

A Lone Star and The City on The Hill: Exception and the health of democracy in U.S. state politics

Emma Crewe and Daniel Scott Souleles

Abstract

Elected politicians in Texas and Massachusetts would likely accept the premise that their states are exceptional, positive examples of the U.S. experiment in democratic self-governance. After all, politicians in both states have been known to selectively draw on history, ideals, and contemporary comparisons to the rest of the United States (as well as the U.S. Federal government) to explain just how great their states are. Despite common claims to both exception and nearly identical governing institutions at the same time, Texas and Massachusetts have different legislative and political cultures which produce dramatically different laws and societies, particularly around issues of reproductive rights and bodily autonomy. This article compares examples from the legislative process and legislative outcomes in Massachusetts and Texas to illustrate the routine way in which democracy can drift away from the ideals of equal participation of all members of the body politic. However, whether or not they are contributing to healthy democracy nationally or statewise should not be measured by one criteria alone: say, whether their legislative process is well-informed or public engagement is inclusive or rights are protected for all or they are having a beneficial influence on other states, but rather a combination of these and probably many others. There is another sense in which these two legislatures are connected. Specifically, state legislatures in the U.S., due to the particularities of the U.S. federal system, are extremely potent actors in setting the national political agenda and governing the lives of people in the U.S. In this article we contrast political cultures in two state legislatures, and explore the influence they have on each other, as part of an ethnographic approach that tends to get neglected in US parliamentary studies.

Key Words: United States, Texas, Massachusetts, Reproductive Rights, Trans Rights, Legislative Process, Democracy

Democracy remains the only political form that is both generative of a people's care for the common and makes power accountable...it makes humans responsible to and for the world. Therefore [democracy] is not optional.¹

Why is democracy so hard?

In 2022 and 2023 the authors found themselves in an unusual circumstance: we were both doing field-based ethnographic projects on the health of democracy in state legislatures in the United States. Specifically: Crewe was following the Texas Legislature; Souleles was studying the Massachusetts Legislature; and both Texas and Massachusetts legislatures were passing laws about reproductive health care and trans-rights, often *in response to one another*, allowing for lateral comparison of what works well and what works poorly in the democratic processes in both states.

Part of what makes our experience as researchers so unusual is two-fold: first, as is well-known, parliamentary and legislative studies have a bias towards survey-based research such that anything that looks qualitative, much less immersive, ethnographic, cultural, or, anthropological is still relatively unusual.² Second, while there is actually a fair amount of research on state legislatures in the United States, what exists, again, tends to be dominated by political scientists or policy researchers, and tends to be deductive, rationalizing, or variable-testing.³ Obviously, this research has its place, but any time one becomes curious about cultures, or norms, or history, it is often marginally helpful.

That said, though, there is excellent feminist⁴, journalistic⁵ and historical,⁶ literature on U.S. state-level legislative politics. Also, when researchers do have occasion to work ethnographically, the results are often incredibly nuanced as in Alvord's analysis of the small business revolt *against* tax-cuts in Kansas.⁷ To our knowledge, even in this feminist, journalistic, and historical archive, or on the occasions when researchers on U.S. state-level politics do work ethnographically, there is not much directly comparative, nor is there much work that uses the situation of present-day U.S. state-level politics to think about democracy more generally.

On the face of it, Texas and Massachusetts have identical political institutions. They are both states, two among 50 in the U.S.'s federal, republican system. What this means is that both Massachusetts and Texas have a three-branch system of government, in which the judiciary, the executive, and the legislature are all separate and notionally co-equal branches of government. Moreover, both Massachusetts and Texas have a bicameral legislature, with a Senate and a House of Representatives that must agree on all legislation before sending it on to the governor for final approval or veto. Both states also exist in a two-party, winner-take-all electoral system based on geographical-cum-population-specific, single-member electoral districts. Both states are also dominated by one or the other of the U.S.'s two main political parties (Democrats in Massachusetts, Republicans in Texas). While there are some differences in the size of electoral districts, as well as the tenure of legislators (Texas has a part-time legislature, Massachusetts a full-time), the institutional similarities are overwhelming, particularly in light of how differently each state actually legislates.

Recently in an essay in memory of Erik Olin Wright, Wendy Brown has sought to answer the question, "Why is Democracy so Hard?"⁸ When Brown says democracy, she seems to suggest a sort of government that reflects the broad-based will of the people and that is premised on some grounding level of egalitarian dignity and capacity among its members as well as an open and civically virtuous culture. What makes this sort of government so hard is how actively people have to work towards the many features of society that allow democracy to happen. Democracy requires an active, constant and ultimately irresolvable struggle over fundamental values between and among the people and a political culture that consists of well-informed, materially-provisioned, and civically-virtuous citizens. Democracy also has a number of habits that seem to undermine its successful operation, namely: democracy is bad at self-denial, bad at operating at scale, bad at dealing with complexity (particularly representative democracy), bad at taking care of beings outside of the political community (such as animals), and is bad at reigning in tyrannical majoritarian impulses. Degradation in any one of these conditions or the accentuation of any one of these bad habits can lead democracy to break down and slide into various sorts of autocracy and unaccountably centralized power. To Brown's point, and given all that has to go right for democracy to work, it would appear that autocracy is in fact much easier than democracy.

We (the authors) value democracy and seek to strengthen the institutions that allow for self-governance. As such, we suggest that a comparative analysis of how Massachusetts and Texas legislated on reproductive and trans-rights in response to one another illustrates just how variously two institutionally identical political systems can operate as well as how certain pathologies of democracy can fester. In Texas's case, and to its credit, there is a broad, grass-roots policy development process in which it is relatively straightforward to connect the will of the people to legislative outcomes. However, in the cases that we discuss, these outcomes are instances of majoritarian intolerance regarding the basic human rights and dignity of many Texans that are not necessarily supported by the majority of the population. Massachusetts, by contrast has evolved a centralized and opaque legislative process in which it is relatively difficult to understand when or why something happens, and who supports it. However, somewhat paradoxically, this process both seems to represent the will of the majority of the Massachusetts residents in general, and to protect the rights of minority Bay-Staters in particular.

