ASTROTURF LITIGATION

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"A fellow from Texas can tell the difference between grass roots and Astroturf."
—Senator Lloyd Bentsen[1]

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1. Ryan Sager, Opinion, *Keep Off the Astroturf*, N.Y. TIMES, Aug. 19, 2009, at A27.

INTRODUCTION

In late 2021, after the Supreme Court declined to block Texas' SB 8 anti-abortion bill, commentators were quick to frame SB 8—and other legislation encouraging the enforcement of reactionary policies through private litigation—as a form of courtroom vigilantism.[2] In an op-ed published on September 4, 2021—days after the Supreme Court ruling—Professors Jon Michaels and David Noll warned that the United States was becoming a nation of vigilantes;[3] writing in the *New York Review of Books* later that month, Professors Robert L. Tsai and Mary Ziegler compared SB 8 to "bounty bills" such as the Fugitive Slave Act of 1850.[4] In an article the following month, law professor and bioethicist R. Alta Charo likewise characterized SB 8 as "vigilante injustice."[5]

Portraying SB 8 and its ilk as vigilante-enabling statutes places them firmly within existing discussions of vigilantism in the United States.[6] In this framing, SB 8's lineage can be traced back to a long history of

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2. *See, e.g.*, Jon D. Michaels & David L. Noll, Opinion, *We Are Becoming a Nation of Vigilantes*, N.Y. TIMES (Sept. 4, 2021, 11:00 AM) [hereinafter Michaels & Noll, *Nation of Vigilantes*], https://www.nytimes.com/2021/09/04/opinion/texas-abortion-law.html; Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 CORNELL L. REV. 1187, 1187 (2023) [hereinafter Michaels & Noll, *Vigilante Federalism*]; Robert L. Tsai & Mary Ziegler, *The New Abortion Vigilantism*, N.Y. REV. BOOKS (Sept. 23, 2021), https://www.nybooks.com/online/2021/09/23/texas-abortion-vigilantism/; R. Alta Charo, *Vigilante Injustice—Deputizing and Weaponizing the Public to Stop Abortions*, 385 NEW ENG. J. MED. 1441 (2021); Isabella Oishi, *Legal Vigilantism: A Discussion of the New Wave of Abortion Restrictions and the Fugitive Slave Acts*, 23 GEO. J. GENDER & L. (2022); Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L. REV. 1483, 1487 (2022) (referring to prevailing academic characterizations of SB 8 and similar legislation as legal vigilantism); Jennifer A. Brobst, *Perilous Private Enforcement Strategies: From Posses and Citizen's Arrest to Texas Heartbeat Statutes*, 14 CONLAWNOW 11, 16–17 (2022).

3. Michaels & Noll, *Nation of Vigilantes*, *supra* note ; Michaels & Noll, *Vigilante Federalism*, *supra* note , at 1191–92.

4. Tsai & Ziegler, *supra* note .

5. Charo, *supra* note .

6. *See, e.g.*, Jim Jones, *The Serious and Growing Danger of Vigilantism*, HILL (Nov. 29, 2021, 11:00 AM), https://thehill.com/opinion/criminal-justice/583282-the-serious-and-growing-danger-of-vigilantism/; Jonathan Obert, *Vigilantism, Again in the News, is an American Tradition*, CONVERSATION (Aug. 27, 2020, 12:33 PM), https://theconversation.com/vigilantism-again-in-the-news-is-an-american-tradition-141849; WILLIAM C. CULBERSON, VIGILANTISM: POLITICAL HISTORY OF PRIVATE POWER IN AMERICA 117–18 (1990); H. JON ROSENBAUM & PETER C. SEDERBERG, VIGILANTE POLITICS, at ix (1976); WILLIAM E. BURROWS, VIGILANTE!, at xii–xv (1976); *see also* ARMANDO NAVARRO, THE IMMIGRATION CRISIS: NATIVISM, ARMED VIGILANTISM, AND THE RISE OF A COUNTERVAILING MOVEMENT, at xvii–xviii (2009); Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31, 35–36 (1996).

violence against (among others) blacks and immigrants.[7] As such, the discussion of such legislation has focused on American historical precedents, and on connections with contemporary American political developments.[8] For example, in setting out the backdrop to "private subordination regimes" targeting (among other things) abortion and LGBTQ rights, Michaels and Noll refer to factors specific to the United States, such as a decline in federal civil rights protection.[9]

Although vigilantism is not unique to the United States, or to settler societies, it has played a significant role in American culture and law enforcement.[10] It is therefore scarcely surprising that the academic discussion of American private subordination regimes has adopted a vigilante-centric analysis. However, such a framing has two problems. First, by drawing on the language of vigilantism, it risks obscuring the role of the State in outsourcing enforcement. Second, the vigilantism framing may encourage academic analysis to focus on peculiarly American elements of such regimes, at the expense of potential parallels with other jurisdictions.[11]

This Article suggests a different approach: treating SB 8 and other "vigilante-enabling" statutes as facilitating a particular form of astroturfing. Reframing such legislation as encouraging "astroturf litigation" addresses both weaknesses of the vigilante-centric analysis. First, it emphasizes the involvement of the political actors enabling and encouraging such litigation. Second, focusing on astroturfing enables comparisons with other jurisdictions in which "private-law" litigants have been deployed by the regime for overtly authoritarian purposes.

Consider the following example. In late 2014, Hong Kong police cleared pro-democracy demonstrators occupying the districts of Mong Kok and Admiralty, effectively ending the months-long Umbrella Movement.[12] One might have expected the police to have acted in the exercise of their (already considerable) public order powers. Yet they did

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7. *See, e.g.*, Jones, *supra* note ; Obert, *supra* note ; Michaels & Noll, *Vigilante Federalism*, *supra* note , at 1193.

8. It is somewhat telling that Michaels and Noll end their article with the phrase "only in America." *See* Michaels & Noll, *Vigilante Federalism*, *supra* note , at 1264.

9. *See id.* at 1197.

10. *See, e.g.*, Jones, *supra* note ; Obert, *supra* note .

11. *But see, e.g.*, Regina Bateson, *The Politics of Vigilantism*, 54 COMPAR. POL. STUD. 923, 925–32 (2021) (noting theoretical disagreements over how to define vigilantism and arguing for a parsimonious account of vigilantism as "the extralegal prevention, investigation, or punishment of offenses").

12. I discuss the background to the 2014 Umbrella Movement demonstrations at greater length in Alvin Y.H. Cheung, *Road to Nowhere: Hong Kong's Democratization and China's Obligations Under Public International Law*, 40 BROOK. J. INT'L L. 465, 467–72 (2015).

not. Instead, officers removed protesters—in the case of Mong Kok, from public roads—in purported enforcement of three separate injunctions obtained in private law actions. However, all of the plaintiffs were politically connected to the regime. The plaintiff in one action was a subsidiary of a Chinese state-owned enterprise; the solicitor representing the plaintiffs in another had close political ties to Beijing.[13]

The Umbrella Movement injunctions bear the hallmarks of a mobilization of ostensibly "private" individuals and groups by the government. Although pro-democracy demonstrators in Hong Kong also faced violence from pro-Beijing counter-demonstrators,[14] a vigilante-centric analysis obscures the extent to which the Hong Kong and Beijing governments were involved in choreographing responses to the Umbrella Movement.[15] Viewing reactionary state legislation in the United States through the lens of astroturf litigation places these statutes in the context of a much broader discussion of authoritarian uses of law, in particular, how autocrats and would-be autocrats try simultaneously both to repress political opposition, and to conceal their involvement in that repression.[16] The increasingly overt abandonment of liberal democracy by significant portions of the American right[17]—whose

13. Samson Yuen & Edmund W. Cheng, *Neither Repression nor Concession? A Regime's Attrition Against Mass Protests*, 65 POL. STUD. 611, 624 (2017).

14. *See, e.g.*, *id.* at 621–22.

15. *See id.* at 614–15, 623–25.

16. For discussion of the various methods autocrats use to consolidate political power while maintaining the appearance of democracy and legality, see *e.g.*, ROSALIND DIXON & DAVID LANDAU, ABUSIVE CONSTITUTIONAL BORROWING 36, 45–53 (2021) (discussing the perverse deployment of constitutional ideas and institutions of liberal democratic origin); Alvin Y.H. Cheung, *Beyond Comparative Constitutionalism: Abusive Legal Borrowing*, BALKINIZATION (Sept. 23, 2021, 9:30 AM), https://balkin.blogspot.com/2021/09/beyond-comparative-constitutionalism.html (discussing abusive legal borrowing more broadly); Alvin Y.H. Cheung, *Legal Gaslighting*, 72 U. TORONTO L.J. 50, 50 (2022) (discussing how authoritarians justify legal change using purported comparisons to norms and institutions in liberal democracies); WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN 7–8 (2019); Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 571–81 (2018) [hereinafter Scheppele, *Autocratic Legalism*]; ANDRÁS L. PAP, DEMOCRATIC DECLINE IN HUNGARY: LAW AND SOCIETY IN AN ILLIBERAL DEMOCRACY 163–64 (2017); YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 232 (2017); Ozan Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673, 1677, 1686–1715 (2015); Kim Lane Scheppele, *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*, 26 GOVERNANCE 559, 559–60 (2013) [hereinafter Scheppele, *Frankenstate*].

17. *See, e.g.*, Thomas Zimmer, Opinion, *The Republican Party Is Abandoning Democracy. There Can Be No 'Politics as Usual'*, GUARDIAN (Feb. 22, 2022, 6:12 AM), https://www.theguardian.com/commentisfree/2022/feb/22/why-are-democrats-like-biden-still-defending-republican-politicians; Zack Beauchamp, *The Republican Revolt Against Democracy, Explained in 13 Charts*, VOX (Mar. 1, 2021, 7:30 AM), https://www.vox.com/policy-and-politics/22274429/republicans-anti-democracy-13-charts; David A. Graham,

strategists have also been active abroad[18]—suggests that rights-stripping legislation in the United States should be treated as yet another instance of global democratic retreat. Adopting this broader analysis may shed new light on the conditions under which astroturf litigation becomes possible—and on possible criticisms and countermeasures.

This Article also advances one particular criticism of astroturf litigation—one that does not presuppose any commitment to liberal democracy. I argue that astroturf litigation is especially pernicious not merely because it is illiberal or anti-democratic (although it is certainly both of these), but because it involves two layers of deception by the regime: astroturf litigation obfuscates both what is being done (as with the Umbrella Movement injunctions), as well as who is doing it. I further argue that this deception makes astroturf litigation not merely illiberal or anti-democratic, but anti-legal.

Part I gives a more detailed definition of astroturf litigation and distinguishes it from other instances of private litigation. Parts II and III consider U.S. astroturf-enabling statutes such as SB 8 and the Umbrella Movement injunctions in Hong Kong, respectively. Part IV offers some tentative lessons that can be drawn from these instances of astroturf litigation. Part V concludes.

I. ASTROTURF LITIGATION: WHAT AND WHY

This Part begins with a discussion of existing accounts of astroturfing in the political arena, before offering a definition of astroturf litigation. I then discuss autocrats' rationales for astroturf litigation and distinguish astroturf litigation from other forms of litigation, before setting out the problems associated with astroturf litigation.

