

Potential Legal Ramifications of Measure 1
September 2014

Introduction

In February 2013, Senate Concurrent Resolution No. 4009 passed in the North Dakota Senate by a vote of 26 to 21.¹ On March 22, 2013, it passed in the House by a vote of 57 to 35.² It will appear on a statewide ballot in November 2014 as Measure 1.³ If voters approve it, it will appear as a new section in Article I of the North Dakota Constitution.⁴ It will go into effect thirty days after passage,⁵ and is not subject to the Governor's signature or veto.⁶ Similar amendments were recently rejected in other states, including Colorado and Mississippi.⁷ Measure 1 reads:

“The inalienable right to life of every human being at any stage of development must be recognized and protected.”⁸

Recent press reports and op-eds regarding Measure 1 have raised a number of questions: What will Measure 1 do in general? Is Measure 1 self-executing? Will Measure 1 operate to determine the constitutionality of North Dakota statutes? What will Measure 1 do specifically? Namely, will it end all abortions in North Dakota; will it reshape the structure of laws around abortion; will it prohibit the use of living wills and do-not-resuscitate orders; will it prohibit people from making medical decisions; and will it prohibit the practice of in vitro fertilization? This memo addresses these questions.

I. What Will Measure 1 Do in General?

This section discusses the three major parts of Measure 1: the inalienable right to life, the definition of life, and the obligation to protect life.

a. The Inalienable Right to Life

Measure 1 first provides to every resident of North Dakota an “inalienable right to life.” This provision mirrors language in the Declaration of Independence, that all men have “certain unalienable Rights,” including the right to “Life.”⁹ The United States

¹ Dave Thompson, *ND Senate approves abortion ballot question that says life begins at conception*, MSN NEWS, Feb. 8, 2013, available at <http://news.msn.com/politics/nd-senate-approves-abortion-ballot-question-that-says-life-begins-at-conception>.

² Laura Bassett, *North Dakota Personhood Amendment Passes State House*, HUFFINGTON POST, Mar. 22, 2013, available at http://www.huffingtonpost.com/2013/03/22/north-dakota-personhood_n_2934503.html.

³ *Id.*

⁴ S. Con. Res. 4009, 63rd Leg. (N.D. 2013).

⁵ N.D. CONST. art. III, § 8-9.

⁶ See N.D. CONST. art. V, § 9.

⁷ Thompson, *supra* note 1.

⁸ S. Con. Res. 4009, 63rd Leg. (N.D. 2013).

⁹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Constitution, which is the governing document of the United States government, contains no such clear right to life, but it has been read to contain an implied interest in life.¹⁰

b. The Definition of Life

Measure 1 would protect life in North Dakota “at any stage of development.” The North Dakota legislature has defined when life ends, but it has not defined when life begins. This memo, therefore, uses the definition of the beginning of life asserted by supporters of Measure 1. Senator Margaret Sitte, who introduced Measure 1 in the legislative assembly, has said that life begins at conception.¹¹ Other news articles indicate that sponsors and supporters of Measure 1 similarly assert that “life” begins at conception, or, to be precise, fertilization by a sperm of an ovum.¹²

To determine when life ends, the North Dakota legislature has adopted the Uniform Determination of Death Act, which declares that death occurs when someone has “sustained either irreversible cessation of circulatory and respiratory functions or irreversible cessation of all functions of the entire brain, including the brain stem.”¹³ This is a dual, or disjunctive, definition of death, as it can be met by cardiac death¹⁴ or brain death.¹⁵

Supporters of Measure 1 assert that the amendment should have an effect at the very beginning of life through to the end. During legislative debate on Measure 1, Senator Sitte was asked whether Measure 1 could prohibit living wills. Sitte responded, “That

¹⁰ There are only three references to “life” in the United States Constitution. See U.S. CONST. art. III, § 3, cl. 2 (dealing with charges of treason during the “Life of the Person” charged with treason); U.S. CONST. amend. V (providing that a criminal defendant shall not “be twice put in jeopardy of life or limb” and that individuals shall not “be deprived of life . . . without due process of law.”); U.S. CONST. amend. XIV (states shall not “deprive any person of life . . . without due process of law”).

