

State Considers Amendment to Protect Human Life at Any Stage of Development

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Next week, voters in North Dakota will consider a [proposal](#) that would amend the state constitution to address the right to life. If adopted, the North Dakota constitution would state: "The inalienable right to life of every human being at any stage of development must be recognized and protected." The amendment was proposed by state Senator Margaret Sitte, who has indicated that the amendment "is intended to present a direct challenge to *Roe v. Wade*." Whether such an amendment would have an impact on a woman's ability to terminate a pregnancy, however, is not certain. Similar federal legislation that would recognize the right to life for the unborn has been criticized by legal scholars who have maintained that Congress cannot displace the Supreme Court's interpretation of the U.S. Constitution.

Like the North Dakota proposal, the so-called [Human Life Bill](#) would have recognized human life as beginning at conception, and would have prohibited the states from depriving all human life of their rights under the Fourteenth Amendment of the U.S. Constitution. Supporters of the Human Life Bill argued that section 5 of the Fourteenth Amendment provides Congress with the discretion to craft legislation needed to secure the guarantees of the Fourteenth Amendment. Legal scholars argued, however, that Congress cannot displace the Court's interpretation of the Constitution in *Roe*. New York University law professor [Samuel Estreicher](#), for example, contended: "*Roe* and its progeny define the limits of governmental action in this area . . ."

In [Katzenbach v. Morgan](#), a 1966 case involving section 5 of the Fourteenth Amendment, the Supreme Court emphasized that section 5 does not grant Congress the power to enact laws that have the effect of diluting the equal protection and due process decisions of the Court: "[Section 5] grants Congress no power to restrict, abrogate, or dilute these guarantees." In [City of Boerne v. Flores](#), a 1997 case involving section 5 and the Religious Freedom Restoration Act, the Court further observed that "Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."

Supporters of the North Dakota proposal may attempt to distinguish the amendment from the federal legislation by emphasizing that it is a ballot measure that will be voted on by the general public and is not legislation like the Human Life Bill. Thus, the concerns raised by legal scholars and the Supreme Court are not relevant. In fact, some legal scholars have acknowledged that a constitutional amendment could allow the unborn to be recognized as persons under the U.S. Constitution.

Nevertheless, it must be emphasized that the right to terminate a pregnancy was found to exist within the U.S. Constitution's right of privacy. Thus, even if the North Dakota proposal were adopted, it would not seem to have an impact on our understanding of the U.S. Constitution. While the North Dakota proposal might not ultimately reach abortion, it could possibly have an impact on other activities that are not similarly protected under the U.S. Constitution, including those that are not entirely clear at the moment.