A. Defining Astroturf Litigation

In politics, "astroturfing" broadly refers to the use by a political actor of third-party agents to present certain facts or opinions, thereby creating

The GOP Abandons Democracy, ATLANTIC (Dec. 10, 2020), https://www.theatlantic.com/ideas/archive/2020/12/republican-party-abandoning-democracy/617359/; Benjamin Knoll, *Republicans Have Abandoned Their Support for Liberal Democracy*, HUFFPOST (Sept. 5, 2017, 5:32 PM), https://www.huffpost.com/entry/republicans-have-abandoned-their-support-for-liberal_b_59af0f3ee4b0d0c16bb5284b.

18. *See, e.g.*, Mike Wendling, *How Trump's Allies Stoked Brazil Congress Attack*, BBC NEWS (Jan. 9, 2023), https://www.bbc.com/news/world-us-canada-64206484; Elizabeth Dwoskin & Gabriela Sá Pessoa, *Trump Aides Bannon, Miller Advising the Bolsonaros on Next Steps*, WASH. POST (Nov. 23, 2022, 1:09 PM), https://www.washingtonpost.com/world/2022/11/23/brazil-bolsonaro-bannon/.

the false impression of grassroots support.[19] However, existing definitions of astroturfing differ enough in specifics that they merit further examination.

The term "astroturf" (originally a brand name of artificial grass) was first used in a political context by Texas senator Lloyd Bentsen in 1985. Bentsen used the term to describe the "mountain of cards and letters" his office received—correspondence that happened to advance the interests of the insurance industry:[20] "A fellow from Texas can tell the difference between grass roots and Astroturf."[21]

Although the creation of a misleading impression of popular support lies at the heart of astroturfing, academic accounts of the phenomenon disagree as to what other elements are required. In particular, existing definitions disagree on whether a financial relationship has to exist between the agents creating the appearance of grassroots support for a particular cause and the principal who stands to benefit from that apparent support. In a 2004 article discussing corporate astroturfing, Thomas P. Lyon and John W. Maxwell characterize astroturfing as the covert subsidizing of a group with similar views to lobby when the group normally would not do so.[22] Similarly, in his 2009 review of Cass Sunstein's *Infotopia*, Gerry Mackie defines "astroturfing" as "the use of paid agents to create falsely the impression of popular sentiment (the grass roots are fake, thus the term astroturf, which is artificial grass)."[23] In contrast, Marko Kovic, Adrian Rauchfleisch, Marc Sele, and Christian Caspar argue (in the specific context of digital astroturfing) that agents need not be paid for astroturfing to occur, and instead the agents may simply be sympathetic third parties.[24] They argue that the relevant elements are orchestration, the appearance of spontaneity, deception, and the pursuit of some strategic goal by the principal.[25]

These conceptual disagreements even extend to whether the principal's involvement is concealed. Lyon and Maxwell's definition, as set out above, requires that the principal's role be covert. Kovic et al., however, suggest that the political actors need not be deceitful about

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19. Adam Bienkov, *Astroturfing: What is it and Why does it Matter?*, GUARDIAN (Feb. 8, 2012, 10:17 AM), https://www.theguardian.com/commentisfree/2012/feb/08/what-is-astroturfing.

20. Sager, *supra* note .

21. *Id.*

22. Thomas P. Lyon & John W. Maxwell, *Astroturf: Interest Group Lobbying and Corporate Strategy*, 13 J. ECON. & MGMT. STRATEGY 561, 561 (2004).

23. Gerry Mackie, *Astroturfing Infotopia*, 56 THEORIA: J. SOC. & POL. THEORY 30, 32 (2009).

24. Marko Kovic et al., *Digital Astroturfing in Politics: Definition, Typology, and Countermeasures*, 18 STUD. COMMC'N SCIS. 69, 76 (2018).

25. *Id.*

their involvement for astroturfing to occur.[26] In support of that proposition, they cite Matteo Vergani's account of the "grassroots orchestra," namely "a grassroots campaign coordinated by a non-grassroots political actor and performed autonomously by activists. . . . the higher-level political actors inspire and guide the grassroots participation without intervening in the content."[27]

My definition builds on the premise that astroturfing is fundamentally about the deceptive fabrication of mainstream support. If such deception is (as I suggest) central to astroturfing, it is difficult to envision an astroturfing campaign in which no efforts are made to obfuscate or conceal the political actor's involvement. On the contrary, the exposure of a political actor's involvement in what previously appeared to be a grassroots campaign will typically undermine the effectiveness of such a campaign.[28] Situations in which a political actor overtly supports or instigates activity intended to give the impression of grassroots support more closely fit Lyon and Maxwell's account of the "bear hug" (the co-optation of existing actors through overt payments)[29] or Vergari's "grassroots orchestra."[30] Although each of these phenomena involve the coordination of political activity intended to give the impression of popular support for a particular cause, neither the "bear hug" nor the "grassroots orchestra" involve the same level of deception about the political principal's involvement. As such, I consider the key elements of astroturfing to be: (a) the use of agents (b) to engage in orchestrated activity (c) that is supposed to resemble spontaneous grassroots activity (d) to further a political actor's own objectives, while (e) obscuring that political actor's involvement in the campaign.

Astroturf litigation replaces orchestrated political activity such as letter-writing or protests with litigation—specifically, private litigation. One of the hallmarks of political astroturfing is that the agents' activities have the appearance of spontaneous organization by private individuals;[31] similarly, for astroturf litigation to be effective, it must resemble litigation that would otherwise be brought by a private party. Accordingly, I define astroturf litigation as (a) the use of "private" agents by a political actor (b) to engage in litigation (c) that superficially

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26. *Id.* at 72.

27. Matteo Vergani, *Rethinking Grassroots Campaigners in the Digital Media: The 'Grassroots Orchestra' in Italy*, 49 AUSTL. J. POL. SCI. 237, 240 (2014).

28. *See, e.g.*, Lyon & Maxwell, *supra* note 22, at 564 ("Astroturf lobbying relies on the *covert* nature of corporate sponsorship in achieving its effectiveness . . . ." (emphasis added)).

29. *See id.*

30. *See* Vergani, *supra* note 27, at 240.

31. *Id.* at 249.

resembles private litigation (d) to further the political actor's own objectives, while (e) obscuring that political actor's involvement in the litigation.

B. The Logic of Astroturf Litigation

Having explained what astroturf litigation is, I now turn to the reasons why political actors might want to engage in it. I suggest here that the reasons for doing so resemble the reasons for outsourcing more overt or violent forms of repression.

Lynette Ong's study of the outsourcing of repression in the People's Republic of China ("PRC") is particularly illustrative.[32] Ong refers to two distinct types of outsourced repression: violence at the hands of third-party agents (whom Ong has previously referred to as "thugs-for-hire"),[33] and the use of nonviolent "brokers"—individuals with social capital trusted both by the state and by the targeted citizens[34]—to legitimize state repression, typically through appeals to social relations and affective emotions. In relation to the former, Ong argues that "outsourcing violence to third-party agents provides the pretense for plausible deniability and evasion of political accountability."[35] As noted above, a key element of astroturfing (be it legal or political) is the obscuring of a political actor's involvement; as with the outsourcing of violence, astroturfing provides the political actor with a veneer of plausible deniability.[36] As for the latter, Ong suggests that persuasion by social brokers is effective precisely because it is not perceived as state repression.[37] Although litigation is less often associated with affective emotions, the link between effectiveness and the obscuring of state responsibility remains the same.

Both of these rationales, however, come with a caveat. Governments only resort to thugs-for-hire, or to astroturfing, when they seek to minimize the anticipated costs of direct repression. If the perceived costs of being *openly* anti-democratic, illiberal, and/or anti-legal are

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32. Ong acknowledges that similar phenomena can occur—and has occurred—in other countries, including ostensibly democratic ones. *See* LYNETTE H. ONG, OUTSOURCING REPRESSION: EVERYDAY STATE POWER IN CONTEMPORARY CHINA 5 (2022).

33. Lynette H. Ong, *'Thugs-for-Hire': Subcontracting of State Coercion and State Capacity in China*, 16 PERSPS. ON POL. 680, 680 (2018).

34. ONG, *supra* note 32, at 3.

35. *Id.*; *cf. id.* at 26 (focusing on the accountability of the nonstate agent, rather than that of the state).

36. Edward T. Walker, *What's the Difference Between Political Grassroots and Big-Interest Astroturf?*, UCLA NEWSROOM (July 8, 2014), https://newsroom.ucla.edu/stories/whats-the-difference-between-political-grassroots-and-big-interest-astroturf.

37. ONG, *supra* note 32, at 3.

sufficiently low, there is no need for a regime to engage in astroturfing at all.

C. Astroturf Litigation and Other Litigation

The idea that certain political disputes have been improperly brought into the courts is not new. Two strands of the existing academic literature on the phenomenon are particularly relevant. First, Ran Hirschl and others have discussed "juristocracy" and whether political subject matter has improperly been brought before the courts. Second, George Pring, Penelope Canan, and others have written extensively about the use of strategic lawsuits against public participation ("SLAPPs"). I discuss how astroturf litigation departs from these earlier accounts of politicized litigation, as well as other forms of private enforcement, below.

1. Strategic Lawsuits Against Public Participation (SLAPPs)

SLAPPs[38] are lawsuits brought to prevent or discourage comment on public issues by individuals, citizens, or activists.[39] Although the identity of both plaintiffs and defendants may vary widely, all SLAPPs have two things in common. First, they involve the allegation of one or more civil wrongs.[40] Second, they are brought with the purpose of forcing defendants to expend energy and resources on defending the litigation (or to cease political activity entirely).[41] Plaintiffs in SLAPPs frequently do not aim to secure a victory in the courts; they may not even be concerned with the merits of the dispute at all. Rather, the objective is simply to engage in a war of attrition, in which the defendant(s) must spend time and money contesting protracted litigation.[42]

As with SLAPPs in general, a major rationale for astroturf litigation is to exhaust defendants' time and resources.[43] The use or threat of such litigation signals that even minor transgressions may consume a regime critic in protracted court proceedings. Consider, for instance, the lawsuit filed by then-President Trump against the *New York Times* in February

38. *See generally* GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 3 (1996).

39. *E.g.*, BYRON SHELDRICK, BLOCKING PUBLIC PARTICIPATION: THE USE OF STRATEGIC LITIGATION TO SILENCE POLITICAL EXPRESSION 1 (2014).

40. *See id.*

41. *See id.* at 2.

42. *See id.*

43. *See id.*

2020, in relation to a 2019 op-ed.[44] Under the standards applicable to public figures and the protections offered to opinion pieces in the media under U.S. First Amendment jurisprudence, the lawsuit had virtually no merit. However, as with many other SLAPP cases, it appears that ultimate legal victory was irrelevant. The objective in SLAPP cases—to compel defendants to expend time and legal costs in defending an action, regardless of that action's merits—is also a feature of astroturf litigation.