¹¹ Margaret Sitte, *Abortion Discussion*, MINOT DAILY NEWS, June 2, 2013, available at

<http://www.minotdailynews.com/page/content.detail/id/575966/Abortion-discussion.html>.

¹² *North Dakota Lawmakers Move to Ban Abortion by Defining Life as Starting at Conception*, CBSNEWS, Mar. 22, 2013, available at http://www.cbsnews.com/8301-201_162-57575901/north-dakota-lawmakers-move-to-ban-abortion-by-defining-life-as-starting-at-conception/; TeamSarah4Choice, *Is ND Republican Margaret Sitte vying to open Coat Hanger Factories 2Replace Medical Abortions*, DAILY KOS, Feb. 8, 2013, available at <http://www.dailykos.com/story/2013/02/08/1185518/-Is-ND-Republican-Margaret-Sitte-vying-to-open-Coat-Hanger-Factories-2Replace-Medical-Abortions>.

¹³ N.D. CENT. CODE § 23-06.3-01 (2014).

¹⁴ See Rob Stein, *A Struggle to Define ‘Death’ for Organ Donors*, NPR, Mar. 28, 2012, available at <http://www.npr.org/blogs/health/2012/03/27/149463045/a-struggle-to-define-death-for-organ-donors> (defining cardiac death as “an irreversible cessation of circulation and heartbeat and breathing and no intervention will be done to restore it.”).

¹⁵ See Ajay Kumar Goila & Mridula Pawar, *The Diagnosis of Brain Death*, INDIAN J CRIT CARE MED. 2009 Jan-Mar; 13(1): 7–11, available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2772257/> (providing the accepted definition of brain death as “the irreversible loss of all functions of the brain, including the brainstem. The three essential findings in brain death are coma, absence of brainstem reflexes, and apnoea.”); see also New York State Dept. of Health & New York State Task Force on Life & The Law, *Guidelines for Determining Brain Death*, Nov. 2011, available at https://www.health.ny.gov/professionals/hospital_administrator/letters/2011/brain_death_guidelines.pdf.

might come about later.”¹⁶ Janne Myrdal, Chair of ND Choose Life (the primary group supporting Measure 1), was asked in a radio interview whether the amendment would protect senior citizens from “aggressive end-of-life termination.” She responded that the amendment “could” do so and that she supports “protecting the elderly.”¹⁷ The *Minot Daily News* reported that Tim Knutson, Minot coordinator for ND Choose Life, considers Measure 1 to be not just about abortion but about the right to life “at any age.”¹⁸ And John Trandem, Chair of North Dakota Right to Life, which has endorsed Measure 1, stated that the amendment “doesn't pertain only to abortion; this pertains to every living human being.”¹⁹

In construing the scope of Measure 1's effect, North Dakota courts will look to its plain language,²⁰ which points to life “at any stage of development,” and will therefore give force to Measure 1 from the beginning through to the end of life.

c. The Obligation to Protect the Right to Life

Measure 1 provides that the right to life “must” be recognized and protected. This provision indicates that Measure 1 departs from the usual role of a constitution as a document of negative rights, meaning that it sets forth what governments *may not* do,²¹ and is a provision that sets forth a positive right — meaning that it describes what the North Dakota government *must* do.

Although most of the individual rights set forth in the North Dakota Constitution are framed as negative rights, there are a number of positive rights set forth, including the requirement that all searches and seizures be reasonable²²; the legislature provide free public schools²³; and public money be expended only by legislative appropriation.²⁴

¹⁶ 2013 Senate Standing Committee Minutes at 12, Senate Judiciary Committee, Jan. 29, 2013, available at <http://www.legis.nd.gov/files/resource/63-2013/library/scr4009.pdf?20140810104335>.

¹⁷ Interview With Janne Myrdal on Measure 1 in North Dakota, COMMON SENSE CLUB, Jan. 9, 2014, available at http://www.podcast.flagfamily.com/dtzspxpyjc.html?name=2014-01-09_1-09-13_csc_hr_3_interview_janne_myrdal.mp3.

