apply the higher rate to out-of-state insurers from states applying that higher rate in the first instance).

103. W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 650, 654–55 (1981) (describing such schemes in California, Kansas, and South Carolina); *see also* Lee R. Russ, Annotation, *Construction, Application, and Operation of State "Retaliatory" Statutes Imposing Special Taxes or Fees on Foreign Insurers Doing Business Within the State*, 30 A.L.R.4th 873, § 1 (1984) ("Most, if not all, jurisdictions have enacted 'retaliatory' statutes pertaining to the taxation of foreign insurers which, in effect, substitute the general tax laws of the foreign insurer's home state for the general tax laws of the state applying the retaliatory statute whenever the general tax laws of the foreign insurer's home state are more burdensome than the general tax laws of the state applying the retaliatory statute.").

104. *W. & S. Life Ins.*, 451 U.S. at 669 n.22.

105. *See id.* at 94; *see also* KAN. STAT. ANN. § 40-253 (Westlaw through laws enacted during the 2023 Reg. Sess. of the Kan. Leg. effective on June 8, 2023).

106. § 40-253.

107. *See id.*

108. In a variation on this, New Mexico once enacted a law to correct its own differential treatment of New Mexico and New York businesses in procurement matters, which had led New York to then treat New Mexico businesses differently in its procurement processes. *See* H.B. 10, 43rd Leg., First Sess. (N.M. 1997). As the New Mexico legislature explained,

Another category of interstate linkage is found where states want to move forward with a policy initiative but do not want to risk the economic consequences of being the sole regulator in a given realm. Connecticut, for example, became the first state to adopt a labeling regime for genetically modified foods, but it specified that the provisions would only become operative if neighboring states of sufficient size were to do so as well.[109] Similarly, in an act amending the state's civil practice rules to modify the process for suing state or municipal entities, New York specified that certain provisions would only take effect if New Jersey were to enact a law "having an identical effect."[110] In a kind of inverse variation on this "hesitant first mover" phenomenon, states will sometimes follow other states into a regulatory realm and will borrow the work of the earlier movers instead of starting from scratch. A state adopting another state's regulatory regime for its own use, rather than painstakingly importing each provision piecemeal, might simply announce that the regulated entities must comply with the standards set forth in another state's

> Certain recent amendments to the New York state procurement statutes have the effect of prohibiting New Mexico businesses from selling goods or providing services to New York state and local governments and quasi-governmental entities. This act eliminates all differential treatment of any kind between New York state business enterprises and New Mexico businesses in New Mexico procurement and thereby negates the application to New Mexico businesses of the New York amendments and protects the access of New Mexico businesses to the New York market.

Id.

109. H.B. 6527, 2013 Leg., Jan. Sess. (Conn. 2014) (providing that the labeling requirements are to become operative when "(1) [f]our states, not including this state, enact a mandatory labeling law for genetically-engineered foods that is consistent with the provisions of this subsection, provided one such state borders Connecticut; and (2) the aggregate population of such states located in the northeast region of the United States that have enacted a mandatory labeling law for genetically-engineered foods that is consistent with this subsection exceed twenty million based on 2010 census figures"). As explained by one commenter, this provision was "meant to allay fears that Connecticut could suffer negative economic impacts by going it alone—higher food prices and lawsuits from major food companies. Lawmakers are counting on safety in numbers, and hoping their state's precedent will encourage others to follow suit." Claire Thompson, *Connecticut Will Label GMOs if You Do Too*, GRIST (June 3, 2013), https://grist.org/food/connecticut-will-label-gmos-if-you-do-too/ [https://perma.cc/47EH-YDYN]. Maine subsequently enacted a food labeling law with a similar trigger requirement resting on the actions of other states. *See* Legis. Doc. 718, 126th Leg., 1st Reg. Sess. (Me. 2013). These state laws were preempted in 2016 when Congress enacted a national food labeling regime that required a national disclosure standard for bioengineered food. KRISTEN MILLER, OFF. OF LEGIS. RSCH., CONNECTICUT'S GENETICALLY ENGINEERED FOOD LABELING LAW "TRIGGER" 2–3 (2018), https://www.cga.ct.gov/2018/rpt/pdf/2018-R-0268.pdf [https://perma.cc/XKQ2-EL29 (staff-uploaded archive)].

110. Assemb. B. 1051, 236th Leg., Reg. Sess. (N.Y. 2023).

law.[111] A Connecticut law, for example, requires products to meet the energy efficiency standards set forth in California law.[112] Similarly, a Hawai'i law requires the state fire council to perform their cigarette-related duties in accordance with New York's fire safety standards for cigarettes.[113] This anodyne practice of borrowing the regulatory work of other states bears no resemblance to California's self-destruct provision.

To be sure, California is not the first state to express a desire that another state repeal or rescind an objectionable law. Montana, of the view that Idaho had enacted "highly discriminatory prohibitions on out-of-state purchasers bidding on timber," passed a joint resolution urging "the Idaho Legislature to repeal its laws that: (1) restrict or discourage Montana companies from bidding on Idaho state timber sales; or (2) treat Montana companies in any way differently from Idaho companies."[114] The resolution further specified that if the Idaho statute were not repealed by the following year, the Montana Department of Natural Resources and Conservation should "be encouraged to propose legislation that will similarly favor Montana companies in the sale of timber in a manner that will ensure full, fair compensation to beneficiary institutions."[115]

Nor is California the first to enact legislation that is in some way contingent on the outcome of litigation concerning another state's law. The closest cousin to S.B. 1327's self-destruct provision is found in a conditional enactment in Louisiana arising out of a series of interstate conflicts on the disposal of hazardous waste.[116] In 1989, Alabama enacted the Holley Bill,[117] which essentially prohibited the importation of hazardous waste into the state of Alabama from states that do not have hazardous waste facilities.[118] The law

111. *See* H.B. 331, 54th Leg., 1st Sess. (N.M. 2019) (enacting gaming standards pegged to Nevada and New Jersey laws); H.B. 94, 124th Gen. Assemb., Reg. Sess. (Ohio 2001) (linking disability assessment criteria to those operative in New York).

112. CONN. GEN. STAT. ANN. § 16a-48 (2024).

113. HAW. REV. STAT. § 132C-5 (2022).

114. S.J. Res. 13, 57th Leg., Reg. Sess. (Mont. 2001).

115. *Id.*

116. Act of July 5, 1990, No. 273, § 2, 1990 La. Sess. Law Serv. 733, 738 (not enacted).

117. ALA. CODE § 22-30-11 (Westlaw through Acts 2023-1 through 2023-3 of the 2023 First Spec. Sess.; through Acts 2023-4 through 2023-491, and Acts 2023-493 through 2023-561 of the 2023 Reg. Sess.; and Acts 2023-562 through 2023-569 of the 2023 Second Spec. Sess.); *see also* Nat'l Solid Wastes Mgmt. Ass'n v. Ala. Dep't of Env't Mgmt., 729 F. Supp. 792, 797 (N.D. Ala. 1990), *vacated*, 910 F.2d 713 (11th Cir. 1990), *modified*, 924 F.2d 1001 (11th Cir. 1991) (explaining that the act was known as the "Holley Bill").

118. The failure of the excluded states to provide adequate capacity within their borders also put them in violation of federal law requiring each state to do exactly that. *See generally* Nat'l Solid Wastes Mgmt. Ass'n v. Ala. Dep't of Env't Mgmt., 910 F.2d 713, 716-17 (11th Cir. 1990), *modified*, 924 F.2d 1001 (11th Cir. 1991) (describing the capacity assurance requirements in federal law).

was promptly challenged as a violation of the Commerce Clause, but in January of 1990, a federal district court upheld the statute and dismissed the lawsuit.[119] Enter Louisiana, also concerned about the disposal of hazardous waste within its borders.[120] In July of 1990, while the Alabama district court decision was pending on appeal, Louisiana enacted a law that was "substantively identical" to the Holley Bill.[121] Louisiana's law contained the following proviso regarding the pending appeal:

> The provisions of this Act shall become effective on January 1, 1991, unless the United States 11th Circuit Court of Appeals renders an opinion that Act No. 89-788 of the Alabama Statutes is declared unconstitutional in the matter entitled "National Solid Waste Management Association, et al. v. The Alabama Department of Environmental Management, Civil Action No. 890g-1722-W" presently pending before that court, but only to the extent that the provisions of the said Alabama Act are determined to be declared unconstitutional.[122]

A month after the enactment, the Eleventh Circuit did indeed find that Alabama's Holley Act imposed unconstitutional burdens on interstate commerce,[123] and thus Louisiana's version never went into effect.[124]

Louisiana's conditional enactment boils down to the following: Alabama has prohibited certain kinds of waste, and we plan to do the same, unless the federal appellate court announces that this is forbidden.[125] Rather than waiting for the Eleventh Circuit to issue its ruling and then convening, either to proceed with the plan in the event of a favorable ruling or to abandon the cause if the waste exclusion scheme were to be struck down, the Louisiana state legislature created the functionally equivalent circumstance.[126] Its endeavor would not have been meaningfully different if instead it had chosen this structure for its

119. *Nat'l Solid Wastes Mgmt.*, 729 F. Supp. at 805.

120. Act of July 5, 1990 § 1 (setting forth legislative findings that the "generation, management, and disposal of hazardous wastes is a cause of continuing concern to the citizens of this state").

121. Louvin H. Skinner, National Solid Wastes Management Association v. Alabama Department of Environmental Management*: Environmental Protection and the Commerce Clause—Is Environmental Protection A Legitimate Local Concern?*, 37 LOY. L. REV. 189, 195 (1991); *see* Act of July 5, 1990 § 1.

122. Act of July 5, 1990 § 2.

123. *Nat'l Solid Wastes Mgmt.*, 910 F.2d at 725.

124. The Editor's and Revisor's Notes for the Louisiana bill describe the bill as enacted "subject to the United States 11th Circuit Court of Appeals holding that an Alabama statute was constitutional. The United States 11th Circuit Court of Appeals held that the Alabama statute was unconstitutional." LA. STAT. ANN. § 30:2207 note (Westlaw through the 2024 First Extraordinary and Second Extraordinary Sessions).

125. *See* Act of July 5, 1990 § 2.

126. *Id.*

conditional enactment: as long as the Eleventh Circuit clears the path for waste exclusion plans, this law becomes operative.

Louisiana's conditional enactment is similar to S.B. 1327's self-destruct provision in acknowledging that litigation concerning another state's law could produce an outcome that would cast doubt on the validity of its own law.[127] And further, that Louisiana and California would apply those decisions to their own versions and voluntarily abide by them, rather than waiting for a direct frontal attack on their own laws.[128] That said, what California did was profoundly different. Most obviously apparent on the face of the affected laws is the trans-substantive nature of the linkage. Whereas Louisiana sought to regulate waste importation in the same way that Alabama had regulated waste importation, California sought to regulate guns (and gun control litigation) in the same way that Texas had regulated abortions (and abortion litigation).[129] A state's acknowledgement that a ruling on a sister state's law should be treated as authoritative makes the most sense when the two states are regulating in the same area, so that the regulations are indeed identical rather than repurposed.[130] Louisiana's conditional enactment reflects a straightforward pragmatism that does not require the same degree of explanation as the linkage across subject matter.[131]

Contrasting this to S.B. 1327, it is not just that California linked two completely different areas of regulation, both of considerably higher political salience than waste disposal—it is that we inhabit a moment in which gun rights and abortion rights are understood to be *opposites* of each other—the first set favored by conservatives and the second set favored by liberals.[132] Louisiana was

127. *Compare id.* (stating that the Act shall become effective unless a sister state's law is deemed unconstitutional by the federal court of appeals), *with* CAL. BUS. & PROF. CODE § 22949.71 (Westlaw through Ch. 39 of 2024 Reg. Sess.) (stating that the Act shall cease to be operative if a Texas law is invalidated in its entirety by either the United States Supreme Court or the Texas Supreme Court).

128. *See* Act of July 5, 1990 § 2.

129. *See id.*

130. *See id.*

131. Because Louisiana's law never went into effect, the state never spent any money defending it. Contrast that to California, which not only used public resources to defend S.B. 1327 but also paid $556,000 to the plaintiffs' attorneys. *See infra* note 232 and accompanying text.

132. Nicholas J. Johnson, *Principles and Passions: The Intersection of Abortion and Gun Rights*, 50 RUTGERS L. REV. 97, 99 (1997) (explaining that "these two issues are often viewed as occupying opposite positions in the political spectrum"). Why there is so little ground occupied in American politics for the anti-abortion, anti-gun crowd or the pro-choice, pro-gun contingent is a topic for another time. *See* E.J. Dionne Jr., *The Supreme Court's Pro-Gun, Pro-Life Problem*, WASH. POST (Dec. 1, 2021, 3:50 PM), https://www.washingtonpost.com/opinions/2021/12/01/supreme-courts-pro-gun-pro-life-problem/ [https://perma.cc/B5LS-XZVD (staff-uploaded, dark archive)] (noting that those who "fight for tougher gun laws" comprise "a small minority of the political movement trying to outlaw abortion").

piggybacking off of Alabama's initiative, subject to approval by the Eleventh Circuit,[133] whereas California was inverting the Texas gambit and using it to pursue ideological ends directly opposed to those that Texas would endorse.[134] Where Louisiana's interstate linkage mechanism expressed confidence in the presumptive validity of the Alabama scheme it wished to implement,[135] California was embracing a scheme that it had previously condemned as unconstitutional—in an amicus brief to the Supreme Court, no less.[136] The magnitude of these differences can best be gauged with a sustained examination of the bill's pathway to becoming law. In the next part we take a closer look at the deliberations over S.B. 1327 and this extraordinary self-destruct provision that both links it to, and distinguishes it from, the Texas original.

II. "WE WANT TO PUT THE COURT IN A SITUATION WHERE THEY ARE HELD TO ACCOUNT."

The proponents of S.B. 1327 were consistently open about the fact that the bill was not only modeled on the Texas law but was a reaction against it and the Court's refusal to enjoin it.[137] Governor Newsom specifically advised his

133. *See* Act of July 5, 1990 § 2.

134. *See* Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 84 (2014) (explaining why high salience interstate conflicts should be treated differently than low salience ones). To be clear, the argument here is not that the dispute between California and Texas is unprecedented in its political salience or ideological fervor—if nothing else the nation's experience with slavery, and specifically the efforts of Northern states to use their own state lawmaking power to resist and obstruct it, would put any such supposition to rest. *See generally* Paul Finkelman, *Sorting Out* Prigg v. Pennsylvania, 24 RUTGERS L.J. 605, 661 (1993) (noting that "northern states refused to enforce federal laws" and enacted "legislation in opposition to the national government"); Kate Masur, *Abortion Rights and Federalism: Some Lessons from the Nineteenth Century United States*, 14 CONLAWNOW 151, 158 (2022) (observing that "Northerners adopted state-level personal liberty laws to mitigate oppressive aspects of the Constitution and federal law."). The argument instead is specifically focused on the unique qualities of the self-destruct provision. What seems to be unprecedented, at least within the results yielded by this survey, is California's commitment to abandon its own regime at whatever point the Texas one is invalidated. Intuitively it makes sense that states would rarely if ever choose to do this, because we would instead expect that states enmeshed in bitter ideological disagreement would pursue their own ends in a maximalist and unqualified manner. California used the Court's solicitude for gun rights to correct its neglect of reproductive rights, but pulled its punches, limiting the corrosive effect of an ever-expanding use of court-obstruction mechanisms.

135. *See* Act of July 5, 1990 § 2.

136. *See* Brief for Mass. et al. as Amicus Curiae Supporting Petitioners, *supra* note 22, at 7–16.

137. When the bill passed out of committee, Governor Newsom said:

> Today, the Legislature took an important step towards holding the gun industry accountable for mass shootings in our communities involving illegal firearms and protecting residents, utilizing the U.S. Supreme Court's ruling that allowed private citizens in Texas the ability to

staff to model the Texas language, and he proposed "tying the legality of both bills together."[138] As we will see, Governor Newsom repeatedly (and rather gleefully) pointed to the bill's genealogy to trap the Court in the following rhetorical bind: (1) this bill is structurally identical to the one upheld by the Court, so (2) the Court must either uphold this one or reveal its hypocrisy.[139] But legislators expressed ambivalence about re-creating a scheme of such dubious origins.[140] To the extent that the self-destruct provision was meant to express or assuage those anxieties, it received remarkably little attention.[141]

A. *Taking Advantage of S.B. 8's "Flawed Logic"*

At a press conference held on the day the bill was introduced, Senator Robert M. Hertzberg, one of the bill's co-authors, remarked that

> in a just world, a woman's right to choose would be sacrosanct, and California's people would be protected from ghost guns and assault weapons. Sadly, the United States Supreme Court seemed determined to turn common sense on its head. Our message today to the United States Supreme Court is as follows: what is good for the goose is good for the gander. I look forward to rushing a new bill to the governor's desk to take advantage of that United States Supreme Court guidance.[142]

In a written version of the statement circulated as a press release the same day, Senator Hertzberg announced that "[w]ith this bill, we take advantage of the Court's flawed logic to protect all Californians and save lives."[143]

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sue abortion providers. So long as the Supreme Court has set this precedent, California will use it to save lives.

Legislation Sponsored by Governor Newsom To Hold the Gun Industry Accountable and Strengthen Protections Moves Forward, OFF. OF GOVERNOR GAVIN NEWSOM (Apr. 5, 2022), https://www.gov.ca.gov/2022/04/05/legislation-sponsored-by-governor-newsom-to-hold-the-gun-industry-accountable-and-strengthen-protections-moves-forward/ [https://perma.cc/2TZ2-HMKA] [hereinafter *Legislation Sponsored by Governor Newsom*].

138. Symon, *supra* note 69; *see also* Oshin, *supra* note 69 ("Newsom advised his administration to model the new measure on the structure of Texas's abortion law.").

139. *Governor Newsom Highlights*, *supra* note 10, at 21:55 (statement of Governor Gavin Newsom).

140. *See Hearing Before the S. Judiciary Comm.*, 2021–22 Reg. Sess., at 04:18 (Cal. Apr. 5, 2022), https://www.senate.ca.gov/media-archive [https://perma.cc/6XNJ-H8YW] (on file with the North Carolina Law Review) [hereinafter *Hearing Before S. Judiciary Comm.*] (debating and voting on S.B. 1327).

141. *See infra* notes 158–63 and accompanying text.

142. *Governor Newsom Highlights*, *supra* note 10, at 09:57 (statement of Sen. Robert M. Hertzberg).

