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Annotated Bibliography: "Persons Born" and the Jurisprudence of "Life"

by

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I. Introduction

This annotated bibliography reviews U.S. legal sources that interpret and apply the meaning of the word "life" as it appears in the context of the substantive aspects of due process in federal and state constitutions and in the inalienable rights clauses appearing in many state constitutions.

The Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution state that "no person shall be deprived of life, liberty, or property without due process of law," applying this constraint to the federal and state governments, respectively.[2] Similar principles are enshrined in most, if not every, state constitution, sometimes using identical language and sometimes with distinctive formulations for the same or closely-related concepts.[3] A majority of state constitutions also include provisions setting out specific "inalienable rights" including life, liberty, and the pursuit of happiness.[4] Both types of

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[2] U.S. CONST. amends. V, XIV. Note that this bibliography is focused on the rights of pregnant persons. The assertion that "fetal life" is encompassed by state or federal constitutional provisions addressing life is beyond the scope of this bibliography.

[3] *See infra* Part V and the accompanying Trends/Groupings Table.

[4] *Id.*

provisions have venerable histories. In Anglo-American law, the idea of due process is traced back to origins in 1215, in Magna Carta.[5] Inalienable rights clauses in state constitutions share roots with the Declaration of Independence and Lockean philosophy, but also draw on the rich philosophical discussions of the 18th century.[6]

Over time, the meanings of "liberty" and "property" in federal and state constitutions have received significant attention from scholars and jurists. "Liberty," for example, has supported the recognition of substantive rights to privacy, bodily integrity, family, marriage, and other fundamental rights.[7] "Property" was famously theorized by Charles Reich to encompass the "new" property, beyond tangible items to include other sources of wealth, like reputation and education.[8]

The jurisprudential meaning of "life," on the other hand, has been comparatively ignored in American jurisprudence, both on the federal and state levels. Instead, perhaps because the concept of "liberty" was often given an expansive interpretation, there was little parallel exploration of the scope of "life" in the context of substantive due process or inalienable rights protections.[9]

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[5] MAGNA CARTA, 1215 (Prof. Nicholas Vincent trans., Sotheby's Inc.), *available at* https://www.archives.gov/files/press/press-kits/magna-carta/magna-carta-translation.pdf (last visited May 26, 2023).

[6] Joseph Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, 25 HASTINGS CONST. L. QRTLY. 1, 11 (1997).

[7] *See generally Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding "liberty" contains right of individual to control the upbringing of their children); *Loving v. Virginia*, 388 U.S. 1 (1967) (holding freedom to marry person of another race cannot be infringed by the State); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Harlan, J., concurring) (arguing Fourteenth Amendment's "liberty" protects fundamental right to privacy); *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding "liberty" protects intimate private conduct in individual's home); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (holding that Due Process Clause protects right to live as a family unit).

[8] Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964). *See also* Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969)

[9] *See* Howard, *infra* Part II(A); *see also* Charles E. Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property,"* 4 HARV. L. REV. 365 (1891).

This legal terrain shifted in 2022 with the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, which reversed the recognition of a fundamental right to abortion in *Roe v. Wade* and *Planned Parenthood v. Casey* and raised questions about other judicial decisions resting on due process protections of "liberty."[10] The *Dobbs* Court's circumscribed view of "liberty" rights naturally invites renewed attention to "life" in the due process triad and states' inalienable rights clauses, after many decades when "life" was overshadowed by "liberty" and "property." Indeed, since the 2022 decision in *Dobbs*, several state courts have looked to constitutional "life" provisions to determine the constitutionally appropriate scope of abortion regulations.[11]

Today, questions about the scope of constitutional protections for the "life" of "persons" are most starkly presented by state laws that permit abortion only when necessary to save a pregnant person's life, leaving doctors and other health providers to decide exactly how these standards should be applied in the nuanced context of the real world.[12] But beyond extreme life-or-death situations, substantive notions of "life" might also encompass government obligations to allow its constituents to pursue the good life, human dignity, happiness, safety, and health,

[10] *Dobbs v. Jackson Whole Women's Health*, 142 S. Ct. 2228 (2022); *id.* at 2300 (Thomas, J. concurring) ("Because the Due Process Clause does not secure *any* substantive rights, it does not secure a right to abortion.").
[11] *See, e.g.*, *Members of Medical Licensing Board of Indiana v. Planned Parenthood*, 211 N.E.3d 957, 961-62 (Ind. 2023); *Wrigley v. Romanick*, 988 N.W.2d 231, 242 (N.D. 2023).
[12] For examples of the dilemmas faced by health care providers and pregnant people under these laws, *see* J. David Goodman, *Abortion Ruling Keeps Doctors Afraid of Prosecution*, NYTIMES (Dec. 13, 2023), https://www.nytimes.com/2023/12/13/us/texas-abortion-doctor-prosecution.html#:~:text=Cox's%20doctor%2C%20Damla%20Karsan%2C%20determined,which%20would%20be%20her%20third.; Lauren Coleman-Lochner, *Doctors Fearing Legal Blowback Are Denying Life-Saving Abortions*, BLOOMBERG LAW (July 12, 2022, 10:30 AM), https://news.bloomberglaw.com/health-law-and-business/doctors-fearing-legal-blowback-are-denying-life-saving-abortions; *Doctors Are Still Confused by Abortion Exceptions in Louisiana. It's Limiting Essential Care*, TIME (May 24, 2023, 3:11 PM), https://time.com/6282288/louisiana-abortion-exceptions-confusion-doctors/; *Texans Who Perform Abortions Now Face Up to Life in Prison, $100,000 Fine*, TEXAS TRIBUNE (Aug. 25, 2022, 5:00 AM), https://www.texastribune.org/2022/08/25/texas-trigger-law-abortion/; *Women Denied Abortions Sue Texas to Clarify Exceptions to the Laws*, TEXAS TRIBUNE (Mar. 7, 2023, 3:00 PM), https://www.texastribune.org/2023/03/07/texas-abortion-lawsuit/.

including through permitting access to abortion and recognizing other aspects of reproductive autonomy.