¹⁸ Jill Schramm, *Wisconsin Anti-Abortion Group Promotes Measure 1 in N.D.*, MINOT DAILY NEWS, Aug. 13, 2014, available at <http://www.minotdailynews.com/page/content.detail/id/610331/Wisconsin-anti-abortion-group-promotes-Measure-1-in-N-D-.html?nav=5010>.

¹⁹ *ND Measure 1 on November Ballot Aims to Protect Life*, VALLEY NEWS LIVE, Apr. 30, 2014, available at <http://www.valleynewslive.com/story/25390716/measure-1-on-november-ballot-aims-to-ban-abortion>.

²⁰ *North Dakota Dep't Human Servs. v. Thompson*, 1998 ND 226, ¶ 7, 586 N.W.2d 847, 848; *Sexton v. Sutherland*, 42 ND 509, 174 N.W. 214, 217.

²¹ *State v. Ertelt*, 548 N.W.2d 775, 776 (N.D. 1996) (the “North Dakota Constitution is an instrument of limitations of authority to enact legislation.”) (internal quotations omitted); *Daly v. Beery*, 45 N.D. 287, 178 N.W. 104, 111 (N.D. 1920) (The usual purpose of the North Dakota Constitution is to “place a limitation . . . on those to whom [the people] have delegated certain powers, so as to prevent an abuse of the powers.”).

²² *State v. Herrick*, 1997 ND 155, ¶ 17, 567 N.W.2d 336, 341.

²³ *Bismarck Public School Dist. No. 1 v. North Dakota*, 511 N.W.2d 247, 263 (N.D. 1994) (Sandstrom, J., dissenting).

²⁴ *Municipal Services Corp. v. Kusler*, 490 N.W.2d 700, 704 (N.D. 1992).

Measure 1 would impose an additional duty on the North Dakota government to recognize and protect every resident's right to life at any stage of development.²⁵ The North Dakota Constitution requires governmental action to meet this mandate,²⁶ which includes state funding for all necessary programs to recognize and protect every resident's life.²⁷ No other state constitution or the Federal Constitution imposes upon the government a positive duty to protect life.

Other countries, however, do provide for such a right. India's right to life, for example, "has resulted in several significant advancements in the area of tobacco control regulation."²⁸ This also includes the right to food and adequate nutrition, which has compelled Indian courts to order "the release of national stocks of surplus food-grains to famine stricken communities [and] nationally sponsored lunch programs."²⁹ The Indian Supreme Court has also held that a woman's right to life includes the right to be free from workplace sexual harassment.³⁰ The right to life has also been interpreted to mean "the right to a healthy and pollution-free environment."³¹

Similarly, Indonesia's high court has held that citizens have a "right to water, and that the government is obligated to meet 'the daily needs of every individual.'"³² The Nigerian Federal High Court "ordered the cessation of gas flaring in the Niger Delta community because it 'violates guaranteed constitutional rights to life and dignity.'"³³

II. Is Measure 1 Self-Executing?

"[A] constitutional provision becomes immediately operative only if it is a self-executing provision."³⁴ Self-executing provisions are those that establish "a sufficient rule by

²⁵ See *Doherty v. Ransom Cty.*, 5 ND 1, 63 N.W. 148, 149 (1895) ("[W]e are constrained to view our constitutional provision, not as a grant of power, but as a limitation upon power . . . For that purpose the constitutions generally, if not universally, use the word 'may.' Here the mandatory word 'shall' is used.").

²⁶ N.D. CONST. art. I, § 24 ("The provisions of this constitution are mandatory and prohibitory unless, by express words, they are declared to be otherwise."); N.D. CONST. art. IV, § 13 ("The legislative assembly shall enact all laws necessary to carry into effect the provisions of this constitution."); *State ex rel. Twichell v. Hall*, 44 ND 459, 171 N.W. 213, 221 (1918) ("The general rule is that constitutional provisions are mandatory."); *State ex rel. Rusk v. Budge*, 14 ND 532, 105 N.W. 724, 726 (1905) ("[A]ll constitutional provisions are mandatory, unless expressly declared to be otherwise."); see also *Preckel v. Byrne*, 62 ND 356, 243 N.W. 823, 825-26 (1932); *Schumacher v. Byrne*, 61 ND 220, 237 N.W. 741, 747 (1931).