143. *Governor Newsom Takes Action To Hold the Gun Industry Accountable and Advance California's Nation-Leading Protections*, OFF. OF GOVERNOR GAVIN NEWSOM (Feb. 18, 2022), https://www.gov.ca.gov/2022/02/18/governor-newsom-takes-action-to-hold-the-gun-industry-

Governor Newsom, after expressing anger at the gun lobby's persistent extremism in the face of repeated tragedy, then said that "what makes this day a little bit different and the reason I'm a little bit more optimistic is that we're going to start playing by their rules now, and not continue to be on the defense."[144] He continued:

> The Supreme Court of the United States opened up a door—wide open. We're using their rules, those that they seemingly support, coming out of the extreme anti-abortion legislation that came out of Texas, and we're going to allow all of you to enforce the rules and regulations and laws of the State of California and I think that's a good thing. If Texas can use a law to ban a woman's right to choose and to put her health at risk, we will use that same law to save lives and improve the health and safety of the people in the State of California, allowing you to enforce the illegal sales and manufacturing of weapons of war and assault rifles and ghost guns in the State of California. And by the way, there is no principled way the U.S. Supreme Court cannot uphold this California law. None. Period, full stop. It is quite literally modeled after the law they just upheld in Texas.[145]

At the end of the press conference, Governor Newsom was asked directly to address whether this legislation was "also about applying pressure to the Supreme Court's . . . authorizing the Texas law. How much does that play a role?"[146] He answered that the Court's authorization was

> absurd . . . [and] outrageous, . . . but they opened up the door. They've set the . . . tenor, the rules. And either we can be on the defense complaining about it, or we can play by those rules. And we're going to play by those rules. . . . We'll expose . . . their rank hypocrisy if they overturn this legislative effort while upholding [the Texas legislation], or we'll get them to reconsider the absurdity of their previous decision.

accountable-and-advance-californias-nation-leading-protections/ [https://perma.cc/2DBA-LXBA] [hereinafter *Governor Newsom Hold Gun Industry Accountable*].

144. *Governor Newsom Highlights*, *supra* note 10, at 20:45 (statement of Governor Gavin Newsom).

145. *Id.* at 21:01. A reporter, noting the number of gun laws that had been caught up in litigation and struck down, asked Governor Newsom why there was reason to think that this time would be any different. *Id.* at 27:19 (statement of Kitty Alvarado, KPBS News). After noting the number of gun laws that California has successfully defended but acknowledging reason for frustration with "ideological judges" and a "stacked" U.S. Supreme Court, Governor Newsom said, "I think what we're doing is taking them to task a bit, aren't we, on this Texas abortion decision, and calling the question. We'll see how principled the U.S. Supreme Court is." *Id.* at 27:43 (statement of Governor Gavin Newsom).

146. *Id.* at 34:16 (statement of Julie Watson, Associated Press).

> Either way . . . we will be doing something appropriate and something constructive.[147]

At the California Senate Judiciary Committee hearing on S.B. 1327, senators explored the connection to the Texas law in further depth, repeatedly engaging with—but not nearly resolving—the essential conundrum of enacting a law based on a sister state's admittedly "flawed logic."[148] In his opening remarks, Senator Hertzberg characterized the bill squarely as a gun control measure, a corrective to the horrific epidemic of gun violence engulfing the nation.[149] He went on to discuss the specific role of ghost guns and assault weapons in mass shootings and the astonishing rise in ghost guns confiscated in California.[150] Emphasizing the need for "creative . . . new tools" to combat the epidemic of gun violence, Senator Hertzberg introduced the private right of action as "harness[ing] the power of [the] community."[151] Noting private rights of action in existing law such as California's Unruh Civil Rights Act[152] and the Americans with Disabilities Act,[153] Hertzberg then turned to Texas's S.B. 8, describing it as "an egregious abortion restriction" and asserting that Texas "debased" private enforcement schemes.[154]

Making the central premise of S.B. 1327 unmistakably clear, Senator Hertzberg said: "If Texas can use this mechanism to take away a woman's right to choose . . . California can use the same mechanism . . . to save lives."[155] Observing that the Supreme Court had refused to enjoin the Texas law, he explained:

147. *Id.* at 34:28 (statement of Governor Gavin Newsom).

148. *Governor Newsom Hold Gun Industry Accountable*, *supra* note 143.

149. *Hearing Before S. Judiciary Comm.*, *supra* note 140, at 04:25 (statement of Sen. Robert M. Hertzberg, Member, Cal. S. Judiciary Comm.).

150. *Id.* at 05:10. "Ghost guns" are assembled at home using pre-manufactured parts that can be ordered on the internet. Annie Karni & Chris Cameron, *'Ghost Guns': What They Are and Why There's a Fight over Them*, N.Y. TIMES (Aug. 8, 2023), https://www.nytimes.com/article/what-are-ghost-guns.html [https://perma.cc/8B8Y-D9M9 (staff-uploaded, dark archive)]. They do not have serial numbers and can be purchased without a background check. *Id.*

151. *Hearing Before S. Judiciary Comm.*, *supra* note 140, at 07:08 (statement of Sen. Robert M. Hertzberg, Member, Cal. S. Judiciary Comm.).

152. Unruh Civil Rights Act, ch. 1866, 1959 Cal. Stat. 4424 (codified as amended at CAL. CIV. CODE §§ 51–52 (Westlaw through Ch. 39 of 2024 Reg. Sess.)); *see also* Dep't of Fair Emp. & Hous. v. Law Sch. Admission Council Inc., 896 F. Supp. 2d 849, 865 (N.D. Cal. 2012) ("[T]he Unruh Act . . . creates a private right of action as a matter of state law.").

153. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, 327 (codified as amended in scattered sections of 42 and 47 U.S.C.).

154. *Hearing Before S. Judiciary Comm.*, *supra* note 140, at 09:02 (statement of Sen. Robert M. Hertzberg, Member, Cal. S. Judiciary Comm.).

155. *Id.* at 09:42.

> The Supreme Court has allowed S.B. 8 to remain in place. So what did we do? We sat down and we looked at . . . what the Supreme Court [said]. And, unfortunately, in this country the Constitution says what the Supreme Court says it [does]. And so what we did is we crafted this law very carefully with respect to the guidance that was given out of S.B. 8.[156]

Anticipating Second Amendment objections, Senator Hertzberg then explained that

> while the Supreme Court recognize[s] an individual constitutional right to bear arms, it certainly does not [recognize a] constitutional right to own . . . illegal assault weapons or a ghost gun. There is no constitutional right to manufacture an illegal weapon. We are not trying to tell people who want to protect their homes or protect their businesses or go hunting or whatever. . . . [This has] nothing to do with them.[157]

The members of the Judiciary Committee grappled with the implications of adopting a framework modeled explicitly on the work product of a state whose politics they did not care to emulate. Senator María Elena Durazo asked questions about specific elements of the bill, such as the knowledge requirement and the provision allowing someone to be sued repeatedly even if they have already successfully defended their conduct against the same claims.[158] Expressing concern, she said she hoped that the bill's authors would "keep on working on making this the kind of bill that doesn't violate other civil rights that we have fought for. [S]omething that gets devised in Texas is not exactly the best model in my mind, politically, for what we have stood for in California."[159]

Senator Hertzberg responded:

> We've had a lot of lawyers on this. . . . [W]e're trying to get within the four corners of the Supreme Court decision, . . . and yet do it in a more intelligent way. Because at the end of the day, assuming someone brings an action to challenge this California law *we want to be able to put the Court in a situation where they are held to account*.[160]

156. *Id.* at 09:56.

157. *Id.* at 10:27.

158. *Id.* at 23:45 (statement of Sen. María Elena Durazo, Member, Cal. S. Judiciary Comm.).

159. *Id.* at 26:51.

160. *Id.* at 27:43 (statement of Sen. Robert M. Hertzberg, Member, Cal. S. Judiciary Comm.) (emphasis added).

Senator Hertzberg went on to invoke a kind of notice justification, explaining that the amicus brief filed by the Firearms Policy Coalition in *Whole Woman's Health v. Jackson*[161] warned the Court that

> if this applies to abortion, the next thing it's going to apply to [is] guns. . . . [The Firearms Policy Commission] had a brief and an argument that was quite brilliant . . . and the Court rejected it! So I think that gave us a little bit more strength in that regard.[162]

The members of the Judiciary Committee continued to press on the linkage to S.B. 8. Where Governor Newsom had championed this feature as a clever way to either guarantee the bill's constitutionality or expose the Court's hypocrisy, the senators expressed skepticism about the wisdom of doing so. Senator Henry Stern spoke emotionally about the mass shooting in his district that was a "change in [his] life," and described the bill as "completely necessary and timely."[163] He went on, however, to note that

> the genesis here is . . . this awful Texas decision. Are we pegging ourselves to that decision? . . . If the future Court is able to overturn that upholding of the Texas abortion ban, which I think was an abhorrent decision, and frankly a misread of the Constitution, of the substantive due process rights that people have under the 14th amendment and a number of other implied and substantive rights. So how much of . . . our strategy here is sort of bound up with that Supreme Court decision, and if it were overturned would we lose footing here in upholding this law—or do you think there is an independent basis to . . . argue this before the

161. 142 S. Ct. 522 (2021).

162. *Hearing Before S. Judiciary Comm.*, *supra* note 140, at 28:36. In the brief to which Hertzberg was referring, the Firearms Policy Coalition tried to warn the Court that

> Texas's novel scheme for infringing upon and chilling the exercise of the right to abortion under this Court's *Roe* and *Casey* decisions, if allowed to stand, could and would just as easily be applied to other constitutional rights. That result is wholly anathema to our constitutional scheme, regardless what one thinks of abortion or, indeed, of any other hotly debated constitutional right, such as the right to keep and bear arms.

Brief of Firearms Policy Coalition as Amicus Curiae in Support of Petitioners, *supra* note 19, at 2.

163. *Hearing Before S. Judiciary Comm.*, *supra* note 140, at 30:40 (statement of Sen. Henry Stern, Member, Cal. S. Judiciary Comm.). Senator Stern was referencing the Thousand Oaks shooting that occurred in 2018. *See id. See generally* Faith Karimi, *How a Night Out Turned into a Night of Horror at a Bar in California*, CNN, https://www.cnn.com/2018/11/09/us/california-thousand-oaks-shooting-how-it-unfolded/index.html [https://perma.cc/HGU2-LER8] (last updated Nov. 14, 2018, 6:58 PM) (describing the events of the shooting).

> Court and get a win at the Supreme Court . . . without affirming what I view as bad precedent?"[164]

This is rather garbled, but the question at the heart of it seems to be this: if the Supreme Court were to reverse course on S.B. 8 and strike it down, would S.B. 1327 be endangered as well because of its similarity? Senator Stern also seems to be asking about the converse: whether a victory in court for S.B. 1327 would necessarily affirm the "bad precedent" of S.B. 8.[165]

With these questions Senator Stern was pressing the committee to consider the implications of using a set of mechanisms that they had condemned when Texas was the state deploying them. How should lawmakers weigh their support for gun control and their desire to see the S.B. 8 decision reversed against the understanding that the review-impairing mechanisms should properly be treated as unconstitutional?

Senator Hertzberg began by gliding past the question about the risk of "affirming" bad precedent, opining that

> the answer to that question is future legislators can do whatever they want . . . . It would be kind of nice in a certain sense . . . [if] the current Supreme Court changes its opinion. Unfortunately—we've seen this over the years—the Supreme Court makes a decision and that's the law until the next group of Justices overturn[s] it. Separate but equal was legal until *Brown v. Board of Education* came around. There's example after example.[166]

Whatever sympathy one might hold for this exasperated take on judicial supremacy, it fails to answer either of the two questions encompassed in Senator Stern's inquiry.

Senator Hertzberg got closer to addressing Senator Stern's second question shortly thereafter when he said: "unlike the abortion issue where there's a constitutional right, and there's argument about that, I don't think that there's a constitutional right to have an assault weapon."[167] This statement was responsive to Senator Stern's concern because it offered a plausible way to distinguish S.B. 8 from S.B. 1327, focusing on the substantive differences

164. *Hearing Before S. Judiciary Comm.*, *supra* note 140, at 31:52 (statement of Sen. Henry Stern, Member, Cal. S. Judiciary Comm.).

165. *Id.*

166. *Id.* at 33:00 (statement of Sen. Robert M. Hertzberg, Member, Cal. S. Judiciary Comm.).

167. *Id.* at 33:32 (statement of Sen. Robert M. Hertzberg, Member, Cal. S. Judiciary Comm.) ("The folks here who are legal gun owners, I respect greatly."). He went on to explain that S.B. 1327 had nothing to do with legal gun owners, contained no ammunition limits or registration requirements, and only addressed a very narrow band of illegal guns. *See id.* at 33:56.

between the right to terminate a pregnancy and the right to bear arms.[168] Perhaps muddying that line of reasoning, Senator Hertzberg then mused that "it would be interesting to revisit, and it certainly would be nice because maybe we could fix . . . [the Court's] ridiculous opinion on abortions."[169] Senator Stern then asked: "[b]ut just to put a finer point on it, at this point, we are dependent, legally, on that decision."[170] Senator Hertzberg replied: "That's correct."[171]

This is a perplexing exchange, one that at best is the product of multiple possible meanings floating past each other, and at worst is just plain wrong. As a general matter, it is not necessarily the case that all private enforcement schemes across all different substantive areas rise or fall together, for exactly the reason that Senator Hertzberg had referenced earlier: the validity of a scheme that burdens the right to manufacture an assault weapon will not necessarily rest on the validity of a scheme that burdens the right to an abortion.[172] California was not "dependent, legally"[173] on the Supreme Court decisions addressing S.B. 8 except to the extent that it was choosing to be. Senator

168. The argument is that S.B. 8's substantive conflict with then-governing precedent on the right to terminate a pregnancy was clear and unmistakable, see Roe v. Wade, 410 U.S. 113, 154 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869 (1992), whereas there was no comparable Supreme Court precedent instructing that the particular weapons prohibited in S.B. 1327 were within the protections offered by the Second Amendment. *Cf.* District of Columbia v. Heller, 554 U.S. 570, 627 (2008) (acknowledging multiple limitations on the right to keep and carry arms, including a requirement that "the sorts of weapons protected were those 'in common use at the time,'" and treating that limitation as "fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons'" (quoting United States v. Miller, 307 U.S. 174, 179 (1939)).

169. *Hearing Before S. Judiciary Comm.*, *supra* note 140, at 34:51 (statement of Sen. Robert M. Hertzberg, Member, Cal. S. Judiciary Comm.).

170. *Id.* at 35:00 (statement of Sen. Henry Stern, Member, Cal. S. Judiciary Comm.).

171. *Id.* at 35:08 (statement of Sen. Robert M. Hertzberg, Member, Cal. S. Judiciary Comm.).

172. Aside from the substantive differences between gun rights and abortion rights, recall the Court's insistence that "the ultimate merits question—whether S. B. 8 is consistent with the Federal Constitution—is not before the Court." *See* Whole Woman's Health v. Jackson, 142 S. Ct. 522, 531 (2021). The Court's decision, while it did permit S.B. 8 to operate pending the litigation and therefore deserved all the criticism that has been leveled at it, allowed the plaintiffs to proceed against a small subset of the defendants they had named in the suit—executive licensing officials who would be required to take disciplinary action against medical providers for violations of S.B. 8. *Id.* at 45–46. It is difficult to see how this aspect of the Court's reasoning would even transfer to the firearms context. At the same time, the firearm prohibitions in S.B. 1327 were replicated in other California laws enforceable by state and local authorities. S. JUDICIARY COMM. BILL ANALYSIS, *supra* note 23, at 8. The avenue for judicial review was therefore not choked off as completely as in S.B. 8—although those challenges would now be subject to the serious deterrent effects of the weaponized fee-shifting regime. *See* Carrillo & Duvernay, *supra* note 89, at 125. The point is that there were sufficient differences between S.B. 8 and S.B. 1327 to raise difficult questions about the extent to which a ruling on one scheme would necessarily invalidate the other.

173. *Hearing Before S. Judiciary Comm.*, *supra* note 140, at 35:00 (statement of Sen. Henry Stern, Member, Cal. S. Judiciary Comm.).

Hertzberg's affirmative answer might have rested on the effect of the self-destruct clause,[174] in which case it would have been more accurate for him to say that the fate of S.B. 1327 had been intentionally and voluntarily linked to the future of S.B. 8 by the bill's drafters. That important clarification might have opened up an interesting discussion about the extent to which the self-destruct clause would serve to ameliorate the very concerns that had prompted members of the committee to express ambivalence about supporting the bill. It would have given us insight into the unique position that the bill's architects were intending to occupy, producing a contingent rather than fixed replication of S.B. 8's review-impairing mechanisms.

But Senator Hertzberg did not mention the self-destruct clause.[175] The best available insight on the rationale underlying the unusual provision was offered by the chair of the Judiciary Committee, Senator Thomas J. Umberg, who made the following remarks after everyone else had spoken:

> This bill has two laudable goals. One is to provide an additional and creative enforcement mechanism as to enforcing currently existing gun laws in California, and secondly is to highlight the absurdity of the Texas law. I'm grateful that you have a provision in the bill that . . . basically voids our law should the Court ultimately decide that the Texas enforcement mechanism is crazy. And I'm hopeful that there will be a finding that the Texas enforcement mechanism is crazy. The challenge of course is that we're sort of, of two minds here, where at least me, and I think you join me Senator Hertzberg in hoping that the Texas law is found to be unconstitutional and thus voiding the law that may be passed out of this committee today. Having said that I'm going to support it, but it is my hope and desire that ultimately this bill [will] actually not proceed because the Texas law is found to be wrong, unconstitutional, and crazy. This sort of comes under the "monkey see, monkey do" rubric and hopefully we won't be doing the "monkey see monkey do" thing all the way to the end of this year's session.[176]

In this striking statement, Senator Umberg demonstrated that his first choice was to live in a world with neither S.B. 8 nor S.B. 1327—where neither Texas nor California use private enforcement and weaponized fee shifting to evade judicial review.[177] He also noted the role of the self-destruct clause in

174. *See* CAL. BUS. & PROF. CODE § 22949.71 (Westlaw through Ch. 39 of 2024 Reg. Sess.).

175. *See Hearing Before S. Judiciary Comm.*, *supra* note 140, at 33:00 (statement of Sen. Robert M. Hertzberg, Member, Cal. S. Judiciary Comm.).

176. *Id.* at 35:16 (statement of Sen. Thomas J. Umberg, Chair, Cal. S. Judiciary Comm.).

177. *See id.*

assisting a reversion back to that equilibrium.[178] On the basis of this reasoning, Umberg arrived at the remarkable conclusion that he would support a bill that he expressly hoped would be short-lived.[179] With the chair of the Judiciary Committee describing the bill as "monkey see, monkey do," S.B. 1327 passed out of the committee by a vote of six to zero.[180]

Reflecting similar themes in more formal language, the written analysis of the bill provided by the California Senate Judiciary Committee forthrightly discussed the bill's provenance and its potential constitutional shortcomings, explaining that "[t]he bill is modeled after a controversial Texas abortion law, and includes a number of the same problematic procedural mechanisms."[181] The bill analysis went on to observe that

> the clear premise of this bill is if Texas can use this clever scheme to subvert federal supremacy and infringe on constitutional rights its Legislature and Governor do not favor, then California should use it to carry out its own, constitutional policy goals. What's good for the goose

178. *See id.*

179. *See id.*

180. *Id.* at 38:17 (voting on the bill by members of the Judiciary Committee). From there, it passed to the Public Safety Committee, where similar themes were explored, although in less detail. *See Hearing Before the S. Pub. Safety Comm.*, 2021–22 Reg. Sess., at 4:40:55 (Cal. Apr. 26, 2022) [hereinafter *Hearing Before Cal. S. Pub. Safety Comm.*], https://www.senate.ca.gov/media-archive [https://perma.cc/6XNJ-H8YW] (on file with the North Carolina Law Review). Senator Hertzberg began by emphasizing that the goal of the bill was to address gun violence; he described the problem of ghost guns and the need to "get creative." *Id.* at 4:43:44. Introducing the private enforcement mechanism as a "new set of tools" that "harnesses the power of the community" as a method of deterrence, Hertzberg then turned to S.B. 8, describing it as a "severe and restrictive abortion law." *Id.* at 4:45:30. Next came the bill's core premise:

> If Texas can use this mechanism to take a woman's right to choose and endanger lives, California, as the Governor has said, can use this same mechanism to ban deadly weapons of war and save lives. Further, the Supreme Court has allowed S.B. 8 to remain in place. If this precedent is to stand, then we should use it to get assault weapon[s] and ghost guns off the streets. We looked at this case very closely.