Ultimately, we suggest that one can only tend to democracy's wounds and strengthen its institutions through close comparative analysis of its daily operation. More to the point, and following Wendy Brown, we observe that democracy degrades when elected politicians choose expediency over civic virtue. In the Massachusetts's case, this is illustrated by legislators ceding authority and power to leadership; and in Texas's case this is illustrated by politicians ceding authority to influential activists using the legislature to further an extremist religious agenda. Before we can turn to these democratic processes, though, we should offer some historical context to what Massachusetts and Texas were considering when we were doing our field work in the first place. Put another way, this means that we have to talk about gender and civil rights in the United States.

What should we think of women's bodies? Or, some notes on the cosmology of gender

The situation for reproductive and gender affirming care in the United States, in the Spring and Summer of 2022 was perilous. In September of 2021, the State of Texas had passed a six week ban on abortions and chose to enforce it with "bounty" style legislation. At the time of the Texas bill's passage, abortion was still legal due to a 50-year-old supreme court precedent (*Roe v. Wade*, or just "Roe") that would later be overturned. Given this, Texas figured it couldn't have employees

of the state enforce its ban and needed to circumvent court scrutiny. To do this, Texas created a civil action allowing normal citizens the ability to sue people who facilitate an abortion for Texans past the sixth week of pregnancy. The bounty could potentially reach US\$10,000 per abortion abetted. Despite having the practical effect of denying a constitutional right guaranteed to Americans for 50 years, the Supreme Court of the United States allowed this Texas law to stand.⁹

While the U.S. federal system allows for considerable variation in the legal regimes of the several U.S. states, it's nearly unprecedented to have one state coercively reach into another state as Texas sought to do with its abortion bounty law. In fact, one would have to go back to the fight over slavery and the status of African Americans prior to the U.S. civil war for even a somewhat analogous, inter-state struggle over basic rights. In the lead up to the Civil War, the U.S. Congress passed the fugitive slave act as part of the Compromise of 1850 which required state and local officials to aid in the capture and return of escaped slaves, regardless of the legality of slavery in a given state. Similarly, in 1854 the U.S. Supreme Court issued the "Dred Scott v. Sanford" decision which held that descendants of those imported to the U.S. as slaves could not be U.S. citizens and could not enjoy any of the rights and privileges of U.S. citizens, regardless of whether one or one's ancestors were freed from slavery. Moreover, Dred Scott v. Sanford held that slaves were property, that no government official at any level in the U.S. could deprive others of such property, and that all government officials must aid in returning such property as required by the fugitive slave act. The combination of the moral abomination of slavery, federally sanctioned inter-state rights-stripping, and the coercive enforcement of the fugitive slave act led to a civil war in which upwards of 600,000 people died (roughly two percent of the U.S. population). The aftermath of the Civil War also led to the passage of the 13th, 14th, and 15th amendments to the U.S. constitution which collectively did away with the legal regime which allowed for slavery.¹⁰

While we don't necessarily feel the U.S. is on the verge of another civil war, we think it is helpful to point to what precedent we can identify of conflict between the states over the guarantee of basic rights. It's useful to see both the potential for such explosive conflicts in a federal context, as well as to see how such conflicts might play out. In any event, we do feel that our comparison to the period around the U.S. Civil War does illustrate the political potency that questions of basic rights have in a democracy.

In May 2022, the news outlet *Politico* published a draft opinion from the U.S. Supreme Court which would annul the right to an abortion, setting aside 50 years of precedent and advancing a reactionary standard for ascertaining the rights of Americans.¹¹ This Court would in fact issue this opinion, largely unchanged, on 24 June 2022 as *Dobbs v. Jackson Women’s Health Organization*, or just “Dobbs” (No. 19-1392). In this opinion, Justice Alito, arguing for the majority of the court stated that there is no right to abortion in the constitution. Moreover, as Justice Thomas echoed and explained in an opinion dramatically expanding American rights to guns (*New York State Rifle and Pistol Association Inc v. Bruen*, or just “Bruen” No. 20-843) the correct standard for determining the rights of Americans was to survey the country and see what rights obtained at the Nation’s founding or passage of relevant portions of the Constitution. It’s no surprise, then that Justices Alito and Thomas would find an absence of reproductive justice at the Nation’s Founding as women were still generally considered men’s property under the principle of coverture. To justify his “historical” or “traditional” argument, in fact, Justice Alito cites an English jurist, Matthew Hale (1609-1676), who, among other distinctions, presided over a witchcraft trial in which two were sentenced to death and who argued in favor of marital rape.¹²

Along with such reactionary hostility to women’s reproductive freedom, numerous Republican politicians across the U.S. were hyping a panic around transgender people, claiming that gender affirming care was tantamount to child abuse. In service to this panic, a number of laws were cropping up across the country outlawing gender affirming care for children, and allowing more general hostility to trans people by introducing various forms of discrimination and surveillance. Judith Butler has suggested that present-day reproductive rights-stripping and panics around the legal status of transgender people might be taken together as a larger, global moral panic around “gender” writ large.¹³ In this telling, worries about gender are often contradictory amalgams of the place of women in society, the relative fluidity or stability of gender and sexual categories, as well as misplaced fears of pedophilia and other forms of sexual violence. Too, Butler sees these contradictory amalgams as misdirected phantasmic proxies for other “real” threats to human life such as environmental degradation and the spread of toxins and pollutants or the increasing difficulty of making a living under neoliberal capitalism, which many elites are perfectly happy to either ignore or exacerbate. More to the point, Butler suggests that gender panics seem to allow for

a fascist political imaginary of rights-stripping, eliminationist policies, and self-righteous moral sadism, and allow for the erosion of democracy by autocratic political entrepreneurs, as seen in Russia, Hungary, as well as various U.S. states.

Given the tenor of public debate in the U.S., and nationwide fascination with these issues, Crewe saw something of this in how these ‘culture wars’ played out in Texas.¹⁴ Arguably various threads of these gender panics underly this political moment and create a web across the whole of the U.S., and although extremist vs moderate expressions of it are uneven across states and within them, and articulations are inconstant and shift depending upon the immediate audience, nonetheless one must understand this larger political context before inquiring into lawmaking about gender.

