

When are Constitutional Amendments Unconstitutional?



By Paul Engel

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- If you thought that the Dobbs v. Jackson Women's Health case had put the question of abortion to bed, you were wrong.
- Activists are attempting to amend to amend the constitution of several states to protect abortion.
- Would such amendments to state constitutions violate the Constitution of the United States?

Since last year's Supreme Court decision in Dobbs v. Jackson Women's Health Organization overturned the court's precedent in Roe v. Wade, there has been a flurry of work on both sides of the debate. Some states passed legislation restricting access to abortions except for medically sound reasons, others to not only secure abortion access in law but effectively declare themselves abortion sanctuary states. Some groups are working to enshrine abortion in their state's constitution. With all the heated rhetoric on both sides, one question never seems to be asked: Would any of these state constitutional amendments be constitutional?

The Issue That Will Not go Away

Just as those in 1973 who thought that Roe v. Wade would put an end to the abortion debate, there are those who thought the 2022 case Dobbs v. Jackson Women's Health would also end the debate. Both groups were wrong. In 1973, the Supreme Court,

rather than tamping down the controversy, simply encouraged the two sides to further entrench their positions and inflame their demonstrations. In 2022 the court did the same thing, just in the other direction. So I was not surprised when state legislatures, many who had already prepared for the overturning of Roe v. Wade, simply changed their battlegrounds. States like Florida, Texas, and others placed more restrictions on abortions, while states like California and New York protected abortions with state laws. Some states are even trying to take abortion protection to the next level. Not content to protect abortion with state law, they are trying to amend their state's constitution to do so.

Ohioans will vote next November on a petition to amend their constitution with language that includes the following:

The Amendment would amend Article I of the Ohio Constitution by adding Section 22, titled "The Right to Reproductive Freedom with Protections for Health and Safety."

The Amendment provides that:

- 1. Every individual has a right to make and carry out one's own reproductive decisions, including but not limited to decisions on contraception, fertility treatment, continuing one's own pregnancy, miscarriage care, and abortion.*

Ohio Initiative Petition

Arizona for Abortion Access, a political action committee, has contacted Arizona Secretary of State, Adrian Fontes, in an attempt to get a constitutional amendment protecting abortion on the November 2024 ballot. Activists in Florida have been collecting signatures in an attempt to overturn recent state law to protect the right to abortion. Nebraska and South Dakota also appear to be moving toward putting a constitutional amendment before their citizens. Other states like North Dakota, Oklahoma, Arkansas, and Montana have been

trying to amend their state's constitution, but with little apparent success.

All of these actions have one thing in common: They are attempts to supersede the will of the people as expressed by their representatives, with the will of the people as expressed at the ballot box. To understand this maneuver, we have to understand what a constitution is.

What is a Constitution

Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the Legislature repugnant to the Constitution is void.

[Marbury v. Madison Opinion](#)

A Constitution is the fundamental and paramount law, either of a nation or of a state. Since any changes to a state constitution must be ratified by a vote of the people of that state, we see that the people of a state are sovereign not only over their government, but their elected representatives as well. Unfortunately, the process in most of our states for amending their constitution appears to ignore the fundamental nature of their constitution, and replace their republican form of government with a democracy.

DEMOCRACY, *noun Government by the people; a form of government, in which the supreme power is lodged in the hands of the people collectively, or in which the people exercise the powers of legislation.*

[DEMOCRACY, Webster's 1828 Dictionary](#)

The issue is not where the supreme power of a state is lodged, but the method by which it is exercised. Most of the states only require a simple majority to ratify an amendment to their

constitution. While at first this may seem a good and equitable process, it ignores one fundamental issue: If the fundamental law of a state can be changed by a simple majority vote of the people, we have left the realm of a republic and become a form of democracy. Good, you say? America is a democracy, so its amendment processes should be democratic.

That is not what the Framers of our Constitution thought though:

“Democracy... while it lasts is more bloody than either aristocracy or monarchy. Remember, democracy never lasts long. It soon wastes, exhausts, and murders itself. There is never a democracy that did not commit suicide.”

[John Adams, letter to John Taylor, 1814](#)

This is why the United States is a republic, not a democracy.

We are now forming a republican government. Real liberty is neither found in despotism or the extremes of democracy, but in moderate governments

[Alexander Hamilton – Federal Convention, June 26, 1787](#)

So why is amending a constitution by a simple majority so dangerous? Because it can easily be used as a citizen legislature rather than the fundamental law of the state.

The Constitution for the United States, including all of the amendments, is just under 8,000 words. According to [Ballotpedia](#), it's 39,000 words long and has been amended 115 times. If you are curious, the longest and most amended constitution is [Alabama's](#) at 389,000 words and 950 amendments. To a certain extent the size difference between the constitution of a state and the United States makes sense. After all, as James Madison wrote in Federalist Paper #45:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to

remain in the State governments are numerous and indefinite.