Id. at 4:45:43. His closing remarks emphasized that "there's no constitutional right to have an illegal weapon," and acknowledged that

> it is a creative use of this law . . . I suspect that it will be challenged and that given the Supreme Court . . . with the lawyers from the Governor's office and my office we spent a lot of time thinking through this in great detail to make sure it was within the framework that was set forth by the United States Supreme Court and if they want to determine that it is unconstitutional they have every right to do so. But right now this is the law, and we feel like right now we are on pretty solid ground. And given the challenge with gun violence, this is a critically important new tool.

Id. at 5:11:29. The bill was then passed to the Appropriations Committee.

181. S. JUDICIARY COMM. BILL ANALYSIS, *supra* note 23, at 2.

> is good for the gander. It is certainly clear that this mechanism will advance the policy of the state to restrict the relevant weapons, as it has declared "the proliferation and use of assault weapons [and .50 BMG rifles] poses a threat to the health, safety, and security of all citizens of this state."[182]

The bill analysis argued that California's version was less constitutionally offensive because the prohibited conduct was less likely to be constitutionally protected: "The central difference is that Texas' law almost certainly infringes on Texans' constitutional rights. Here, the bill's private enforcement mechanism is being used to carry out gun control laws that arguably fall within constitutional parameters."[183] That distinction, of course, would turn out to be short-lived: in a matter of months, the Court would rule in *Dobbs* that the right to terminate a pregnancy is not protected by the Constitution.[184] And in *Bruen*, the Court would ratchet up the difficulty of defending firearm regulation, announcing a novel doctrinal approach that requires lawmakers to show that any firearm regulation they were seeking to defend against Second Amendment challenge has a "historical analogue."[185]

But even at the time the bill analysis was written, its authors understood that a direct comparison of reproductive rights and Second Amendment rights would only go so far in justifying S.B. 1327. First, the authors observed: "[T]here is a risk that utilizing this model only legitimizes it further, which could have negative ramifications across the nation."[186] Second, the authors noted that "[b]eyond just simply allowing for private rights of action, the bill also includes a series of procedural mechanisms that are particularly problematic, and arguably raise serious due process concerns."[187] Among these were the weaponized attorney fee provisions that made it prohibitively risky for anyone to challenge any California firearm law.[188] The analysis does not spell it out explicitly, but the discussion is consistent with the idea that the attorney fee provisions in S.B. 8 and S.B. 1327 placed identical burdens on the rights of

182. *Id.* at 12 (alteration in original) (quoting CAL. PENAL CODE § 30505 (Westlaw through Ch. 39 of 2024 Reg. Sess.)).

183. *Id.* at 11.

184. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242–43 (2022).

185. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2132–33 (2022); *see also* Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 111–13 (2023) (discussing the novelty of the Court's approach in *Bruen*).

186. S. JUDICIARY COMM. BILL ANALYSIS, *supra* note 23, at 12.

187. *Id.*

188. *See* CAL. CIV. PROC. CODE § 1021.11 (Westlaw through Ch. 39 of 2024 Reg. Sess.), *invalidated by* Miller v. Bonta, 646 F. Supp. 3d 1218, 1232 (S.D. Cal. 2022).

access to courts, regardless of the constitutional status of the underlying conduct that the respective burdened populations wish to protect.[189]

The analysis thus concluded with this striking summation:

> [W]hile the goal of repurposing the Texas law may be sound, these problematic provisions may not justify those ends. They insulate government action from meaningful challenge by creating a strong, punitive deterrent for any that try and in the end, may violate due process guarantees. These provisions undermine our justice system and the policy of the State of California.[190]

For a bill to get passed out of the Judiciary Committee with that characterization is remarkable enough, but what is also perplexing is that nowhere in the analysis is there any discussion of the self-destruct provision, and the extent to which it might serve to ameliorate some of these concerns.[191] By ensuring that California's version did not outlast the Texas original, did the bill's drafters endeavor to modulate the effect of the norm-destroying qualities that were so carefully laid out in the candid discussion? Or does the "self-destruct" provision just accentuate the drafters' awareness that the mechanisms they were attempting to repurpose were constitutionally problematic? The otherwise thorough and insightful analysis does not explain how the self-destruct provision should inform our understanding of the scheme as a whole.[192]

The self-destruct provision received some attention in the bill analysis memorandum provided by Alison Merrilees, chief legal counsel for the California State Assembly Committee on Judiciary, but not enough to answer these thorny questions. That memorandum notes that "the connection between the Texas law and the bill, is explicit in the bill itself. One provision provides that if and when the Texas law were invalidated, the bill would become inoperative."[193] After quoting the self-destruct provision, the bill analysis simply goes on to observe that "[t]hus, the flawed logic and clever private enforcement mechanism of the Texas law, developed to avoid judicial scrutiny and not involve government enforcement of an unconstitutional law, is replicated in this bill."[194] Aside from the inaccuracy in referencing the self-

189. *See* S. JUDICIARY COMM. BILL ANALYSIS, *supra* note 23, at 12–14.

190. *Id.* at 14.

191. *See id.* at 10–14.

192. *See id.*

193. STAFF OF ASSEMB. COMM. ON JUDICIARY, 2021–22 REG. SESS., SB-1327 BILL ANALYSIS 8 (Cal. June 10, 2022) (prepared by Alison Merrilees) [hereinafter ASSEMB. COMM. ON JUDICIARY BILL ANALYSIS], https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220SB1327 [https://perma.cc/VH2R-744D (staff-uploaded archive)].

194. *Id.*

destruct provision to conclude that the Texas scheme is "replicated" in the California bill—the Texas original has no such durational limit—the observation does not provide much additional insight into whether the self-destruct provision can be seen to ameliorate the concerns laid out in the remainder of the memorandum.[195] After querying "Aren't we better than Texas?" the bill analysis concludes with this skeptical summation:

> The Committee and Legislature may wish to consider whether it is wise to incorporate Texas's problematic scheme for evading judicial review through vigilante-style enforcement, as well as its numerous elements that conflict with the state's priorities and principles, into California law to help enforce the state's regulations of firearms, potentially violating the rights of Californians in the process. The Committee and Legislature may also wish to consider the risk that utilizing this model may only legitimize it further and potentially invite US Supreme Court scrutiny of the state's existing regulatory system related to firearms.[196]

Despite concerns of this nature being expressed at various points, the bill marched on from committee to committee and from the Senate to the Assembly.[197]

In a chilling and horrific alignment of events, the Senate floor debate on S.B. 1327 took place on May 24, 2022, about an hour after the school shooting in Uvalde, Texas, that took the lives of nineteen children and two adults.[198] Speaking at length about the need for additional measures to address the "ghost gun epidemic," Senator Anthony Portantino, one of the bill's co-authors, then acknowledged that "obviously it is modeled off of something that happened in Texas related to a woman's right to choose . . . let's use that model for good, let's use that plan for something that keeps us safe, and not something that punishes women."[199]

195. *See id.* at 10.

196. *Id.* at 15–16.

197. *See SB-1327 Firearms: Private Rights of Action*, CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=202120220SB1327 [https://perma.cc/EH4L-KPK4] (last updated July 22, 2022).

198. *Hearing Before the Cal. State S.*, 2021–22 Reg. Sess., at 2:48:40 (Cal. May 24, 2022) [hereinafter *Cal. S. Floor Hearing*] (statement of Sen. Anthony Portantino), https://www.senate.ca.gov/media-archive [https://perma.cc/4GAZ-WHKU] (on file with the North Carolina Law Review). It was so recent that the fatality count was dramatically understated in Senator Portantino's remarks. *Compare id.* (noting two fatalities), *with* Holly Yan, Harmeet Kaur, Melissa Alonso, Amir Vera & Sharif Paget, *Remembering the Victims of the Uvalde, Texas Massacre*, CNN (May 18, 2023), https://www.cnn.com/interactive/2023/05/us/victims-uvalde-school-shooting/ [https://perma.cc/U3UP-NUKP] (noting twenty-one fatalities).

199. *Cal. S. Floor Hearing*, *supra* note 198, at 2:48:40 (statement of Sen. Anthony Portantino).

The leadership team driving S.B. 1327 continued to emphasize the link to Texas even as the bill was being signed into law, suggesting that S.B. 8 was not merely an initial impetus for how the California bill came into existence but a core part of how the bill's proponents understood its purpose and function.[200] Senator Hertzberg said in a statement that "[i]f Texas is going to use this legal framework to essentially outlaw abortion and harm women, all with the Supreme Court's blessing, California is going to use it to save lives and take AR-15s off our streets."[201] Co-author Senator Anthony Portantino expressed similar themes, emphasizing "[t]he continued need to adopt sensible solutions to our nation's tragic history of gun violence" before asserting: "If Texas can outrageously use this type of law to attack a woman's reproductive freedom, we can do the same thing in California to hold gun dealers accountable for their actions."[202] The consistency of the framing from the bill's introduction through its enactment belies the doctrinal transformation that had taken place while the bill was pending: with the issuance of the opinion in *Dobbs*, reproductive freedom was no longer constitutionally protected, while gun laws would now be held to the "historical analogy" test newly minted in *Bruen*.[203] Nonetheless, lawmakers continued to draw the contrast between reproductive rights and gun rights to justify the repurposing of private enforcement and punitive fee-shifting in the fight against assault weapons and ghost guns.[204] Governor Newsom even ran a full-page advertisement in several Texas newspapers to

200. Debra C. Weiss, *Using Texas' Abortion Law Playbook, California Allows Private Suits over Sales of Banned Weapons*, ABA J. (July 25, 2022, 12:22 PM), https://www.abajournal.com/news/article/using-texas-abortion-law-playbook-california-allows-private-suits-over-banned-weapons-sales [https://perma.cc/P2E5-EWTY].

201. *Id.*; *see also* Deliso, *supra* note 6.

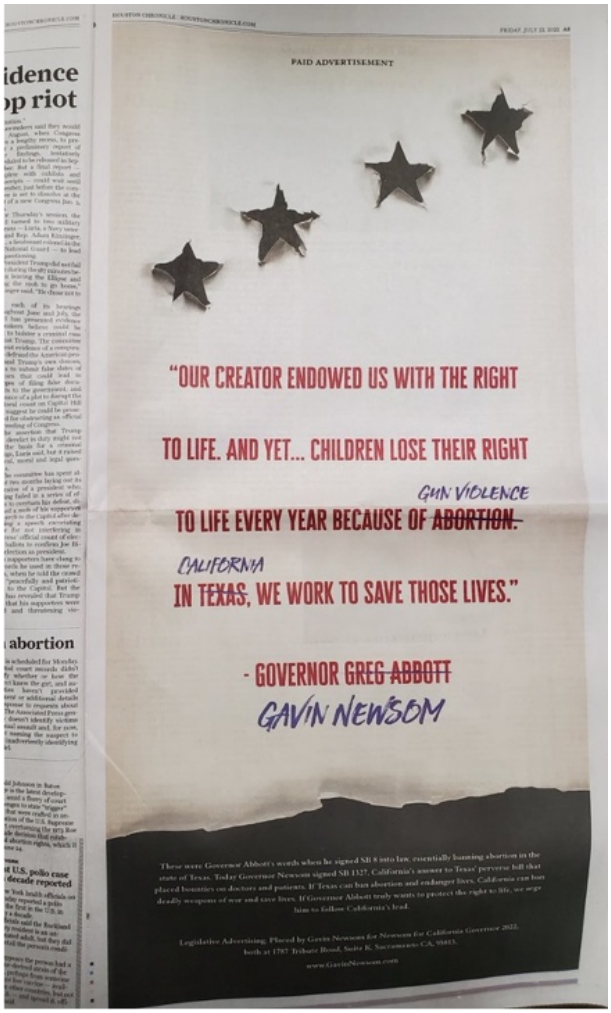
202. Quintana, *supra* note 69.

203. Newsom, for his part, had anticipated just these changes, predicting and preemptively attacking them in his February 2022 press conference announcing S.B. 1327. *Governor Newsom Highlights*, *supra* note 10, at 24:00 (statement of Governor Gavin Newsom).

204. Stracqualursi, *supra* note 27 (reporting Governor Newsom's statement that "[i]f Texas can ban abortion and endanger lives, California can ban deadly weapons of war and save lives").

coincide with the bill's signing,[205] shown as it appeared in the *Houston Chronicle* below:[206]

Figure 1: Newsom Advertisement in the *Houston Chronicle*



205. Deliso, *supra* note 6; *see also* Alex Seitz-Wald, *California Gov. Gavin Newsom Goes After Abbott in Texas on Guns and Abortion*, NBC NEWS (July 22, 2022, 4:31 AM), https://www.nbcnews.com/politics/politics-news/california-gov-gavin-newsom-running-full-page-ads-texas-rcna39475 [https://perma.cc/G9NR-A3TQ] ("The ads . . . will run in the Austin American-Statesman, Houston Chronicle and El Paso Times.").

206. Rodney Ellis (@RodneyEllis), X (July 22, 2022, 12:44 PM), https://twitter.com/RodneyEllis/status/1550522184233263105 [https://perma.cc/2PMH-ZMG3].

These striking images begin with a quote by Texas Governor Greg Abbott speaking in support of S.B. 8: "Our Creator endowed us with the right to life. And yet . . . children lose their right to life every year because of abortion. In Texas, we work to save those lives."[207] In the advertisement, "abortion" is crossed out and replaced with "gun violence," while "Texas" is crossed out and replaced with "California."[208] The attribution of the original quote to Governor Greg Abbott is stricken through and replaced with Governor Gavin Newsom. At the bottom appears this explanatory text:

> These were Governor Abbott's words when he signed S.B. 8 into law, essentially banning abortion in the state of Texas. Today Governor Newsom signed California's S.B. 1327, California's answer to Texas' perverse bill that placed bounties on doctors and patients. If Texas can ban abortion and endanger lives, California can ban deadly weapons of war and save lives. If Governor Abbott truly wants to protect the right to life, we urge him to follow California's lead.[209]

Was Newsom really endeavoring to speak to Texas residents with these advertisements? Many speculated that this was part of a long-term strategy related to running for national office.[210] Newsom has emphatically denied this, but he certainly seemed to be speaking on a national scale when reflecting on the need for Democrats to "start playing hardball."[211] He went on to remark that "I think Democrats have been playing a little soft."[212] Referring to a famous line of former First Lady Michelle Obama, he said he would "much rather follow, 'When they go low, we go high.' But I also think we'd be completely missing the moment we're living in. The door's open. It's now fair play. The Supreme

207. Gavin Newsom (@GavinNewsom), X (July 22, 2022, 10:48 AM), https://X.com/GavinNewsom/status/1550492948269129728 [https://perma.cc/8QD4-SH3P] [hereinafter Newsom, X]; *see also* 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/JDE9-HP3T (dark archive)] (reporting Governor Abbott's statement at the signing of S.B. 8).

208. Newsom, X, *supra* note 207.

209. *Id.*

210. Seitz-Wald, *supra* note 205.

211. *Id.* ("[Newsom] said, he thinks national Democrats have been too slow to recognize the threat Republicans represent, and too willing to let the other side pick the issues and set the terms of the political debate.").

212. *Id.*

Court left the door open."[213] Newsom described himself as wanting "to keep finding creative ways to influence the national conversation."[214]

Whatever Newsom's aspirations beyond California, the ads resonated within the state as well, at least as measured in additional campaign contributions.[215] As one source reported, "His supporters have been thrilled with his out-of-state activities . . . the ads pay for themselves."[216] At least some subset of California voters relished the direct engagement with political adversaries in another state, happy to dispense with the pretense that S.B. 1327 was merely an effort to attend to intrastate matters.[217]

The support was hardly unanimous. Unsurprisingly, advocates for gun rights went on the record with their objections, describing the bill as "firmly unconstitutional," and implicitly invoking the superior status of gun rights as compared to reproductive rights, arguing that "the 2nd Amendment is explicitly spelled out in the Bill of Rights."[218] But critics were also concerned with

213. *Id.*

214. *Id.* "Plus, he said, it beats putting out 'another press release criticizing Manchin and Sinema. Sinema and Manchin. Manchin, Sinema. Sinema, Manchin—I can't do that anymore,' referring to Sens. Joe Manchin, D-W.Va., and Kyrsten Sinema, D-Ariz., who have stymied much of the Democrats' agenda in Washington." *Id.*

215. *Id.*

216. *Id.* ("[T]he new Texas ads cost around $30,000—a fraction of the $23 million he reported having in his campaign war chest—and far less than the value of the media attention they earn."). The source added that generating additional contributions was not the intention of running the ads. *Id.*

217. *See id.*

218. S. JUDICIARY COMM. BILL ANALYSIS, note 23, at 15; *see also* Letter from Roy M. Griffith Jr., Legis. Chair, Cal. Rifle & Pistol Assoc., Inc., to Steven Bradford, Sen., Cal. State Senate (Apr. 13, 2022), https://crpa.org/wp-content/uploads/2022/04/S.B.-1327-CRPA-Opposition-Senate-PS-April-2022.pdf [https://perma.cc/W4NR-F5Z5 (staff-uploaded archive)] (critiquing the bill's connection to Texas on the grounds that the "action in Texas is in direct conflict with the US Supreme Court," but also observing that the "Second Amendment is, and forever will be, a Constitutional right. Etched in stone into every Americans' list of unalienable rights is the controversial, but incredible, right to 'keep and bear arms.' The Supreme Court has affirmed this time and time again. Whereas abortion is not a Constitutional right."); *FPC Statement on California Governor Gavin Newsom's Signing of Anti-Rights Bills*, FIREARMS POL'Y COAL. (July 22, 2022), https://www.firearmspolicy.org/fpc-statement-on-california-governor-gavin-newsoms-signing-of-anti-rights-bills [https://perma.cc/5WBA-NRQ8]. The Firearms Policy Coalition ("FPC") statement describes S.B. 1327 as part of a "continued assault on the peaceable people of California" and noting that Governor Newsom "is boastfully broadcasting his latest legislative power grab in Texas in a twisted victory lap. To be clear, neither the people of Texas nor Californians deserve the rights-restricting agenda that Gov. Newsom and his ilk are set on implementing. Without reservation, FPC will seek out every available tool to redress this legislative overreach." *Id.* The statement closes by encouraging anyone "interested in becoming a potential plaintiff in litigation

precisely the qualities we focus on here: the use of California's legislative process to intentionally recreate a regime with constitutionally troubling implications as a response to Texas's action and the Supreme Court's inaction. Political commentators dismissed it as "foolish," a "stunt," "political posturing," and "an exercise in political one-upmanship that makes a mockery of the legislative process."[219]

The ACLU expressed even graver concerns, describing S.B. 1327 as "an attack on the constitution."[220] Dismissing the argument that it could be justified by contrasting abortion rights with firearm rights, the ACLU asserted that the

> problem with this bill is the same problem as the Texas anti-abortion law it mimics: it creates an end run around the essential function of the courts to ensure that constitutional rights are protected . . . . This legal framework is unsound and invalid no matter what activity it is directed at because it eviscerates basic principles of constitutional government by

targeting these newly signed bills" to contact the FPC hotline. *Id.* Chuck Michel, president of the California Rifle and Pistol Association, said

> This is tit for tat political gamesmanship, which is the worst reason to be passing some kind of a bill. . . . You're going to deputize a bunch of amateurs—non-lawyers, non-cops—to judge a neighbor's actions and then give them the right to drag them into court over it.