When they play out legislatively, arguments about gender have to do with the basic features of social life, what is acceptable and beyond the pale, and who counts as a person. By pointing to these basic values and prerequisites for social life we mean to point towards something that has to do with some of the essential building blocks for forging a society. Arguments about gender and when life starts, are fundamental disagreements about who gets to be a respected member the body politic, about who gets treated with dignity in the United States, and people act accordingly, in conflict not only about the answers to these questions but who has the power to decide. When Wendy Brown talks about politics as, “a realm of value conflict,”¹⁵ we presume that these are the sort of fundamental, irreconcilable values she has in mind. The conclusions of such politics determine the basic conditions of social life: which bodies can go where? Who is to survive or die? Who has to leave their home if that home is in a state like Texas or Florida? For the political right, bodies out of place – women, transgender people, migrants – and sinful ideas as social contagion – “cultural Marxism,” critical race theory, feminism, gender transition, homosexuality – need to be erased, and countered with all-encompassing entities beyond the individual such as the family, God, and a moral, Christian State¹⁶. The other side promotes equality and tolerance of ambiguity and, as Judith Butler puts it, that everyone is equally grievable.¹⁷ When one thinks about abortion or access to gender affirming medical care, if you try and accommodate both sides, this wasn’t a battle between good and evil so much as an even broader conflict of values about which kind of bodies should survive in what space. Each side sees each other as a form of social contagion, and politicians inevitably get caught up in these painful battles over worldview.

Taken together, and returning to Massachusetts, while looking south and west to the Gulf of Mexico, it seemed there was a climate of fear and worry among people who valued women's reproductive freedom and autonomy and among those who cared about the lives of trans people. What should a progressive state like Massachusetts do in response to such a basic threat to its very way of life?

What to do about Bounty Hunters and a Hostile Judiciary?: Massachusetts and an exceptional response

To understand the response in Massachusetts, we need to explain how politics was constituted at the time of Souleles's field work.¹⁸ First, Democrats held overwhelming majorities in both houses of the legislature. Second, most legislation tends to languish in committees never to pass in Massachusetts. That legislation that does pass always often involves the direct blessing of House or Senate leadership, private negotiations, and a suspension of the rules of normal legislative procedures. It was often cited to Souleles that something like 6,000 bills is filed in Massachusetts every year, and perhaps 10 percent of them become law. Moreover, Souleles also heard the folk wisdom that if a bill was going to pass it often took six years, meaning three legislative sessions, to pass.

Along with these bare statistics, leadership in the Massachusetts House of Representatives and the Senate has both centralized and drifted towards insular secrecy. This is reflected in the state of "debate" in both chambers. As a rule of thumb little substantive debate happens in the chamber and most votes are either unanimous roll call votes, or non-tabulated voice votes. Over the last few decades, too, there has been a gradual decrease in even these sorts of pro forma votes. What tends to happen, by contrast, is leadership decides on a legislative agenda ahead of time, then whatever discussion remains happens in private legislative caucuses, and whatever emerges to see the light of day in public formal session is often a retrospective consecration of private deliberation. The upshot of all of this is that it is extremely difficult to know why something passes when it does, and whether or not a given senator or representative supports or opposes a given piece of legislation.

Setting aside these political mechanics, one-way ruling democrats in Massachusetts distinguish themselves and align themselves with the will of their voters is by committing to the protection and expansion of bodily autonomy, reproductive freedom, and civil rights. Relatively little of state-level political activity breaks into the news or broader public awareness; these issues, though are guaranteed to do so. And given these value commitments on the part of politicians, a certain climate of fear and sense of urgency was likely unavoidable in the Massachusetts legislature. So, the Senate was first to act.

In the course of the budget debate, a member of leadership, Senator Cindy Friedman proposed Amendment 388, which she explained as follows, and which we quote at length because she reveals so much¹⁹:

Thank you, Madam President, and through you to the members. I rise in support of Amendment 388.

As you are aware, over the past several months, events have taken place across the county that have put access to reproductive and gender-affirming health care at risk. A significant number of states have or are seeking to limit access to, or altogether ban, reproductive and gender-affirming health care services and there is evidence that a decision by the United State Supreme Court will further threaten access to reproductive health care.

What is most concerning at this moment and which has created a sense of urgency is that some states are beginning to pass laws that seek to limit this critical care beyond their state borders. They are passing “bounty-style” provisions that allow a resident of a state – for example a resident of Texas or Oklahoma, where reproductive care is severely limited – to bring a civil suit or private right of action against someone in our state who provides, aids, or abets a resident of Texas or Oklahoma in receiving such care in Massachusetts, where that care is legal. And where such care – both reproductive and gender-affirming health care – has been embraced through our public policy, statutes, and ballot initiatives.

We are now faced with a situation where another state – through state laws enacted by their legislature – is threatening the rights of law-abiding residents in our Commonwealth for engaging in activities that are legal under our laws and were enacted

by our duly elected legislature here in Massachusetts. This is an egregious and direct attack on a state's ability to make their own laws and protect their own residents.

Amendment 388 seeks to block these extraterritorial laws from interfering with legally protected health care activity in Massachusetts. The amendment, to the extent possible, protects those who provide and assist in providing reproductive and gender affirming health care services, along with patients who are seeking such critical care in the Commonwealth. It also ensures that Massachusetts – and its laws, regulations, agencies, and institutions – do not assist in the enforcement of draconian laws passed by other states that attempt to regulate healthcare services that are, again, legal in Massachusetts.

It is helpful to know that the budget is often a vehicle for policy changes in Massachusetts, given how hard it is to pass general pieces of legislation. For any other sort of bill, amendments must be germane to the subject of the bill they are seeking to change; not so for the budget. Budget amendments can be on *any* topic. This is part of why legislators propose hundreds of amendments. More to the point, passing policy changes in this way also allows one to skip the legislative hearing and committee process and multiple legislative sessions that most normal bills are meant to move through. This is particularly useful to know if one wants to get something done quickly and/or with relatively little scrutiny in Massachusetts. As one might expect, too, amendments only make it to the floor, much less pass with the blessing of leadership, of which, again, Senator Friedman is a member. With these preliminaries out of the way, we can start to attend to the specifics of what Senator Friedman is up to and how she understands her actions.