²⁷ *State ex rel. Walker v. Link*, 232 N.W.2d 823, 826 (N.D. 1975) ("Neither the Legislature nor the people can, without a constitutional amendment, refuse to fund a constitutionally mandated function.").

²⁸ Oscar A. Cabrera & Juan Carballo, *Tobacco Control Litigation: Broader Impacts on Health Rights Adjudication*, 41 J.L. MED. & ETHICS 147, 151 (2013).

²⁹ Michael J. McDermott, *Constitutionalizing an Enforceable Right to Food: A New Tool for Combating Hunger*, 35 B.C. INT'L & COMP. L. REV. 543, 544 (2012).

³⁰ *Annotated Legal Bibliography on Gender*, 18 CARDOZO J.L. & GENDER 531, 573 (2012).

³¹ Robert Carnwath, CVO, *Institutional Innovation for Environmental Justice*, 29 PACE ENVTL. L. REV. 555, 557 (2012).

³² George S. McGraw, *Defining and Defending the Right to Water and Its Minimum Core: Legal Construction and the Role of National Jurisprudence*, 8 LOY. U. CHI. INT'L L. REV. 127, 181 (2011).

³³ Randall S. Abate & Elizabeth Ann Kronk, *Commonality Among Unique Indigenous Communities: An Introduction to Climate Change and Its Impacts on Indigenous Peoples*, 26 TUL. ENVTL. L.J. 179, 194 (2013).

³⁴ *State ex rel. Vogel v. Garaas*, 261 N.W.2d 914, 918 (N.D.1978).

which its purpose can be accomplished without the need of legislation to give it effect.”³⁵ A self-executing provision is one that the judiciary can enforce without the assistance of a legislative enactment.³⁶ If the provision is self-executing, then no further legislation is necessary to put it in force.³⁷

In contrast, a provision is non-self-executing if it requires appropriate legislation to implement its objective.³⁸ Non-self-executing provisions are those that “merely establish[] general objectives, without setting forth rules by which those objectives can be accomplished such that the provision must remain inoperative until appropriate legislation is enacted to give it effect.”³⁹

To determine whether a constitutional provision is self-executing, The North Dakota Supreme Court looks to the provision’s language for two indicia. First, an amendment will generally *not* be self-executing if the provision contains language such as “as provided by law,” “unless otherwise provided by law,” “shall be fixed by law,” “as may be prescribed by law,” and “[t]he legislative assembly may provide for.”⁴⁰ This signals that the provision’s execution rests not on its own language, but on other enabling legislation. Second, the Supreme Court asks whether the language can be interpreted on its own, or whether additional legislative support is necessary to put it into effect.⁴¹

There is no “as provided by law” language in Measure 1. Furthermore, while the terms contained in Measure 1 may require additional *definition*, they do not necessarily require additional *legislation* to be put into force. It is the judiciary’s province to provide the definition of terms like “life,” “must,” “recognize,” and “protect,” and it is capable of doing so. Therefore, it is possible that the North Dakota courts will find Measure 1 to be self-executing. This means that upon inclusion of the Amendment in the North Dakota Constitution, all government agents will be obligated to take immediate steps to protect the right to life at any stage of development.⁴²

III. The Potential Legal Ramifications of a Self-Executing Amendment

³⁵ *Id.*

³⁶ *Davis v. Burke*, 179 U.S. 399, 403 (1900) (Declaring a provision of the Idaho constitution to be “self executing”; “where a constitution asserts a certain right, . . . it speaks for the entire people as their supreme law, and is full authority for all that is done in pursuance of its provisions.”)

³⁷ *Id.*; *see also Vogel*, 261 N.W.2d at 918 (“a constitutional provision becomes immediately operative only if it is a self-executing provision.”).

³⁸ *Vogel*, 261 N.W.2d at 918.