Fuentes, *supra* note 6. The National Rifle Association's statement:

> The language contained in this bill, along with the rhetoric surrounding it, betrays the political purpose of its sponsors. The bill is aimed at using the gun issue as a political football, making clear that the legislation would become inoperative should the U.S. Supreme Court overturn Texas's recently passed abortion law or if that law is repealed by the Texas Legislature.

California: Senate Judiciary Hearing Bill To Use Gun Owners as Political Pawns, NAT'L RIFLE ASS'N INST. FOR LEGIS. ACTION (Apr. 5, 2022), https://www.nraila.org/articles/20220405/california-senate-judiciary-hearing-bill-to-use-gun-owners-as-political-pawns [https://perma.cc/WGK3-YSP9].

219. Walters, *Federal Judge*, *supra* note 28. The same commentator, in a previous article, described it as "a political gesture," a "publicity stunt," and "a piece of Newsom's very obvious campaign to raise his national political standing by taking potshots at Texas and Florida and their Republican governors, rather than serious policymaking." And perhaps most uncontrovertibly, "one of the strangest pieces of legislation to ever be passed by the California Legislature and signed into law." Dan Walters, *Newsom's New Gun Control Bill Just a Stunt*, CALMATTERS (July 27, 2022), https://calmatters.org/commentary/2022/07/newsoms-new-gun-control-bill-just-a-stunt/ [https://perma.cc/8PGR-MZA9] [hereinafter Walter, *Newsom's New Gun Control Bill*].

220. Letter from Kevin G. Baker, Dir. of Governmental Rels., Am. Civ. Liberties Union Cal. Action, to Bob Hertzberg, Sen., Cal. State Senate (May 2, 2022), https://aclucalaction.org/wp-content/uploads/2022/05/S.B.-1327-5.2.22.pdf [https://perma.cc/L2VK-XSLS].

> destroying an individual's ability to petition a court to block the State from violating a legal right.[221]

Within a few months, these concerns would be substantially vindicated. By September 2022, three different complaints were filed in federal district court challenging the fee-shifting provisions as unconstitutional.[222] They did not challenge the bounty-hunter provisions, and thus were not hindered by the justiciability obstacles that had thwarted the S.B. 8 plaintiffs. Recall that the fee-shifting provisions applied to any effort to seek declaratory or injunctive relief against any firearm regulation, including those that are enforced by California state officials rather than private parties. The gun rights advocacy groups were therefore able to bring suit against the California Attorney General, challenging the fee-shifting provisions that they could potentially be facing in any of their cases seeking relief from any of California's numerous firearm regulations.[223]

The State's first response was to make a commitment that it would not

> seek fees under the fee-shifting mechanism in section 2 of S.B. 1327 in every particular action involving the California Department of Justice in which that issue has been raised. And defendants hereby commit—*consistent with the original legislative objective of S.B. 1327*—not to seek fees or costs from any plaintiff or plaintiff's attorney under section 2 of S.B. 1327 in any case, unless and until a court ultimately holds that the fee-

221. *Id.* Kevin Baker, the ACLU Director of Governmental Relations who wrote the letter, was no stranger to California legislative politics—he had previously served as Deputy Chief Counsel to the California Assembly's Judiciary Committee. *See* Kevin G. Baker (@kevingbaker), X, https://X.com/kevingbaker [https://perma.cc/YQ5N-HPJH (staff-uploaded archive)].

222. Complaint for Declaratory, Injunctive, or Other Relief at 1, Miller v. Bonta, No. 22-cv-1446 (S.D. Cal. Sept. 26, 2022), 2022 WL 18492889; Complaint for Declaratory and Injunctive Relief at 7, S. Bay Rod & Gun Club, Inc. v. Bonta, No. 22-cv-1461 (S.D. Cal. Sept. 28, 2022), 2022 WL 18492888; Complaint for Declaratory and Injunctive Relief ¶ 97, Def. Distributed v. Bonta, 2:22-CV-06200 (C.D. Cal. Oct. 21, 2022), https://www.courthousenews.com/wp-content/uploads/2022/08/Ghost-Gunner-lawsuit.pdf [https://perma.cc/8SLM-X2SG (staff-uploaded archive)]. Defense Distributed is a Texas company that sells the "Ghost Gunner" milling machine, which allows people to build their own firearms, including AK-47 assault rifles. *See id.* ¶ 1. Defense Distributed dropped its challenge in November 2022 in exchange for a waiver of fees and costs. *See* Stipulation re: Dismissal of Action with Prejudice and Waiver and Release of Claims ¶ 4, *Def. Distributed*, 2:22-CV-06200, https://www.courthousenews.com/wp-content/uploads/2022/11/Defense-Distributed-stipulation-to-dismiss-case.pdf [https://perma.cc/5V2J-XDNQ (staff-uploaded archive)]. The voluntary dismissal followed a district court ruling denying a preliminary injunction and characterizing Defense Distributed's Second Amendment arguments as a "word salad." Def. Distributed v. Bonta, No. CV 22-6200-GW-AGRX, 2022 WL 15524977, at *5 (C.D. Cal. Oct. 21, 2022), *adopted*, No. CV 22-6200-GW-AGRX, 2022 WL 15524983 (C.D. Cal. Oct. 24, 2022).

223. Complaint for Declaratory, Injunctive, or Other Relief, *supra* note 222, ¶ 28.

> shifting provision in section 4 of S.B. 8 is constitutional and enforceable and that decision is affirmed on appeal or no appeal is taken.[224]

The State asserted that this commitment rendered the lawsuit nonjusticiable, but the court disagreed and allowed the case to proceed.[225]

At that point, the law's origin story caught up with it: in a truly remarkable move, Attorney General Rob Bonta, who by all indications was part of the team that had developed S.B. 1327,[226] informed the court that "at this time, the Attorney General is not in a position to defend the merits of a provision that is indistinguishable in relevant part from a provision that he has opined is unconstitutional."[227] Governor Newsom's office intervened to defend the law, but was unable to salvage the scheme from that inauspicious beginning.[228]

In the closing days of 2022, the court issued a permanent injunction against the fee-shifting provisions of S.B. 1327, finding that they violate the First Amendment right to petition the government for redress of grievances and are preempted by federal law governing the allocation of attorney's fees in civil rights litigation.[229] The opening lines of the order offered a sequence of quotes from Governor Newsom lambasting the Texas original:

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224. Defendants' Opposition at 2, Miller v. Bonta, No. 22-cv-1446 (S.D. Cal. Nov. 14, 2022) (emphasis added). The State specified that the

> commitment extends to fees or costs incurred at any time in connection with any suit filed before the date on which a decision ultimately upholding the constitutionality of section 4 of S.B. 8 is affirmed on appeal (or the time to file an appeal expires). And it applies to all prospective plaintiffs and their attorneys, regardless of whether they are a plaintiff or attorney in the present case. Defendants are prepared to enter a stipulation to this effect with plaintiffs should plaintiffs agree to do so.

Id.

225. *Id.* at 2. *See generally* Miller v. Bonta, 646 F. Supp. 3d 1218 (S.D. Cal. 2022) (hearing the plaintiffs' claim on the issue).

226. *See Californians Will Be Able To Sue Those Responsible for Illegal Assault Weapons and Ghost Guns*, OFF. OF GOVERNOR GAVIN NEWSOM, (July 22, 2022), https://www.gov.ca.gov/2022/07/22/californians-will-be-able-to-sue-those-responsible-for-illegal-assault-weapons-and-ghost-guns/ [https://perma.cc/J945-EL5F].

227. Cheryl Miller, *Governor Turns to Olson Remcho To Defend Bounty-Hunter Gun Law*, LAW.COM: THE RECORDER (Dec. 9, 2022, 6:18 PM), https://www.law.com/therecorder/2022/12/09/governor-turns-to-olson-remcho-to-defend-bounty-hunter-gun-law/ [https://perma.cc/86RK-456K (staff-uploaded, dark archive)]. Bonta further explained that his office had joined a lawsuit challenging the fee-shifting language in the Texas abortion law. *Id.*

228. Alex Riggins, *Federal Judge To Block Part of California Gun Law Modeled After Texas Abortion Ban*, SAN DIEGO UNION-TRIBUNE (Dec. 16, 2022, 5:02 PM), https://www.sandiegouniontribune.com/news/courts/story/2022-12-16/injunction-california-gun-law-fee-shifting [https://perma.cc/A57D-CXER (dark archive)].

229. *Miller*, 646 F. Supp. 3d at 1231; *see also* S. Bay Rod & Gun Club, Inc. v. Bonta, 646 F. Supp. 3d 1232, 1235 (S.D. Cal. 2022).

> "It is cynical." "It is an abomination." "It is outrageous and objectionable." "There is no dispute that it raises serious constitutional questions." "It is an unprecedented attempt to thwart judicial review." Such are the Intervenor-Defendant Governor's expressed views regarding the fee-shifting provisions of a Texas law (S.B. 8) and, at least by implication, of California's § 1021.11.[230]

And then, in a moment that may have been one of the strangest in a chronology filled with oddity, Governor Newsom applauded the ruling that struck down his brainchild.[231] His office issued the following statement:

> I want to thank Judge Benitez. We have been saying all along that Texas' anti-abortion law is outrageous. Judge Benitez just confirmed it is also unconstitutional. The provision in California's law that he struck down is a replica of what Texas did, and his explanation of why this part of S.B. 1327 unfairly blocks access to the courts applies equally to Texas' S.B. 8. There is no longer any doubt that Texas' cruel anti-abortion law should also be struck down.[232]

The State did not appeal the order and in June 2023 agreed to pay $556,000 in plaintiff attorney's fees.[233] As of this writing, the attorney fee provisions are permanently enjoined while the private enforcement mechanism continues in full force, still tethered to S.B. 8 by the self-destruct clause.

B. *A Policy of Parity in the Self-Destruct Provision*

For all the attention lavished on S.B. 8 during the time that S.B. 1327 was pending, this history does not explain or even address the fundamental paradox created by the self-destruct provision: if S.B. 1327 is sensible gun policy, why not stick with it—regardless of what happens with S.B. 8? If the bill

230. *Miller*, 646 F. Supp. 3d at 1222.

231. Chris Norris, *Fed Judge Strikes CA's Anti-Gun Response to Texas Anti-Abortion Law*, L.A. MAG. (Dec. 21, 2022), https://lamag.com/news-and-politics/fed-judge-strikes-cas-anti-gun-response-to-anti-abortion-texas-law [https://perma.cc/SHL5-EAAJ] ("Outsmarting either his opponents or himself, Governor Gavin Newsom claimed victory in Monday's defeat of a gun law he'd proposed to provoke debate on Texas's 'bounty' law banning abortion.").

232. *Governor Newsom Issues Statement*, *supra* note 23.

233. Stipulation and Joint Request for Order Regarding the Parties' Settlement of Plaintiffs' Claims for Attorney's Fees and Costs at 2–3, *Miller*, 646 F. Supp. 3d 1218 (No. 3:22-cv-1446), https://storage.courtlistener.com/recap/gov.uscourts.casd.743320/gov.uscourts.casd.743320.50.0.pdf [https://perma.cc/YM9F-L8WV (staff-uploaded archive)]. This is particularly remarkable for a case in which the complaint was filed on September 26, 2022, and the order permanently enjoining the law was issued on December 19, 2022, less than three months later. *See* Opinion and Order Enjoining Enforcement of California Code of Civil Procedure § 1021.11 at 17, *Miller*, 646 F. Supp. 3d 1218 (No. 3:22-cv-1446), https://storage.courtlistener.com/recap/gov.uscourts.casd.743320/gov.uscourts.casd.743320.43.0.pdf [https://perma.cc/ZB5S-X8L4 (staff-uploaded archive)].

compromises procedural fairness for gun rights litigants but does so justifiably, to serve the greater good of saving lives, why not let it rise or fall on its own? What were the architects of the bill hoping to achieve with the provision instructing that S.B. 1327 would last only as long as S.B. 8?

Combining the bill's distinctive legislative history with the text of the provision itself, we can discern that the self-destruct provision reflects both cynicism and good faith in the crafting of a response to the Court's acquiescence in S.B. 8. It is cynical because it implicitly acknowledges the constitutional defects of the court-obstructing mechanisms in the bounty hunter model.[234] But at the same time, it reflects good faith in its commitment to stand down if the Texas law comes to an end, rather than waiting for a ruling that specifically invalidates the California law.[235] It is a voluntary pledge to abide by rulings directed at Texas.[236] It expresses both pragmatism and ambivalence about review-impairing mechanisms, stopping short of a full and unmitigated embrace of weaponized fee-shifting and private enforcement that would indeed contribute to the kind of legitimation and proliferation that the ACLU has lamented.[237] In the words of Senator Hertzberg, "we wanted to use it without saying that we agreed with it."[238]

The self-destruct provision works to embed in S.B. 1327 the following core premise: we are entitled to use review-impairing mechanisms to prevent gun violence and save lives—but only for as long as Texas is allowed to use them to prevent abortion.[239] This premise asserts a strange kind of contingent entitlement that immediately raises questions about the scope of state power and the appropriate considerations for state lawmakers to weigh in their policymaking.[240]

One of the arguments that surfaced repeatedly in the deliberations over S.B. 1327 is that it differed from S.B. 8 in the degree to which it burdened a clear and established constitutional right. As the bill's proponents would observe, *Roe* and *Casey* had provided a concrete instruction to states that they could not entirely eliminate the right to terminate a pregnancy prior to viability, while no such precedent foreclosed the prohibition on ghost guns or assault

234. *See* Aviel & Kersh, *supra* note 14, at 2053, 2097–136 (noting scholars that had identified the constitutional defects of exclusive private enforcement and explaining why the fee-shifting mechanisms in S.B. 8 and S.B. 1327 are also unconstitutional).

235. CAL. BUS. & PROF. CODE § 22949.71 (Westlaw through Ch. 39 of 2024 Reg. Sess.).

236. *Id.*

237. *See* Letter from Kevin G. Baker, *supra* note 220.

238. Interview with Robert M. Hertzberg, Sen., Cal. State Senate (Aug. 9, 2023).

239. CAL. BUS. & PROF. CODE § 22949.71 (Westlaw through Ch. 39 of 2024 Reg. Sess.).

240. Perhaps a perfect case of asymmetric constitutional hardball. Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 943–71 (2018).

weapons.[241] Conversely, firearm rights advocates would counter that the Second Amendment's textual guarantee of the right to bear arms renders it more significant, legitimate, and enduring than the unenumerated rights growing out of the Court's substantive due process cases. We do not need to resolve this debate to see that California did stand in a fundamentally different posture with regards to governing precedent than Texas had stood in the summer of 2021, and lawmakers noted that in discussing and deliberating over the bill.[242]

That is not to say that this eliminates concerns about California's scheme. S.B. 8 so clearly defied governing precedent that most commentators emphasized this particularly trenchant conflict in critiquing the scheme,[243] but the broader problem with blocking pre-enforcement review is that it prevents the very assessment of whether the substantive prohibition at issue does or does not burden constitutional rights.[244] This is a problem not only for clear conflicts

241. *See supra* Section II.A; *see also* Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 CORNELL L. REV. 1187, 1255 (2023) (observing that S.B. 1327 "is not a close counterpart to S.B. 8 but a far more modest measure both with respect to the substance of the regulation and the procedural burdens it imposes on defendants. As a substantive matter, neither ghost guns nor assault weapons have (yet) received the type of explicit constitutional protection that the right to abortion has garnered for close to fifty years.").

242. *See supra* notes 137–54 and accompanying text. In addition to the substantive differences between gun rights and abortion rights, another key difference lies in the fact that S.B. 1327 replicated prohibitions that existed in other California law, enforced by state officials, and thus subject to judicial review. *See supra* note 89 and accompanying text. If there is something improper about a state attempting to shield substantive prohibitions from judicial review—a proposition that the Court was not willing to endorse when confronted with S.B. 8—then it must be noted that Texas had done that more conclusively than California by implementing an abortion ban that was only enforceable by private individuals.

243. *See, e.g.*, Aziz Z. Huq, *The Private Suppression of Constitutional Rights*, 101 TEX. L. REV. 1259, 1328 (2023) (grounding S.B. 8's defects in its direct conflict with *Roe* and *Casey*); Strauss, *supra* note 18, at 81 (stating that the problem with S.B. 8 was that "it prohibited pre-viability abortions at a time when that prohibition was unquestionably inconsistent with the Supreme Court's decision"); Norris, *Promise and Perils*, *supra* note 46, at 1501 (emphasizing that S.B. 8, in contrast to previous and widely accepted private enforcement regimes, "tasks people with enforcing a law that was patently unconstitutional under U.S. Supreme Court precedent at the time of its passage"); Rhodes & Wasserman, *Defensive Litigation*, *supra* note 41, at 189 ("[T]he law is clearly constitutionally invalid under the Supreme Court's prevailing reproductive-freedom jurisprudence, under which states cannot prohibit abortions prior to fetal viability.").

244. *See* Fallon, *Constitutional Remedies*, *supra* note 55, at 1305 (explaining why it is a "risky strategy" to raise constitutional objections only after "violating a statute and taking one's chances that a constitutional argument will prevail," and noting that "[i]t was to alleviate the chilling effects of threatened criminal and civil enforcement actions that the modern law of constitutional remedies had evolved to allow suits for injunctions as the norm"). Other scholars have expressed skepticism that pre-enforcement review "is constitutionally essential and that the inability to challenge the validity and enforcement of S.B. 8 in that posture reflects an independent constitutional defect and defies the rise of law." Howard M. Wasserman & Charles W. "Rocky" Rhodes, *Solving the Procedural Puzzles of the*

like the one in S.B. 8 but for a much wider range of constitutional questions,[245] and for the system itself, which rests on the availability of courts to adjudicate these disputed questions.[246] This is what the ACLU was expressing in its conclusion that "[n]o worthy motive and no permissible goal can justify such a radical and dangerous assault on our constitutional structure."[247]

The self-destruct provision serves not only to recognize these concerns but makes a significant concession to them. California eschewed a fairly powerful (even if not ultimately conclusive) distinction between its regime and the one in Texas: that the Second Amendment as currently construed allowed California to prohibit assault weapons and ghost guns, and so it was perfectly free to delegate enforcement to private parties without committing the same offense as Texas.[248] It could have staked its claim on the assertion that each bounty hunter regime will stand or fall on the degree of harmony between its substantive prohibitions and the constitutional requirements in that area. The bill's architects chose not to do so, instead making a commitment that the invalidation of the Texas law would also be fatal to the California regime.[249] During the deliberations, the bill's proponents consistently repeated the refrain: if Texas can do this, so can we.[250] The self-destruct provision adds: if Texas cannot, then neither will we.[251] The self-destruct provision therefore should be understood as modulating the destructive effects of a race to the bottom in which each state feels emboldened by their political rivals to impair access-to-court values in service of their own substantive ideological ends.