Astroturf litigation and SLAPPs are problematic for many of the same reasons. Both are typically deployed against regime opponents. Both are intended to chill or punish instances of political expression or other civic participation. Moreover, both are disingenuous in the same way: they both seek to reframe a public political dispute as a "purely" private-law one.[45]

Despite these similarities between astroturf litigation and SLAPPs, they differ in two important ways. First, astroturf litigation involves a further layer of indirection: it gives a misleading message about *who* is punishing a defendant, as well as *what* they are being punished for. SLAPPs, on the other hand, involve no such deception. Plaintiffs in SLAPPs—typically individuals with political power—may even have an interest in making their identity known, with a view to exerting a chilling effect on other would-be opponents. The second difference is one of emphasis. Academic discussion of SLAPPs has focused largely on the effect they have in wearing down defendants' resources. Although astroturf litigation may have a similar effect in practice, that effect is an incidental benefit: obfuscation, rather than exhaustion, remains the distinguishing characteristic of astroturf litigation.

2. Traditional Private Enforcement Regimes

Not all private litigation brought in service of public policy goals is illegitimate.[46] In particular, private enforcement regimes have long been part of U.S. federal and state law. Under the False Claims Act (initially passed in 1863), a private citizen (referred to as a "relator") may bring a *qui tam* action against anyone who has defrauded the federal government; a successful relator receives a share of any money recovered.[47] More recent legislation, such as the Sherman Act and Title

44. Michael M. Grynbaum & Marc Tracy, *Trump Campaign Sues New York Times Over 2019 Opinion Article*, N.Y. TIMES (Feb. 26, 2020, 3:18 PM), https://www.nytimes.com/2020/02/26/business/media/trump-new-york-times-lawsuit.html.

45. *See* discussion *infra* Section I.D.

46. *See generally*, Norris, *supra* note (suggesting that private enforcement is valuable insofar as it advances democratic participation).

47. 31 U.S.C. § 3730(b)–(d) (referring to civil actions for false claims).

VII of the Civil Rights Act of 1964, empowers private actors to file suit, and gives plaintiffs primary (if not always exclusive) responsibility for the conduct of that litigation.[48]

However, astroturf litigation differs markedly from older private enforcement regimes in two ways. First, some (but not all) of the earlier regimes provide for residual government control of proceedings. *Qui tam* actions under the False Claims Act are brought in the name of the government, which must receive copies of the complaint and "substantially all material evidence and information" the relator possesses.[49] Further, the government retains the power to take over or discontinue the action, regardless of the relator's wishes; even if the government declines to take over the action after it is initially brought, the court may permit the government to stay discovery, or to intervene, at a later date.[50]

Even where older private enforcement regimes have *not* kept the government in the driver's seat, they impose other limits on bringing suit. The U.S. Supreme Court, for instance, has typically insisted that plaintiffs must show that they have suffered some form of concrete, particularized injury: the harm must not be merely abstract, and the plaintiff must be affected in some individual way.[51]

Neither of these differences are unique to statutory regimes, or to the United States. The tort of public nuisance—very much a creature of common law[52]—is subject to similar limitations. A key element of public nuisance is that the nuisance must be *public*: it must pose some sort of danger or obstruction to the public at large.[53] As a result, the government is generally the proper plaintiff in public nuisance litigation; a private

48. *See* Michaels & Noll, *Vigilante Federalism*, *supra* note , at 1195–96.

49. 31 U.S.C. § 3730(b)(2).

50. 31 § 3730(b)–(c); *see also* U.S. *ex rel.* Polansky v. Exec. Health Res. Inc., 599 U.S. 419, 423–427 (2023).

51. *See* Michaels & Noll, *Vigilante Federalism*, *supra* note , at 1208 n.101 (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)).

52. *See generally* David R. Hodas, *Private Actions for Public Nuisance: Common Law Citizen Suits for Relief from Environmental Harm*, 16 ECOLOGY L.Q. 883, 883 (1989) (discussing historic common law position).

53. *See, e.g.*, Wildtree Hotels Ltd. v. London Borough of Harrow [2000] UKHL 70, [2001] 2 AC 1, 7D-E (HL) (stating "a public nuisance, such as an interference with the use of a public highway, is a wrong to the public as a whole and the ordinary common law remedy was a prosecution on indictment"); Leung Tsang Hung & Anor v. Incorporated Owners of Kwok Wing House, [2007] 4 H.K.C.F.A.R. 1, 7 (C.F.A.) (holding public nuisance must involve a state of affairs that "endangers the lives, safety, health, property or comfort of the public; or obstructs the public in the exercise or enjoyment of any right that is common to members of the public").

individual can only bring suit if she has suffered particular damage beyond that suffered by the public at large.[54]

3. Champerty and Maintenance

Astroturf litigation should also be distinguished from the historic crimes and torts of champerty and maintenance. Nobles in medieval England frequently "fomented and sustained" lawsuits as a means of oppression; maintenance and champerty developed as a response to these abuses of process.[55] To the extent that astroturf litigation is concerned with the stirring up of litigation as a means of oppression, its policy rationale resembles that of champerty and maintenance.

Nonetheless, the substantive criteria for maintenance and champerty mean that astroturf litigation will rarely ever be considered to fall within either category. A key element of maintenance and champerty is that the support for the litigation must be *unjustified*, and courts' views of what constitutes an acceptable justification have varied over time.[56] A genuine commercial interest—or even a charitable motive—may well be enough to take support for litigation outside the realm of champerty and maintenance.[57] To the extent that astroturf litigation can be construed as advancing a public policy objective, it is unlikely that astroturf litigation will also constitute champerty or maintenance.[58]

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54. *See, e.g.*, *Wildtree Hotels* [2001] 2 AC 1, 7D-E ("To support an action for damages, the plaintiff has to prove that he suffered particular damage greater than that suffered by members of the public in general."); *Leung Tsang Hung*, 4 H.K.C.F.A.R. at 5–6; Hodas, *supra* note 45, at 884 (noting that there was an absolute bar on private suits for public nuisance until 1536); Wilfred Estey, *Public Nuisance and Standing to Sue*, 10 OSGOODE HALL L.J. 563, 566–69 (1972) (Can.) (discussing significant limits in Canada on private plaintiffs' ability to bring suit for public nuisance). *But see* Scott W. Stern, *Moral Nuisance Abatement Statutes*, 117 NW. L. REV. 613, 614 (2022) (arguing that there is historical precedent for plaintiffs having standing to sue for "moral nuisances" in the absence of special injury).

55. Giles v. Thompson [1993] UKHL 2, [1994] 1 AC 142, 153C-E (HL) 1.

56. New Zealand Law Commission *Subsidizing Litigation* (NZLC R72, 2001) at 4.

57. *See id.*

58. Peter Thiel's funding of the Hulk Hogan litigation against Gawker suggests that champerty and maintenance have little contemporary relevance as a means of curbing litigation against public speech. *See, e.g.*, Jeff John Roberts, *Why Billionaires Can Destroy You with Lawsuits – and Keep It a Secret*, FORTUNE (May 25, 2016, 7:13 PM), https://fortune.com/2016/05/25/thiel-gawker/.

D. Problems with Astroturf Litigation

Astroturf litigation, as I have defined it, is objectionable on multiple levels. First—and most obviously—astroturf litigation resembles the use of SLAPPs in that both are used to suppress civil and political rights. Second, astroturf litigation is anti-democratic; this objection is also relatively straightforward. Third, astroturf litigation is, as I shall argue below, *anti-legal*. I examine the latter two problems at greater length below.

1. Astroturf Litigation Is Anti-Democratic

The charge that astroturf litigation is anti-democratic can be interpreted in two ways: as a reference to concerns about juristocracy and the judicialization of politics,[59] and as a reference to the broader array of techniques deployed by autocrats in jurisdictions experiencing democratic decay.

a. "Juristocracy"

Astroturf litigation raises the question of whether "political" subject matter—the resolution of problems relating to moral dilemmas, public policy, or political controversies—are being resolved through judicial means,[60] frequently with the implication that judicial resolution of such problems is improper.

Ran Hirschl, in discussing the judicialization of politics, refers to the phenomenon as involving three inter-related processes: (1) the increased use of legal discourse, rules, and procedure into the political and policy-making sphere; (2) the expansion of the role of courts and judges in resolving public policy disputes; and (3) the reliance on courts and judges to address "core political controversies that define (and often divide) whole polities."[61]

Astroturf litigation most directly implicates the third process Hirschl describes: that of the "judicialization of mega-politics." However, existing accounts of this process do not entirely capture the problems associated with astroturf litigation. Hirschl and others appear to view the

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59. *See, e.g.*, RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 1–3 (2007) [hereinafter HIRSCHL, TOWARDS JURISTOCRACY]; Ran Hirschl, *The Judicialization of Politics*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS 119–20 (Keith E. Whittington et al. eds., 2008) [hereinafter Hirschl, *Judicialization of Politics*].

60. *See* Hirschl, *Judicialization of Politics*, *supra* note 59, at 119.

61. Hircshl, *Judicialization of Politics*, *supra* note 59, at 121–23.

judicialization of mega-politics as involving the expansion of public law jurisdiction; Hirschl, for instance, refers to "the increased judicial scrutiny of core prerogatives of legislatures and executives," judicial ratification of regime changes, judicial oversight of electoral processes, restorative justice, and even defining the nature of the polity.[62] To be fair, astroturf litigation does raise a concern that Hirschl and others express—that the courts are an inappropriate arena for the resolution of questions that are fundamentally political in nature. However, astroturf litigation adds an additional layer of complexity: not only does such litigation shift political disputes from the political to the legal arena; it obfuscates the fact that such disputes have been shifted at all. Where the nature of the action—and even the identity of the actual aggrieved party—are concealed, identifying the judicialization of mega-politics—let alone objecting to it—becomes far more difficult.

b. Democratic Decay

The second sense in which astroturf litigation is anti-democratic is that it is one of a variety of techniques through which autocrats target political opposition, while obscuring the fact that such targeting is taking place. Such techniques include the perverse deployment of constitutional ideas and institutions of liberal democratic origin,[63] the cobbling together of norms and institutions from disparate jurisdictions into a "Frankenstate,"[64] and the justification of legal change using purported comparisons (involving varying levels of misrepresentation) to norms and institutions in liberal democracies.[65]

2. Astroturf Litigation Is Anti-Legal

More significantly for present purposes, however, I suggest that astroturf litigation is not merely illiberal or anti-democratic, but anti-legal. My argument relies on a "thin" account of legality—one that does not presuppose any commitment to liberal democracy; as noted in the Introduction, it cannot be assumed that the principals in astroturf litigation have any such commitments.