³⁹ *Id.*

⁴⁰ *State ex rel. Agnew v. Schneider*, 253 N.W.2d 184, 187-88 (1977).

⁴¹ *Id.* at 192 (finding a constitutional provision was not self-executing because it “did not contain all of the necessary prerequisites so as to make it self-executing but its implementation required legislation, and without legislation it was uncertain exactly how to proceed.”).

⁴² Contrary to the statements of Measure 1 supporters, the North Dakota Supreme Court has found constitutional provisions to be self-executing. *See Vogel*, 261 N.W.2d 914; *State ex rel. Syvertson v. Jones*, 74 ND 465, 23 N.W.2d 54 (1946); *State ex rel. Reese v. Mooney*, 64 ND 620, 255 N.W. 105 (1934); *Great Northern Railway Co. v. Duncan*, 42 ND 346, 176 N.W. 992 (1919); *State ex rel. Twichell v. Hall*, 44 ND 459, 171 N.W. 213 (1918).

If Measure 1 is self-executing, then government agents would be mandated to take official action based solely upon the amendment, independent of any enabling legislation. What action they could take is more fully described in section four below. Briefly, however, state actors might reasonably construe the amendment as including the following:

- State court judges might be constitutionally obligated to give no force to living wills or health care proxies if they contain do-not-resuscitate orders or other provisions regarding end-of-life care;
- Law enforcement agencies might be obligated to arrest for murder those who provide in vitro fertilization, and prosecutors might be obliged to prosecute them;
- Legislators might be required to include in the state’s budget adequate funding to feed, house, and provide medical care to every North Dakota resident;
- The Governor and the Department of Health might be obligated to ensure that residents are not adversely affected by oil production in western North Dakota. This could include ensuring clean air and water, a great reduction in vehicle traffic and sound and light pollution, and funding schools, law enforcement agencies, and social services adequate to meet the needs of North Dakota’s new residents who have come to the state to work. If these services are not provided, residents might be able to sue for them.⁴³
- State prisons may be required to provide better food, housing, medical and dental care, and recreation to inmates than these inmates currently receive.

Private actors — i.e. non-governmental residents of the state — could also have certain rights. These include, but are not limited to, the following:

- The right to obtain state funding for health care, including extraordinary beginning-of-life and end-of-life care. Pursuant to its obligations under Measure 1, the state could be required to pay for such care;
- An embryo or fetus would have the right to sue for all rights afforded to residents of North Dakota. The state could be obligated to pay for an attorney to represent that embryo or fetus;
- Any resident of North Dakota could have the right to a state-funded attorney to sue for any benefits that are necessary to ensure the resident’s right to life.

IV. Potential Factual Ramifications

This section describes some of the most salient or intended potential effects of Measure 1. This list is not exhaustive. It does carry with it, however, the promise of extensive and wide-ranging litigation.

⁴³ Pursuant to federal constitutional law, “residents” include both current North Dakota residents and anyone who might migrate to the state and reside here for any period of time. *See Saenz v. Roe*, 526 U.S. 489, 501-02 (1999) (Reaffirming “the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State. That right is protected not only by the new arrival’s status as a state citizen, but also by her status as a citizen of the United States.” This includes the rights of “a citizen of one State who travels in other States, intending to return home at the end of his journey.”).

Abortion and medical decisionmaking. Supporters of Measure 1 have indicated that they hope it will end abortion in North Dakota.⁴⁴ While Measure 1 cannot nullify the landmark abortion cases *Roe v. Wade*⁴⁵ and *Planned Parenthood v. Casey*,⁴⁶ there is little doubt that anti-abortion advocates will use the amendment to challenge these cases in an effort to end abortion in North Dakota.