The problem is that the self-destruct provision exempts the most troubling aspects of both S.B. 8 and S.B. 1327 from this linkage mechanism. As noted

Texas Heartbeat Act and Its Imitators: The Limits and Opportunities of Offensive Litigation, 71 AM. U. L. REV. 1029, 1051 (2022) [hereinafter Wasserman & Rhodes, *Offensive Litigation*].

245. *See* Fallon, *Constitutional Remedies*, *supra* note 55, at 1305, 1337 (explaining the "case- and abortion-transcending significance" of the Supreme Court's decision to allow S.B. 8 to go forward, thereby "permitting Texas to preclude the only judicial relief that would avoid the chilling of a constitutional right").

246. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1789 (1991) (observing that "[w]hat would be intolerable is a regime of public administration that was systematically unanswerable to the restraints of law, as identified from a relatively detached and independent judicial perspective"); *see also* Fallon, *Constitutional Remedies*, *supra* note 55, at 1310 ("[T]he Constitution requires an adequate scheme of rights to sue and judicial remedies to ensure that federal and state officials will stay generally within constitutional bounds.").

247. Letter from Kevin G. Baker, *supra* note 220.

248. *See supra* notes 155–57, 165–70 and accompanying text; *see also* Michaels & Noll, *supra* note 241, at 1255.

249. CAL. BUS. & PROF. CODE § 22949.71 (Westlaw through Ch. 39 of 2024 Reg. Sess.).

250. *See supra* notes 145–46, 154–55 and accompanying text.

251. CAL. BUS. & PROF. CODE § 22949.71 (Westlaw through Ch. 39 of 2024 Reg. Sess.).

above in Part I, both regimes contain a series of attorney's fee provisions that raise constitutional issues of their own—aside from the infirmities of deputizing private citizens to enforce arguably (or inarguably) unconstitutional substantive prohibitions.[252] Indeed, these weaponized fee provisions apply to any Texas abortion law or any California firearms law—they are not limited to the bounty hunter suits that S.B. 8 and S.B. 1327 create.[253] They delineate an entire area of law by subject matter and then target litigants by viewpoint, inflicting catastrophic fee liability on anyone seeking injunctive or declaratory relief against any law in that entire domain—in either a defensive or offensive posture, and upon the dismissal of a single claim.[254] Both fee regimes, moreover, impose joint and several liability upon any *attorney* who represents a person challenging state law, an obvious effort to deter lawyers from taking any such case.[255] Through these fee provisions, California and Texas attempt to shield themselves from scrutiny across an entire area of law, targeting a group of disfavored litigants for special obstacles on the way to the courthouse.[256]

252. *See supra* Part I.

253. The relevant section of the Texas Civil Practice and Remedies Code provides:

> Notwithstanding any other law, any person, including an entity, attorney, or law firm, who seeks declaratory or injunctive relief to prevent this state, a political subdivision, any governmental entity or public official in this state, or any person in this state from enforcing any statute, ordinance, rule, regulation, or any other type of law that regulates or restricts abortion or that limits taxpayer funding for individuals or entities that perform or promote abortions, in any state or federal court, or that represents any litigant seeking such relief in any state or federal court, is jointly and severally liable to pay the costs and attorney's fees of the prevailing party.

TEX. CIV. PRAC. & REM. CODE ANN. § 30.022(a) (Westlaw through legislation effective July 1, 2023, of the 2023 Reg. Sess. of the 88th Leg.). Similarly, the relevant section of the California Civil Procedure Code provides:

> Notwithstanding any other law, any person, including an entity, attorney, or law firm, who seeks declaratory or injunctive relief to prevent this state, a political subdivision, a governmental entity or public official in this state, or a person in this state from enforcing any statute, ordinance, rule, regulation, or any other type of law that regulates or restricts firearms, or that represents any litigant seeking that relief, is jointly and severally liable to pay the attorney's fees and costs of the prevailing party.

CAL. CIV. PROC. CODE § 1021.11(a) (Westlaw through Ch. 39 of 2024 Reg. Sess.).

254. *See* Aviel & Kersh, *supra* note 14, at 2079–80.

255. *See supra* note 253 and accompanying text (specifying that any "attorney" or "law firm" who seeks declaratory or injunctive relief is liable for the opposing party's fees).

256. As I have recently argued, these fee provisions inflict such severe obstacles on access to courts that they violate multiple principles of structural constitutional law and individual liberties, in addition to being rather clearly preempted by the statutory principles that govern litigation in federal court. Aviel & Kersh, *supra* note 14, at 2092–95, 2130–36.

We could imagine a happy future in which S.B. 8 gets struck down because its viewpoint-discriminatory fee shifting scheme violates due process, equal protection, and First Amendment principles—even though there is no longer a fundamental right to terminate a pregnancy.[257] And because these principles protect would-be litigants regardless of whether the conduct they wish to engage in is considered a fundamental right, a ruling like this would clearly have a trans-substantive application.[258] It would make sense for California to stand down in the face of a ruling like this, but the attorney fee provisions *are not subject to the self-destruct provision*.[259] The self-destruct provision only links the lifespans of the private enforcement mechanisms in the two regimes.[260] The paucity of discussion on the self-destruct provision throughout the bill's legislative history leaves us without an explanation for this choice.[261] It may

257. Indeed, as noted above, the attorney fee provisions of S.B. 1327 have been enjoined on this basis. S. Bay Rod & Gun Club, Inc. v. Bonta, 646 F. Supp. 3d 1232, 1240, 1245 (S.D. Cal. 2022).

258. *See* Aviel & Kersh, *supra* note 14, at 2096. (explaining that access-to-court rights do not depend on the constitutional status of the underlying conduct comprising the subject of would-be litigation).

259. California's self-destruct clause specifies that "[t]his chapter shall become inoperative upon invalidation of Subchapter H (commencing with Section 171.201) of Chapter 171 of the Texas Health and Safety Code in its entirety." CAL. BUS. & PROF. CODE § 22949.71 (Westlaw through Ch. 39 of 2024 Reg. Sess.). Subchapter H of Chapter 171 of the Texas code contains the most well-known aspects of S.B. 8: the prohibitions on performing abortions after a detectable fetal heartbeat, the exclusive private enforcement mechanism, and the statutory damages of $10,000 for each violation. TEX. HEALTH & SAFETY CODE ANN. §§ 171.201-12 (Westlaw through legislation effective July 1, 2023, of the 2023 Reg. Sess. of the 88th Leg.). Texas put the fee-shifting provisions that apply to all abortion litigation in an entirely separate code—in the Texas Civil Practice and Remedies Code, where it appears as a section titled, "Award of Attorney's Fees in Actions Challenging Abortion Laws." TEX. CIV. PRAC. & REM. CODE ANN. § 30.022 (Westlaw through legislation effective July 1, 2023, of the 2023 Reg. Sess. of the 88th Leg.). An invalidation of that section would have no effect on California law, because California's self-destruct provision does not concern itself with anything outside the Texas Health and Safety Code. *See* CAL. BUS. & PROF. CODE § 22949.71 (Westlaw through Ch. 39 of 2024 Reg. Sess.).

260. Even in the unlikely event that the Texas Supreme Court or the Supreme Court of the United States were to invalidate in its entirety subchapter H of the Texas Health and Safety Code, under the terms of the self-destruct provision, that would not void the provisions in California law that impose joint and several fee liability for anyone challenging any California firearm law. *See supra* note 259 and accompanying text. Like Texas, California put the most troubling part of its new fee-shifting regime in its civil procedure code—and the self-destruct provision only renders inoperative the relevant chapter of the California Business and Professions Code, where we find the prohibited weapons, the private enforcement mechanism, and the statutory damages of $10,000 for each violation. CAL. BUS. & PROF. CODE § 22949.71 (Westlaw through Ch. 39 of 2024 Reg. Sess.); CAL. HEALTH & SAFETY §§ 171.201-212 (Westlaw through Ch. 39 of 2024 Reg. Sess.).

261. *See supra* Part II.

have simply been a drafting oversight rather than an intentional decision to exclude the weaponized fee provisions from the self-destruct mechanism.[262]

In any event, a complete linkage between S.B. 1327 and S.B. 8 would still present the fundamental puzzle that we started with: if California is willing to burden the First Amendment right to petition in order to save lives, why would it cease that willingness upon S.B. 8 coming to an end? How does the trade-off between honoring access-to-court values and preventing gun violence turn on what *Texas* is doing? The self-destruct provision reveals that California was burdening court access rights not just to save lives, a goal that would presumably remain constant regardless of what happens in Texas, but also to push back against the Court's refusal to hold Texas responsible for its defiance of governing precedent—potentially even to change the ultimate outcome of the Texas law.[263] The bill's drafters repeatedly expressed the hope that the Court would reconsider its decision allowing S.B. 8 to move forward, and the self-destruct provision adds a concrete and explicitly transactional incentive for the Court to consider in its review: remove the barriers to court access that reproductive rights advocates face in Texas, and we will lower the obstacles we've put in the pathway of gun rights advocates.[264]

California's position can best be explained as one that insists on evenly distributed responsibility for the preservation of access-to-court norms. It treats parity as a necessary component of any reasonably functioning federalist system in which (1) states have increasingly polarized preferences on abortion, gun control, gender-affirming care, critical race theory, gas stoves, and everything

262. After all, consider the comments made by Governor Newsom expressing that he was "pleased to see gun control bill he signed into law struck down," and thanking Judge Benitez for illustrating the constitutional defects of S.B. 8. *Governor Newsom Issues Statement*, *supra* note 23; Tom Joyce, *Gavin Newsom Pleased To See Gun Control Bill He Signed into Law Struck Down*, CTR. SQUARE (Dec. 20, 2022), https://www.thecentersquare.com/california/article_c4de5214-809a-11ed-b26c-fbe8607ca15a.html [https://perma.cc/T56J-39F3]; Rachel Schilke, *California Citizen Gun Control Law Struck Down by Federal Judge*, WASH. EXAM'R (Dec. 20, 2022, 12:00 AM), https://www.washingtonexaminer.com/restoring-america/faith-freedom-self-reliance/california-citizen-gun-control-law-struck-down [https://perma.cc/X3YX-BXEL] ("Benitez's ruling is the exact outcome Newsom desired."). The ruling only concerned the fee-shifting provisions; Newsom's response to the ruling suggested that he did not see those as de-coupled from the rest of the regime. *Id.*

263. Newsom, *Supreme Court Opened the Door*, *supra* note 26 ("Maybe California's move will lead the court to change its mind about allowing Texas's bounty-hunter scheme. If that's the case, women's reproductive care across our nation would be better off. If there's anything I've learned as a father of four kids, it is that sometimes you don't realize you've made a mistake until you see the consequences of your actions come true."); *see also Hearing Before S. Judiciary Comm.*, *supra* note 140, at 34:51 (statement of Sen. Robert M. Hertzberg, Member, Cal. S. Judiciary Comm.) (musing that with the enactment of 1327 "maybe we could fix . . . [the Court's] ridiculous opinion on abortions").

264. CAL. BUS. & PROF. CODE § 22949.71 (Westlaw through Ch. 39 of 2024 Reg. Sess.).

else;[265] (2) are allowed and expected to enact laws that reflect this variety of preferences;[266] (3) up to the limits imposed by constitutional principles, including the ones that protect access to courts.[267] In sum, we can view the self-destruct provision as insisting that the work of upholding access-to-court values will not be borne exclusively by blue states. More specifically—recalling that California entered the fray not upon S.B. 8's enactment, but upon the law getting a green light from the Court—we can interpret S.B. 1327 as an effort to ensure that states will share the work of upholding access-to-court values regardless of whether their substantive ideological preferences align with those held by the current Court's majority.[268]

With this purpose unearthed, we are now prepared to consider the normative questions presented by this extraordinary experiment: is this a legitimate interest for state lawmaking? Does it fit within a tolerable or even desirable account of how states may wield power in our federalist system? And even if we are able to answer that affirmatively at some level of abstraction, does it justify the (contingent) burden on access-to-court values that California has inflicted on gun rights advocates? Is there any convincing rejoinder to the charge that California's "attack on the Constitution," as the ACLU put it, is as pernicious as the one it was intended to neutralize? And do any of these answers turn on whether S.B. 1327 could be said to enjoy any reasonable prospect of success in achieving its goals? We turn to these questions in the next Part.

III. IN SEARCH OF A THEORY FOR REPRISAL-DRIVEN LAWMAKING

The core descriptive argument of the preceding part is that the architects of S.B. 1327 used California's lawmaking machinery (1) to force ideological consistency on the Court in its review of obstacles on court access; (2) with the

265. *See, e.g.*, Ari Natter, *How Gas Stoves Became a Weapon in the Culture Wars*, BLOOMBERG (June 9, 2023, 11:05 AM), https://www.bloomberg.com/news/articles/2023-06-09/how-gas-stoves-became-part-of-america-s-culture-wars [https://perma.cc/544Q-TT5A (staff-uploaded, dark archive)] (describing how gas stoves "were suddenly part of the left-right culture wars" after Democratic-leaning cities like New York and Los Angeles began regulating their use more stringently in response to environmental and health concerns).

266. *See* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 222 (2000) (noting that "federalism is meant to preserve the regulatory authority of state and local institutions to legislate policy choices").

267. *See* Aviel & Kersh, *supra* note 14, at 2104–10.

268. *See supra* Section I.C. "'It's all about these two big issues that are facing us. And you can't have a double standard. You can't have one standard for guns and another standard for women's reproductive health. It's not right,' Democratic state Sen. Robert Hertzberg, who carried the bill, said in an interview." Don Thompson, *New California Gun Control Law Mimics Texas Abortion Measure*, HILL (July 22, 2022, 10:13 AM), https://thehill.com/homenews/ap/ap-u-s-news/new-california-gun-control-law-mimics-texas-abortion-measure/ [https://perma.cc/USF8-5VEL (staff-uploaded archive)].

goal of bringing down another state's constitutionally troubling scheme. In this Part, we begin to consider how to gauge whether these are legitimate goals for state lawmaking. How might we begin to construct an appropriate normative framework for this interesting and troubling experiment?

A. *Of Various Federalisms—Old and New, Vertical and Horizontal*

As soon as we set out to resolve whether a state has overstepped whatever discernible lines demarcate the boundary between its domain and that of other actors, we appear to have a question on our hands about federalism.[269] It thus seems sensible to consult the extraordinarily rich body of scholarly work that has, over decades, set out to describe and theorize federal-state relations and, to a lesser degree, state-to-state relations.[270] Perhaps surprisingly, given the breadth and depth of this literature, it does not yet offer tools to either substantiate or refute the idea that states may have an interest in policing the constitutional compliance of other states, much less disciplining the Court in its performance as referee.[271]

To be sure, we find important observations that provide critical context for California's experiment. The battle over S.B. 8 and S.B. 1327 certainly confirms Heather Gerken's insight that "[s]tates are not sites where groups can shield themselves from national policy, national politics, or national norms. Instead, they are the sites where we battle over—and forge—national policy, national politics, and national norms."[272] Jessica Bulman-Pozen's work compiles

269. The noncommittal language acknowledges how much the new federalist school of thought has done to dismantle the idea of clear and enforceable boundaries on state power. Instead of an insistence on "sovereignty and separate spheres," the new federalists offer accounts that recognize that "states and the federal government regulate shoulder-to-shoulder in the same, tight policymaking space." Heather K. Gerken, *Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85, 87 (2014); *see also* Heather K. Gerken, *Federalism and Nationalism: Time for a Détente?*, 59 ST. LOUIS U. L.J. 997, 999 (2015) (noting that the "new nationalists have used a lot of terms to describe federal-state relations—polyphonic, iterative, negotiated, interactive, uncooperative—but the most honest term is 'messy'").

270. *See, e.g.*, Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1906–12 (2014) [hereinafter Gerken, *New Nationalism*].

271. For purposes of this discussion, I am not assessing how a court should rule when presented with the constitutionality of review-impairing mechanisms. A court in that posture would apply doctrinal principles drawn from separation of powers precedents as well as First Amendment, due process, and equal protection principles. *See* Aviel & Kersh, *supra* note 14, at 2100. I am instead trying to evaluate here whether the purpose that California expressed is consistent with our views about the role of states in a constitutional democracy, specifically one riven with conflict and afflicted with a referee whose impartiality has been brought into substantial question.

272. Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695, 1696 (2017).

the evidence to show that "states function as sites of partisan identification."[273] These crucial insights about the role of party polarization in understanding contemporary federalism certainly help explain why California lawmakers devoted such effort to the enactment of S.B. 1327[274]—and why Governor Newsom advertised the gambit in newspapers serving largely Democratic cities in Texas.[275] But what metrics can help us evaluate whether it was "appropriate and constructive,"[276] in Newsom's words, for California to use its lawmaking power in this way?

What does the literature have to say about the rules of engagement: *how should states conduct themselves* during these battles over gun rights, gay rights, and abortion?[277] Is it appropriate for states not only to pursue their own policy preferences on these challenging and nationally salient issues, but to react to the excesses of other states in pursuing their policy preferences? And to the failures of the Court in policing these excesses? These are different questions than the ones that motivate the existing federalism literature, and we do not appear to have readymade answers to them.[278] Grossly oversimplified, the vertical federalism literature addresses the interests that states have in fending off an overweening federal Leviathan and the benefits that arise from policy experimentation and regulatory diversity.[279] The horizontal federalism

273. Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1117 (2014); *see also* Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1923 (2014) ("By advancing a Republican or Democratic agenda, or by offering a toehold for networked interests to further their causes through direct democracy, states engage in political struggles on behalf of people both inside and outside their borders, and they are watched by Americans nationwide. National political conflict is drawn on the canvas of the states.").

274. *See* Act of July 22, 2022, ch. 146, 2022 Cal. Stat. 3551 (codified at CAL. BUS. & PROF. CODE §§ 22949.60–.71; CAL. CIV. PROC. CODE § 1021.11).

275. Seitz-Wald, *supra* note 205 (reporting that Governor Newsom advertised in the *Austin American-Statesman*, *Houston Chronicle*, and *El Paso Times*).

276. *Governor Newsom Highlights*, *supra* note 10, at 34:28 (statement of Governor Gavin Newsom).

277. Heather K. Gerken, *The Taft Lecture: Living Under Someone Else's Law*, 84 U. CIN. L. REV. 377, 378 (2016) [hereinafter Gerken, *Taft Lecture*] (noting that except for specific doctrinal questions addressed under Dormant Commerce Clause, personal jurisdiction, and the Full Faith and Credit Clause, "we've done relatively little to theorize the ways states *ought* to interact"). Gerken has acknowledged that this is where the new federalism literature has the most room for growth. Gerken, *New Nationalism supra* note 270, at 1916. ("[T]here's a case to be made that identifying 'rules of engagement' is the most pronounced weakness of this school . . . .").