This broader conception of "life" was referenced in the early documents that informed the drafters of the U.S. Constitution and the constitutions of the colonies, such as the writings of noted British jurists Sir Edward Coke and William Blackstone.[13] Drawing on these influential legal thinkers, an expansive idea of government obligations with respect to "life" is intimated in the Declaration of Independence and the state constitutional provisions that share its philosophical underpinnings.[14] A typical example is the North Carolina Constitution of 1776, reaffirmed in 1868, which provides that "all persons . . . are endowed by their Creator with certain inalienable rights," including "life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."[15] That the drafters of the Fifth and Fourteenth Amendments also adopted the word "life" suggests a reaffirmation of this conceptual baseline.[16]

Beginning in the 1940s, a capacious understanding of the term "life" was incorporated into international human rights documents. The Universal Declaration of Human Rights (UDHR), which explicitly applies only to "humans born," provides that "[e]veryone has the right

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[13] Operating before modern understandings of pregnancy and at a time when women had limited autonomy, Blackstone identified the "quickening" as a critical marking point of a pregnancy, after which life "begins in contemplation of the law." 1 WILLIAM BLACKSTONE, COMMENTARIES *125. Sir Edward Coke likewise identified "quickening" as a key marker of "life" for common law purposes. Sir Edward Coke, 3 INSTITUTE OF THE LAWES OF ENGLAND 50 (London 1648). While these two jurists remain influential in Anglo-American law, their limited views of women's rights and capacities are at odds with modern concepts of equality. *See* Melissa Murray, *Children of Men: The Roberts Court's Jurisprudence of Masculinity*, 60 HOUSTON L.REV. 799, 877 (2023); Amanda Trau, *The Superficial Application of Originalism in Dobbs: Could a More Comprehensive Approach Protect Abortion Rights?*, 50 FORDHAM URB. L.J. 867, 883 (2023). In any event, contemporary anti-abortion advocates' assertions regarding "fetal life" are fundamentally different from the idea of "quickening" as a marker. *See, e.g.*, Jennifer Holland, *Abolishing Abortion: The History of the Pro-Life Movement in America*, 10 AM. HISTORIAN 36 (2016) (describing pro-life activists' rejection of "quickening" marker).

[14] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). "Life" and the "pursuit of Happiness" both appear as unmodified "unalienable [r]ights," allowing for expansive interpretation; *see also infra* part II.B.

[15] Constitution of the State of North Carolina, Art. I, Sec. 1.

[16] For a comprehensive analysis on statutory construction and legislative purpose based on related statutes, s*ee* JABEZ G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 45:1–45:15 (Norman J Singer & J.D. Shambie Singer, eds., 2022) (1891).

to life, liberty and security of person."[17] The "International Bill of Rights," which adds two binding treaties to the UDHR's declaratory commitments, elaborates on this provision.[18] Specifically, the International Covenant on Civil and Political Rights (ICCPR), a treaty ratified by the United States in 1992, states that "[e]very human being has the inherent right to life."[19] The UN Human Rights Committee's General Comment 36 construing this provision observes that "[t]he right to life is a right that should not be interpreted narrowly."[20] The General Comment further notes that the right entails an entitlement to "enjoy a life with dignity," which includes "safe, legal, and effective" access to abortion to protect pregnant peoples' lives and health.[21]

These international developments are particularly instructive because their protections for "life" ultimately derive from the same sources as domestic U.S. due process and inalienable rights frameworks – the very frameworks that influenced those who drafted the UDHR and the two covenants that make up the International Bill of Rights.[22] While U.S. jurisprudence has generally been silent on the interpretation of "life" in constitutional contexts, international developments in both human rights and comparative law demonstrate that a more robust understanding of the substantive right to "life" of "humans born" is possible and is, indeed, consistent with historical understandings of the term.[23]

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[17] G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 3 (Dec. 10, 1948) [hereinafter UDHR], *available at* https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/043/88/PDF/NR004388.pdf?OpenElement (last visited May 26, 2023).
[18] John P. Humphrey, *The International Bill of Rights: Scope and Implementation*, 17 WM. & MARY L. REV. 527 (1976).
[19] International Covenant on Civil and Political Rights, art. 6, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).
[20] Human Rights Committee, General Comment No. 36 on Article 6: Right to Life, ¶ 3, U.N. Doc. CCPR/C/GC/36 (2018), *available at* https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/261/15/PDF/G1926115.pdf?OpenElement (last visited May 26, 2023).
[21] *Id.* ¶¶ 3, 8.
[22] Kristina Ash, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence*, 3 NW. J. INT'L HUM. RTS. 1, 2-3 (2005) ("Given its instrumental role in creating this Universal Bill of Rights, it is no surprise that the three covenants are primarily consistent with the Bill of Rights in the United States Constitution.").
[23] UDHR, *supra* note 17, at 72.