To start, Senator Friedman seeks to outline where a “sense of urgency” around Reproductive Care is coming from. Massachusetts itself had enshrined strong protections for reproductive freedom into law (over a governor's veto) in 2020 in response to the conservative drift of the U.S. Supreme Court (the “Roe act”²⁰). Now, though, it would seem that other states are seeking to meddle in the prerogative of Massachusetts to offer healthcare to all who come via these extraterritorial bounty provisions. This is an odd wrinkle as it would seem to present an instance where it is unclear what Massachusetts can or should do about other states' laws. Senator Friedman then explains specifically what her amendment would do. Note, the following speech excerpt is fairly detailed. What is worth paying attention to is how systematically she walks through the ways the state both

allows for reproductive and gender affirming care and the ways the state enforces laws and collaborates with other states:

- Directs the Department of Public Health to establish a statewide standing order that authorizes the dispensing of emergency contraception in Massachusetts by any licensed pharmacist;
- Insulates health care providers, including doctors, psychologists, nurses, physician assistants, pharmacists and social workers, from adverse consequences from their licensing boards for providing reproductive or gender-affirming health care, so long as the services as provided would have been lawful and consistent with the standards of professional practice and conduct if they occurred entirely in Massachusetts;
- Prevents Massachusetts law enforcement agencies from providing information or assisting federal or other state law enforcement agencies or private citizens or quasi-law enforcement agents with any investigation or inquiry into services constituting legally protected health care activity in Massachusetts;
- Prevents medical malpractice insurers from discriminating against or adjusting a healthcare provider's risk classification or premium charges as a result of providing reproductive or gender-affirming health care services here in Massachusetts;
- Requires judgment creditors to file an action to enforce a judgment issued in another state concerning legally protected health care activity, rather than simply file a copy of a foreign judgment to have it recognized within Massachusetts;
- Prevents Massachusetts courts from ordering a person within Massachusetts to give testimony or produce documents for use in connection with litigation concerning legally protected health care activity;
- Prevents judges from issuing a summons where pending prosecution concerning legally protected health care activity or where a grand jury investigation concerning legally protected health care activity has commenced or is about to commence for a criminal violation of a law of another state;
- Requires Massachusetts courts, in actions filed to enforce a judgment issued in connection with litigation concerning legally protected health care activity, to not give any force or effect to such judgement if it was issued without jurisdiction;

- Excludes cases brought concerning legally protected health care activity from Massachusetts' anti-SLAPP statute;
- Prevents the governor from extraditing a person to another state who was charged in another state as a result of engaging in this legally protected health care, except where required by federal law; and
- Creates a new cause of action for interference with legally protected health care activities in the Commonwealth through abusive litigation filed or prosecuted in a state other than the Commonwealth. This essentially means that anyone who faces abusive litigation in another state over legally protected reproductive and gender-affirming healthcare services can sue in Massachusetts courts to obtain a judgment of, among other things, damages, including actual damages, expenses, costs and reasonable attorney's fees, against the person who sued them in the other state's court.

It's worth reflecting on the one hand how sweeping the provisions Senator Friedman is laying out are as well as how quickly they'll be adopted as compared to a run of the mill bill which would have to have a public hearing and would likely languish for six years prior to passage. When the politicians (in leadership) meet the moment, things move quickly and decisively. In closing, Senator Friedman explains the scope and limitation of what she is up to:

Now, to be clear, Amendment 388 does not and cannot insulate healthcare providers from criminal civil consequences in other states, nor does it authorize the delivery of health care services that would otherwise be illegal under Massachusetts law.

It is imperative that we as a legislature be proactive and do all we can to protect our citizens who engage in activities that are lawful under our state laws and statutes. Amendment 388 seeks to provide that protection in the realm of health care, and I urge you to support this amendment.

Thank you, Madam President. I hope that the amendment is adopted.

First, Senator Friedman was addressing an ongoing, seemingly ever-changing national political situation in the context of a budget amendment. Not only was it likely that more would happen related to reproductive freedom and trans health before the budget got finished, but this put Senator

Friedman's action in the midst of budget negotiations. Too, the Senate does their budget after the house. So, at this point the Senate could be seen to be taking action that the house did not. Second, there was a bit of uncertainty as to how (Republican) Governor Baker would react to this budgetary provision, given that he vetoed the Roe act of 2020, which the legislature then had to override.

In subsequent weeks, as the session rolled on, the House, on 26 July 2022 (five days before the end of the session) elected to pass its own bill (H5090) echoing much of what Senator Friedman put in her budget amendment. Rep. Michlewitz, the Chair of the Ways and Means Committee had the following to say:²¹

On June 24 the Supreme Court overturned Roe v. Wade, changing the landscape for our nation. I don't think frankly that any of us thought we would really be here dealing with this issue in this way, but here we are. We passed the Roe Act last session. Now we are responding with this bill. Reproductive care means so much more than just abortion. The U.S. Supreme Court has set up a system of care fraught with peril. By relying on states' rights, the Court has left it up to which zip code you live in to determine the level of protection for women's rights and women's health and safety. In contrast to what is happening in other states, we are taking steps to strengthen and expand our support for reproductive health care. We are expanding the definition of when pregnancy termination is allowed to cases of grave diagnoses for the fetus. We are strengthening the doctor-patient relationship. We are doing away with deductibles and copayments for abortion care. We are allowing for both over the counter and prescription medication, and vending machine dispensing of morning after medication. We will not allow anyone from out of state to dictate to us how we will choose to provide care for the women of the commonwealth. I wanted to thank my fellow conferees and counterparts in the Senate. Thank you, Mr. Speaker, for your support in making sure that we get this issue to the governor's desk in the most expeditious manner possible.

Applause sounded from the chamber as the roll call was ordered.