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62. *See id.* at 124–29.
63. *See generally* DIXON & LANDAU, *supra* note 16, at 11.
64. Scheppele, *Frankenstate*, *supra* note16, at 560.
65. *See* Cheung, *Legal Gaslighting*, *supra* note , at 80; *see also* Scheppele, *Autocratic Legalism*, *supra* note 16, at 547–48.

a. Astroturf Litigation and "Thin" Legality

In saying that astroturf litigation is "anti-legal," I mean that it is inconsistent with the rule of law. I am not, however, referring to a "thick" conception of the rule of law—one that requires the substance of the law to be consistent with some conception of fundamental rights or democratic government. Rather, I argue that astroturf litigation is inconsistent even with a "thin" conception of the rule of law[66]—one that does not presuppose any commitment to substantive rights or democratic government.[67] A "thin" account has two major benefits. On a descriptive level, insofar as an account of legality does not incorporate any substantive commitments to liberalism or democratic government, it will better capture what is distinctly virtuous about legality.[68] On a normative level, an account of the rule of law that frames it as being distinct from such commitments is less vulnerable to being rejected as an attempt to impose "Western" notions of liberal democracy. Moreover, if astroturf litigation is inconsistent even with a "thin" account of the rule of law, it must necessarily also be inconsistent with less parsimonious conceptions of legality.

b. The Distinct Value of Legality and Legal Candor

However, my argument goes slightly further. I suggest not only that legality is valuable for reasons other than the degree to which it facilitates liberal democracy, but that a state of legality is valuable because it (a) enables individuals to form expectations about what they can do and what can be done to them (and thus enables private ordering); and (b) expresses certain social norms.[69] As I have argued elsewhere, these two functions are the bases for the distinct value of legality—what I refer to as "legal candor."[70]

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66. *See generally* JØRGEN MØLLER & SVEND-ERIK SKAANING, THE RULE OF LAW: DEFINITIONS, MEASURES, PATTERNS AND CAUSES 13–27 (2014) (explaining the attributes of "thin" and "thick" conceptions of the rule of law).

67. For this argument set out in full, see Cheung, *Legal Gaslighting*, *supra* note , at 55.

68. *See, e.g.*, Mila Versteeg & Tom Ginsburg, *Measuring the Rule of Law: A Comparison of Indicators,* 42 L. & SOC. INQUIRY 100, 103–06 (2017).

69. *See* Cheung, *Legal Gaslighting*, *supra* note , at 56–59.

70. *Id.* at 59–60.; *see also* Michael P. Foran, *The Rule of Good Law: Form, Substance and Fundamental Rights*, 78 CAMBRIDGE L.J. 570, 572 (2019) (UK) (referring to legal integrity in the "Fullerian" sense).

c. Private Ordering.

Martin Krygier argues that the "overarching end" of the rule of law "is opposition to the arbitrary exercise of power"[71]—or, at least, reducing such exercise to tolerable levels.[72] This goal does not require any substantive commitment to any conception of fundamental rights, nor to any conception of democratic government. Nonetheless, even a "rule of the bad law" enables citizens to form expectations as to what they may do, or what may be done to them, with some level of certainty. Such expectations, in turn, allow citizens (a) not to lose (or fear losing) something they already have, and (b) to plan their future affairs, including coordination with others.[73]

d. Expression of Social Norms.

A legal act—be it a written instrument or an act of enforcement—conveys a variety of messages, only some of which the actor may have intended to convey.[74] A sentence imposed on a criminal defendant does not merely communicate the legal norms that appear in the text of the judgment itself, the statutes, or applicable precedent. It may also, when examined in context, convey other, rather different, messages—messages that do not appear in the text(s) at all: making an example of a dissident, for instance, or showing lenience to a regime collaborator.

e. Legal Candor

Legal candor is the degree to which a legal act conveys internally consistent norms that facilitate private ordering. Put another way, to the extent that a legal act expresses something different from what the legal act purports to be, it sends conflicting messages to individuals about where they stand with respect to the State, or to each other and, therefore, lacks legal candor.[75]

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71. Martin Krygier, *The Rule of Law: Legality, Teleology, Sociology*, *in* RELOCATING THE RULE OF LAW 45, 57 (Gianluigi Palombella & Neil Walker eds., 2009).

72. Martin Krygier, *Four Puzzles About the Rule of Law: Why, What, Where? And Who Cares?*, *in* 50 NOMOS 64, 77 (2011).

73. *See, e.g.*, THOMAS HOBBES, LEVIATHAN: OR, THE MATTER, FORME & POWER OF A COMMONWEALTH ECCLESIASTICALL AND CIVILL 83-84 (A. R. Waller ed., Cambridge Univ. Press 1904) (1651).

74. *See generally* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PENN. L. REV. 1503, 1508 (2000).

75. This account resembles some varieties of what David Pozen has characterized as "constitutional bad faith." *See* David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 920–39 (2016).

Consider the following: a building inspector levies a heavy fine for a building code violation. The building does not, in fact, comply with the building code. There is, on the face of things, a legal basis for the imposition of the legal sanction.

What if it is also known that the building code in that particular jurisdiction is widely ignored? That background fact *might* suggest there is something unusual about imposing a heavy fine at a particular site. Nonetheless, there might be innocuous explanations. The state might have a limited number of building inspectors. It might have just finished a ministerial reshuffle that placed building inspectors under the supervision of another department. It may have decided to enforce the building code more strictly—perhaps due to a change in policy, or in the aftermath of an earthquake in which many buildings collapsed.

Let us introduce one more background fact. Suppose that it is also widely known that the building in question contains the offices of an NGO that the government seeks to suppress. How might this affect one's assessment of why the fine was levied on that particular building?

The building inspector—or the regime at large—can point to the text of the building code and say that there is a clear violation. And, based on the text of the code, there is. But the subtext—what the act of enforcement expresses when it is viewed in context—has nothing to do with ensuring building safety, and everything to do with suppressing civil society. Nobody within that society could seriously believe that the NGO was punished because it violated the building code. Yet it is not clear to the NGO—or to the wider public—what exactly the NGO did that resulted in the sanction. In the absence of that information, citizens are unable to determine what acts will result in sanctions. The result of this lack of legal candor is pervasive and extensive self-censorship.[76]

3. Astroturf Litigation and Legal Candor

Based on the account of legal candor above, I argue that astroturf litigation offends legal candor—and is therefore anti-legal—in at least two separate ways: (a) the use of private law actions is itself an abuse of legality; and (b) the indirection introduced by the use of ostensibly private plaintiffs further undermines legal candor.[77]

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76. This result is by design. *See* Perry Link, *China: The Anaconda in the Chandelier*, CHINAFILE (Apr. 11, 2002), http://www.chinafile.com/library/nyrb-china-archive/china-anaconda-chandelier.

77. I discuss a third—the use of astroturf-enabling statutes as constructive bans on certain types of activity—in the context of anti-abortion statutes in Part II below.

a. Private Law Actions as Inherently Abusive

One of the reasons political incumbents might want to bring private law actions is to give a political dispute the appearance of a "purely" legal one.[78] A private law action—by a public actor or otherwise—purports to be a private law dispute between private individuals. Such a smokescreen may be useful as a means of concealing the dispute. Changes to a constitution involve publicity and political mobilization; a civil lawsuit, by contrast, may go largely unnoticed. Yet the lawsuit, in context, expresses a very different message: a desire to bring the state apparatus to bear against a political opponent.

Consider this example: activist A gives a public speech criticizing the policies of official O, and O sues A for defamation. The mere fact that an official is asserting a "private" cause of action in respect of A's political speech might be enough to raise suspicions. Nonetheless, there might be more innocuous explanations. Perhaps O happens to be a particularly litigious individual; perhaps A's remarks were particularly *ad hominem* against O.

Suppose, however, that there is more relevant background. There might, for instance, be a long history of defamation suits brought by officials against political opponents (and nobody else).[79] Perhaps the cost of defending proceedings, or paying a damages award, would bankrupt all but the most affluent defendants, and it just so happens that bankrupt individuals cannot run for political office.[80] Would these factors change how one characterizes O's suit against A?

I suggest that O's lawsuit in the example above demonstrates a lack of legal candor. On its face, the litigation claims to be a straightforward private lawsuit involving two private individuals. Yet it is painfully

78. This is not to deny that the civil procedural regime reflects latent political choices on the use and regulation of state violence. *See, e.g.*, Shirin Sinnar, *Civil Procedure in the Shadow of Violence*, *in* A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES 32, 32–33 (Brooke Coleman et al. eds., 2022).

79. *See, e.g.*, Cassandra Chan, *Breaking Singapore's Regrettable Tradition of Chilling Free Speech with Defamation Laws*, 26 LOY. L.A. INT'L & COMPAR. L. REV. 315, 315 (2003); Cameron Sim, *The Singapore Chill: Political Defamation and the Normalization of a Statist Rule of Law*, 20 PAC. RIM L. & POL'Y J. 319, 319–20 (2011); Mong Palatino, *Singapore Government Threatens Critics and Independent Media with Defamation Claims*, GLOBAL VOICES (Dec. 11, 2018, 5:25 PM), https://advox.globalvoices.org/2018/12/11/singapore-government-threatens-critics-and-independent-media-with-defamation-claims/; Eric Ellis, *Singapore Authorities Use Libel Laws to Silence Critics*, AUSTRALIAN, Sept. 26, 2002, at B09; BEA BODROGI, CIVIL DEFAMATION AND MEDIA FREEDOM IN HUNGARY 5 (Int'l Press Inst. 2017).

80. *See, e.g.*, INT'L BAR ASS'N, PROSPERITY VERSUS INDIVIDUAL RIGHTS? HUMAN RIGHTS, DEMOCRACY AND THE RULE OF LAW IN SINGAPORE 28 (2008) (noting that the practical effect would be to eliminate dissidents from political life).

obvious that the real reason that A is being targeted has nothing to do with a private dispute at all.

The reframing of a political dispute as a "private law" action is dishonest about what norm actually applies to the defendant. It may serve to conceal—both from the defendant and from the public at large—specifically what conduct has attracted the sanction; alternatively, even if the "real" reason for the litigation is secretly known to regime and public alike, the obscuring of that reason in public discourse has its own corrosive effect on legality.[81]

b. Use of Paper Plaintiffs.

The use of paper plaintiffs adds a further layer of obfuscation. A "private law" action brought by a public actor is misleading because it disguises official conduct in the public sphere as something else entirely.[82] Suits at private law brought by private plaintiffs are doubly deceptive: they give a misleading message about who is punishing a defendant, as well as what they are being punished for.

c. Broader Consequences

These features of astroturf litigation also have broader consequences that autocratic regimes might find desirable. First, as noted above, uncertainty regarding what acts will attract legal reprisals will result in self-censorship, as individuals refrain from broad swathes of activity in order to avoid nebulous "red lines."[83] Second, astroturf litigation—like political astroturfing—may undermine public trust in advocacy organizations and other civil society groups,[84] further hindering organized resistance to the regime.

II. ASTROTURFING AGAINST ABORTION[85]

As noted in the Introduction, anti-abortion legislation such as SB 8 has, to date, been treated as enabling a type of legal vigilantism.[86] More

81. *See, e.g.*, Link, *supra* note 76 (discussing Chinese interrogators' use of rhetoric such as, "You yourself know the reason [for your arrest]" to induce confessions).

82. On the corrosive effect that this type of obfuscation has on the legitimacy of state action, see generally SUZANNE METTLER, THE SUBMERGED STATE 9, 26, 30 (2011).

83. *See, e.g.*, Link, *supra* note 76.

84. *See, e.g.*, Edward T. Walker & Andrew N. Le, *Poisoning the Well: How Astroturfing Harms Trust in Advocacy Organizations*, 10 SOC. CURRENTS 184, 185 (2023).

85. *See generally* Maya Manian, *Privatizing Bans on Abortion: Eviscerating Constitutional Rights Through Tort Remedies*, 80 TEMP. L. REV. 123, 123–30 (2007).