II. Organization and Methodology

Following the Introduction and this Organization and Methodology section, Part III of the bibliography sets out legal scholarship relating to the right to life, focusing on the rights of pregnant persons in the context of abortion. Consideration of fetal life is outside the scope of this bibliography.

Accordingly, Part III provides the historical background of references to "life" relevant to both the federal and state constitutions' due process and inalienable rights clauses. This Part also includes a discussion of dictionary definitions of "life" pertinent to both federal and state constitutional provisions. Part IV turns to scholarly analyses and selected case law illuminating the federal due process protections for "life." Following that, Part V embarks on a similar review of interpretations of "life" in scholarly commentaries and case law implicating state constitutions, including both state due process and inalienable rights clauses. Part VI of the bibliography provides a brief review of scholarly commentary and decisions regarding the scope of "life" in international law and comparative contexts. A short Conclusion follows. In each section, sources are set out in chronological order.

The materials listed in this bibliography were identified through a careful and intensive research process engaging several different approaches to triangulate the results. For the federal survey, researchers relied on searches in Westlaw, Google, and ScholarOne, the comprehensive book and journal database available through the Snell Library at Northeastern University. Searches primarily focused on decisions of the U.S. Supreme Court and federal courts of appeal, though our results include a few selected federal district court decisions. For the state survey, researchers conducted separate Westlaw and Google searches for each state, focusing on states' highest courts and encompassing both state constitution due process and inalienable rights

clauses, if any. Researchers supplemented these searches with proprietary AI tools designed to assist in searching designated databases. International materials were obtained through UN websites and Westlaw, Google, and Scholar One searches. Historical dictionary research relied on material available through Westlaw, Google, and university library collections.

III. Shared Historical Background of Federal and State Protections for "Life"

A. Due Process Concepts: Magna Carta and Influential Commentators of the Founding Era

The essential concept of due process in Anglo-American law, and the due process texts enshrined in both federal and state constitutions, are originally derived from Magna Carta of 1215. Chapter thirty-nine of this feudal-era document provides that no freeman will be seized, dispossessed of property, or harmed except by the "law of the land."[24] The specific phrase "due process of law" first appeared as a substitute for the "law of the land" language in a 1354 statute of King Edward III that restated Magna Carta's guarantees.[25]

Scholarship from the late nineteenth century, as well as more recent historical inquiries, have examined the meaning given to each aspect of the Great Charter's protections, including (albeit usually in passing) the protection of "life." As described below, these works rely on authoritative commentaries from jurists Edward Coke (1552-1634) and William Blackstone (1723-1780), and moral theorists such as John Locke (1632-1704) and Francis Hutcheson (1694-1746), with whom the drafters of the federal and colonial constitutions were deeply familiar.

1. Charles E. Shattuck, *The True Meaning of the Term 'Liberty' in Those Clauses in the Federal and State Constitutions that Protect Life, Liberty, and Property*, 4 HARV. L. REV. 365, 373 (1891)

[24] MAGNA CARTA, *supra* note 5, para. 29.
[25] *Magna Carta: Muse and Mentor*, LIBRARY OF CONGRESS, https://www.loc.gov/exhibits/magna-carta-muse-and-mentor/due-process-of-law.html (last visited May 26, 2023).

Consistent with the jurisprudential debates at the time, this essay homes in on the meaning of "liberty" and argues for a narrow interpretation of the term; the Progressive Era author's cautionary approach regarding the right to contract and similar economic rights was rejected by the U.S. Supreme Court as it entered the so-called "*Lochner* era" of America jurisprudence. However, Shattuck's article coincidentally gathers historical evidence concerning the meaning of "life" in the due process context. According to Shattuck (citing Blackstone), in the thirty-ninth article of Magna Carta the elementary rights protected were "life (including limb and health), personal liberty (using the phrase in its more literal and limited sense to signify freedom of the person or body, not all individual rights), and property." Blackstone averred that "[t]he Great Charter protected every individual in the nation in the free enjoyment of his life, liberty, and property." And Blackstone described a right of personal security as including "life, limb, health, and reputation" – the same rights, Shattuck observes, "which Coke and other commentators on the thirty-ninth article include under the terms 'aliquo modo destruatur,'and which may fairly be included under the term "life" in our constitutions[]." Shattuck's oft-cited essay was awarded a prize from the Harvard Law School Association for a graduating law student.[26]

2. Sheldon Gelman, *"Life" and "Liberty": Their Original Meaning, Historical Antecedents, and Current Significance in the Debate Over Abortion Rights*, 78 MINN. L. REV. 585, 588 (1995)

Despite this article's title, Gelman primarily focuses on the original meaning of "liberty," but the article also addresses historical evidence regarding the meaning of "life" for purposes of due process. Gelman argues that the due process formulation acquired its more modern connotation "as a comprehensive list of important or fundamental rights - in seventeenth- and

[26] Paul A. Freund, *New Vistas in Constitutional Law*, 112 U. Pa. L. Rev. 631, 632 (1964).