[James Madison – Federalist Paper #45](#)

Yet, as often happens, the people of these states have abused their power to establish the fundamental laws for their state in order to become direct legislators, thereby turning their state from a republic into a form of democracy. Again, many of you may be thinking “Great! Majority rules.” But is that true? Between 2005-2008, Erica Chenoweth and Maria Stephan studied the effectiveness of violent and non-violent political uprisings. Their research led to the 2011 book, [Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict](#).

Further research showed the surprisingly small critical mass needed for success: movements that were able to mobilize at least 3.5 percent of the population were uniformly successful.

[Erica Chenoweth illuminates the value of nonviolent resistance in societal conflicts – Harvard Kennedy School](#)

If Mss. Chenoweth and Stephan’s research is correct, it doesn’t take 50%+1 to change a society, just a committed 3.5%. Which may explain why state constitutions, supposedly the fundamental and paramount law of the state, include laws [regulating private sewer systems](#), the [use of golf carts on city streets](#), and the [confinement of pigs during pregnancy](#).

Supremacy

Regardless of the manner used amending the constitution of their state, those who would enshrine abortion in their states’ constitution are attempting either to void the acts of the legislature that have restricted it or as a preemptive strike against any future legislation. On its face, this seems to be a winning strategy. That is, except for one little thing: Supremacy.

If the constitution of a state is the fundamental and

paramount law of the state, it seems to reason that, as the supreme law of the state, the abortion activists have a winning plan. However, each state has joined the compact known as the Constitution of the United States. In this compact we find the following clause:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Constitution, Article VI, Clause 2

While the constitution of any state may be the fundamental law of the state, the Constitution of the United States holds supremacy over it. This means that any state law or constitutional clause in that state that is contrary to the Constitution of the United States is void. What does that say about these attempts to amend state constitution? If I can show you that any such amendment is a violation of the Constitution of the United States, then those acts are void, and the judges in every state should ignore them, right?

The Right to Life

While the right to life is an adage adopted by many in the pro-life movement, it's certainly more fundamental than that. All the way back in 1791, when the Bill of Rights was adopted, it protected the right to life.

*No person shall ... be deprived of **life**, liberty, or property, without due process of law;*

U.S. Constitution, Amendment V (emphasis added)

The Due Process clause of the Fifth Amendment makes it quite clear, no person shall be deprived of life without due process

of law, which the free legal dictionary defines as:

An established course for judicial proceedings or other governmental activities designed to safeguard the legal rights of the individual.

[Due Process – The Free Legal Dictionary](#)

This protection of life was once considered so important that in 1868 it was again enshrined into the Constitution by the Fourteenth Amendment, this time specifically limiting the states.

nor shall any State deprive any person of life, liberty, or property, without due process of law;

[U.S. Constitution, Amendment XIV, Section 1](#)

I know, many pro-abortionists do not believe that the child in the womb is a person, but do political actors get to redefine words to support their political agendas?

PERSON *An individual human being consisting of body and soul.*

[PERSON – Webster's 1828 Dictionary](#)

PERSON *A living human.*

[PERSON – The Free Legal Dictionary](#)

The child in the womb, from the moment of conception, is an individual human being. They possess DNA separate and distinct from their mother. Furthermore, from the moment of conception, the fertilized egg shows signs of life such as taking in nourishment and growing. After just five weeks there's a detectable heartbeat which, in short, is evidence the child is alive. Therefore, to legally deprive that child of their right to life, there must be due process, a process designed to protect the legal rights of that child.

Conclusion

So where does all this leave us? If we had a constitutional judicial system, the judges in every state would ignore these state amendments as acts contrary to the supreme law of the land: The Constitution of the United States. They would require the state to either prove that the child in the womb is not an individual, living human being, or that their existence violates a fundamental right of the mother, such as her right to life. To all of those who say that the woman has a right to her own body, I do not disagree. Just as the child does not have the right to take the mother's life, the mother does not have an inherent right to take the child's life.

As the Supreme Court was wrong in 1973 to think the Roe v. Wade decision would end the controversy over abortion, they were just as wrong to think the Dodd v. Jackson Women's Health would end it. While people may not like the fact that the Constitution of the United States protects the right to life, it's the supreme law of the land. Imagine what life would mean if the United States were a democracy, i.e., if those protections for life could be overturned by a mere 50% vote. Then the United States would truly resemble the dystopia described in the saying:

Democracy is two wolves and a lamb voting on what to have for lunch. Liberty is a well-armed lamb contesting the vote!
—Attributed to Benjamin Franklin.

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