This use could come in many forms. An executive branch official could shut down the state's sole clinic that provides abortions. A prosecutor could charge clinic operators criminally. It is most likely, however, that members of the legislative assembly will attempt to pass Measure 1-inspired anti-abortion laws.⁴⁷ Once passed, the state's sole clinic will likely challenge the laws in court. This will entail expense, time, and litigation, and if the laws clearly contradict the *Roe* or *Casey* holdings, the state could be required to pay for the clinic's legal bills in addition to its own.⁴⁸

Measure 1 could, furthermore, require the legislative assembly to pass every law it can to eliminate a woman's right to choose an abortion short of the *Roe/Casey* limit. This could include laws that lengthen the waiting period for an abortion, stricter regulations on clinics, laws that increasingly restrict the right of minors to obtain an abortion, and so forth. To be clear, Measure 1 is not *necessary* for this legislation; as long as laws satisfy *Roe*, *Casey*, and all other constitutional requirements, they can be passed without Measure 1. The amendment could, however, *mandate* such laws. Indeed, Measure 1 could *force* the North Dakota government to challenge *Roe* and *Casey*, even if the resulting legal actions are expensive and frivolous.

Cases in which a pregnant woman must obtain an abortion to preserve her own life will present an intractable conflict. Pursuant to Measure 1, the state will be obligated to protect the right to life of the woman no less than that of the fertilized ova, embryo, or fetus. If only one life can survive, the state would have to decide whether the mother or

⁴⁴ *North Dakota Lawmakers*, *supra* note 12; TeamSarah4Choice, *supra* note 12.

⁴⁵ 410 U.S. 113 (1973).

⁴⁶ 505 U.S. 833 (1992).

⁴⁷ The legislative assembly in its 2013 session passed a number of anti-abortion laws that clearly or quite probably violate federal constitutional rights under *Roe v. Wade* and/or *Planned Parenthood v. Casey*. See *MKB Mgmt. Corp. v. Burdick*, 2014 U.S. Dist. LEXIS 60152 (D.N.D. Apr. 16, 2014) (holding HB 1456 is unconstitutional under *Roe* and *Casey*). To be sure, these and other such laws do not depend upon Measure 1 for their validity. To the extent that they contradict the *Roe* or *Casey* holdings, Measure 1 will not save them.

⁴⁸ N.D. CENT. CODE § 28–26–01(2) (2014), states:

In civil actions the court shall, upon a finding that a claim for relief was frivolous, award reasonable actual and statutory costs, including reasonable attorney's fees to the prevailing party. Such costs must be awarded regardless of the good faith of the attorney or party making the claim for relief if there is such a complete absence of actual facts or law that a reasonable person could not have thought a court would render judgment in that person's favor, providing the prevailing party has in responsive pleading alleged the frivolous nature of the claim. This subsection does not require the award of costs or fees against an attorney or party advancing a claim unwarranted under existing law, if it is supported by a good-faith argument for an extension, modification, or reversal of the existing law.

the fetal life will die. Either way, the state will have violated North Dakota's constitution, and may be subject to a lawsuit and money damages.⁴⁹

Furthermore, if the state prevents the woman from obtaining an abortion when necessary to preserve her life, the state will have violated the mother's constitutional right of "enjoying and defending [her own] life."⁵⁰

In vitro fertilization. Assuming that "life" for the purpose of Measure 1 begins at fertilization, the state could be obligated to consider the administration of IVF to be murder.

During the administration of IVF, ova are extracted from the woman and are mixed in a lab with a donor's sperm. As a result, a number of ova are fertilized. As long as five days after fertilization, one or more of the fertilized ova are transferred into the woman's uterus. To increase the chance of pregnancy, doctors generally transfer more than one fertilized ovum at one time. One or more of the ova usually do not survive; IVF doctors and their patients are aware of this fact and expect it.

North Dakota law defines murder as when one "[i]ntentionally or knowingly causes the death of another human being"⁵¹ or when one "[c]auses the death of another human being under circumstances manifesting extreme indifference to the value of human life."⁵² Murder is a class AA felony,⁵³ for which the maximum punishment is life imprisonment without the possibility of parole.⁵⁴

Assuming that life begins at conception, doctors who administer IVF would apparently be acting with the intent or at least with indifference to the lives of the multiple ova that are either fertilized but not transferred to the woman's uterus, or are transferred but do not survive. Nurses, clinic or hospital staff, and other medical assistants could be guilty of accomplice crimes, including conspiracy to murder. Women and men who hope to become parents through IVF could also be criminally liable.

