

Gehrke: Utah lawmakers should listen to the pros and stop considering themselves ‘constitutional scholars’

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You might think that when legislative attorneys say a bill is likely unconstitutional, sensible lawmakers would back off.

You’d be wrong — or at least you’d be giving legislators too much credit for acting sensibly. The Office of Legislative Research and General Counsel is required to flag bills that, in the office’s opinion, are almost certain to violate either the U.S. or Utah constitutions by attaching a so-called “constitutional note” to bills with a “high probability” of being struck down by the courts.

Every year, usually a handful of bills get such treatment, almost always from conservative members trying to poke the federal government over guns or public lands or abortion. And often, the self-styled “constitutional scholars” try to ram their legislation through anyway. The latest example is [Rep. Karianne Lisonbee’s HB205](#), which would make it a crime for doctors to perform an abortion if the mother seeks the procedure for the sole reason of terminating a fetus that has been diagnosed with Down syndrome.

In a hearing last week, the Clearfield Republican couldn’t point to instances in which this has happened in Utah, nor could she describe how exactly her bill could be enforced.

But a larger problem with the bill is that there really is no question it violates the U.S. Constitution. In fact, a court in Indiana has already struck down an identical law in that state.

Utah’s legislative attorneys advised that in light of *Roe v. Wade* and following abortion-related rulings “there is a high probability that the court would find the proposed legislation unconstitutional because the legislation violates current case law establishing a woman’s constitutional right to a nontherapeutic pre-viability abortion.”

“If we pass this bill, we are buying ourselves a lawsuit,” [Rep. Brian King, D-Salt Lake City, said during the House Judiciary Committee hearing.](#)

And of course, he’s right. And of course, taxpayers will have to foot the legal bill, and when the state loses — and of course, it will lose — Utahns will end up paying the legal fees for the other side, too.

All that so a group of Republican legislators have a catchy snippet for their re-election fliers come November.

It used to be easier for attorneys to raise constitutional questions, but more than a decade ago, frustrated legislators created the “high probability” standard.

Since then we've seen fewer notes. Some bills that still received one included Rep. Brian Greene's bill barring the federal government from regulating in-state gun manufacturers. That bill didn't pass. The Montana bill it was patterned after was struck down by the courts.

And Rep. Ken Ivory's bill directing the state to seek a takeover of federal land in 2012 had a whopper of a constitutional note. The Legislature passed it anyway and has tried to slog ahead with the "take back the lands" endeavor, even though a legal analysis by the Conference of Western Attorneys General reiterated that a lawsuit would almost certainly have been unsuccessful.

Marina Lowe, legislative and policy counsel for the ACLU of Utah, said the notes serve an important purpose.

"It's a tremendous benefit to the Legislature, especially legislators who are considering bills with a constitutional note, to be able to understand what they're buying," Lowe said, "especially when they're passing laws that might potentially spend taxpayer money for a lawsuit."

The attorneys who work for the Legislature are pros and conscientious about the work they do. The legislators they serve swear an oath to "support, obey and defend" the U.S. Constitution and the Utah Constitution, and it benefits everyone for them to listen to their counsel and to take their obligations seriously.