eighteenth-century England, particularly in the writings of Whigs and social contract theorists like John Locke and Frances Hutcheson." Gelman notes that under this tradition, life, rather than liberty, is "the most basic right." Further, this understanding of "life" includes "more than mere biological existence; it also encompasses physical integrity, 'health and indolency of body,' and even a minimum quality of life." These influences, Gelman argues, guided eighteenth and nineteenth century Americans when they "devised the Constitution and ratified the Fourteenth Amendment." This expansive understanding was so widely accepted, writes Gelman, that "it seems inconceivable that anyone familiar with Locke, Hutcheson, and Blackstone would use 'life' to limit widely accepted notions of natural right. These writers held that health, limb, and body are fundamental rights that belong to the same family of rights as 'life.'"[27]

3. A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA (1968; updated 2015)

This book provides an in-depth analysis of the influence of Magna Carta on the initial development of federal and state constitutions. It describes in detail the ways in which British law was adapted by the colonies and highlights the influences of Sir Edward Coke. In the book's epilogue, Howard notes "the pervasive place Coke had in the libraries, arguments, and writings of American lawyers and other leaders at critical junctures in our history," as well as the "intellectual leadership of the American colonies" in using Magna Carta as a foundation for American constitutionalism. The book discusses the role of Natural Law in constitutional thinking (particularly in early state constitutions) as well as the development of substantive due process following the adoption of the Fourteenth Amendment.

4. GERARD MAGLIOCCA, THE HEART OF THE CONSTITUTION: HOW THE BILL OF RIGHTS BECAME THE BILL OF RIGHTS (2017)

[27] *See* John Locke, SECOND TREATISE OF GOVERNMENT § 6 (1690) (writing that "health" is included among a person's inalienable natural rights).

Tracing the federal Bill of Rights from its inception to the 20th century, this book describes James Madison's 1789 proposal for a "preface" to the Constitution. The proposed text was eventually reworked and moved to the end of the document to become the Bill of Rights. Madison's proposed preface was based on provisions of several existing state constitutions, including Virginia's. The draft, eventually subsumed in the Bill of Rights, identified the purpose of government as, among other things, providing for the "enjoyment of life and liberty."

B. "Inalienable Rights": The Declaration of Independence and its Precursors

Completed in 1776, the Declaration of Independence uses the term "life" only once, in the familiar first sentence of the second paragraph: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." This phrasing draws on sources ranging from Aristotle to John Locke to George Mason.[28] Legal commentators analyzing the Declaration have particularly noted the context in which it was drafted, and the intention of the Declaration's signers to underscore government's obligations not simply to prevent death, but to ensure good lives of its citizens. Language that directly echoes these provisions of the Declaration appears in at least thirty-four state constitutions, some of which were drafted prior to – and influenced -- the Declaration.[29]

1. Chester James Antieau, *Natural Rights and The Founding Fathers-The Virginians*, 17 WASH. & LEE L. REV. 43 (1960)

[28] Linda Keller, *The American Rejection of Economic Rights as Human Rights & the Declaration of Independence: Does the Pursuit of Happiness Require Basic Economic Rights?*, 19 N.Y.L. SCH. J. HUM. RTS. 557 (2003).
[29] The Preamble to the U.S. Constitution also includes affirmative language regarding the government's purposes, including, for example, to "promote the general Welfare." U.S. CONSTITUTION, PREAMBLE. On the interpretive significance of the Constitution's Preamble, see Brian Leiter, Carole E. Handler, & Milton Handler, *A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation*, 12 CARDOZO L. REV. 117, 122 (1990); ERWIN CHEMERINSKY, WE THE PEOPLE: A PROGRESSIVE READING OF THE CONSTITUTION FOR THE TWENTY-FIRST CENTURY 53 (2018); and David Schwarz, *Reconsidering the Constitution's Preamble: The Words that made Us U.S.*, 27 CONST. COMM. 55 (2021).

Professor Antieau writes that Virginia was one of the first colonies to adopt the language of natural rights, such as the right to life, as part of its political structure. The formulations adopted indicate that "life" was viewed expansively. On June 12, 1776, Virginia adopted the Declaration of Rights which stated that "all men... have certain inherent rights... namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness." One of Virginia's most prominent founding fathers, Thomas Jefferson, wrote and advocated for natural rights, including the right to life in the Declaration of Independence. Similar statements were included in the early drafts of the U.S. Constitution. One example is that of Virginian George Mason who, in drafting a declaration of rights for the U.S. Constitution, wrote "all freemen have certain essential inherent rights... the enjoyment of life and liberty... and pursuing and obtaining happiness and safety."

2. **Richard Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights, and Fourteenth Amendment,* 66 TEMPLE L.REV. 361 (1993)**

Reinstein argues that the Fourteenth Amendment served to incorporate into the U.S. Constitution the substantive protection of natural rights set out in the Declaration of Independence.

3. **Michael Treaner, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's Bill of Rights*, 106 MICH. L. REV. 487 (2007)**

In this critical review of Akil Amar's book on the Bill of Rights, Professor Treaner notes that several of the colonial resolutions endorsing the Declaration of Independence – particularly those of New York, Virginia, and North Carolina – cited the inherent right to "enjoyment of life."