86. *See, e.g.*, *supra* note and accompanying text.

recent legislation creating private rights of action in service of other reactionary political agendas—such as victimizing transgender individuals and banning the teaching of critical race theory—has been characterized in the same way.[87] This Part begins by outlining the political background to rights-stripping legislation in the United States before focusing on two such statutes in particular: Louisiana's Act 825 and Texas's SB 8. I suggest that the courts' reasoning in upholding both statutes highlight the limits of a vigilante-centric analysis, and that an astroturf-centric analysis may offer more promise in resisting such legislation.

A. Political Background

The American anti-abortion political movement began in the late 1960s;[88] over the next several decades, it became a cornerstone of social conservatism in the United States.[89] Following the Supreme Court's decision in *Roe v. Wade*[90] in 1973, anti-abortion groups began to coalesce into a national movement;[91] by the late 1970s, opposition to abortion had become a partisan political issue.[92]

After a differently constituted Supreme Court upheld *Roe* in the *Casey* decision of 1992,[93] two separate debates consumed the anti-abortion movement: whether to adopt a strategy of overt confrontation or incremental circumscription, and whether to adopt a fetus-centric narrative or one purporting to protect women's rights.[94] Incrementalism and the "women-protecting" rationale subsequently gained significant ground; the notion that women need to be protected from themselves has increasingly been used to justify state anti-abortion legislation, including in Louisiana and Texas.[95] Louisiana's "Act 825" reflects this paternalist reasoning. It gives a woman a statutory right to sue her abortion provider, even if the abortion was conducted competently, and even if it

87. *See, e.g.*, Michaels & Noll, *Vigilante Federalism*, *supra* note , at 1198–1213.

88. Opposition to abortion in the United States—albeit in less organized form—has a much longer history. *See, e.g.*, Deepa Shivaram, *The Movement Against Abortion Rights is Nearing its Apex. But it Began Way Before Roe*, NPR (May 4, 2022, 5:00 AM), https://www.npr.org/2022/05/04/1096154028/the-movement-against-abortion-rights-is-nearing-its-apex-but-it-began-way-before.

89. *See, e.g.*, JENNIFER L. HOLLAND, TINY YOU: A WESTERN HISTORY OF THE ANTI-ABORTION MOVEMENT 12–15 (2020).

90. 410 U.S. 113 (1973).

91. *See, e.g.*, Shivaram, *supra* note 88.

92. *Id.*

93. Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992).

94. *See generally* Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1649 (2008).

95. *See id.* at 1646–47.

was done with her consent;[96] after protracted litigation, it came into effect in 2004.[97]

Another major innovation in anti-abortion legislation occurred in 2019, when Waskom, Texas—located on the border shared with Louisiana—banned abortion but barred municipal officials from enforcing the ban. Instead, it allowed private citizens to sue individuals who provided abortions or assisted someone in obtaining one.[98] Numerous other cities in Texas followed suit, ultimately paving the way for state legislation in the form of SB 8 in 2021.

Republican-controlled state legislatures have subsequently sought to deploy similar legislation to target (*inter alia*) discussion of homosexuality within classrooms, support for transgender students, and critical race theory.[99] For present purposes, however, I shall focus on Act 825 and SB 8 as representative examples. These two statutes have two common features: they incentivize plaintiffs to sue abortion providers, and they have been carefully crafted to insulate the public actors who supported these laws from liability.

B. Incentivizing Plaintiffs

Act 825 and SB 8 foment litigation in three ways. First, they adopt an expansive view of standing—thereby encouraging litigation by the morally outraged. Second, they significantly inhibit defendants' ability to defend against litigation—in effect, a statutory kneecapping. Third—and most tangibly—the statutes offer significant financial remuneration to anti-abortion plaintiffs.

1. Expanding Standing

As noted above, Act 825 confers a cause of action on any woman who has undergone an abortion in respect of *any* damage suffered "by the unborn child or mother" for up to ten years after the abortion. SB 8, however, is much broader in scope—it permits "[a]ny person, other than an officer or employee of a state or local governmental entity" to bring

96. Manian, *supra* note 85, at 131.

97. *See generally* Jennifer L. Achilles, *Using Tort Law to Circumvent* Roe v. Wade *and Other Pesky Due Process Decisions: An Examination of Louisiana's Act 825*, 78 TUL. L. REV. 853, 854 (2004).

98. Jessica Gresko & Paul J. Weber, *Origin Story of the Texas Law that Could Upend* Roe v. Wade, ASSOC. PRESS (Sept. 4, 2021, 12:11 PM), https://apnews.com/article/texas-us-supreme-court-laws-185e383ba4aa6cfc558231dcabd4104a.

99. *See, e.g.*, Michaels & Noll, *Vigilante Federalism*, *supra* note , at 1191.

suit, regardless of whether they have suffered *any* injury at all.[100] Nor was SB 8 enacted against a background of restrictive Supreme Court jurisprudence on standing. Rather, by explicitly *excluding* any supervisory or residual role for the state, SB 8 *relies*—as its proponents have admitted—on an expansive approach to standing.[101]

2. Kneecapping Defendants

One of the ways that the anti-abortion statutes encourage "private" litigation is by tilting the scales in plaintiffs' favor. Act 825, for instance, not only provides that consent is *not* a defense, but displaces the ordinary rules of negligence and medical malpractice—which would otherwise limit liability.[102] When combined with the framing of the cause of action—which encompasses *any* damage suffered "by the unborn child or mother" for up to ten years after the abortion[103]—the effect is to create an absolute liability tort.[104]

SB 8 is similarly plaintiff-friendly. A plaintiff may sue in any Texas district court, but a defendant may not seek to have the action transferred without the plaintiff's consent—allowing the plaintiff to handpick their judge (in a state in which judges are elected in partisan elections), and to select a location maximally inconvenient to the defendant.[105] The Act also precludes defenses based on ignorance, mistake of law, any court decision that is not binding on the court in which the action was brought, any binding court decision that has subsequently been overruled (either on appeal or in a separate action), or even issue estoppel or *res judicata*.[106]

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100. TEX. HEALTH & SAFETY CODE ANN. § 171.208(a); *see, e.g.*, Diego A. Zambrano & Sharon Driscoll, *Maneuvering Around the Court: Stanford's Civil Procedure Expert Diego Zambrano on the Texas Abortion Law*, STAN. L. SCH. (Sept. 8, 2021), https://law.stanford.edu/2021/09/08/maneuvering-around-the-court-stanfords-civil-procedure-expert-diego-zambrano-on-the-texas-abortion-law/.

101. State courts have historically adopted a much more expansive approach to standing than federal courts, in part because they are not bound by the case or controversy requirement under Article III of the Constitution. *See, e.g.*, Peter N. Salib & David K. Suska, *The Federal-State Standing Gap: How to Enforce Federal Law in Federal Court Without Article III Standing*, 26 WM. & MARY BILL RTS. J. 1155, 1169 (2018) ("[M]any states have adopted a comparatively lax doctrine that permits citizens to sue for generalized grievances.").

102. Achilles, *supra* note 97, at 855, 859–60.

103. *Id.* at 854–55.

104. *But see* Manian, *supra* note 85, at 131 (making the more modest claim that the statute imposes strict, rather than absolute, liability).

105. *See* Michaels & Noll, *Vigilante Federalism*, *supra* note , at 1209.

106. *Id.*

3. Cold, Hard Cash

More significantly, the anti-abortion statutes are designed to impose crippling financial costs on defendants. Act 825 displaces Louisiana's normal $500,000 statutory cap on medical malpractice damages, exposing doctors to unlimited personal liability.[107] SB 8 may potentially be even more generous: a successful plaintiff may receive injunctive relief, costs, attorney's fees, and statutory damages of no less than $10,000 for each abortion performed, induced, aided, or abetted.[108] Even if a defendant successfully defends a SB 8 action, however, they will still lose financially: the statute precludes defendants from receiving costs or attorney's fees.[109] The result of these features is a legal regime that encourages, and facilitates, astroturf litigation.

4. Shielding Public Actors

Just as the anti-abortion statutes encourage private litigants to sue, they also insulate public actors from their operation. In litigation involving Act 825 and SB 8, state and federal courts have repeatedly focused on the "private" tort that both statutes purport to create. This vigilante-centric analysis has enabled the public actors responsible for enforcing both statutes to evade legal liability.

5. Louisiana's Act 825

In *Okpalobi v. Foster*, the plaintiffs—six healthcare clinics and two doctors providing reproductive health services in Louisiana—sued the State's governor and attorney general, seeking a preliminary injunction against enforcing Act 825. They argued that Act 825 (a) violated the Fourteenth Amendment by exposing a physician to significant financial liability regardless of whether they had met standards of due care, (b) placed an undue burden on a woman's right to have an abortion, and (c) was unconstitutionally vague, due to its imposition of an "invisible duty of care" on doctors.

At first instance, the Federal Court for the Eastern District of Louisiana agreed with the plaintiffs. It specifically referred to the prospect of "unlimited monetary liability based upon an invisible duty of care"[110] for up to ten years after the abortion and concluded that Act 825

107. Achilles, *supra* note 97, at 859–60.
108. Michaels & Noll, *Vigilante Federalism*, *supra* note 2, at 1209.
109. TEX. HEALTH & SAFETY CODE ANN. § 171.208(i).
110. Okpalobi v. Foster, 981 F. Supp. 977, 983 (E.D. La. 1998), *aff'd*, 190 F.3d 337 (5th Cir. 1999), *rev'd en banc*, 244 F.3d 405 (5th Cir. 2001).

was a "backhanded and subtle"[111] attempt to infringe the constitutional rights of abortion providers and women seeking abortions. Accordingly, it granted a preliminary injunction against the enforcement of Act 825.

On appeal, a panel of the Fifth Circuit affirmed (with one dissent). After concluding that the court had jurisdiction under the Eleventh Amendment, the majority went on to consider (*inter alia*) whether there was a justiciable controversy involving the defendant state officials. It answered this latter question in the affirmative, on the basis that the statute was "immediately and coercively self-enforcing."[112] As Act 825 had a coercive impact on abortion providers—in the form of "untenable risks of unlimited civil liability under an unconstitutional Act"—it was self-enforcing, and the plaintiffs therefore had standing.[113]

The majority also agreed with the Eastern District's assessment of the purpose and effect of Act 825, concluding that the statute was "a thinly-veiled attempt to regulate and interfere with a right protected by the United States [C]onstitution,"[114] and referring to the State's argument that its purpose was "to encourage a physician to inform a woman of all the risks associated with having an abortion" as "disingenuous."[115]

However, the Fifth Circuit—sitting en banc—reversed the panel and dismissed the case.[116] Judge Jolly (who had dissented below) wrote for the majority (ten out of fourteen) on standing and concluded that the plaintiffs lacked standing for two reasons. First, it was not enough that Act 825 had a coercive effect; the coercive effect had to be caused *by the defendants*.[117] As the statute's coercive effect was the result of individual tort plaintiffs rather than state officials, the majority concluded that there was no causal link between the injuries suffered by the plaintiffs and the defendant state officials.[118] Second, the defendant officials could not prevent private plaintiffs from bringing suit under Act 825.[119] Consequently, the majority concluded, an injunction against the defendants would not redress the harms suffered by the plaintiffs:

111. *Id.* at 986.
112. Okpalobi v. Foster, 190 F.3d 337, 349 (5th Cir. 1999), *rev'd en banc*, 244 F.3d 405 (5th Cir. 2001).
113. *Id.*
114. *Id.* at 347.
115. *Id.* at 356.
116. Okpalobi v. Foster, 244 F.3d 405, 409 (5th Cir. 2001).
117. *Id.* at 426.
118. *Id.*
119. *Id.* at 427.