In somewhat abbreviated fashion, Chair Michelwitz is echoing much of what Senator Friedman laid out: the right to abortion and reproductive freedom is under direct attack (the reactionary

faction of the supreme court had struck down Roe at this point); and other states are reaching into Massachusetts seeking to shape what care people in Massachusetts have access to. Too, Chair Michelwitz is offering a significantly expanded law as compared to Senator Friedman's budget amendment. This law, H5090 seeks to answer wider threats.

H5090 is a big piece of legislation. It runs to 31 pages and 619 lines. Ultimately, despite being in the unanswerable veto window and despite having vetoed the Roe act two years prior, Governor Baker enthusiastically signed H5090 into law, saying the following in a press release:

Massachusetts remains steadfast in its commitment to protect access to reproductive health care services, especially in the aftermath of the Supreme Court's decision overturning *Roe v. Wade*," said Governor Charlie Baker. "The Court's decision has major consequences for women across the country who live in states with limited access to these services, and our administration took quick action in the hours following that decision by issuing an Executive Order to protect access here in the Commonwealth. This new legislation signed today builds on that action by protecting patients and providers from legal interference from more restrictive laws in other states. We are grateful for the compromise and dedication to the issue that our legislative colleagues demonstrated to make this important, bipartisan law a reality.²²

Note, too, the Governor Baker claims first mover status by foregrounding *his* executive order which the House and Senate's legislation then built on. The Governor will not miss out on meeting the moment.

Arguably, Massachusetts got to the good outcome. It is protecting the rights of women, as well as those of people seeking gender affirming care in Massachusetts. Massachusetts politicians are turning the bay state into a haven and protecting Massachusetts residents from Texas. However, due to centralization of leadership and a trajectory away from open legislating, it's unclear how exactly these amendments and bills came about, who drafted them, what public commentary there was or was not, and how individual legislators felt about this or that component of them. Rather, leadership passes them rather abruptly and according to its usual "exceptional" process. More to

the point, most legislators are content with this because it allows them to both avoid hard, drawn-out procedural votes, and to coast on the legislative work of leadership and their staffers. Often, Republicans (and occasionally, progressive Democrats) will raise process complaints, but I've never seen these complaints have much consequence except to mark one as a trouble-maker in the eyes of leadership. In short, Massachusetts got to a decent outcome but at the expense of an open democratic culture of governance.

State interference in the family in Texas

Unlike Massachusetts, in Texas there was no secret as to what leadership was up to. In 2022, and as they do every legislative session, the Republican Party in Texas published its 15 top ranked legislative priorities ready for the 88th session, agreed by the Permanent Legislative Priorities Committee to the Convention, chaired by Nathan Macias.²³ Three of these targeted sex or gender: (1) stop sexualizing Texas kids, (2) ban gender modification of children, and (3) save women's sports by banning 'biological' men from competing. A fourth also concerned the family – (4) Parental Rights and Educational Freedom – but emphasized the opposite imperative, i.e., that the state should not interfere:

Parents are the primary decision makers for their children in all matters. This authority shall be protected as an inalienable right. This shall include the choice of schooling where the money follows the child without strings attached, and enforcement and penalty mechanisms when parents' rights are violated. The right to education shall be free from any social theories.

5000 delegates were involved in the selection and articulation of these priorities.²⁴ What is more, these eight priorities were extremely well-publicized across Texas by the Republican party at state and level locals but also by various Ultra Conservative organisations and websites, including Texas Scorecard, Texas Eagle Forum, Texas Values, Defend Texas Liberty, Texas Right to Life, Empower Texans, Texas Public Policy Foundation, Family Policy Alliance, etc, often with philanthropic donations from Texan oil tycoons, as widely reported by the press.²⁵ As Republicans prepared to campaign for these priorities, they produced impressive explanations of the legislative process and lobbied lawmakers.²⁶

In understanding how these priorities took hold in a section of the Republican party, as part of a wider shift towards the right, three aspects of the socio-political economy of Texan democracy played a vital part. First, the campaign in favour of Christian-influenced socially conservative politicians, institutions and policies has received nearly \$100m from oil tycoons and three in particular – Tim Dunn and brothers Farris Wilks and Dan Wilks – according to the Texas Tribune.²⁷ This has enabled Ultra Conservatives to create an extraordinarily efficient political operation of campaigning, winning elections and lobbying across the State. Secondly, this operation has focused strategically on the election of Governor, Lieutenant-Governor, and Attorney General, all state-wide elected incumbents being on the far right of the party, and on election primaries for the legislature, where few voters participate and gerrymandering of the election boundaries has meant that even extremist Republicans can then easily win in the general election. Ultra Conservatives have been winning seats in the House and Senate but also threatening to oust more moderate Republicans (or ‘RINOs’ – Republicans in Name Only, according to the far right) who fail to support their priorities with an ousting in the next primary.²⁸ Thirdly, for decades the Christian-inspired far right has been engaged in a push-back to what they see as the cultural takeover by the left (or “cultural Marxists”) in schools and universities, a negative view of Texan history and a liberal attitude towards immigration. They have been creating ‘moral enclaves’ in schools, as Dilger and Janson²⁹ write about in the context of Nigeria and Tanzania, to shape children in moral citizens, and now using the legislature to further this cause. The consequence of these processes, many years in the making, is that even though far right views in Texas have represented the minority, they have a disproportionately significant influence over state politics. This is clearly seen in the issue of abortion. Despite a recent poll showing that 54% of Texans support abortion with no or minor restrictions, and 71% favour permitting it if caused by rape or incest,³⁰ the state has among the strictest laws in the US.