4. **GEORGE ANASTAPLO, REFLECTIONS ON LIFE, DEATH, AND THE CONSTITUTION 42 (2009)**

Professor Anastaplo situates the Declaration's reference to "life" in the context of a struggle over the nature of government. He notes that in the Declaration, "[l]ife-and-death issues figure prominently . . . , as do complaints about repeated interference with orderly government in the thirteen Colonies. Although personal human concerns are ultimately appealed to, a proper political order is depended on for a reliably civilized life. Again and again, good government is placed in juxtaposition to tyrannical measures."

5. **Patrick J. Charles, *Restoring "Life, Liberty, and the Pursuit of Happiness" in Our Constitutional Jurisprudence: An Exercise in Legal History*, 20 WM. & MARY BILL RTS. J. 457 (2011)**

A legal historian, Patrick Charles parses through the history of the Declaration of Independence and identifies a few clues as to the meaning of "life" in the document. For example, Charles notes that Jefferson's original draft of the Declaration used the phrase "to preserve life," rather than "life" alone. The reference to "preservation" was later removed, either by Jefferson or the drafting committee. The reference might have been removed because it was redundant, or because it was unduly limiting, or for some other reason entirely; there is no record of why it was deleted. Charles also notes that British philosopher Jeremy Bentham was critical of the Declaration's phrasing. According to Charles, Bentham opined regarding "[t]he rights of 'life, liberty, and the pursuit of happiness,' that 'if they mean anything, they must mean the right to enjoy life, to enjoy liberty, and to pursue happiness.'" Finally, the article notes the Declaration's influence on the Thirteenth, Fourteenth, and Fifteenth Amendments, documenting "that members of the Reconstruction Congress used the Declaration's language as the embodiment of the Founders' Constitution."

C. Relevant Dictionary Definitions of "Life"

This research regarding dictionary definitions of "life" relevant to the founding era through the Reconstruction era was guided by Gregory Maggs' helpful work identifying the dictionaries in most common use during those times.[30] The definition of "life" appearing prominently in most of the dictionaries was "the union and cooperation of the soul with the body."[31] Some additional definitions addressed bodily functions and time span as key elements. For example, two dictionaries defined "life" as "that condition of an animal or plant by which the faculties or properties are exercised for a certain space of time, or from the time of birth to its death."[32] Many dictionaries also referenced the quality of life as an alternative definition. Webster's dictionary, for instance, included as one such definition, the "Condition; course of living, in regard to happiness and misery."[33] For state constitutions drafted in the nineteenth century or earlier, these same dictionaries are relevant to understanding the meanings of constitutional references to "life."

Some later dictionaries in common usage in the United States adopted a different approach to defining life. For example, the dictionaries in the Merriam-Webster family, first published in 1898, set out as the primary definition of life, the "[s]tate of being which begins with generation, birth, or germination, and ends with death; also, the time during which this state

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[30] Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*. 82 GEO. WASH. L. REV. 358 (2014).

[31] This definition or a close variation appeared in JOHN ASH, NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1775), NATHAN BAILEY, THE NEW UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (4th ed. 1756), BARCLAY'S UNIVERSAL ENGLISH DICTIONARY (1792), SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (10th ed. 1792), THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1790), JOHN WALKER, A CRITICAL PRONOUNCING DICTIONARY (1791), NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828), THE UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE (Robert & Charles Morris eds., N.Y.C., Peter Fenelon Collier 1899), and JAMES BUCHANAN, A NEW ENGLISH DICTIONARY (1769).

[32] This definition was adopted in THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (18th ed. 1781). It was also the leading definition of "life" offered in NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

[33] Webster, An American Dictionary, *supra* note 31. *See also* Johnson, *supra* note 31; Sheridan, *supra* note 31; Walker, *supra* note 31; The Universal Dictionary, *supra* note 31.

continues."[34] However, the 1910 edition of Black's Law Dictionary focused on function and capacity, as had the earlier dictionaries by Dyche (1781) and Webster (1828), defining life as "[t]hat state of animals and plants, or of an organized being, in which its natural functions and motions are performed, or in which its organs are capable of performing their functions."[35]

D. Evolving Concepts of "Life"

1. Samuel D. Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)

In one of the most influential law review articles ever written, Warren and Brandeis focus on defining a right to privacy. However, they briefly describe the evolution of the "right to life." In "very early times," they write, the "'right to life' served only to protect the subject from battery in its various forms." But, they argue, the "scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life, -- the right to be let alone."

2. Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841 (1966)

This powerful article focuses on tort law, but references "one of Jefferson's self-evident truths – the inalienable right to life" as a variation on the proposition posited by tort expert Dean William Prosser that the disabled have a "right to live in the world." TenBroek notes that of course, "we do not kill off our disabled," so the right to live in the world must mean something more than mere existence. He argues that the "right to live in the world" should support "enlightened social policy for the physically disabled in the law of torts and elsewhere."

3. Daniel G. Bird, *Life on the Line: Pondering the Fate of a Substantive Due Process Challenge to the Death Penalty*, 40 AM. CRIM. L. REV. 1329 (2003)

[34] Merriam-Webster Dictionary, 1st ed. (1898).
[35] Black's Law Dictionary, 2d ed. (1910).