"[t]hese defendants have no ability to enforce Act 825, *a purely private tort statute*, which can be invoked only by private litigants."[120]

In his dissent, Judge Parker observed that the circuit's own precedent included decisions that ruled on the constitutionality of civil provisions in statutes with both civil and criminal provisions.[121] He also suggested that there was a connection between the defendants and Act 825: the Governor and Attorney General, by virtue of their control and oversight of the medical review panels which would determine which claims fell under Act 825,[122] had "a routine, concrete role in enforcing Act 825."[123]

Following the Fifth Circuit's en banc opinion, the plaintiffs sought declaratory relief in state court in *Women's Health Clinic v. State*.[124] The plaintiffs received a preliminary injunction at first instance.[125] On appeal, the Louisiana Court of Appeals concluded that it lacked jurisdiction on the basis that there was no justiciable controversy.[126] Although the state's jurisdictional standard differed from the federal standard, the court adopted the Fifth Circuit's reasoning on lack of causation and redressability—reasoning that focused on the existence of paper plaintiffs (notwithstanding the state's involvement in their creation). The effect of this ruling was to preclude any pre-enforcement challenges to Act 825 and to insulate Louisiana authorities from legal accountability.[127]

6. Texas' SB 8

SB 8 adopts the same logic as Act 825 to insulate Texan officials from liability. Its provisions explicitly bar any official or instrumentality of the state from enforcing its provisions, for (it would appear) the specific purpose of avoiding federal review.[128]

In *Whole Woman's Health v. Jackson*, several abortion providers filed suit in federal court, seeking an injunction against SB 8 taking effect. The defendants included the state's attorney general; the judge and clerk of a state district court; and members of several state administrative and

120. *Id.* at 422 (emphasis added).
121 *Id.* at 443–44 (Parker, J., dissenting).
122. *Id.* at 449–50.
123. *Id.* at 450.
124. 804 So. 2d 625 (La. 2001).
125. *Id.* at 626.
126. Women's Health Clinic v. State, 825 So.2d 1208, 1213 (La. Ct. App. 2002).
127. *See* Manian, *supra* note 85, at 144.
128. *See, e.g.*, Michaels & Noll, *Vigilante Federalism*, *supra* note , at 1207–08; *Maneuvering Around the Court*, *supra* note 100.

regulatory boards.[129] The defendants moved to dismiss the suit for want of jurisdiction; the court refused to do so.

Despite the prohibition on direct enforcement of SB 8 by state officials, the district court concluded that the state official defendants nonetheless had a role in enforcing SB 8. Although the officials in question could not enforce a violation of SB 8 itself, they retained the power to pursue violations of other state laws (such as the Medical Practice Act or Nursing Practice Act) triggered by the SB 8 violation,[130] including through disciplinary and civil actions. Similarly, it held that the judicial defendants, by exercising coercive power in SB 8 private enforcement actions, had a sufficient causal link to the enforcement of SB 8.[131]

In relation to the judicial defendants' reliance on *Okpalobi*, the district court specifically observed that the Fifth Circuit had not stated that there was no proper defendant in challenges to anti-abortion laws creating private rights of action. Accordingly, in the absence of any clarification from the Fifth Circuit or from the State, the judicial defendants were indeed the proper defendants and "[t]o find otherwise would be to tell Plaintiffs that there is no state official against whom they may bring a challenge in federal court to vindicate their constitutional rights."[132]

Before the district court could hear the plaintiffs' motion for a preliminary injunction, the Fifth Circuit stayed all proceedings. In a per curiam opinion, the panel held that SB 8 "emphatically precludes enforcement by any state, local, or agency officials," and that as a result the defendant officials lacked a sufficient connection to the enforcement of SB 8.[133] A five-to-four majority of the Supreme Court agreed in part, holding that the judicial defendants and Attorney General were not proper defendants.[134] Although the Court allowed abortion providers to proceed against members of the state's medical licensing board, this amounted to, at best, a pyrrhic victory: abortions in Texas had, by then, effectively ceased.[135]

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129. Whole Woman's Health v. Jackson, 556 F.Supp.3d 595, 607–08 (W.D. Tex. 2021), *stay granted*, 13 F.4th 434 (5th Cir. 2021), *aff'd in part, rev'd in part*, 595 U.S. 30 (2021).

130. *Id.* at 611.

131. *Id.* at 626.

132. *Id.* at 628.

133. Whole Woman's Health v. Jackson, 13 F.4th 434, 438 (5th Cir. 2021) *aff'd in part, rev'd in part*, 595 U.S. 30 (2021).

134. Whole Woman's Health v. Jackson, 595 U.S. 30, 51 (2021).

135. *Id.* at 62 (Sotomayor, J., concurring in part and dissenting in part).

C. Astroturf-Enabling Statutes and Legal Candor

The case law on Act 825 and SB 8 points to two distinct ways in which the anti-abortion statutes are anti-legal. First, they effectively ban the provision of abortion services while purporting merely to "regulate" such services. Second, they use "private" plaintiffs to disguise the regulatory nature of the legislation. In short, such statutes obfuscate both what is being done, and who is involved in doing so.

As to the first point—that of official water-muddying regarding the aims of the statute—the arguments in *Okpalobi* are particularly revealing. As noted above, Louisiana argued that the purpose of Act 825 was "to encourage a physician to inform a woman of all the risks associated with having an abortion." Yet the entire scheme of Act 825, as the district court recognized, was palpably inconsistent with this purported objective. The statute's imposition of an "invisible duty of care" on abortion providers—a duty that was impossible for them to comply with—amounted to a ban on the abortion services it purported to regulate.

The second point—that the anti-abortion statutes use "private" actions in "tort" to disguise what is being done—again points to the broader problem with astroturf litigation, and the limits of a "vigilante-centric" framing of such statutes. Recall that I defined astroturf litigation as (a) the use of "private" agents by a political actor (b) to engage in litigation (c) that is supposed to resemble private litigation (d) to further the political actor's own objectives, while (e) obscuring that political actor's involvement in the litigation. As the case law demonstrates, the anti-abortion statutes have deputized aggrieved "private" individuals to engage in mass "tort" litigation to further a partisan political objective. Yet the courts—by focusing purely on the formal question of who the paper plaintiffs would be in such litigation—have effectively insulated the officials involved in passing or enforcing such statutes from legal accountability.

III. CLEARING HONG KONG'S UMBRELLA MOVEMENT

The 2014 clearance of the Umbrella Movement protests in Hong Kong—although taking place against a very different factual background—provides another example of astroturf litigation. This Part lays out the background to the Umbrella Movement litigation, then focuses on several irregularities in the litigation that reveal its nature as astroturf litigation. I then place the astroturf cases in their broader political context. Although the litigation achieved the Hong Kong and Beijing governments' two main objectives of clearing the protests without

bloodshed and obscuring their own involvement, subsequent developments strongly suggest that astroturf litigation will not become a permanent fixture in the territory.

A. Background to the Umbrella Movement

The Umbrella Movement of 2014 began as a response to growing frustration at Beijing's repeated delaying of full elections in Hong Kong.[136] Under the Basic Law—the territory's Beijing-imposed constitutional instrument—both the Chief Executive, and half of the seats in the Legislative Council, were selected not through universal suffrage, but through a Byzantine system specifically designed to privilege the votes of special interests perceived to be loyal to Beijing. However, the Basic Law also provided that the "ultimate aim" was to select Hong Kong's Chief Executive, and the entirety of the legislature, by universal suffrage.

Beijing's response to this "ultimate aim" was—at least initially—to string out the process of democratization. Between 2003—the year that an estimated 500,000 people marched in protest against proposed national security legislation[137]—and 2007, Beijing delayed full elections from 2007 (for Chief Executive) and 2008 (for the Legislative Council) to 2012, and then again to 2017 (for Chief Executive) and 2018 (for the legislature). Beijing then sought not merely to delay democratic elections, but to deny them altogether. By 2013, when the Hong Kong and Beijing governments sought to hammer out electoral arrangements for 2017 and 2018, Beijing's representatives made clear that they would not accept any possibility of a Chief Executive candidate who did not toe the Party line. Any hopes that cooler heads would prevail were conclusively dashed on August 31, 2014, when the National People's Congress Standing Committee ("NPCSC") decreed that Beijing would retain a stranglehold over nominating Chief Executives, guaranteeing its ability to hand-pick Chief Executive candidates.

The August 31st decision precipitated protests, including a class boycott by university and secondary school students; on September 26th,

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136. For more information on Beijing's numerous attempts to delay, and then to deny, democratization in Hong Kong, see generally Alvin Y.H. Cheung, *Road to Nowhere*, *supra* note , at 467–74; Alvin Y.H. Cheung, *Political Contestation in Hong Kong: From Containment to Elimination*, *in* BETWEEN POLITICS AND FINANCE: HONG KONG'S 'INFINITY WAR'? 32–33, 39 (Alessia Amighini ed., 2020) [hereinafter Cheung, *From Containment to Elimination*].

137. *See, e.g.*, *Rebellion: Forcing a Backdown over Hong Kong's New Internal-Security Law Could Be Only the Beginning*, ECONOMIST (July 10, 2003), http://www.economist.com/node/1908260.

demonstrators scaled a fence to enter the forecourt of Hong Kong government headquarters (known as Civic Square). In response to the police deployment of tear gas rounds against protesters in Civic Square on September 28th, large numbers of demonstrators occupied parts of the Mong Kok and Admiralty districts, including (in the case of the latter) the environs of CITIC Tower, adjacent to Government Headquarters, marking the beginning of the Umbrella Movement.

The movement posed a thorny dilemma for the Hong Kong and Beijing governments. Capitulating to the protesters' demands was politically impossible. Yet escalating repression—in an eerie echo of the Tiananmen Square massacre of 1989—was also not an option, for fear of generating even greater backlash.[138] The solution came from what, at first glance, might seem like an unexpected source.

B. The Litigation

On October 20, 2014—almost a month after the occupations began—three sets of plaintiffs each applied ex parte, in separate actions, for injunctions against the demonstrators:[139] (a) two taxi operators' associations, in respect of the Mong Kok occupations ("the Taxi Operators Action"); (b) a minibus company, in respect of the Mong Kok occupations ("the Minibus Manager Action"); and (c) the owners of CITIC Tower, in respect of the CITIC Tower occupation ("the CITIC Tower Action").[140] In each of these three actions, injunctions were granted ex parte on October 20, 2014.[141] After inter partes hearings on October 24th and 27th, the Court of First Instance ordered that the injunctions remain in place, with minor revisions to the injunctions relating to the Mong Kok occupations.[142] When police subsequently cleared the Mong Kok and CITIC Tower protest sites, they did so in purported enforcement of the injunctions[143] rather than pursuant to statutory public order powers.[144]

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138. *See* Yuen & Cheng, *supra* note 13, at 615–18.