278. Perhaps because the question has never been presented so directly.

279. *See* Gerken, *New Nationalism*, *supra* note 270, at 1891; Gerken, *Taft Lecture*, *supra* note 277, at 380. Ernest Young's influential account of "the underlying values that federalism is generally thought to serve" notes that "[s]tate governments provide a check on national overreaching" and that "[f]ederalism permits a diversity of regulatory regimes from state to state, which may allow satisfaction of more people's preferences, regulatory experimentation, and competition among states to provide the

literature grapples with the interests that states have in fending off the cross-border externalities of their sister states—not living under another's law, as Gerken has evocatively put it.[280] What California's experiment presses us to consider, in contrast, is whether states should be understood as having a legitimate interest in ensuring parity across state borders in the safeguarding of constitutional norms, specifically those that protect access to courts. To the extent that this is a federalism problem at all, it is something of a diagonal one. As we saw repeatedly in the preceding Part,[281] California was engaging with its ideological adversaries not only in another state but also on the Supreme Court.[282] But what really makes this uncharted territory is that California's desire to ensure that states share the work of upholding access to courts is a new kind of regulatory preference, different in significant ways than the paradigmatic state interests that are typically reflected in judicial and scholarly discourse about federalism.[283] The literature treats states as having first-order preferences about the regulation of primary conduct and second-order preferences about how those substantive provisions will be best enforced.[284] The

most attractive regime." Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 52 (2004) [hereinafter Young, *Rehnquist Court's*]. He goes on to explain that

> "[j]ust *having* state governments is not enough; those governments need to have meaningful things to *do*. Federalism cannot provide regulatory diversity unless states have autonomy to set divergent policies; state governments cannot provide fora for political participation and competition unless meaningful decisions are being made in those fora."

Id.

280. Gerken & Holtzblatt, *supra* note 134, at 88.

281. *See supra* Part II.

282. Marcia L. McCormick, *Solving the Mystery of How* Ex Parte Young *Escaped the Federalism Revolution*, 40 U. TOL. L. REV. 909, 924 (2009) (describing diagonal federalism as a construct that addresses questions of "power that crosses the federal-state line and also the judicial-executive branch line").

283. *See* Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 7 (2010) [hereinafter Gerken, *Foreword: Federalism*] (identifying in federalism discourse the pervasive "sense that states should have control over 'their' policies"); Richard Briffault, *"What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1312 (1994) ("As expounded by Justice O'Connor in *Gregory v. Ashcroft*, the principal themes in the case for federalism-as-decentralization are that 'the federalist system is a check on abuses of government power'; it 'assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society'; it 'increases opportunity for citizen involvement in democratic processes'; it 'allows for more innovation and experimentation in government'; and it 'makes government more responsive by putting the States in competition for a mobile citizenry.'" (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).

284. *See, e.g.*, Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493 (1987) (reviewing RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 1987) (asserting that the "first, and most axiomatic, advantage of decentralized government is that local laws can be adapted to local conditions and local tastes, while a national government must take a uniform—

interests that drove California to adopt a regulatory scheme intended to last only as long as a sister state's version was allowed to stand are best understood as a set of third-order regulatory preferences, developed in reaction to the constitutional defiance of sister states and the Court's failure to intervene.[285] We will need new theoretical tools to evaluate how this kind of meta-preference fits into our understanding of states in a federalist system.

The understanding of state interests that permeates the federalism literature—vertical and horizontal, old and new—continues to reflect the same underlying assumption of Brandeis's laboratories of democracy: that states are primarily driven by the pursuit of first-order regulatory preferences.[286] These are the perennially important policymaking questions that comprise the regular business of the states' traditional police powers: which conduct shall be allowed and under what circumstances? Can ice be manufactured and sold to the public without a permit?[287] Which medical procedures should doctors be permitted to perform, and subject to what kinds of conditions? Which weapons should be available to which kinds of people, in which kinds of places? Should people be allowed to own Gila monsters as pets?[288] Whether or not the subject matter is politically salient or fraught with constitutional implications, the essential point is that states are understood to have different preferences about the kind of conduct they wish to permit within their borders, and that variation is at the heart of the central normative values that federalism is understood to serve: "from creating spheres of minority rule, to satisfying local preferences, to providing laboratories for democratic experimentation."[289] These canonical understandings of the virtues of federalism rest on the basic empirical premise

and hence less desirable—approach."). McConnell goes on to offer, as an example, two states whose populations differ in their preference for outlawing smoking in public buildings. *Id.* at 1494. From there, additional illustrative examples include: interstate differences in education and welfare funding, incorporation procedures for corporate organizations, and products liability rules. *Id.* at 1499. All of these examples fall under first- or second-order preferences.

285. CAL. BUS. & PROF. CODE ANN § 22949.71 (Westlaw through Ch. 39 of 2024 Reg. Sess.).

286. As Brandeis put it, the experiments are of a "social and economic" nature, a phrase that he repeats several times in emphasizing that "[t]here must be power in the states and the nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

287. *See generally id.* (addressing the issue of permit requirements when selling and manufacturing ice).

288. Mead Gruver, *A Colorado Man Died After a Gila Monster Bite. What Experts Say About Keeping Pet Lizards*, INDEPENDENT (Feb. 22, 2024, 5:46 AM), https://www.independent.co.uk/news/world/americas/colorado-gila-monster-pet-lizard-b2500413.html [https://perma.cc/77AZ-8KE2] (reporting on the death of a Colorado man after being bitten by the Gila monster that he unlawfully kept as a pet and explaining differing state laws about keeping Gila monsters as pets).

289. Jessica Bulman-Pozen & Olatunde C.A. Johnson, *Federalism and Equal Citizenship: The Constitutional Case for D.C. Statehood*, 110 GEO. L.J. 1269, 1314 (2022).

that states will differ from each other and from the nation in the decisions they make about ice, medical procedures, weapons, and Gila monsters—their first-order regulatory preferences.[290]

States are also understood to have second-order regulatory preferences: how will those substantive prohibitions be enforced? Through civil or criminal penalties? Via public or private enforcement?[291] S.B. 8 and S.B. 1327 are distinctive in the second-order preferences they reflect: enforcement mechanisms that make it uniquely difficult for objectors to challenge these laws in court. And just as with the underlying first-order preferences regarding abortion and gun control, a state's choice of enforcement mechanism might raise constitutional questions. To sidestep those complications for the sake of building our typology, let's return to the Gila monster. A state might prohibit keeping a Gila monster as a pet but choose not to impose criminal penalties on violators. It might choose to have the prohibition enforced only by state wildlife officials along with a reporting system for private citizens. These design choices are a logical extension of the differences we expect to see among states in their first-order preferences. The laudatory understanding of federalism as promoting "choice, competition, participation, experimentation, and the diffusion of power" readily encompasses these second-order regulatory preferences.[292]

But as we saw in the preceding Part, the preferences that drove California lawmakers to adopt S.B. 1327 were of an entirely different sort, arising out of a desire to avoid an asymmetry between liberal and conservative states in their compliance with court-access norms.[293] In enacting S.B. 1327,[294] California was driven by a kind of third-order set of regulatory preferences preoccupied with interstate fairness and overtly contingent on the behavior of other actors: which substantive prohibitions and enforcement mechanisms will best promote an

290. Young, *Rehnquist Court's*, *supra* note 279, at 57 (stating "that our constitutional tradition is committed to some degree of state autonomy, and that autonomy has traditionally been justified, in part, on grounds of regulatory diversity").

291. *See, e.g.*, Stern, *supra* note 40, at 625–44 (chronicling an extensive history of state legislation empowering private individuals to enforce substantive prohibitions on liquor, prostitution, and pollution).

292. Gerken, *Foreword: Federalism*, *supra* note 283, at 6.

293. As Jon D. Michaels has explained, "Newsom is not going to allow this new tool that the court has countenanced to be used asymmetrically—that is, just by red states—to undermine progressive constitutional rights." Jennifer Mascia, *Could Gun Restrictions Modeled on Texas's Anti-Abortion Law Work?*, TRACE (Jan. 19, 2022), https://www.thetrace.org/2022/01/texas-abortion-law-applied-to-guns-california-new-york/ [https://perma.cc/W9AV-52VU].

294. Act of July 22, 2022, ch. 146, 2022 Cal. Stat. 3551 (codified at CAL. BUS. & PROF. CODE §§ 22949.60–.71; CAL. CIV. PROC. CODE § 1021.11).

equitable distribution of constitutional responsibilities given the choices being made by sister states and the Supreme Court?[295]

This is fundamentally different than the kinds of state interests that tend to inform scholarly discussions about federalism. Take, for example, this account of state regulatory preferences in Ernest Young's influential work:

> California chooses to set rigorous environmental standards, but Louisiana prefers looser regulation in order to attract industry. Vermont relies on a state income tax as a source of revenue, while New Hampshire emphasizes property taxes. New Jersey protects lesbian women and gay men from discrimination based on their sexual orientation, but Michigan does not. New York's state judges are appointed by the governor; Texas elects them.[296]

Young goes on to specify that his examples demonstrate that "state-by-state diversity extends not only to particular substantive policies, but also to the structure of the government and the means by which policy choices are carried out."[297] In this vivid discussion of states having "meaningful things to do," meant to illustrate that "one of the most basic aspects of state autonomy is the right to do things differently," it is easy to see both first- and second-order regulatory preferences driving state lawmaking.[298] But the kind of third-order preferences such as the ones that California sought to advance do not figure into this account, and so these otherwise important and illuminating observations will not help us assess whether states might have an interest in policing each other's constitutional compliance or whether it is appropriate for them to use their lawmaking apparatus to try to do so.[299] State interests are treated as authentic and independent, not reactionary or strategic—arising out of in-state needs and commitments rather than seeking to correct malfeasance in the way that other states are regulating their citizenry.

295. Michaels and Noll engage with these questions but stop short of fully defending the proposition that states have a legitimate interest in the enforcement of cross-border constitutional compliance. They offer instead a pragmatic discussion of risks and rewards, concluding that "officials in blue states seeking to avail themselves of the instruments endorsed in *Whole Woman's Health* face a more difficult and complicated task than do their counterparts in red states whose primary objective may well be to unleash neighbor against neighbor for political gain." *See* Michaels & Noll, *supra* note 241, 1258.

296. Young, *Rehnquist Court's*, *supra* note 279, at 53–54.

297. *Id.* at 54.

298. *Id.* at 52–53.

299. Young continues by addressing welfare reform, provision of health insurance, and environmental regulation—all examples reflecting first- and second-order preferences rather than the type of third-order preferences with which California was concerned. *Id.* at 55. Earlier canonical works on federalism share this quality. *See supra* note 284.

To be clear, the point is not that we lack compelling accounts of interstate conflict; it is just that they do not quite capture the moves that California was making in this instance. Consider this discussion of the central concern that predominates in thinking about horizontal federalism—that divergence in first-order regulatory preferences cannot be contained within territorial boundaries:

> When lax gun-ownership enforcement in Virginia increases the number of firearms in New York, we worry. When Massachusetts marries same-sex couples from states that don't recognize those marriages, we worry. When California's emissions standards trump the emissions standards of other states, we worry. When the Texas school board's efforts to move its curriculum in a socially conservative direction change textbooks for many states, we worry.[300]

This anxiety about spillovers offers a superficial appeal as a framework for the problem we face, because it speaks to the profound ideological differences between California and Texas on both abortion and gun laws.[301] But upon inspection, the classic problem of spillovers that has motivated so much of horizontal federalism literature and doctrine is very different than what we're concerned with here. California and Texas unquestionably have different first- and second-order preferences that may well spill over into each other's territories. Our specific concern here, however, is that California has used its lawmaking apparatus to advance a third-order preference that Texas be required to comply with constitutional access-to-court norms.[302] This is not just another example of spillover; it is an entirely new kind of state regulatory preference, and it invites a new round of theorizing.[303] The insights that federalism scholars

300. Gerken & Holtzblatt, *supra* note 134, at 61–62.

301. *See* Ed Kilgore, *We Are Two Nations, Divisible*, N.Y. MAG. (July 8, 2021), https://nymag.com/intelligencer/article/polarization-reflects-real-differences-between-americans.html [https://perma.cc/T9ET-ZXKH]; Jon D. Michaels, *If the Supreme Court Lets Other States Copy Texas's Abortion Law, It'll Be Chaos*, WASH. POST (Jan. 10, 2022, 6:00 AM), https://www.washingtonpost.com/outlook/2022/01/10/court-legal-vigilantes-polarize/ [https://perma.cc/3FCV-R2SQ (staff-uploaded, dark archive)].

302. California articulated cross-border externalities in its amicus brief opposing S.B. 8, emphasizing that it was feeling the effects of the Texas abortion ban due to patients traveling to California to obtain care that was no longer legal in Texas. "Any substantial reduction in the availability of abortion services in one State causes people to seek services in other States, burdening those States' health care systems and limiting access to care for residents there." Brief for Mass. et al. as Amicus Curiae Supporting Petitioners, *supra* note 22, at 2. S.B. 1327 does not resolve those directly—it does not make abortion any more accessible in Texas so as to staunch the flow of patients into California needing abortion care. Only via the indirect and highly unlikely mechanism of pressuring the Court to reconsider its allowance of S.B. 8 can S.B. 1327 be said to actually have any effect on spillovers.

303. *Cf.* Gerken, *Foreword: Federalism*, *supra* note 283, at 20 (describing a body of federalism scholarship "premised on the idea that we need to develop new conceptual tools to understand the many areas where sovereignty is not to be had").

have generated by focusing on first-order and second-order regulatory preferences will have limited purchase in thinking about this phenomenon. The federalism literature will need a new model that can help us gauge whether states have a role to play in policing each other's constitutional compliance; the purpose here is not to offer such a model, which will have to await further work in this area, but simply to highlight its necessity.[304]

Readers may be skeptical that states have any legitimate interest in serving as self-appointed constitutional compliance monitors—or concerned that even if this was an acceptable role for states to play, it would not justify the incursion on access-to-court values that S.B. 1327 inflicts, albeit temporarily and contingently. There is both a question about means and a question about ends—one might have no objection in the abstract to California serving as an interstate norm enforcer as long as it does not sacrifice court-access rights in the short term as a means of enforcing those norms.[305] Some will surely object that California's stake in whether Texas complies with the Constitution amounts to little more than the kind of moral outrage that supposedly undergirds the bounty hunter regime in the first place.[306] Perhaps, but there may be reason to pause before proclaiming once and for all that states have no business using their legislative process to force an equitable distribution of norm-protecting responsibilities, either in the abstract, or in the particular circumstances that

304. And as we develop new models, one strand of inquiry is whether the likely efficacy of a state's chosen compliance mechanism in changing the behavior of other actors has any weight in its normative legitimacy. The intellectual case for federalism has not depended on individual state policies being sensible or effective. *See* Young, *Rehnquist Court's*, *supra* note 279, at 54 (explaining why it is "difficult to argue for or against federalism based on the attractiveness or unattractiveness of particular policies that the states might adopt"). So here too we might evaluate whether states have legitimate interests in attempting to enforce the equitable distribution of constitutional norms without first being confident that their efforts will succeed. That said, whether the costs of California's gambit outweigh the likely benefits is an important dimension of the problem. *See infra* Section III.C.

305. *See* Aviel & Kersh, *supra* note 14, at 2097–103 (explaining how S.B. 8 and 1327 impair access-to-court rights).

306. *See* Rhodes & Wasserman, *Defensive Litigation*, *supra* note 41, at 224 (explaining that "Texas Solicitor General Stone compared an S.B. 8 action to a tort of 'outrage,' where an individual becomes aware of a non-compliant abortion and it causes them moral or psychological harm" (quoting Transcript of Oral Argument at 3, Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021) (No. 21-463), https://www.supremecourt.gov/oral-arguments/argument_transcripts/2021/21-463_8758.pdf [https://perma.cc/8353-EXNZ (staff-uploaded archive)]); *see also* Michaels & Noll, *supra* note 241, at 1229 (2023) (explaining that plaintiffs authorized to sue under S.B. 8 and copycat regimes "are marshaling the power of the state to operationalize moral outrage at others' actions—actions that in no meaningful or cognizable way compromise who those plaintiffs are and the lives that they plan to lead"). For an explanation of why S.B. 8 cannot properly be understood as codifying a special tort of outrage, see John C.P. Goldberg & Benjamin C. Zipursky, *Tort Theory, Private Attorneys General, and State Action: From Mass Torts to Texas S.B. 8*, 14 J. TORT L. 469, 489 (2021).

confront us: specifically, a rapidly reconstituted Court moving quickly to reshape law to align with its own substantive ideological preferences.[307]

I recognize that this characterization is both highly contestable and requires its own separate scholarly treatment to flesh out properly.[308] But the role the Court played in bringing about S.B. 1327 is a crucial part of this story. For the first six months of 2022, as S.B. 1327 was being formulated and debated, the Court had let Texas flout a clear and established constitutional command.[309] Its admonition that it had not considered S.B. 8 on the merits did little to assuage concerns that it was simply unmotivated to protect the court-access rights of doctors and reproductive rights advocates, or to quiet speculation that the Court would not be so sanguine if it were gun rights advocates who were excluded from court.[310] California was taking action in what could be thought of as an all-hands-on-deck moment, attempting to exercise whatever force it could muster from its vantage point.[311] That is not to justify S.B. 1327 in any conclusive sense, but rather to query whether we are ready to discard the idea that states might serve as laboratories of constitutional compliance. Maybe it is precisely one of the fail-safes that federalism is said to offer—especially in a highly polarized climate in which the Court is unwilling to police the constitutional violations of states controlled by its ideological allies.[312]

This is not to dismiss or deny the very real constitutional defects in S.B. 1327. As a federal judge tasked with ruling on their validity, Judge Benitez was

307. Jack Balkin, *Abortion, Partisan Entrenchment, and the Republican Party*, YALE L. SCH. PUB. L. & RSCH. THEORY (forthcoming) (manuscript at 1–3) (describing a "conservative constitutional revolution" that has been "turbo-charged since 2017, when the first of three new conservative Justices joined the Court."); Miriam Seifter, *Saving Democracy, State by State?*, 110 CALIF. L. REV. 2069, 2070 (2022) (observing that the United States Supreme Court is among the institutions that "now confer minoritarian advantage on the Republican Party").

308. For one important undertaking in this regard, see Reva Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—And Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1130 (2023) (showing how the conservative legal movement pursued constitutional change "through specialized judicial appointment practices designed to achieve movement-party goals . . . . A Supreme Court that the Republican Party composed through a series of norm-busting appointments practices immediately thereafter changed several bodies of law to decide *Dobbs*.").

309. *See Whole Woman's Health*, 142 S. Ct. at 529–30 (allowing S.B. 8 to go into effect in spite of its conflict with *Roe v. Wade* and *Casey v. Planned Parenthood*). The conflict between S.B. 8 and governing precedent would be alleviated in June 2022, when *Roe* and *Casey* were overruled by *Dobbs*. *See* 142 S. Ct. 2228, 2242 (2022).

310. Mascia, *supra* note 293 ("The court's majority may hold guns in higher constitutional esteem than reproductive autonomy . . . .").

311. *See generally* Seitz-Wald, *supra* note 205 (reporting on the various ways that California responded).

312. *See* David Landau, Hannah J. Wiseman & Samuel R. Wiseman, *Federalism for the Worst Case*, 105 IOWA L. REV. 1187, 1190 (2020) ("Historically, federalism has been viewed as a major protection of liberal democratic constitutionalism in the United States.").

right to strike down the fee-shifting provisions.[313] The question is whether there is nonetheless any supportable basis to defend what California did given the circumstances. To the extent we can sustain this uncomfortable position, the rationale would rest on a theory of role differentiation that allows a state legislator to engage in a different calculus than what would be required of federal courts. We turn now to a consideration of this possibility.

B. *Role-Differentiated Morality as an Explanatory Frame*

To make the point starker, let us imagine a state legislator reasoning exactly thus: "If I were a judge reviewing this ex post, I would strike this down. But I'm nonetheless going to vote aye." (This is really just a paraphrase of Senator Umberg's statement that he was going to support the bill in spite of his "hope and desire that ultimately this bill actually not proceed because the Texas law is found to be wrong, unconstitutional, and crazy.").[314] Can we harmonize this seemingly inconsistent position by positing that a state legislator might have a different set of role instructions than a judge, such that it would be defensible for a state legislator to vote in favor of something that a judge should strike down?

