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# The Texas abortion ban violates conservative principles

*S.B. 8 Relies on litigation tricks that conservatives have long condemned as a threat to the rule of law.*

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Abortion rights supporters protest outside the city hall in Edinburg, Texas, on Sept. 1, 2021. *AP Photos*

The Texas "heartbeat" bill that the Supreme Court declined to block last week is almost as restrictive as the Texas law that the court overturned half a century ago in *Roe v. Wade*.

The fact that this new bill nevertheless took effect is a remarkable victory for the anti-abortion cause, made possible by an innovative enforcement mechanism that relies on private litigation.

That victory, however, required embracing tactics that conservatives have long condemned. Texas Senate Bill 8 invites lawsuits by financially incentivized plaintiffs who need not claim any personal injury, rigs the rules in their favor, establishes vague liability theories that threaten freedom of speech, and offers a model for attacking other rights that the Supreme Court has said are protected by the Constitution.

The Texas law at issue in *Roe* prohibited abortion except when it was necessary to save the mother's life. S.B. 8 bans abortion after fetal cardiac activity can be detected, which happens around six weeks into a pregnancy, long before "viability" and before many women even realize they are pregnant.

The organizations that challenged the law estimated that it would affect "at least 85% of Texas abortion patients." The only exception is for a "medical emergency," meaning the ban applies to cases involving rape, incest or predictably lethal fetal defects.

S.B. 8 allows "any person" to sue someone who performs a prohibited abortion, "aids or abets" it, or "intends" to do so. While it exempts women who seek abortions from liability, potential defendants include a wide range of ancillary actors accused of facilitating the procedure.

"Aiding or abetting" abortion explicitly includes helping to pay for it and could encompass other sorts of assistance, such as driving a woman to a clinic or watching her kids while she is there. And although S.B. 8 says aiding or abetting does not include "speech or conduct protected by the First Amendment," its authorization of lawsuits based on what a defendant "intends" to do, even when he does not actually do it, makes that limitation illusory in practice.

Anyone who provides information on how to obtain a post-heartbeat abortion, for example, can be sued based on the allegation that he intended to facilitate the procedure. His First Amendment defense would come into play only after he is forced to invest time and money in responding to that claim.

S.B. 8 makes that threat especially potent because it bars prevailing defendants from recovering their legal costs. Prevailing plaintiffs, meanwhile, are promised compensation for their expenses, along with "statutory damages" of at least $10,000 per abortion.

The law also limits the defenses available to the targets of the lawsuits it authorizes. A defendant cannot escape liability, for example, by citing a court decision deeming S.B. 8 unconstitutional if that ruling was subsequently overturned, even if that happened after the conduct cited by the plaintiff.

Cato Institute senior fellow Walter Olson, author of *The Litigation Explosion* and *The Rule of Lawyers*, notes that "legal conservatives used to be the sharpest critics" of methods for "turbocharging litigation" such as "the private attorney general idea," one-way fee shifting, and "overbroad defendant designation," while "legal progressives scoffed at these complaints." The "lasting lesson," Olson says, is that "there is no weapon introduced into legal process that will be used only by one team."

Just as conservatives have adopted litigation tactics they once viewed as a threat to the rule of law, progressives can easily adapt the S.B. 8 strategy for purposes that conservatives will not like. Legislators could ban gun possession or "hate speech," either of which would be clearly unconstitutional under the Supreme Court's precedents, while trying to evade legal challenges by limiting enforcement to private lawsuits.

Pro-choice legislators could attack the pro-life movement by authorizing lawsuits against anyone who "intends" to facilitate the blocking of abortion clinic entrances, which arguably would include anyone who expresses the view that abortion is tantamount to murder. Conservatives may regret sacrificing their avowed principles for short-term political gain.