In this Note analyzing a potential due process claim against the death penalty, Daniel Bird examines the U.S. Constitution and the early history of the "right to life" to predict the likelihood of success if a claimant were to bring such a case. Bird looks back to John Locke and other writings regarding inalienable human rights, which included the right to self-preservation. These rights, as other writers have also noted, made their way into the Declaration of Independence. Although a substantive "right to life" is not squarely protected by the U.S. Constitution's text as a fundamental right, Bird argues that its absence actually may signal that it is the most fundamental right. In *Logan v. United States*, 144 U.S. 263, 287 (1892), for example, the U.S. Supreme Court noted "[t]he rights of life and liberty were not granted by the [C]onstitution, but were natural and inalienable rights of man; and [the] [F]ourteenth [A]mendment of the constitution, declaring that no state shall deprive any person of life, liberty or property without due process of law . . . simply furnished an additional guaranty against encroachment by the States upon the fundamental rights which belong to every citizen as a member of society."

4. **Daniel Morris, *The Death of Life?: Due Process Doctrine after Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach*, 40 RUTGERS L.J. 503 (2009)**

In this Note, the author observes that "[i]nstances in which a party alleges that the government wrongfully deprived a person of life without due process are rare before courts." He argues that one reason for this is that the courts have yet to develop a satisfactory test for determining when life-related rights are fundamental.

5. **Elizabeth Weeks Leonard, State Constitutionalism and the Right to Health Care, 12 U.Penn. J. Const. L. 1325 (2010)**.

The author notes that thirteen state constitutions mention health, but it is not explicitly identified in the Federal Constitution. She observes that on the federal level, "[o]ne might

suggest that the right to health is implicitly and necessarily subsumed within the right to life. But no court has been willing to read the Constitution so broadly."

6. **Mary Ziegler, *Identity Contests: Litigation and the Meaning of Social-Movement Causes*, 86 U. COLO. L. REV. 1273 (2015)**

This article lays out the long history of claims based on a right to life and traces the shifting arguments that shaped dialogues about the New Deal order, the Cold War, and the poverty rights movement. Beginning in the 1930s, the argument that the right to life guaranteed economic security became a core justification for the New Deal order. Indeed, during his time as governor of New York, Franklin Delano Roosevelt defended state economic intervention by proclaiming that "every man has a right to life, and this means that he also has a right to make a comfortable living." However, the apparent success of those using a right to life in support of a guaranteed standard of living was short-lived, pre-empted by a conservative reframing of the concept to focus on commitments to Christianity, small government, and family.

7. **Kevin M. Barry, *The Death Penalty and the Fundamental Right to Life*, 60 B.C.L. REV. 1545 (2019)**

This article argues that the death penalty violates the fundamental right to life and explores the idea of dignity inherent in the concept of fundamental rights. The author first asserts that condemned individuals have a fundamental right to life based on a history and tradition of diminished support for the death penalty nationally and worldwide, the dignity of the condemned persons, and the negative right not to be killed by one's government. The article next argues that the death penalty deprives this right in violation of substantive due process because the State cannot prove that the death penalty is narrowly tailored to achieve deterrence or retribution. Arbitrariness, delay, and unreliability reveal the absence of a compelling purpose, and execution defies narrow tailoring. Lastly, this article argues that the idea of a "right to life"

is not inconsistent with abortion rights and in fact, might fortify abortion rights "by acknowledging the inherent risks to life that pregnancy and childbirth impose on women."

IV. Federal Case Law on the Scope of "Life"

Researching case law on the due process protections for "life" is challenging. The term "life" appears in many divergent contexts, sometimes just as part of a list of rights protected by the Due Process Clause and sometimes in situations having nothing to do with rights at all. Despite diligent digging, we have found no majority federal appellate opinion that speaks in any detail about the meaning of the term "life" in the federal Due Process Clause. This seems to leave the scope of substantive due process protections for "life" a largely open question in federal law, though there may be other hurdles to bringing a claim based on deprivation of life, such as establishing sufficiently arbitrary conduct by the government.

The Supreme Court stated in *DeShaney v. Winnebago County* that the Due Process Clause does not confer an "affirmative right to government aid, even where such aid may be necessary to secure life, liberty, or property interests," but that notorious decision does not speak to the current context in the arena of reproductive rights.[36] Post-*Dobbs*, the immediate question is not whether government has an obligation to affirmatively facilitate life-saving abortions, but whether a government violates due process when it actively frustrates access to reproductive healthcare through criminal sanctions and other mechanisms. Cases of potential relevance are summarized below.

A. U.S. Supreme Court

1. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990)

[36] *DeShaney v. Winnbago Cty*., 489 U.S. 189 (1989).

In a case involving an incapacitated patient, the Supreme Court upheld the State of Missouri's insistence on "clear and convincing evidence" of the patient's desire to end her life before permitting her family to direct the withdrawal of life-sustaining medical interventions. The Court based its opinion on common law and due process liberty rights. However, in discussing the relevant law, the Court noted that "[i]t cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment." The Court observed that the interests involved were not only the State's interest in protecting life, but the individual's interest in her own life and dignity as well. The dissenting justices argued that the State's "clear and convincing" evidence standard was too high, and that it undercut the patient's right to choose to die with dignity. The dissenters further opined that "the State's general interest in life must accede to Nancy Cruzan's particularized and intense interest in self-determination in her choice of medical treatment."