Related ideas have been considered at length in an extensive literature devoted to role-differentiated morality, a broad umbrella of ideas unified by the central notion that the right thing to do in a given situation is determined by the contours of one's assigned role.[315] It is a mainstay of legal ethics scholarship because it has been offered as a justification for the third-party harms that lawyers inflict when scrupulously following unique professional mandates such as the obligation to protect client confidences.[316] Constitutional law is no stranger to role morality, and has lavished particular care on the development

313. *See* Aviel & Kersh, *supra* note 14, at 2097–36 (explaining why the fee shifting provisions are unconstitutional).

314. *See Hearing Before S. Judiciary Comm.*, *supra* note 140, at 35:16 (statement of Sen. Thomas J. Umberg, Chair, Cal. S. Judiciary Comm.).

315. *See generally* ARTHUR I. APPLBAUM, ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE (1999) (positing that the right thing to do is determined by the contours of one's assigned role); Michael O. Hardimon, *Role Obligations*, 91 J. PHIL. 333, 333–34 (1994) (arguing that role obligations are central to morality).

316. *See, e.g.*, W. Bradley Wendel, *Lawyer Shaming*, 2022 UNIV. ILL. L. REV. 175, 204 ("The problem that frames much of theoretical legal ethics is the supposed conflict between the demands of impartial morality and those obligations, or at least permissions, that arise from the lawyer's professional role and her relationship with a specific client."); Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885, 885 n.1 (1996) (canvassing legal ethics scholarship that addresses the "lawyer's specialized role and its distinctive moral demands, which can diverge from common sense moral intuition").

of a well-theorized role morality for federal judges.[317] In fact, as one scholar observes, "[t]he efforts of constitutional law scholars to develop a role morality for judges—one that is linked to the perceived place of judges in the constitutional scheme—are sufficiently numerous and familiar that they risk not being recognized as related and as having that purpose."[318] Is there a plausible role morality for state legislators that would allow them to vote yes on something like S.B. 1327, knowing that it contains the same mechanisms they've condemned as unconstitutional in the Texas version?

We might start by recalling that California also has a long-standing commitment to prevent gun violence, one that, notwithstanding the self-destruct provision, is credibly furthered in the interim while the constitutionality of the new review-impairing regime is being worked out.[319] We can imagine a state legislator saying: "it is my job to protect the interests of Californians—saving their lives from gun violence—using all available means. If the Supreme Court has left these review-impairing mechanisms available, then we will use them too—even if we would not have endorsed their use in the first place."

This legislator is not engaged in nullification, in which states openly defy governing precedent,[320] or even a form of departmentalism, in which government officials outside of the judiciary assert a prerogative to engage in their own constitutional interpretive endeavors.[321] First of all, those charges just

317. For an important recent example, see Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 TEX. L. REV. 221, 294 (2023) [hereinafter Fallon, *Selective Originalism*] ("[R]ecognition that moral obligations and ideals can vary with roles is deeply ingrained in everyday life.").

318. Neil S. Siegel, *After the Trump Era: A Constitutional Role Morality for Presidents and Members of Congress*, 107 GEO. L.J. 109, 118 (2018) [hereinafter Siegel, *Trump Era*]. Siegel laments that "it has not seemed worthwhile to a great many constitutional law scholars to cultivate a culture of role constraints on elected officials." *Id.* at 122.

319. *See* Stephen P. Halbrook, *California's Assault Weapon Ban*, *in* FIREARMS LAW DESKBOOK § 10:10 (2023) (providing a historical overview of California's gun violence prevention efforts).

320. John Dinan, *Contemporary Assertions of State Sovereignty and the Safeguards of American Federalism*, 74 ALB. L. REV. 1637, 1641 (2011) (discussing contemporary nullification efforts and observing that "[t]he Supremacy Clause makes clear that federal law prevails over conflicting state law, and any notion to the contrary has long ago been clearly and appropriately repudiated"). For an overview of nullification efforts throughout American history and an argument that S.B. 8 should be thought of as a type of nullification, see Lauren Moxley Beatty, *The Resurrection of State Nullification—And the Degradation of Constitutional Rights: S.B.8 and the Blueprint for State Copycat Laws*, 111 GEO. L.J. ONLINE 18, 37–40 (2022).

321. *See* Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 497 (2018). [hereinafter Fallon, *Judicial Supremacy*]. Fallon defines departmentalism as

do not fit where the legislator is taking advantage of a mechanism that the Court was invited to repudiate but declined to do so.[322] California clearly and publicly waited until the Court had signed off on S.B. 8 before making its move.[323] The bill's advocates understood the rhetorical heft of this posture and deployed it repeatedly, emphasizing during one of the committee hearings that they had consulted with multiple lawyers and "spent a lot of time thinking through this in great detail *to make sure that it was within the framework that was set forth by the United States Supreme Court*."[324] An explicit commitment to judicial supremacy in the face of disagreement was offered during the deliberations as a reason to *support* the law.[325] As Senator Hertzberg said, with perhaps a somewhat theatrical sense of resignation:

> The Supreme Court decides what is constitutional . . . what the Supreme Court says is final because it is the Supreme Court. The Supreme Court made the determination that this type of process, private rights of action, are constitutional. So we've taken that and used that as an additional tool. Every tool that we have available that's determined to be

> the theory that each branch of government should interpret the Constitution for itself and that judicial interpretations, once rendered, are subject to reexamination, challenge, and rejection by the President and Congress. . . . I shall understand popular constitutionalism as encompassing departmentalism, but also as embracing a view of the Constitution that makes its interpretation by Congress, the President, and even ordinary citizens as appropriate as interpretation by the Judiciary. In a democratic republic, popular-constitutionalist theories postulate, citizens are entitled to demand, and to exercise levers of political and other power to seek to ensure, that the government, including the courts, will construe the Constitution as the citizenry conscientiously believes that it ought to be construed.

Id.; *see also* Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1288 (2004) (describing a form of "state-based interpretive departmentalism").

322. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 531, 538–39 (2021) (explaining that "petitioners asked us to enjoin any enforcement of S. B. 8" and declining to do so).

323. *Whole Woman's Health v. Jackson* was decided on December 10, 2021. *See id.* at 522. The very next day Newsom called on his staff to draft "California's own version of S.B. 8" directed at assault weapons and ghost guns. *See* Eachambadi, *supra* note 66; *see also* Patrick Svitek, Eleanor Klibanoff & Reese Oxner, *Texas Abortion Law Author Reacts to California Gov. Gavin Newsom's Pledge To Do the Same Thing with Guns: "Good Luck"*, TEX. TRIB. (Dec. 13, 2021, 1:00 PM), https://www.texastribune.org/2021/12/13/texas-abortion-law-gavin-newsom-guns/ [https://perma.cc/K5A9-A2C6] (identifying Newsom's motivation as the Supreme Court's ruling on *Whole Woman's Health v. Jackson*).

324. *Hearing Before Cal. S. Pub. Safety Comm.*, *supra* note 180, at 5:11:29 (emphasis added). Hertzberg continued by further emphasizing his commitment to judicial supremacy: "if they want to determine that it is unconstitutional they have every right to do so. But right now this is the law and we feel like we are on pretty solid ground." *Id.*

325. *Id.*

> constitutional . . . if it saves one life it seems to me that it is something worth trying.[326]

The self-destruct provision further conveys California's ready embrace of judicial supremacy and the state's commitment to comply not only with the rulings that directly bind it, but even to rulings on the validity of sister state law.[327]

Our imagined state legislator is not expressing a willful disobedience of the Court but instead a kind of opportunism, suspending her initial first-best judgment about the vices and virtues of private enforcement mechanisms and weaponized fee-shifting. She's decided that the obligations of her role do not require her to forego mechanisms that have been made available to others, even if her first preference is that they not be available to anyone—and even if their proliferation runs the risk of further degrading our collective commitment to preserving access-to-court values. We can readily stipulate that state legislators, as a general matter, have a duty not to knowingly enact unconstitutional laws, and with that premise in place it seems absurd to suggest that they might legitimately vote for something they believe the courts should invalidate.[328] But the trajectory here does not quite fit within that straightforward construct. One might criticize California for replicating a regime with court-obstructing mechanisms, but disobedience of the Court is not a suitable charge: California legislators were voting in favor of something they hoped would be deemed unconstitutional in the future.[329]

We can further posit that state legislators have an obligation not only to represent the interests of their constituents in the short term, but also to protect the overall integrity of a constitutional democracy that includes viable channels for judicial review. On that foundation, we might reject California's gambit, even though it was not in direct defiance of governing precedent, because it has the tendency to contribute to a further degradation of access-to-court values.[330] It is not clear, however, that unilateral disarmament is an effective strategy for

326. *Id*.

327. Act of July 22, 2022, ch. 146, § 1, 2022 Cal. Stat. 3551, 3562 (codified at CAL. BUS. & PROF. CODE § 22949.71).

328. Members of state legislatures do, after all, take an oath to support the Constitution. *See* U.S. CONST. art. VI (providing that "the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution").

329. Recall Senator Umberg's comment that "I think you join me Senator Hertzberg in hoping that the Texas law is found to be unconstitutional and thus voiding the law that may be passed out of this committee today." *See Hearing Before S. Judiciary Comm.*, *supra* note 140, at 35:16 (statement of Sen. Thomas J. Umberg, Chair, Cal. S. Judiciary Comm.).

330. *See* Letter from Kevin G. Baker, *supra* note 220.

discharging the duty to protect the long-term vitality of the system.[331] A norm that is honored by only one side of a controversy, after all, is not much of a norm. By engineering a situation in which combatants on both sides of the nation's ideological divide have reason to fear that they will be harmed by a degradation in access-to-court values, California sought to preserve those very values.[332] California facilitated a public discourse in which it could be seen as sharply as possible that these rights are precious for everyone, regardless of partisan identification, and at risk from all quarters. California's national prominence and its political profile allowed it to do something that no other actor in the system was in a position to achieve—the animating rationale for a role-specific justification.

But what if California's strategy was more likely to fail than to succeed in holding the Court to account, potentially causing more harm than good? Even if we embrace the worthiness of California's aims and are willing to excuse its reliance on constitutionally troubling mechanisms to achieve those longer-term ends, we might wonder whether S.B. 1327 was sufficiently well-designed to bring about the parity that it sought. If S.B. 1327 was unlikely to have any discernible effect on Supreme Court decision-making, but was likely to encourage other states to enact their own copy-cat schemes, then the net effect would seem to be a negative one. Perhaps the most straightforward way to gauge California's experiment, then, is with a simple cost-benefit analysis.

C. *Cost-Benefit Analysis*

Even if we could develop a theory of federalism that accounted for state interests in cross-ideological constitutional compliance, and even if we could draw on role morality to excuse the short-term constitutional defects in the means that California chose, we might still critique the gambit on the grounds that the costs outweigh the benefits. We might want to know whether there was any reasonable prospect that California might succeed, especially given the risk that California's move would result in the further legitimization and proliferation of court obstruction efforts through exclusive private enforcement and weaponized fee regimes.

331. Siegel, *Trump Era*, *supra* note 318, at 168 (elucidating why "unilateral disarmament is unlikely to prove a good strategy" when faced with a collective action problem).

332. The self-destruct provision ensures that the right-of-access impairments in California's version are temporary—or at least, conceivably time-bound, with an end date placed in the hands of another actor. *See* Act of July 22, 2022, ch. 146, § 1, 2022 Cal. Stat. 3551, 3562 (codified at CAL. BUS. & PROF. CODE § 22949.71).

There is no doubt that private enforcement regimes are proliferating, and it is not difficult to treat that as a negative and costly development.[333] But who bears responsibility for that is a tricky assessment. Justice Sotomayor warned that the Court's refusal to enjoin S.B. 8 would lead other states to try "new permutations" before Newsom or anyone else had called for a California version.[334] California was not the first state to copy Texas; that honor belongs to Oklahoma, which enacted its version in May 2022.[335] California was simply the first blue state to do so. If red states were already moving to emulate Texas in burdening rights disfavored by conservatives, then the question is what effect California's entry into the game had on further proliferation. Would lawmakers in conservative states that had not yet entered the fray be more likely to adopt a version of their own, wanting to join forces against California? Or would they hesitate out of some sort of solidarity with firearms owners living in blue states, seeing that obstruction of court access is not merely something that liberals should fear? Maybe lawmakers in other liberal states, seeing that California had already made the point, became less likely to enact their own versions. Perhaps no other state was more likely to enact a copy-cat bill as a result of California's move.

It is difficult to know whether California's ingenuity in repurposing S.B. 8 to advance a progressive agenda has had or will have any effect on the lawmaking trajectory of other states. Nonetheless, the same qualities we examined above in assessing a role morality construct—California's public

333. *See* Michaels & Noll, *supra* note 241, at 1263–64; Aviel & Kersh, *supra* note 14, at 2097–136; James E. Pfander, *Judicial Review of Unconventional Enforcement Regimes*, 102 TEX. L. REV. 769, 771 (2024).

334. Whole Woman's Health v. Jackson, 142 S. Ct. 522, 551 (2021) (Sotomayor, J., concurring) ("[B]y blessing significant portions of the law's effort to evade review, the Court comes far short of meeting the moment. . . . [T]he Court clears the way for States to reprise and perfect Texas' scheme in the future to target the exercise of any right recognized by this Court with which they disagree. This is no hypothetical. New permutations of S. B. 8 are coming."). Scholars have similarly sounded the alarm about proliferation. *See generally* Aviel & Kersh, *supra* note 14 (arguing that accepting proliferation will result in a profound aggrandizement of state power); *see also* Pfander, *supra* note 333, at 769 ("The WWH framework encourages more states, both red and blue, to use unconventional private enforcement regimes to limit pre-enforcement review.").

335. Oklahoma Heartbeat Act, ch. 190, 2022 Okla. Sess. Laws 1 (codified at OKLA. STAT. tit. 63 § 1-745.31–.44), *invalidated by* Oklahoma Call for Reproductive Justice v. State, 531 P.3d 117 (Okla. 2023). Idaho actually enacted a privately enforced pre-viability abortion ban a few weeks before Texas, on April 27, 2021, but with some significant differences. *See* Fetal Heartbeat Preborn Child Protection Act, ch. 289, 2021 Idaho Sess. Laws 867 (codified as amended at IDAHO CODE § 18–8801–08). The civil action is limited to women who had an abortion performed in violation of the heartbeat provision, and has an effective date 30 days after judgment in any federal appellate court that "upholds a restriction or ban on abortion for a preborn child because a detectable heartbeat is present on the grounds that such restriction or ban does not violate the United States constitution." *See id.* § 18-8805(1).

prominence and political profile—could be said to heighten the legitimization effect that the ACLU warned about and accelerate a race to the bottom in which no one is motivated to protect the court-access rights of their ideological adversaries. And if that phenomenon unfolds with no corresponding prospect that California would actually influence either the United States or the Texas Supreme Court to reconsider the legality of S.B. 8, then the costs would seem to outweigh the benefits.

There is, however, an alternate definition of success that should be considered in weighing costs and benefits. Proponents spoke in terms of getting the Court to reverse its S.B. 8 decision, a prospect that had diminished to zero by the time the bill was actually enacted, but there remained a viable possibility that S.B. 1327 could nonetheless contribute to a second-best outcome in which the Court displayed a commitment to parity between abortion rights and gun rights. The enactment of S.B. 1327, even after S.B. 8 litigation had finished its run in the Court and *Roe* was overturned, left open the possibility that if California's version came before the Court, it would be given a green light just as S.B. 8 had received.[336] This would be a leveling down, to be sure, reducing the court-access rights of firearm advocates rather than elevating the court-access rights of reproductive health advocates, but nonetheless an outcome that would reflect a consistent parsimonious view of federal rights enforcement rather than a discrepancy between favored and disfavored rights.[337] Some observers might understandably be skeptical that the Court would feel compelled to manifest any such consistency,[338] but we could still view

336. Some scholars have argued that *Whole Woman's Health v. Jackson* was correctly decided, given the complexities of federal jurisdiction and the barriers to obtaining pre-enforcement review, and that the same outcome should unfold regardless of the nature of the underlying substantive rights. *See* Wasserman & Rhodes, *Offensive Litigation*, *supra* note 244, at 1058. And so perhaps the Court would arrive at the same result of its own accord, without being worried about the effect that an inconsistent approach would have on the public's perception of its integrity.

337. An "equality of the graveyard" rather than an "equality of the vineyard," as both scholars and jurists have notably put it. *See* Rebecca Aviel, *Rights as a Zero-Sum Game*, 61 ARIZ. L. REV. 351, 380 (2019).

338. *See* Michaels, *supra* note 301. Michaels predicts that, "[g]iven the court's recent shows of brazen partisanship, it's unlikely to treat gun rights, campaign contributions or religious accommodations with the same disregard it has shown abortion rights." *Id.* Michaels goes on to query whether we then "might expect to see another wave of bills by the red states in response, perhaps targeting voter turnout organizations, willing providers of services to LGBT families or those who sell or distribute contraception." *Id.*

California's gambit as one that puts additional pressure on the Court to either provide equal treatment or suffer the reputational costs.[339]

The idea of reputational costs for the Court returns us to the possibility sketched out briefly in Part I—that the purpose of S.B. 1327 was not actually to change decision-making outcomes but to reveal the Justices as hypocrites. Put this way, as an exercise in public shaming rather than a meaningful intervention into the preservation of court-access rights, the normative value certainly seems different—pure political theater inflicted on a nation exhausted from relentless partisan posturing. And yet, there is room for debate about whether exposing the Justices as hypocrites can be defended as a worthy endeavor. Theater can serve as a form of social commentary, after all, shaping and reflecting public discourse about the most pressing issues of the day, and the very concept of shame suggests an attunement to the way that others will perceive our behavior, a quality that sometimes seems lacking among certain Justices of the Supreme Court.[340] Scholars are offering reasoned and sober critiques of judicial supremacy as a general matter, and of this Court's jurisprudence in particular.[341] The Court's stature as an institution that is

339. Again, I acknowledge the possibility that the Court is genuinely committed to the parsimonious view of court access rights on display in *Whole Woman's Health*, and thus would apply the same principles to gun rights advocates without regard for its own reputational interests. *See supra* note 336 and accompanying text.

340. An opinion piece published in the New York Times on May 21, 2024, argued that a capacity for shame is a necessary quality of a fair and functional Supreme Court—and asserted that the current Court lacks it:

> We are faced with flatly unacceptable behavior from the most powerful judges in the land. If nothing else, Congress has the power to call that to light, to name and shame the wrongdoers. This would be a truth-seeking mission as well as a public service, showing the American people just how corrupt some justices are.