The regular bi-annual 87th session in 2021 witnessed the passing of the hugely influential ‘Heartbeat bill’ that blocks individuals from seeking an abortion after about six weeks. A trigger law passed in the same year meant that when the US Supreme Court overturned *Roe v. Wade*, making abortion law a matter for the states, the Texas abortion ban could not be challenged. The regular 88th session scarcely touched this subject, even though some moderate Republicans

supported the idea of making exceptions when pregnancy is caused by rape or incest. In 2023 lawmakers from both parties collaborated to pass a bill allowing two exceptions related to pregnancy complications, which they kept intentionally under the radar as it would have been unpopular with many constituents (Republicans because it opened the door to exceptions and Democrats because it did not go far enough), but otherwise abortion received little attention until after the end of the session due to the case of Kate Cox. When she discovered that her fetus had a genetic condition, one that would give a delivered child a short life and painful death, she decided with her doctor that the best course of action was an abortion. A district judge agreed. However, Texas Attorney General Paxton asked the Supreme Court to enforce the anti-abortion ban and warned health care providers they would face prosecution if they helped Cox. The Court decided the doctor's 'good-belief' did not constitute a 'reasonable medical judgement' that Cox's life was in danger. By this time, like many Texans, she had already left the state to find treatment elsewhere.

Meanwhile, controversy during the 88th regular session, which began on January 10th 2023 and ran until May 29th of the same year, was dominated by what proponents of the GOP bills saw as another aspect of the protection of women and children from dangerous ideas about sex and gender. Of the 14 major bills passed in the session, all three concerning sex and gender were passed (SB14 banning care for trans kids; SB15 restricting trans athletes in college sports, and SB12 regulating sexually explicit shows).³¹ To Democrats all three pieces of legislation were an attack on the rights of LGBTQ people, to be challenged as a party and not just individuals. Emma hardly met an anti-trans Democrat or a pro-trans Republican, and a national 2022 Pew Survey found that 66% of Republican thought society had gone too far in accepting people as transgender, while only 15% Democrats thought so.³² It is a hot button partisan issue. But polls tell only a superficial story. The ideological assumptions underpinning the promotion of and opposition to anti-trans legislation was far more complex than two sides, as Emma found when talking to people as the bills made their way through the House and Senate. She tracked media coverage, interviewed politicians and staffers involved, and talked informally to those campaigning for and against, including people watching from the gallery, visiting with lawmakers, and giving evidence to committee hearings.

The views and political strategies of Representatives and Senators towards gender affirming care, partially revealed as the bill made it way through the legislature but also partly hidden by political

exigencies, were far more complex than these opposing cosmological extremes and visceral hatreds imply. First of all, Speaker Phelan wasn't particularly keen on SB14, according to observers on the right, and had expressed that he was against "bashing on the gay community" to journalists only a few years earlier.³³ Whether perception or reality, it is telling that many people said he could have enabled a speedier process for the bill, for example by allowing a Point of Order on 2 May that required the bill to return to Committee for some days. Many moderate Republican Representatives who might describe themselves as pro-life supporters would have backed exceptions to allow abortion in some cases, if politically possible, and, in the same vein, were concerned not to sound negative towards the LGBTQ community. Privately moderate Republicans have more reservations about the church interfering in the state and the state meddling in the decision-making of parents than they were prepared to say in public. However, Senate Bill 14's primary author in the House was a member of the Speaker's team – Representative Tom Oliverson – it was one of the GOP's eight priorities, and given the views among the more extremist grassroots Republicans who influence primaries, who were frequently present in the legislature vigilantly giving evidence and watching proceedings from the Gallery, stopping or significantly amending it would have been extremely politically difficult.

A national organization drafted SB14 and approached two former physicians as the main authors: emergency doctor, Senator Donna Campbell in the Senate and anesthesiologist, Representative Tom Oliverson in the House. Unlike most activists, rather than rely on religious arguments in debate, they spoke in favour of the bill on grounds of their interpretation of science. They had ten authors with five cosponsors in the Senate and five authors and a staggering 75 cosponsors in the House of Representatives, all Republicans, so it is not a surprise that it passed with ease. The Committee that considered the bill and heard evidence from the public in the House, the Public Health Committee, was chaired by one of the coauthors – Representative Stephanie Klick – and had Rep. Tim Oliverson as one of its members. This was more critical to the outcome than the participation of the public. On March 27 around 100 people registered in support of the bill, while over 2,800 were against. 470 people signed up to give evidence but the committee only had the time to listen to several dozen, with several extra committee rooms assigned for visitors to watch on screens. An impressive was given of huge public engagement, but it did not affect the course of the bill.

The bill's opponents, co-ordinated by the LGBTQ Caucus with chair Rep. Mary Gonzalez, poured over the science too but interlaced their arguments with social and health analysis. One Democrat staffer's 'Queer Cheat Sheet', clarified for example, 'Gender is often conflated with sex, but people are not born with gender, but people learn to act in accordance with the socially constructed expectations of their gender as they grow up.' The Reps leading on author questions and strategy, Rep. Jessica Gonzalez, Rep. Julie Johnson and Rep. Ann Johnson, were complemented by Rep. Erin Zwiener leading on amendments and Points of Order in opposition to the bill. In mid May Ann Johnson introduced an amendment specifying that care would be possible if five doctors approved, but the bills' authors rejected this on the grounds that doctors can't always be trusted to keep up with the science. After 23 amendments, in the final vote, every Republican voted in favour bar one (with two absent) while 11 Democrats also voted for the bill and 6 were absent, so the bill passed 92 to 48.³⁴

Some Notes on the Health of Democracy

Both Massachusetts and Texas, with the same legislative structure and institutions, were responding to the same pressing political concerns around transgender health care and reproductive freedom. Yet the processes by which they respectively acted was distinct. Legislative leaders in Massachusetts privately deliberated and then introduced legislation and/or amendments outside of the normal legislative process and quickly shepherded their work to passage. There was no evidence of substantive deliberation, participation on the part of party or grass roots activists, nor much public politics at all. By contrast, Texas's legislature acted on an extremely public grassroots process of setting, advocating for, and passing legislative activities, but ultimately banned medical treatments which could be seen as a denial of basic health rights to many Texans. Too, given the public nature of the party platform process in Texas there was nowhere for legislative leaders to hide their ideological differences or distinctions.

To return to our ethnographic cases, the exceptionalism presented in this article is not only derived from the nationalist ideas that Texas and Massachusetts are in their own ways unique and perhaps superior to other states, but from how each state sought to lead others in response to searing national value conflicts around gender and reproductive freedom. While the less contentious lawmaking

inspires different rhythms in both places, it is the cosmological contests over deeply held values that allows us to see in stereotype how each legislature operates distinctly.