⁴⁹ For example, in up to 2% of pregnancies, a fertilized ova remains in the fallopian tube, which is called an ectopic pregnancy. During such pregnancies, the mother's life is in danger, and the fertilized ova will not survive the treatment. WebMD, *What to Know About Ectopic Pregnancy*, available at <http://www.webmd.com/baby/guide/pregnancy-ectopic-pregnancy>. An extreme interpretation of Measure 1 would threaten a doctor's legal right to treat ectopic pregnancy and the mother's consent to such treatment. This interpretation would entail the treatment being considered to be murder. The state might not want to adopt this interpretation, for obvious political and public safety reasons. However, Measure 1 could be read to *require* the state to do so, and therefore to interfere with the patient-doctor relationship to ensure a number of things: whether the diagnosed ectopic pregnancy is really an ectopic pregnancy, whether there are alternative treatments, and so forth. While the state would probably not *prohibit* treatment for ectopic pregnancies, it may be required under Measure 1 to become involved in a mother's and her doctor's health care decisions to ensure that the life of the fertilized ova is protected if at all possible.

⁵⁰ N.D. CONST. art. I, § 1.

⁵¹ N.D. CENT. CODE § 12.1-16-01(1)(a) (2014).

⁵² N.D. CENT. CODE § 12.1-16-01(1)(b) (2014).

⁵³ N.D. CENT. CODE § 12.1-16-01(1) (2014).

⁵⁴ N.D. CENT. CODE § 12.1-32-01(1) (2014).

The freezing of embryos for later use could also be prohibited. Couples often freeze embryos if the woman has an illness, such as cancer, and will undergo treatment that could harm the ova in her body. Couples may simply want to freeze embryos for later implantation. A substantial percentage of frozen embryos will not survive the freezing and thawing process, and couples may decide to otherwise dispose of the frozen embryos. Because it is highly likely that some frozen embryos will not survive, Measure 1 may require that the state treat this process as murder.

In short, Measure 1 suggests and its supporters assert that life begins at fertilization. IVF entails the fertilization of a number of ova, many or most of which IVF doctors and their patients fully expect not to survive. Should North Dakota courts read Measure 1 as its supporters would like, IVF doctors, their employees, and their patients may be prosecuted, and IVF prohibited as a criminal act.

Extraordinary end-of-life care. Measure 1 does not differentiate between lives at their beginning and at their end. The amendment, therefore, would obligate the state to protect the right to life at its end. This could obligate the state to pay for extraordinary end-of-life care. Where children want to withdraw life support from a parent who would not survive without it, Measure 1 could obligate the state to interfere with the child-parent relationship to protect the person on life support.

Measure 1 could also force courts to nullify the effect of residents' living wills, advance health care directives, and do-not-resuscitate orders that mandate the withdrawal of life support where withdrawal would end patients' lives. North Dakota residents would have less of a right to determine the course of their end-of-life medical care.

Measure 1 supporters claim that living wills and DNR orders are protected because a state statute provides for them. This is an incorrect statement of law. Living wills and DNR orders facilitate the end of life, which may conflict with Measure 1's requirement that the state protect the right to life. Living wills and DNR orders operate when patients are incompetent to express whether or not they want extraordinary life-sustaining care. Measure 1 could render any action that ends such lives to be illegal and the living will/DNR statute to be unconstitutional. Given the comments of Senator Sitte, Janne Myrdal, Tim Knutson, and John Trandem, noted above, it appears that Measure 1 supporters fully expect the amendment to undermine living wills, DNR orders, and the like.

Doesn't the federal constitution protect end-of-life options? Measure 1 supporters rely on a 1990 U.S. Supreme Court case, *Cruzan v. Dir., Mo. Dept. of Health*,⁵⁵ for the proposition that the federal constitution protects end-of-life options. This is far from clear, however.