2. *Washington v. Glucksberg*, 521 U.S. 702 (1997)

The Supreme Court considered whether Washington State's ban on physician-assisted suicide violated plaintiffs' due process rights. The Court upheld the State's ban under the rational basis test, after concluding that there was no fundamental liberty interest in physician-assisted suicide. No member of the Court discussed the due process right to life, but Justice Souter's concurrence examines at length the concepts of substantive due process developed under state constitutions prior to the ratification of the Fourteenth Amendment.

3. *County of Sacramento v. Lewis*, 523 U.S. 833 (1998)

The issue in this case was whether a police officer violated the Fourteenth Amendment's substantive guarantee of a right to life by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected

offender. The Court answered no and held that in such circumstances only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience necessary for a substantive due process violation. Though the claim here was made under the right to life, the Court's opinion speaks generally about substantive due process and liberty, with little attention to the nuances of the due process right to life. In rejecting the claim, the Court stressed that the purpose of the Due Process Clause was to prevent government abuse of power. Though "deliberate indifference" to the medical needs of pretrial detainees, *City of Revere v. Massachusetts Gen. Hospital*, 463 U.S. 239, 244–245 (1983), or of involuntarily committed mental patients, *Youngberg v. Romeo*, 457 U.S. 307, 314–325 (1982), might violate substantive due process, the Court observed that deliberate indifference alone is not the actionable "deprivation." Rather, it is that combined with "the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty." *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 200 (1989). The Court expressly left open whether, in a context in which the individual has not been deprived of the ability to care for himself in the relevant respect, "something less than intentional conduct, such as recklessness or 'gross negligence,'" could ever constitute a "deprivation" for purposes of substantive due process.

4. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998)

The Supreme Court concluded that in a case where a death row inmate claimed that clemency proceedings violated his due process interests in life, the plaintiff could not use his residual life interest as a basis for challenging the clemency proceedings. Justice Stevens dissented in part, observing that "[t]here is . . . no room for legitimate debate about whether a living person has a constitutionally protected interest in life. He obviously does."

B. Other Federal Cases

To search for federal case law that defines "life" as referenced in the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution, we focused on issues relating to access to life support and death with dignity, pollution and climate change impacts, corporal punishment and abuse by state actors, access to medical treatment, rescue services, abortion, and the death penalty. Just as the Supreme Court has never attempted to define the constitutional meaning of "life," federal appellate courts have overwhelmingly avoided defining the scope of "life" with any specificity. Further, when the quality of life is at issue, these courts have generally rested their decisions on liberty interests rather than the right to life. Below are examples of the few cases where lower federal courts have addressed the right to life in the context of due process. These cases are presented chronologically within hierarchical order, with court of appeals cases listed before district court decisions.

1. Right to Discontinue Life Support

***Matter of Baby K*, 832 F. Supp. 1022 (E.D. Va. 1993), *aff'd*, 16 F.3d 590 (4th Cir. 1994).** In a case where two parents disagreed about whether to end their child's life support, the court held that the hospital did not offer a clear and compelling interest to support its request for declaratory judgment allowing it to pull the child's ventilator treatment. According to the court, "when one parent asserts the child's explicit constitutional right to life as the basis for continuing medical treatment and the other is asserting the nebulous liberty interest in refusing life-saving treatment on behalf of a minor child, the explicit right to life must prevail." Although the right to life was central to the court's holding, the court did not discuss the scope of the right to life beyond the immediate life-or-death circumstances presented by the case.

***Deel v. Syracuse Veterans Admin. Med. Ctr.*, 729 F. Supp. 231 (N.D.N.Y. 1990).** In *Deel*, the plaintiff wished to discontinue his respirator with the support of his family and physicians. According to the court, "it is now generally accepted in the lower courts that a person has a constitutional right, whether termed as a liberty interest protected by the Due Process Clause, or an aspect of the right to privacy contained in the notions of personal freedom which underwrote the Bill of Rights, to refuse or discontinue life-sustaining medical treatment." This right is based on individual dignity, the court observed, noting that "the right of personal autonomy is the right to make medical decisions affecting oneself free from unwarranted governmental intrusion." While acknowledging the "state's duty to preserve life," the court stated that the State's interests "must also encompass a recognition of the individual's right to make decisions regarding the quality of his life." Based on this analysis, the court ordered the hospital to abide by Deel's wishes or transfer him to a facility that would honor his choice.

2. Right to a Livable Environment

***Guertin v. State*, 912 F.3d 907 (6th Cir. 2019).** The plaintiffs sued the State of Michigan for effects of the Flint Water Crisis. The two plaintiffs claimed personal injuries and damages from "drinking and bathing in the lead-contaminated water." The complaint did not allege denial of a "right to life," but instead claimed a violation of the right of bodily integrity found in the liberty interests of the Due Process Clause. On appeal, the appellate court permitted most of the claims to go forward based on the alleged liberty violations. In doing so, however, the court specifically noted that "the Constitution does not guarantee a right to live in a contaminant-free, healthy environment."

***Santa Fe All. for Pub. Health & Safety v. City of Santa Fe, New Mexico*, No. CV 18-1209 KG/JHR, 2020 WL 2198120 (D.N.M. May 6, 2020).** The plaintiffs sued federal, state,

and local government entities, challenging laws permitting and regulating "wireless telecommunications infrastructure." The plaintiffs argued that the telecommunications facilities built harmed "their health, ability to travel, and ability to live in their homes." Citing *Guertin* and other cases, the court opined that there is no "right to live in a contaminant-free, healthy environment," and declined to extend the right to bodily integrity to encompass the plaintiffs' claims.