In the Texas 87th and 88th sessions the vast majority of bills passed were bipartisan and elicited a low level of attention from the public. But when gender was the subject matter of law, the lawmakers were far more exposed to both public voice and view so the Republicans had to stop their co-operation with the Democrats and stand out as living up to a more extreme Ultra Conservative ideal. The problem for the moderates is that when wealthy donors bankroll Ultra-Conservative challenges at primaries, as they did in March 2024, the moderates are forced to bend their performance of politics rightwards. Nine more moderate Republicans were ousted in primaries by candidates from the right and Speaker Phelan forced into a run-off despite his record supporting conservative measures for many years. He was being punished for allowing the impeachment of Attorney-General, Ken Paxton, but also for following the long-standing Texan bipartisan tradition of appointing both Republican and Democrat Committee Chairs roughly in proportion to their seats. These Chairs are one of the points of influence in deciding which of the 1000s of proposed bills progress, so they can have an impact on what legislation gets vetoed. However, when far right candidates articulated the false claim that the 88th legislature was “run” by Democrats³⁵, and that Phelan was only Speaker because he made a deal with Democrats to give them Chair positions, it was a bid to destroy co-operation between the parties. Such co-operation was perceived as polluting; by some of the activists in rural Texas even as the work of Satan. By shifting the battle to within the Republican party, the far right are anticipating gaining a hold over lawmaking. In the Republican party, you can see how the struggle for power in the relationship between exceptions and norms could be taking the party further rightwards, even though the extremists only represent a relatively small minority at all levels of the state. So, the hot button exceptions appear to be more a break towards rather than a break from the norm.

In Massachusetts, by contrast, the break from the norm was in the fact that Senate and House Responses to Texas’s actions happened so quickly. Instead of languishing for six years in wait for the unpredictable grace of the Speaker of the House and the President of the Senate, amendments and legislation protecting reproductive freedom and gender affirming care flew through the

Massachusetts State House without public hearing or much in the way of substantive debate or activism.

Taking a step back, we can see what tends to occur in both Massachusetts and Texas as being in part of product of expedience and turning away from democratic civic virtue. In Massachusetts it's easier for legislators to cede power to leadership to set their calendar and tell them how to vote. Practically this means that legislators are shielded from difficult votes and the danger of public exposure that would come from debate. This means, though, that it is nearly impossible to track legislative progress in Massachusetts or to know whether one's representative or senator does or does not support a given piece of legislation, much less substantively participates in the process of passing anything.

In Texas the policy making process is much more open. We see how party activists connect with grass roots organizing and how all this intersects with elected politicians. Too, we can see ideological fissures among Texas Republicans play out in public. So far so democratic. However, the result of this process is a grant of legal authority to ever hardening exclusion, and arguably violence, against members of the body politic. In this scenario women and trans people's rights as citizens progressively degrade as they get ushered out of democratic equality.

Ironically, what Massachusetts and Texas might benefit from is a little bit more of what the other has. In the Massachusetts case, simply put, public politics would seem to go a long way towards allowing democratic participation. In Texas's case, absent a change of heart on the part of the majority of voters in the primaries, some manner of minority protection should be enshrined in hard to change laws such as constitutional amendments or via the courts and rights-based legal protections.

Implications for evaluating legislatures and democracy

It is dangerous to generalize about legislative studies, with other 25,000 books and articles writing about the UK parliament alone by 2009, but clear patterns can be easily found.³⁶ Scholars of legislatures tend to measure performance or effectiveness or strength as if elements can be detached from the whole and assumed to be relatively static. The contradictory aspirations, everyday

political work and wider contexts of these complex institutions and the people within them are often put to one side. Taylor-Robinson et al argue, “research on democracies in Europe and North America continues to rely on normative questions, positivist methodologies and ahistorical theorising... The pressure on specific social science disciplines is to fix problems, produce generalisable laws and predict human behaviour even though history moves situations into different cultural logics or political economic situations.”³⁷ In this article we have made judgements about the health of democracy in two U.S. states but only after both delving into depth about the inner workings of their legislatures as well as setting this within a wider context of cultural logics and political pressures at both state, cross state and federal levels. It is precisely this close-up look and wider picture that is lacking from much evaluation within parliamentary scholarship.

To evaluate legislatures you have to consider what they are aspiring to do. They are always aiming to enable debate, make laws, and scrutinise government; contain at least some elected politicians who claim to represent (and, therefore, interact in complex ways with) groups of diverse people; and usually form political parties in opposition to each other. There can be tensions – between political parties and factions within them, between efficient government and enabling full oversight, and between representing constituencies and complying with agreed positions of parties – that demand politicians shapeshift between aspirations. So, if ‘performance’ is assumed to be a matter of evaluating quantitatively how well or badly the institutions is working in general, or meeting expectations in particular domains (such as oversight of the budget or control of corruption), as it often is,³⁸ then these dynamics and tensions are often glossed over and the views and interests of citizens and constituents simplified or even ignored. The excessive reliance on quantitative measures in measuring parliamentary performance³⁹ makes it difficult to deal with contradictions, changeability and ambiguities. One study about measuring democratic backsliding even went as far as arguing that because there are no *objective* and factual measures of democracy being in decline, only subjective judgements, there is no reliable evidence.⁴⁰ Even methods that require the assessment of several variables at once⁴¹ are treating processes as separable from their context and unable to consider entanglements in the bigger democratic landscape, or assess what results are beneficial to whom. Taking the issue of corruption as one example, Blundo and Olivier de Sardan have explained how you can only understand it if you investigate how it is embedded in daily administrative practices shaped by logics of gift-giving, solidarity, predatory authority and

redistribution accumulation.⁴² Rather than relying on either ‘objective’ or ‘subjective’ measurement, judgement should flow from systematic, rigorous and thorough research that challenges assumptions, confronts complexity and checks, double checks and triple checks findings.