139. *See* Chiu Luen Pub. Light Bus Co., Ltd. v. Persons Unlawfully Occupying or Remaining on the Public Highway Namely, the Westbound Carriageway of Argyle St. Between the Junction of Tung Choi St. and Portland St. and/or Other Persons Hindering or Preventing the Passing or Repassing of Argyle St., [2014] 6 H.K.C. 298, para 1 (H.K.C.F.I.).

140. *Id.*

141. *Id.*

142. *See id.* at para. 152.

143. Shen Yang, *In the Name of the Law: Legal Frames and the Ending of the Occupy Movement in Hong Kong*, 44 L. & SOC. INQUIRY 468, 475 (2019).

144. *See* Public Order Ordinance, Cap. 245, 3-2 to 4-8, §§9–26 (H.K.).

C. Irregularities

Several features of the three actions were unusual: the use of ex parte applications, the particular causes of action, and the particular judge assigned to hear the case.

First, all three sets of plaintiffs applied for injunctions ex parte. Such applications are typically only permitted in cases of urgency or secrecy.[145] However, all three actions were brought *weeks* after the occupations began—and after the plaintiff had attempted to negotiate with the demonstrators. The Court of First Instance concluded that all three applications could nonetheless be made ex parte, after substantial delay, because the "risks of personal safety"—in particular, the possibility of some sort of emergency might occur—could not be predicted.[146] It is not clear why these risks were materially different at the time of the applications, as compared to when they first materialized nearly a month prior.[147]

As a result of this unorthodox approach to the grant of ex parte injunctions, the plaintiffs were able to obtain interlocutory injunctions *in the absence of any opportunity for the demonstrators to make submissions in opposition*. By the time the defendants were able to make submissions at the inter partes hearing, the status quo was already in the plaintiffs' favor by virtue of the ex parte injunctions, putting the defendants at a significant disadvantage.

Second, the causes of action—at least in relation to the Mong Kok actions—are inconsistent with the lawsuits being genuine "private law" actions. Of the three actions, only the CITIC Tower Action involved a claim in private nuisance (in addition to a claim in public nuisance); the Taxi Operators' Action and Minibus Company Action were both based *exclusively* on public nuisance.[148]

Public nuisance remains a creature of common law in Hong Kong. As noted above, the major principles behind public nuisance are well established: the nuisance in question has to affect the public at large, the government is generally the proper plaintiff, and a private individual can only bring suit if she has suffered particular damage beyond that suffered by the public at large.

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145. *See, e.g.*, Tyece Ltd. v. Max Concept Technology Ltd. [2003] 3 H.K.C. 116, para. 4 (H.K.C.F.I.).

146. Chiu Luen Pub. Light Bus Co., Ltd. v. Persons Unlawfully Occupying or Remaining on the Public Highway Namely, the Westbound Carriageway of Argyle St. Between the Junction of Tung Choi St. and Portland St. and/or Other Persons Hindering or Preventing the Passing or Repassing of Argyle St., [2014] 6 H.K.C. 298, para. 105 (H.K.C.F.I.).

147. *See id.* at paras. 103–105.

148. *Id.* at para. 3.

In its inter partes decision, the Court of First Instance paid lip service to the unusual nature of public nuisance, and to the general principle that only the government may sue in public nuisance. It acknowledged that "*generally* only . . . the Secretary for Justice ("SJ") can bring a claim in public nuisance for and on behalf of the general public,"[149] in keeping with its common law origins. It also acknowledged the historic limits on private plaintiffs' standing to bring suits in public nuisance, noting that the plaintiffs had to have an arguable case that they had suffered "'particular, substantial and direct' injury" as a result of the public nuisance.[150]

Nonetheless, the Court of First Instance honored this principle largely in the breach. A careful reading of the judgment suggests that *none* of the Mong Kok plaintiffs suffered any "particular, substantial and direct damage" that would have gone beyond that suffered by any member of the general public resident in that district.[151] Nor was the Secretary for Justice ever formally involved in the proceedings, either by taking the three actions over,[152] or by being joined as a plaintiff to any of the three actions.[153]

Third, the actions were assigned (at the inter partes stage) to a judge who typically presides over constitutional and administrative law cases.[154] This would be highly unusual for ordinary civil lawsuits involving private parties.

D. Paper Plaintiffs

These irregularities begin to make sense if one takes into account the nature of the plaintiffs in all three actions. Goldon Investment, the plaintiff in the CITIC Tower Action, is controlled by the CITIC Group,[155]

149. *Id.* at para. 16.

150. *Id.* at paras. 16–38.

151. *Id.* at paras. 4, 23–27, 36 (referring to purportedly "detailed reasons" in the judgment below warranting the "clear conclusion" that the plaintiffs had shown a serious issue to be tried in relation to such damage).

152. *See* Joyce Ng, *Top Court Judge Questions "Odd" Injunction*, S. CHINA MORNING POST (Nov. 13, 2014, 3:30 AM), https://www.scmp.com/news/hong-kong/article/1638381/top-court-judge-questions-odd-injunction?module=perpetual_scroll_0&pgtype=article&campaign=1638381.

153. *Chiu Luen*, 6 H.K.C. at para. 17.

154. *See* Geoffrey Ma, *CJ's Speech at Ceremonial Opening of the Legal Year 2015*, H.K. GOV'T (Jan. 12, 2015), http://www.info.gov.hk/gia/general/201501/12/P201501120481.htm ("The various injunction proceedings . . . heard over a number of days by the Judge in charge of the Constitutional and Administrative Law List . . . .").

155. Julie Makinen & Violet Law, *Masked Men Set Off Clashes with Police in Hong Kong*, L.A. TIMES (Nov. 18, 2014, 6:35 PM), https://www.latimes.com/world/asia/la-fg-hong-kong-protest-site-20141117-story.html.

a Chinese state-owned enterprise[156] described as the Chinese Communist Party's "window to the outside world."[157] Maggie Chan Man-ki, solicitor for the minibus operator,[158] was a member of a pro-Beijing political party[159] and attended a closed-door meeting with President Xi Jinping in late September 2014, in which Xi reportedly took a hard line on political reforms in Hong Kong.[160] More significantly, the Hong Kong government had apparently encouraged (through an intermediary) at least one of the plaintiffs to bring suit. As such, all three cases were instances of astroturf litigation.

E. Astroturfing as a Response to the Umbrella Movement

The use of paper plaintiffs had two main benefits for the Hong Kong government. First, by using nominally private entities as plaintiffs, the three actions obscured the role of the regime in clearing demonstrators;[161] instead, it could deflect the blame to the plaintiffs, or to the courts. Second, the notionally private-law actions had distinctly public-law consequences. In the case of the Mong Kok injunctions, over a hundred demonstrators were arrested for their failure to vacate areas subject to the injunctions;[162] several were later sentenced to prison for criminal contempt.[163] An ostensibly private law matter, involving ostensibly private persons,[164] thus led to the imprisonment of political opponents of the Hong Kong government.

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156. *See* Yasuo Awai & Kenji Kawase, *CITIC Chief Confirms Talks to Buy Assets of Troubled CEFC*, NIKKEI ASIA (Mar. 29, 2018, 2:45 PM), https://asia.nikkei.com/Business/Companies/CITIC-chief-confirms-talks-to-buy-assets-of-troubled-CEFC.

157. *See* GERRY GROOT, MANAGING TRANSITIONS: THE CHINESE COMMUNIST PARTY, UNITED FRONT WORK, CORPORATISM, AND HEGEMONY 108 (2004).

158. *See* Joyce Ng & Ernest Kao, *Hong Kong Student Leaders: "Political Rewards" Spurred Appointment of Anti-Occupy Lawyers and Beijing Adviser to University's Top Body*, S. CHINA MORNING POST (Oct. 10, 2015, 7:01 AM), https://www.scmp.com/news/hong-kong/education/article/1865904/hong-kong-student-leaders-political-rewards-spurred.

159. *See* Yuen & Cheng, *supra* note , at 624.

160. *See* Michael Forsythe & Alan Wong, *Chinese President Sends Signal Against Political Change in Hong Kong*, N.Y. TIMES (Sept. 23, 2014), https://www.nytimes.com/2014/09/24/world/asia/chinese-president-sends-signal-against-political-change-in-hong-kong.html.

161. *See* Yuen & Cheng, *supra* note , at 624; Yang, *supra* note 135, at 475.

162. *See* Holmes Chan, *Five Hongkongers Found Guilty of Criminal Contempt for Blocking Clearance of Occupy Mong Kok Site*, H.K. FREE PRESS (Mar. 31, 2020, 10:16 PM), https://www.hongkongfp.com/2018/08/31/five-hongkongers-found-guilty-criminal-contempt-blocking-clearance-occupy-mong-kok-site/.

163. *Id.*

164. *See* Joyce Ng, *Justice Secretary Rimsky Yuen Rejects Criticism He 'Indulged' Government over Occupy Central*, S. CHINA MORNING POST (Dec. 17, 2014, 4:25 AM),

F. Postscript: The "National Security Law"

The 2014 astroturf litigation was a resounding success for the Hong Kong and Beijing governments. Nonetheless, such tactics are unlikely to be repeated. Following the end of the Umbrella Movement, both governments changed their strategy from one of containing political opposition to eliminating it,[165] culminating in the "National Security Law" ("NSL") imposed on Hong Kong in 2020.[166] The NSL criminalized broad swathes of activity that would be considered ordinary civic and political participation elsewhere.[167] It also created two distinct state security apparatuses in the territory—one made up of handpicked Hong Kong police, prosecutors, and judges; the other of Mainland state security officials.[168] Early indications suggest that designated "national security" judges in the territory have enthusiastically embraced their newly repressive remit.[169] In the absence of any apparent costs associated with such overt repression, the dissembly of astroturf litigation has become entirely unnecessary.

IV. LESSONS FROM ASTROTURF LITIGATION

Parts II and III above represent merely two examples of astroturf litigation; similar examples can likely be found in other (quasi-) authoritarian jurisdictions. Nonetheless, I suggest that some lessons can still be drawn from them. The first half of this Part will consider the circumstances that facilitate astroturf litigation; the second half will offer some tentative suggestions on how to prevent or mitigate astroturf litigation.

A. Circumstances Facilitating Astroturf Litigation

The case studies above suggest that astroturf litigation becomes viable when there is a perceived need to conceal the involvement of the political actor responsible for engaging in reprisals, or to shield that actor

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https://www.scmp.com/news/hong-kong/article/1663358/justice-secretary-rimsky-yuen-rejects-criticism-he-indulged.

165. *See, e.g.*, Cheung, *From Containment to Elimination*, *supra* note 128, at 31, 33.

166. *See generally* Alvin Y.H. Cheung, *Unpalatable Realities, No Choices*, 19 INT'L J. CONST. L. 1154, 1157 (2021).

167. *Id.* at 1155.