Cruzan involved a Missouri woman, Nancy Cruzan, who was in a persistent vegetative state from which she would never recover. She had expressed to friends, while

⁵⁵ 497 U.S. 261 (1990).

competent, that she would not want extraordinary life-sustaining treatment if she were in a vegetative state.⁵⁶ While the Court *implied* that Nancy had the right to have her wishes honored, it did not explicitly say so, concluding only that the state could require a high standard of proof of her wishes before treatment could be withheld.⁵⁷ Indeed, the Court did not even hold that a *competent* person has the right to refuse life-sustaining treatment (but it probably would, if faced with the question).⁵⁸

The issues whether an incompetent person has the right to die with dignity, pursuant to her wishes, and whether we all have the right to a living will and DNR order remain open. We currently have no federal constitutional right to any of these end-of-life options. Justice Scalia, in *Cruzan*, suggested that these were issues for the states to decide.⁵⁹ Measure 1 adopts Justice Scalia's states'-rights approach; the federal constitution offers no certain protection.

Measure 1 supporters claim they want to promote the "dignity of patients facing the end of their lives" and use *Cruzan* to bolster their claim.⁶⁰ This desire, however, has more in common with the dissenting justices in that case than with the majority. Justice Brennan protested that the majority opinion rejected Cruzan's right to have her end-of-life preferences honored,⁶¹ and Justice Stevens lamented that the Court sided with the state's "abstract, undifferentiated interest in the preservation of life," discounting Nancy's preferences.⁶² *Cruzan* reaffirms the state's right to intrude upon end-of-life decisions while Measure 1 supporters erroneously claim the opposite. Measure 1 could double down on *Cruzan*, taking a panoply of end-of-life options away from North Dakotans.

Conclusion

Should Measure 1 become part of the North Dakota Constitution, its effect will be unprecedented, wide-ranging, and unpredictable. If it is self-executing, every North Dakota government official will be obligated to follow its mandate. If it is not self-executing, the legislative assembly will be obligated to enact enabling laws. In any event, North Dakota will be the first state to impose upon itself the positive duty to protect life from fertilization of the ova to irreversible cardiac or brain death. While supporters of Measure 1 hope this will end abortion in North Dakota, it is much more likely that Measure 1 will impel North Dakota toward a holistic, state-sponsored pre-cradle-to-grave approach to residents' welfare.

This will have some interesting consequences. Residents of North Dakota may be guaranteed state-sponsored health care, adequate housing, and nutritious food. The state

⁵⁶ *Id.* at 265-68.

⁵⁷ *Id.* at 282, 286.

⁵⁸ *Id.* at 279.

⁵⁹ *Id.* at 293, 298 (Scalia, J., concurring).

⁶⁰ *Statement on Misleading Representations About Measure 1 and End-of-Life Care Decisions* at 1, available at <http://ndchooselife.com/wp-content/uploads/2014/08/ND-End-of-Life-Whitepaper-8-1final.pdf>.

⁶¹ *Cruzan*, 497 U.S. at 302 (Brennan, J., dissenting).

⁶² *Id.* at 331 (Stevens, J., dissenting).

may have to provide prenatal and early childhood care. Protecting residents against environmental pollution could become constitutionally mandated.

Yet with every set of good consequences come negative ramifications. Expenditures will skyrocket, forcing a heavy tax increase. Employers may be forced to provide prohibitively expensive health insurance plans. They may be required to install technology that makes working safer and less polluting, thus decreasing their profit margins and encouraging them to relocate their businesses out of North Dakota. As jobs migrate away, the state will be required to pay even more for its pre-cradle-to-grave approach to protecting life. Hopeful couples will not be able to undertake in vitro fertilization. The traditional protections given to families will be undermined, as the state will come to interfere with personal family choices regarding extraordinary beginning- and end-of-life care. Individuals will be less free to make decisions regarding their own health care.

While the state has an important role to play in protecting life, constitutionalizing and mandating that protection will have profound implications that could reshape North Dakota in every regard. It is vital that North Dakota voters understand these implications before they go to the polls in November 2014. Measure 1 is not about abortion, despite what its supporters would like; it is about the role that North Dakotans want the government to play in their lives, and indeed about the fundamental structure of government and society.

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