The case of how reproductive rights and bodily autonomy has been treated in law in Massachusetts and Texas draws attention to complex dynamics and tensions, but also forces us to see interconnection between legislatures and society (and between states) when asking questions about the effectiveness of legislatures. Legislatures can’t be judged without considering their impact on society, just as commenting on the health of democracy is a thin form of evaluation if an in-depth investigation into the inner workings of legislatures is missing. What did we conclude in our health check? While Texas passes laws that emerged out of intensive consultation and debate, and only after large numbers of citizens had the opportunity to give evidence to committees, the outcomes were divisive, harmful and against the will of the majority, in the case of the abortion ban. Massachusetts passed laws in secrecy but that seem to pass other democratic tests based on human rights. This challenges widely held popular, policy and scholarly assumptions that a strong democracy relies on intense public engagement.⁴³ We are not arguing that this means that citizen participation does not matter, but rather than it can’t be relied upon to deliver democracy. Shallow engagement that treats witnesses as no more than consumers of politics, rather than people offering knowledge that might give policymakers pause for thought, doesn’t necessarily improve democracy in practice. Massachusetts and Texas require deeper citizen engagement and decent outcomes before they can claim to be fully democratic not because one automatically leads to the other, but because it is the only way to repair our politics.

In terms of debates in the academic literature we argue that this would mean that legislative studies scholars might be more cautious about making sweeping judgements about the weakness or strength of these institutions simply based on narrow criteria. Good evaluation of complex institutions that are politically and socially connected to vast territories and populations demands a recognition of the broader horizon. Equally democracy scholars, or even international development or policy scholars, ignore legislatures at their peril. Along with the other two branches of government in the U.S., state legislatures play key roles in democratic systems that goes far

beyond outputs in terms of budgets, laws and regulations for the state. Their symbolic power as representative institutions and cross-state influence have an impact on how national and state level democracy is experienced.

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¹ Wendy Brown, "Why Is Democracy So Hard? University of California Memorial Lecture for Erik Olin Wright," *Politics & Society* 48, no. 4, 2020, 550.

² Shane Martin, Michelle M. Taylor-Robinson, and Emma Crewe. 2022, "The *Past* of Parliamentary and Legislative Studies," *Parliamentary Affairs* 75, no. 4, 2022, 727-739; Michelle M. Taylor-Robinson, Emma Crewe, and Shane Martin, "The *Present* of Parliamentary and Legislative Studies." *Parliamentary Affairs* 75, no. 4, 2022, 740-753; and Neil Kaplan-Kelly, "Conclusion: Revisiting and Revitalizing Ethnographies of Legislatures," *Emergent Conversations, PoLAR, Journal for the Association for Political and Legal Anthropology*, 2021, <https://polarjournal.org/2021/11/18/conclusion-revisiting-and-revitalizing-ethnographies-of-legislatures/> Accessed March 27 2024.

³ For example, William B. Hankins, "Finally, Nebraska: A Synthetic Control Analysis of Legislative Structure," *State Politics & Policy Quarterly* 20, no. 1, 2020, 3-22, as indicative of much work in this journal.

⁴ For example, Brown, Nadia. Negotiating the Insider/Outsider Status: Black Feminist Ethnography and Legislative Studies, *Journal of Feminist Scholarship* 3, 2012, 19-34.

⁵ For example, Charlyne Berens, *One House: The Unicameral Progressive Vision for Nebraska* (Lincoln, NE: University of Nebraska Press, 2006).

⁶ As examples, John J. Dinan, *The American State Constitutional Tradition* (Lawrence, KS: University of Kansas Press, 2006) and Mark Peterson, *The City-State of Boston*. (Princeton, NJ: Princeton University Press, 2019).

⁷ Daniel R. Alvord, "What Matters to Kansas: Small Business and the Defeat of the Kansas Tax Experiment," *Politics & Society* 48, no. 1, 2020, 27-66.

⁸ Wendy Brown, *ibid*.

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¹² Jill Elaine Hasday, “On Roe, Alito cites a judge who treated women as witches and property.” *Washington Post*. May 9 2022. <https://www.washingtonpost.com/opinions/2022/05/09/alito-roe-sir-matthew-hale-misogynist/>, accessed August 26 2022.

¹³ Judith Butler, *Who’s Afraid of Gender?* (London, U.K.: Penguin Random House, Allen Lane, 2024).

¹⁴ For similar cosmological battles in Europe, see Marc Abélès, ‘Parliament, Politics and Ritual’, in (eds) E. Crewe and M.G. Müller, *Rituals in Parliament*, (Frankfurt am Main: Peter Lang, 2006, 30) and Emma Crewe, *Lords of Parliament* (Manchester: Manchester University Press, 2005, 216-219).

¹⁵ *Ibid*, 548.

¹⁶ These ideas were expressed to Emma Crewe with surprising consistency by right-wing activists both in the legislature and outside, in different parts of Texas, but resonate with other research by anthropologists and sociologists in other states as well, e.g., A. R. Hoshchild, *Strangers in their Own Land. Anger and Mourning on the American Right* (New York and London: the New Press, 2016).

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¹⁸ Daniel, Souleles, *The Rules Will Be Suspended: Democracy and Possibility in Massachusetts*, forthcoming.

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²¹ Remarks come from the *State House News Service* house session report from July 26 2022, with Craig Sandler credited.

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²³ Nathan Macias, Report of the 2022 Permanent Legislative Priorities Committee to the Convention. Texas GoP Convention, June 16-18 2022, Houston, Texas, <https://texasgop.org/wp-content/uploads/2022/06/9-2022-Report-of-the-Permanent-Legislative-Priorities-Committee.pdf>, accessed December 23rd 2023.

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²⁷ <https://www.texastribune.org/2023/07/24/ken-paxton-impeachment-dunn-wilks/>, accessed December 23 2023.

²⁸ <https://www.texastribune.org/2023/12/12/texas-primary-election-ken-paxton-greg-abbott/>, accessed December 23 2023.

²⁹ Hansjorg Dilger and Marloes Janson, Religiously motivated schools and universities as ‘moral enclaves’: reforming urban youths in Tanzania and Nigeria, in (eds) David Garbin, Simon Coleman and Gareth Millington, *Ideologies and Infrastructures of Religious Urbanization in Africa: Remaking the City* (Bloomsbury: London, 2023).

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