168. *Id.*

169. *See* Carlile et al., *Assessing Recent Developments Affecting Judicial Independence in Hong Kong*, paras. 89–99 (2022), https://www.ayhcheung.com/hkcfa-overseas-npjs-opinion. This report was initially drafted by a team of Hong Kong lawyers in exile, including the author.

from adverse legal or political consequences. In the context of Hong Kong's Umbrella Movement, the Hong Kong and Beijing governments apparently reached the conclusion that they could not be seen to engage in overt repression; that calculation prompted the Hong Kong government to seek out paper plaintiffs to engage in astroturf litigation.[170] In the context of American anti-abortion statutes, astroturf-enabling statutes had the effect of shielding the political actors who had secured their passage—and created the incentives for astroturf litigation to occur—from liability.

If this proposition is correct, governments that cease to perceive a need to conceal their involvement will stop resorting to astroturf litigation. In Hong Kong, for example, the imposition of the "National Security Law" suggests that astroturf litigation is no longer necessary. Similarly, the U.S. Supreme Court's overturning of *Roe v. Wade* may well result in fewer—or less sophisticated—anti-abortion astroturf statutes, as anti-abortion state actors feel increasingly emboldened to act directly.

Judicial formalism—or at least the apparent adherence to judicial formalism—also appears to be a factor in whether astroturf litigation is viable. The *Okpalobi* saga in particular shows how a formalist approach—taking Act 825 at face value as a "private tort statute"—effectively barred abortion providers in Louisiana from *any* means of obtaining legal redress. Similarly, the Court of First Instance in *Chiu Luen* took pains to emphasize that "[t]he political views or considerations behind the [Umbrella Movement] are entirely irrelevant to the determination"[171]—an assertion belied by the fact that an administrative law judge was tasked with handling what the court proceeded to treat as a conventional private law action.[172]

B. Combating Astroturf Litigation

Having considered the logic behind astroturf litigation and the circumstances that enable it to occur, it falls to consider how to prevent astroturf litigation—or, at least, how to mitigate its worst effects. I consider two categories of countermeasure here: those that can be imposed by courts, and those requiring legislative intervention. However,

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170. *See generally* Yuen & Cheng, *supra* note , at 614.

171. *See* Chiu Luen Pub. Light Bus Co., Ltd. v. Persons Unlawfully Occupying or Remaining on the Public Highway Namely, the Westbound Carriageway of Argyle St. Between the Junction of Tung Choi St. and Portland St. and/or Other Persons Hindering or Preventing the Passing or Repassing of Argyle St., [2014] 6 H.K.C. 298, para 1 (H.K.C.F.I.).

172. *See* Ma, *supra* note 146.

as I indicate further below, both types of measure face significant limitations.

1. Judicial Interventions

a. Restricting Astroturfer Standing

As noted above, SB 8 relies on an expansive approach to standing. Similarly, in the Mong Kok actions, the Court of First Instance effectively did away with the requirement that plaintiffs alleging public nuisance must establish that they have suffered special damage. These examples may suggest that the adoption of—or adherence to—stricter rules of standing may go some way to mitigating the effects of astroturf litigation.

b. An Expansive View of "Proper" Defendants in Challenging Astroturf-Enabling Statutes

Conversely, the litigation surrounding Act 825 and SB 8 display an extremely restrictive approach in identifying proper defendants. In both *Okpalobi* and *Whole Woman's Health*, the Fifth Circuit took a highly formalist approach towards the issue, insisting that only astroturf litigants could be the appropriate defendants.[173] The result—as the Western District of Texas recognized—was to deprive abortion providers of any meaningful redress. If astroturf-enabling statutes impose an expansive approach to who can act as a plaintiff, a dose of judicial realism focusing on whether targets of astroturf-enabling statutes can obtain meaningful redress—with a similarly expansive approach to proper defendants—would be appropriate.

c. Champerty and Maintenance

Astroturf litigation is objectionable for many of the same reasons that champerty and maintenance are objectionable. Nonetheless, cases across several jurisdictions indicate that a wider range of interests in the litigation—potentially including a political interest in the litigation—are likely to be viewed as acceptable. Accordingly, attempts to label astroturf litigation as champertous are likely to fail, even in jurisdictions where the courts have not been politically captured.

173. *See supra* Section II.B.

d. Limitations

All of these measures, however, run up against a fundamental limitation: all of them presuppose that the judiciary has not been politically captured—an assumption that will not always hold true. This problem is clearest in the context of American anti-abortion legislation. Many state judges are elected; those elected in conservative states—frequently products of the same political dynamics that facilitated the anti-abortion legislation in the first place—are unlikely to strike down such legislation. However, as the Fifth Circuit's rulings demonstrate, courts with appointed judges—up to and including the Supreme Court—are similarly vulnerable to political capture.[174] Nor should it be thought that Hong Kong judges are immune to such pressures: they have been the target of a systematic campaign by the Beijing and Hong Kong governments to undermine their independence—including astroturf mobilization—that began well before the imposition of the NSL.[175]

2. Legislative Interventions

a. Disclosure of Litigation Funding

Although champerty and maintenance are unlikely to be viable methods of combating astroturf litigation, compelling disclosure of litigation funding may serve a useful purpose. Both political astroturfing and astroturf litigation rely on the concealment of the principal's involvement to be effective. Just as closer scrutiny of funding sources, or compelling the disclosure of corporate or political affiliations, undermines the effectiveness of political astroturfing, compelling litigants to disclose any sources of litigation funding may expose instances of astroturf litigation. However, the imposition of such disclosure requirements will frequently not be feasible: a legislature that is sufficiently politically motivated to pass astroturf-enabling legislation is unlikely to countenance any measure that would expose, or otherwise discourage, astroturf litigation.

b. "Clawback" Statutes

Clawback statutes would force parties who engage in astroturf litigation—and who have a sufficient connection to the forum state—to indemnify their victims (and potentially also pay punitive damages). A recent example of such legislation is New York's Civil Rights Law section

174. *See, e.g.*, Michaels & Noll, *Vigilante Federalism*, *supra* note , at 20, 22–24.
175. *See generally* Carlile et al., *supra* note 169.

70-b, enacted in 2022, which created the statutory tort of unlawful interference with protected rights. Under that statute, an astroturf plaintiff may be sued for compensatory damages—including costs and attorney's fees[176]—and potentially for punitive damages.[177] A broader anti-astroturfing statute could potentially even allow a victim of astroturf litigation to recover from parties in privity with the astroturf litigant (i.e., the principal or principals instigating such litigation).

However, such statutes face at least two limitations. First, astroturf litigation assumes a certain degree of separation between agent and principal; for a clawback statute to be effective, it would need to be drafted to catch not just the agent, but the principal (who is likely to be in a better position to indemnify the victim). Second, in certain types of astroturf litigation the causal link between the litigation and the victim's political participation will be difficult to prove, especially where the subject matter of the astroturfing claim bears no superficial relation to the victim's political activity.

c. Retaliatory Astroturfing[178]

Another possible counter to astroturf litigation is to fight fire with fire. As Michaels and Nolls have observed,[179] several "blue" states are considering astroturf-enabling legislation to pursue progressive political goals, such as gun control.[180]

Progressive astroturf-enabling statutes, however, face a double bind. If such statutes are drafted to have the same oppressive effects as the likes of SB 8, they will be open to the same criticisms; if they are drafted to maintain some semblance of procedural fairness, however, they are unlikely to be nearly as effective.[181] More fundamentally, progressive astroturf-enabling statutes—like their reactionary counterparts—run up against the problem of legal candor: by cloaking an essentially public measure in the garb of a private cause of action, they arguably serve to undermine legality in the name of preserving it.

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176. N.Y. CIV. RIGHTS LAW § 70-b(3)(a) (McKinney 2023).
177. *Id.* § 70-b(3)(b).
178. Michaels & Noll, *Vigilante Federalism*, *supra* note at 43–45.
179. *Id.* at 43–46.
180. *See, e.g.*, Lawrence Hurley, *Analysis: Texas Abortion Law Opens Door to Copycat Curbs on Guns, Other Rights*, REUTERS (Dec. 15, 2021, 1:41 PM), https://www.reuters.com/world/us/texas-abortion-law-opens-door-copycat-curbs-guns-other-rights-2021-12-15/.
181. Even oppressive drafting may not remedy this problem. *See* Michaels & Noll, *Vigilante Federalism*, *supra* note at 45–46.

d. Limitations

Anti-astroturf statutes run up against two sets of problems. A legislature that passed astroturf-enabling legislation in the first place is unlikely to countenance the passage of an anti-astroturf statute. If the legislature has been politically captured (as seems likely where a quasi-authoritarian regime exists), any legislative countermeasure aimed at astroturf litigation would be effectively impossible to enact.

Anti-astroturf statutes enacted by other jurisdictions face a different set of problems. First, in the absence of a meaningful connection between the astroturf litigant and the forum jurisdiction, such statutes are vulnerable to the accusation of jurisdictional overreach. As a result, such anti-astroturf statutes may only be feasible in the context of a federal state like the United States.

Second, such statutes may only be effective in targeting agents, not principals. The principals instigating astroturf litigation are likely to be government officials in their home jurisdiction; as such, they are likely to enjoy some form of state immunity. Moreover, astroturf litigation is only effective if there is a certain degree of separation between agent and principal. Accordingly, proving a sufficient connection between the principal and the astroturf litigation will either raise considerable evidential difficulties, or require the adoption of artificially relaxed standards of causation or privity.

In any event, retaliatory astroturf-enabling statutes run up against yet another fundamental problem: that of legal candor. By cloaking an essentially public measure in the garb of a private cause of action, they arguably serve to undermine legality in the name of preserving it.

CONCLUSION

This Article has defined the phenomenon of astroturf litigation: the use of "private" agents by a political actor to engage in litigation that superficially resembles private litigation to further the political actor's own objectives, while obscuring that political actor's involvement in the litigation. It has also argued that American "private subordination regimes" should not be viewed exclusively through the lens of vigilantism, but as astroturf-enabling statutes; the latter analysis not only centers the role of the regime in fomenting politically driven, ostensibly "private" litigation, but also places astroturf litigation in the broader context of "democratic backsliding" and contemporary authoritarianism in other jurisdictions—such as the 2014 Umbrella Movement litigation in Hong Kong.

Further, astroturf litigation is objectionable not merely because it has been used to serve illiberal and anti-democratic ends, but because it involves active deception by the regime both as to *what* the substantive legal act is, and *who* is responsible for doing it. As such, astroturf litigation is not merely illiberal or anti-democratic, but *anti-legal*.

This Article has also suggested that astroturf litigation finds particularly fertile ground when (a) the political actor perceives the costs of direct involvement to be too high; and (b) the courts in the relevant jurisdiction favor a formalist approach and treat astroturf litigation as an ordinary private civil suit. In the absence of meaningful prospects for legislative or judicial change in the jurisdiction in which astroturf litigation is taking place, anti-astroturfing statutes in other jurisdictions may represent the only response available. Nonetheless, such legislation faces a host of problems—most notably difficulties in penalizing the political principals behind astroturf litigation. In light of these persistent difficulties, astroturf litigation is likely to become an increasingly prevalent tool in the canny autocrat's arsenal—at least where the autocrat in question is not in a position to engage in overt repression.