Jesse Wegman, *There's No Sense of Shame at the Supreme Court*, N.Y. TIMES (May 21, 2024), https://www.nytimes.com/2024/05/21/opinion/supreme-court-alito-flag.html [https://perma.cc/9NXJ-HHF4 (staff-uploaded, dark archive)]. Mr. Wegman's focus was not on the substance of judicial decision making but on the failures of Justices Thomas and Alito to report substantial gifts and avoid the expression of "nakedly partisan opinions" outside of court, but the idea that "the nation needs a court that can be trusted to be fair, a court whose justices have the capacity for shame," is still resonant for evaluating California's gambit. *Id.* On May 29, 2024, Justice Alito announced that he would not recuse himself from two cases arising out of the January 6, 2021, attack on the nation's capital, in spite of the fact that flags had been displayed at his homes that appeared to express support for the "Stop the Steal" movement. *See* Adam Liptak, *Alito Refuses Calls for Recusal Over Display of Provocative Flags*, N.Y. TIMES (May 29, 2024), https://www.nytimes.com/2024/05/29/us/alito-supreme-court-recusal-flag.html [https://perma.cc/AD8L-5ZX5 (staff-uploaded, dark archive)].

341. *See, e.g.*, Fallon, *Selective Originalism*, *supra* note 317, at 223–36; Eric J. Segall & Christopher Jon Sprigman, *Reducing the Power of the Supreme Court: Neither Liberal nor Conservative but Necessary (and Possible)*, N.Y.U. J. LEGIS. & PUB. POL'Y QUORUM (2020); Nikolas Bowie & Daphna Renan, *The*

trusted by the public to protect individual rights and guarantee racial equality is undergoing a profound transformation.[342] If the Justices arrive at different outcomes on procedurally identical court-obstruction regimes due to their varying levels of sympathy for the rights being burdened, then it seems that we should know about it, and that we might value the messengers who brought it to light.

Treating this as a benefit does not alleviate the need to weigh it against the costs of legitimatization and proliferation, not to mention the court-access burdens placed on California's gun rights advocates; it merely serves to flesh out further the wide array of considerations that go into a normative assessment of California's experiment, and to suggest that the discussion here is better thought of as an introduction to an undertaking that will require additional exposition. This assessment is full of uncertainty and may not be susceptible to a definitive conclusion even with subsequent study. But what Part III suggests is that we could potentially establish a theoretical basis for states to attempt to exert leverage over other actors in the system if we have sufficient confidence that the benefits outweigh the costs. In this posture, we could consider whether there are variations that could have been deployed more effectively. While such a redesign will have to await further iterations of this project, this installment illustrates the complexity and importance of the questions given the nature of interstate relationships in an era that speaks of battlefields as much as laboratories.

CONCLUSION

California suspended access-to-court values in an effort to preserve them. One might very well resist the proposition as an inherent contradiction in terms, but the history unearthed here requires us to grapple with this uncomfortable paradox. In repurposing S.B. 8's "flawed logic," California replicated the constitutional error of the original but did so in order to pursue an incontrovertibly different set of objectives, one that would shed light on the threat to our system that S.B. 8 poses.[343] The legislative debate, the dialogue

Supreme Court Is Not Supposed To Have This Much Power, ATLANTIC (June 8, 2022), https://www.theatlantic.com/ideas/archive/2022/06/supreme-court-power-overrule-congress/661212/ [https://perma.cc/S5RW-X92Z].

342. Katy Lin & Carroll Doherty, *Favorable Views of Supreme Court Fall to Historic Low*, PEW RSCH. CTR. (July 21, 2023), https://www.pewresearch.org/short-reads/2023/07/21/favorable-views-of-supreme-court-fall-to-historic-low/ [https://perma.cc/ZX5K-GK2R].

343. *Legislation Sponsored by Governor Newsom*, *supra* note 137 ("Legislation sponsored by Governor Newsom to hold the gun industry accountable and strengthen protections moves forward."); Scott

with the public, and the self-destruct provision examined in this Article reveal that California's purpose was to ensure that all states—regardless of their ideological alignment with the current Court on highly polarizing subjects like abortion and guns—share responsibility for preserving access-to-court norms.

There is ample room for disagreement about whether California's self-appointment as a constitutional norm enforcer is consistent with any defensible view of the way state governments should function in our federalist system. We can continue to debate whether California may credibly claim some kind of role-differentiated justification for enacting something that its architects knew should be struck down. And we might just critique the move on the grounds of cost-benefit analysis, fearful that the risks of further legitimizing court-obstruction regimes will outweigh any realistic prospect of success.

But the history explored here shows that California's gambit cannot simply be treated as the ideological mirror image of the scheme that Texas pioneered.[344] A truly equivalent counterattack would lie in California forging ahead to enact its favored bounty hunter regime without committing to be bound by the fate of any other state's law—after all, that is what Texas did. Instead, California used an unprecedented mechanism to contain the reach of its incursion on the court-access rights of gun advocates.[345] Just as the bill's authors had repeatedly insisted that "if Texas can do this, so can we,"[346] the self-destruct provision assures that California will not deploy any weapons deemed off-limits to Texas.[347] It turns a simple game of one-upmanship into a complex and iterative strategy designed to promote parity in the preservation of constitutional norms.

It remains to be seen whether the strategy will succeed on its own terms as a means of holding the Court to account, under any of the plausible conceptions of success one could apply. As of this writing, just over a year and a half after the effective date of the enactment, the attorney fee provisions in California law have been permanently enjoined.[348] The State has decided not to appeal the decision and has paid over half a million dollars in attorney's fees to lawyers and law firms that specialize in challenging California's gun

Steepleton, *Candidate Pens Law Allowing Gun Lawsuits*, ACORN (Aug. 5, 2022), https://www.theacorn.com/articles/candidate-pens-law-allowing-gun-lawsuits/ [https://perma.cc/6LZU-8HPP].

344. *See supra* Part II.

345. *See supra* Section I.D.

346. *See supra* notes 145–46, 154–55 and accompanying text.

347. Act of July 22, 2022, ch. 146, § 1, 2022 Cal. Stat. 3551, 3562 (codified at CAL. BUS. & PROF. CODE § 22949.71).

348. Miller v. Bonta, 646 F. Supp. 3d 1218, 1222 (S.D. Cal. 2022).

regulation,[349] but the private enforcement mechanism is still operative.[350] The Texan original, albeit the subject of ongoing litigation in both state and federal courts, continues to be operative in every respect.[351] Meanwhile, copy-cat legislation continues to be enacted across a wide array of controversial matters.[352]

In a separate strand of litigation, California's assault weapons ban—enforceable by state officials and on the books since 1989—is looking vulnerable.[353] It was enjoined by Judge Benitez in June 2021, but the Ninth Circuit vacated the judgment and remanded the case "for further proceedings consistent with the United States Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*."[354] If the Supreme Court ends up invalidating

349. *See* Stipulation and Joint Request for Order Regarding the Parties' Settlement of Plaintiffs' Claims for Attorney's Fees and Costs, *supra* note 233, at 2–3.

350. Adin Johnson, *New Law Allows People To Sue Gun Manufacturers*, PHILBROOK L. (Feb. 14, 2023), https://www.philbrook-law.com/blog/new-law-allows-people-to-sue-gun-manufacturers/ [https://perma.cc/PR6M-2VHH] (inviting prospective clients who wish to bring suit under the law).

351. *See* Fund Tex. Choice v. Deski, No. 1:22-CV-859-RP, 2023 WL 8856052, at *13 (W.D. Tex. Dec. 21, 2023) (refusing to dismiss claims against S.B. 8 defendants on venue and improper joinder grounds, and allowing limited discovery to proceed on subject matter jurisdiction). Numerous state court lawsuits are currently pending. One group of fourteen challenges was consolidated and transferred to multi-district litigation court, which denied the defendants' motion to dismiss. Tex. Right to Life v. Van Stean, No. 03-21-00650-CV, 2023 WL 3687408, at *2 (Tex. App. May 26, 2023). The defendants filed an interlocutory appeal which was rejected by the court of appeals and is currently pending before the Texas Supreme Court as of October 2024. *See* Tex. Right to Life v. Van Stean, No. 23-0468 (Tex. *petition for review filed* June 21, 2023). A separate strand of litigation was initiated when two anti-abortion activists, represented by Jonathan Mitchell (the architect of S.B. 8), sought to depose the directors of two reproductive rights organizations to investigate whether they had assisted in violations of S.B. 8. Tex. Equal Access Fund v. Maxwell, No. 02-22-00347-CV, 2024 WL 853320, at *1 (Tex. App. Feb. 29, 2024). Those organizations responded with a range of objections to S.B. 8 and filed a separate suit seeking declaratory and injunctive relief against the Act. *Id.* The trial court dismissed the organizations' declaratory judgment petition and the appellate court affirmed. *Id.* at 19. The organizations filed a petition for review in the Texas Supreme Court on May 15, 2024. *See* Tex. Equal Access Fund v. Maxwell, No. 02-22-00347-CV (Tex. *petition for review filed* May 15, 2024). Litigation also continues in state court over the scope of the medical emergency exception in all of the Texas statutes banning abortion, including S.B. 8. *See* Texas v. Zurawski, No. 23-0629, 2023 WL 8360124 (Tex. 2023). In *Texas v. Zurawski*, oral argument before the Texas Supreme Court took place on November 28, 2023. *See* Transcript of Oral Argument, Texas v. Zurawski, No. 23-0629, 2023 WL 8360124 (Tex. 2023). Post-argument briefing continued through late February 2024, with no ruling yet as of October 2024. *See, e.g.*, Brief for Charlotte Lozier Inst. & All. for Hippocratic Med. as Amicus Curiae Supporting Defendant-Appellant, Texas v. Zurawski, No. 23-0629 (Tex. 2023), https://search.txcourts.gov/Case.aspx?cn=23-0629&coa=cossup [https://perma.cc/HCU3-NKUN].

352. Michaels & Noll, *supra* note 241, at 1211–13.

353. For an overview of California's longstanding assault weapons ban and the extensive litigation to which it has been subject, see Halbrook, *supra* note 319.

354. Miller v. Bonta, No. 21-55608, 2022 WL 3095986, at *1 (9th Cir. Aug. 1, 2022). On remand Judge Benitez again found the ban to violate the Second Amendment and issued a permanent

California's assault weapons ban, and S.B. 1327's private enforcement mechanisms stay on the books, it would result in an interesting variant on what Texas did in the summer of 2021.[355] California would then have a bounty hunter regime in direct violation of governing Supreme Court precedent, with a private enforcement mechanism evading judicial review.[356] Should the private enforcement mechanism then be subject to litigation in the way that S.B. 8 was challenged in the fall of 2021, it would indeed be revealing to see how the Supreme Court handles it.

There's no guarantee that the Court will be even-handed in its treatment of S.B. 1327. Some commentators are confident that the Court will have little difficulty responding differently to S.B. 1327 than it did to S.B. 8.[357] Khiara Bridges, for example, sees this as the most likely outcome, noting that the current Supreme Court majority is comprised of justices who "like gun rights and don't like abortion rights. . . . They're willing to disregard some precedent while venerating other precedent. I have no doubt whatsoever that the Supreme Court will find some bizarre, disingenuous argument to distinguish gun rights from abortion rights."[358] Or the Court might give S.B. 1327 a pass as well, confirming the ACLU's fears about a downward spiral that "eviscerates basic

injunction. *See* Miller v. Bonta, No. 19-CV-01537, 2023 WL 6929336, at *39 (S.D. Cal. Oct. 19, 2023). The injunction has been stayed pending appeal. *See* Miller v. Bonta, No. 23-2979, 2023 WL 11229998, at *1 (9th Cir. Oct. 28, 2023). Oral argument before the Ninth Circuit took place January 24, 2024. *See* U.S. Ct. App. Ninth Cir., *23-2979 Miller, et al. v. Bonta, et al.*, YOUTUBE, at 00:06 (Jan. 24, 2024), https://www.youtube.com/watch?v=0GoF58OR07Y [https://perma.cc/2TF8-YE4H] (on file with the North Carolina Law Review). For a similar journey up and down the federal courts with regards to California's ban on large capacity magazines, see Duncan v. Bonta, 83 F.4th 803 (9th Cir. 2023).

355. *See, e.g.*, Rhodes & Wasserman, *Defensive Litigation*, *supra* note 41, at 189–90 ("[S.B. 8] is clearly constitutionally invalid under the Supreme Court's prevailing reproductive-freedom jurisprudence, . . . [and] this is not a close constitutional question as a matter of judicial precedent.").

356. The bill analysis in fact specifies that by duplicating rather than cross-referencing the definitions of prohibited weapons in existing law, the drafters intended that S.B. 1327's application would stay constant even if the criminally-enforced prohibitions were invalidated as a violation of the Second Amendment. S. JUDICIARY COMM. BILL ANALYSIS, note 23, at 13.

357. As a twist on this, one of the sponsors of S.B. 8 predicts that S.B. 1327 will not stymie judicial review because gun owners will be willing to violate the law, confident that the Court would invalidate any penalty imposed upon them:

> I would tell Gov. Newsom good luck with that. . . . If California takes that route, they'll find that California gun owners will violate the law knowing that they'll be sued and knowing that the Supreme Court has their back because the right to keep and bear arms is clearly in the Constitution, and the courts have clearly and consistently upheld it.

See Svitek et al., *supra* note 323.

358. Liam Dillon, *In Response to Texas Abortion Ban, Newsom Calls for Similar Restrictions on Assault Weapons*, L.A. TIMES (Dec. 11, 2021, 11:02 PM), https://www.latimes.com/california/story/2021-12-11/in-response-to-texas-abortion-law-newsom-calls-for-legislation-to-restrict-assault-weapons [https://perma.cc/XK7C-X85F].

principles of constitutional government."[359] Regardless of how it turns out, there is something transformative about the fact that the Court will have been brought to the decision by California's experiment, and that it will render its ruling in full view of a public poised to scrutinize its consistency across favored and disfavored rights.[360]

Richard Fallon has proposed that the best concept of the rule of law would "insist that the courts—as much as other official decision-makers—must inhabit a network of accountability relationships in which their judgments are examinable, and in some cases resistible, by other officials."[361] By reminding the Court that even in its supremacy it is embedded in a "network of accountability relationships," California is conducting a rule of law experiment worthy of our sustained attention.

359. Letter from Kevin G. Baker, *supra* note 220.

360. *See* Gerken, *Foreword: Federalism*, *supra* note 283, at 9, 71 (lauding "the integrative role that discord and division can play in a well-functioning democracy" and asserting that "[w]e should be more comfortable with division, debate, and deliberative froth").

361. Fallon, *Judicial Supremacy*, *supra* note 321, at 514–15.

APPENDIX: FIFTY-STATE SURVEY METHODOLOGY

Current and historical statutory texts for all fifty states were considered for inclusion within the survey. The survey proceeded in three major phases: (1) searching Westlaw for current state laws that mention another state by name and address the mutual validity, repeal, or operational status of the two states' laws; (2) searching Westlaw's databases of historical bills for changes to statutes to assess whether prior versions of state laws linked their validity to the status of a law in another state; (3) searching HeinOnline for historical state laws that mention another state by name and concern the mutual validity, repeal, or operational status of the two states' laws. In the following sections, "the coder" refers to the person conducting the research and data entry. Coders were either the author of this Article, a research librarian, or a research assistant.

1. Searching Westlaw for Current State Laws. To begin the search, coders would select the "State materials" section from Westlaw's home page and then select their assigned state. Then they would click the "Statutes and Court Rules" option for their specific state. Within this category, the coder would then select the "Advanced Search" function on Westlaw. Next, the coder would run five different searches under the "Statutory Text (TE)" field, comprised of state names along with various terms and connectors likely to yield statutes whose validity was linked in some way to another state's law.

For each search, the terms and connectors sequence was paired with a list of the forty-nine other states linked by the "OR" connector, with the assigned state itself being excluded to reduce the number of irrelevant results. Each sequence was searched separately from the other four and searched in the following order:

(1) ("shall be repealed" OR "is repealed") AND (code OR statute);

(2) (code OR statute) /s (repealed OR invalidated OR unconstitutional);

(3) ("shall become inoperative" OR (rendered /s (inoperative OR invalid OR unconstitutional))) AND (code OR statute);

(4) (repeal OR invalidat! OR (rule! /2 unconstitutional) OR (violat! /s constitut!));

(5) "has in force similar" /s (statute OR legislation).

2. Searching Westlaw for Historical State Laws. To begin this search, coders would select the "State materials" section from Westlaw's home page and then select their assigned state. Coders would then select the "Proposed and Enacted Legislation" category for their specific state. Within that category,

coders would select their state's "Historical Session Laws" under the "Tools & Resources" toolbar. The coder would then click the ⓘ icon next to the prompt stating "Click Scope icon for coverage information" and then record the earliest listed year in the project's Excel tracking sheet under the column "Earliest Year Covered."

Next, the coder would copy search term sequences into the "Text (TE)" box under Westlaw's Advanced Search function. Each sequence was paired with a list of the forty-nine other states linked by the "OR" connector, with the assigned state itself being excluded to reduce the number of irrelevant results. Each sequence was searched separately from the other four and searched in the following order:

(1) ("shall be repealed" OR "is repealed") AND (code OR statute);

(2) (code OR statute) /s (repealed OR invalidated OR unconstitutional);

(3) ("shall become inoperative" OR (rendered /s (inoperative OR invalid OR unconstitutional))) AND (code OR statute);

(4) (repeal OR invalidat! OR (rule! /2 unconstitutional) OR (violat! /s constitut!));

(5) "has in force similar" /s (statute OR legislation).

3. Searching HeinOnline for Historical State Laws. To begin this phase, coders would check the Bluebook to see how their assigned state titles its recorded statutes and how the state abbreviates its statutes. For example, Colorado titles its statutes as "Colorado Revised Statutes" and abbreviates them as "Colo. Rev. Stat." Coders would make note of these titles and change their searches to correspond with their specific state's naming conventions.

In the main search bar, coders would then search the following terms tailored to their state's statutory naming conventions:

(1) "repealed <statute or code> <state>"~30;

(2) "repealed <statute abbreviation>"~30;

(3) "repeals <statute or code> <state>"~30;

(4) "repeals <statute abbreviation>"~30;

(5) "repeal <statute or code> <state>"~30;

(6) "repeal <statute abbreviation>"~30;

(7) "unconstitutional <statute or code> <state>"~30;

(8) "unconstitutional <statute abbreviation>"~30.

For example, the first two searches for Colorado would look like the following: (1) "repealed statute colorado"~30 and (2) "repealed colo rev stat"~30.

Next, coders would filter for all states except for their assigned state. To do this, coders would select "Filter > State Published > Select All" and then would manually deselect their assigned state.

After each of the searches, the coder would look through every hit and determine if the legislation contained provisions that were reliant on other states. Upon determining that such a provision existed, coders would categorize their findings in the results Excel spreadsheet under either "Perfect Hits" or "Close/Maybe Hits." For a result to qualify for the "Perfect Hits" category, the target state must have passed a statute that had its validity explicitly tied to another state's law. For the "Close/Maybe Hits" category, coders would use their discretion to decide if a statute was closely related to the target search. For both categories, coders would include a link to the statute at issue. If the coder found something interesting, but not closely related to the target search, such information could be recorded in a separate column titled "Interesting Otherwise." A "Notes" column was also included and allowed coders to note anything else of significance.

Section I.D of the Article, where the survey results are reported, includes discussion of several laws that did not appear as hits in any of these searches because they do not mention another state by name: the food labeling regime adopted by Connecticut, see note 109 and accompanying text, and the retaliatory taxation schemes imposed by many states on out-of-state insurers, see notes 102–07 and accompanying text. Although these laws are outside of the search parameters because they do not specify another state by name in the manner of California's self-destruct clause, they were included to provide additional context on the varieties of interstate linkage that appeared in state law prior to S.B. 1327.