

Historic US document could block state anti-abortion efforts

by [Gordon Weil, Opinion contributor](#) July 30, 2022 Updated August 1, 2022 Bangor Daily News

After the Supreme Court reversal of Roe v. Wade, some states are trying to ensure that women will be unable to get around the decision.

They seek to prevent women from obtaining “medication abortion” by mail and punish them if they travel out of state to obtain an abortion. But states may be thwarted in their anti-abortion efforts and the most effective method may come from an almost forgotten document.

The “Articles of Confederation” was the governing document of the United States before the Constitution. Some of its terms are still in effect and could overrule state anti-abortion moves.

We are usually taught that the Constitution completely replaced the Articles of Confederation. But an historic opinion that the Articles survive came from one of the most famous lawyers in American history.

The Illinois lawyer who reached that conclusion was Abraham Lincoln who confirmed this position on the day he became president. He said states could not secede, because the Articles created a “perpetual” union and that decision remained in effect.

One other bit of proof of their validity is the name of the country. The Articles officially named the country the “United States of America” and it is the legal authority for the name.

The Articles of Confederation provide that the national government has “the sole and exclusive right and power of ... establishing and regulating post-offices from one State to another, throughout all the United States...” This power is carried over in the Constitution. (It does not ban competing courier services like UPS and Fedex.)

Postal service was key to binding the 13 original colonies together. Even before the Declaration of Independence, the Continental Congress appointed Benjamin Franklin as postmaster general. He promptly created a national post road running from Falmouth, Massachusetts (now Portland, Maine) to Savannah, Georgia. U.S. Route 1.

By the time Lincoln was inaugurated, seven states had seceded from the Union. Because of the essential unifying role of mail, he sought to keep the postal system running in those states. They refused.

Even before the court's Roe repeal, more than half of the estimated 930,000 abortions in the U.S. in 2020 were by taking medication, some probably obtained by mail.

The postal service is under the exclusive control of the federal government. A state cannot block ordinary personal mail simply because it may not like its contents. Action by a state to ban mail containing medication for private use could be overruled under “the exclusive right and power” of the United States.

Most people make regular use of the mail confident that their state cannot open the envelope or block its delivery. In addition to interstate mail, there is now a federal rule allowing individuals to import medications by mail from outside of the country.

Some states are reportedly considering moves to make illegal travel by their residents to other states to obtain abortions. They could be penalized when they return home.

The Articles provide that “inhabitants of each of these States ... shall be entitled to all privileges and immunities of free [sic] citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State” The second of these rights is found in the Articles, not in the Constitution.

Since the founding of the country, Americans have had freedom of movement from state to state. They probably have no idea where the right appears.

Before the abolition of slavery under the Constitution, the Articles allowed a person owning slaves in one state to travel to a state that banned slavery without risking of punishment there.

Today, a person could obtain an abortion in a state where it is lawful and then go to any other state, including returning to their home state even if it banned abortions. If you obey the abortion laws of a state, you may freely travel to another state, even if it bans abortions in its borders, without any risk of punishment.

These Articles should warm the heart of any judges who consider themselves to be “originalists.”

History reveals yet another reason that state anti-abortion actions won't work. The Constitution was amended to ban alcoholic beverages, but that amendment could not be effectively enforced against individuals and it was soon repealed. Similarly, a ban on mailing medications in plain wrappers or traveling for an abortion could not be easily enforced.

Prohibition demonstrated how difficult it is to legislate personal morality and private behavior. More recently, a million Americans have died from COVID-19, many resisting government advice on vaccination or masking orders. Such government action cannot readily be enforced.

In the end, absolutely banning abortion is probably neither legal nor possible. But trying to do that is certainly political.