3.Right to a "Climate System Capable of Sustaining Human Life"

***Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020).** Plaintiffs claimed a right to a "climate system capable of sustaining human life" based on the Due Process Clause of the 5th Amendment and called for a court order requiring the government to phase out fossil fuel emissions and reduce CO2. The court recognized that there is reasonable debate over whether this constitutional right exists but focused its analysis on whether the plaintiffs had Article III standing, thereby avoiding the need to determine if the due process right to life encompassed a right to a climate system capable of sustaining human life.

***Clean Air Council v. United States*, 362 F.Supp.3d 237 (E.D. Pa. 2019).** Plaintiffs alleged that Defendants "invaded their due process right to life and 'personal bodily integrity' by 'allowing and permitting fossil fuel production, consumption, and its associated CO2 pollution.'" The court noted that private acts of fossil fuel production and pollution do not trigger Due Process protections, and therefore found no violation of the plaintiffs' right to life or bodily integrity.

4. Right to Access Medication

a. Right to Experimental Drugs/non-FDA Approved Treatment

***Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach*, 495 F.3d 695 (D.C. Cir. 2007).** The Alliance argued that its members were terminally ill and therefore had a "right to self-defense" that entitled them to access developmental drugs. The D.C. Circuit reframed the claim, stating that the plaintiffs asserted "a constitutional right to assume… 'enormous risks'... in pursuit of potentially life-saving drugs," and dismissed it as failing to meet the criteria for self-defense.

The case is notable for dissenting Judge Judith Rogers' extended treatment of the right to life. Judge Rogers wrote:

> The court fails to come to grips with the Nation's history and traditions, which reflect deep respect and protection for the right to preserve life, a corollary to the right to life enshrined in the Constitution. . . . In the end, it is startling that the oft-limited rights to marry, to fornicate, to have children, to control the education and upbringing of children, to perform varied sexual acts in private, and to control one's own body even if it results in one's own death or the death of a fetus have all been deemed fundamental rights covered, although not always protected, by the Due Process Clause, but the right to try to save one's life is left out in the cold despite its textual anchor in the right to life.

Judge Rodgers continued, linking the right to life to historic American and English texts:

> The heritage of this right predates the Founding. Samuel Adams referred to 'the duty of self preservation' as 'the first law of nature.' Samuel Adams, The Rights of the Colonists: Report of the Committee of Correspondence to the Boston Town Meeting, 7 Old South Leaflets 417 (No. 173) (Burt Franklin 1970) (1772). The common law's eminent commentator, William Blackstone, wrote of three 'principal or primary articles' historically comprising 'the rights of all mankind.' First among these was '[t]he right of personal security ... in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, [and] his health.' William Blackstone, 1 Commentaries 129. Blackstone described the guarantee of '[t]he preservation of a man's health from such practices as may prejudice or annoy it.' Id.at 134. This right included the right to self-defense and the right to self-preservation. 'For whatever is done by a man to save either life or member, is looked upon as done upon the highest necessity and compulsion.'

In conclusion, Judge Rodgers criticized the majority's disregard for the right to life:

> In considering whether the terminally ill patient's interest in self-preservation is protected by the Due Process Clause, the court overlooks the most fundamental

> evidence of the protection that the Alliance claims, namely that the words 'life' and 'liberty' are in the Due Process Clause itself. The right to life, and the asserted corollary right to attempt to preserve life, is not a second derivative species of 'liberty' whose protection by the Constitution should be approached with skepticism.

b. Denial of Medication

***Doe v. Wigginton*, 21 F.3d 733 (6th Cir. 1994).** The court determined that withholding HIV treatment from a prisoner was not a deliberate effort to reduce the prisoner's life expectancy. Accordingly, the court concluded that defendants did not "deprive" Doe of life within the meaning of the Due Process Clause of the Fourteenth Amendment.

***Rainey v. Boyd*, No. 12-CV-00564-CMA-MEH, 2012 WL 3778356 (D. Colo. Aug. 15, 2012).** An inmate initiated a lawsuit claiming a violation of his right to life because he was "den[ied] a low cholesterol diet and expos[ed] to pepper spray." Construing the right to life narrowly, the court held that "plaintiff's allegations do not demonstrate that he was deprived of life or any loss of life, or otherwise suffered a grievous loss in any way."

5. Right to Competent Rescue and Law Enforcement Services

***Culp v. U.S.*, 131 F.2d 93 (8th Cir. 1942); *Landrum v. Moats*, 576 F.2d 1320 (8th Cir. 1978)**. Right to life claims against law enforcement officials were presented in each of these cases, which involved death or serious injury. In both cases, the court of appeals accepted that the claims were supported by the fundamental right to life protected by the Due Process Clause, and the outcome turned on the question of whether the law enforcement officials involved were entitled to qualified immunity.

***Ross v. U.S.*, 910 F.2d 1422 (7th Cir. 1990)**. In a tragic case, the family of a twelve-year-old drowning victim sued several government entities for failures leading up to the boy's death. The claim was based on a written policy that barred civilians and local police from

providing assistance even in cases where an individual was in danger of drowning. In the Ross's case, trained rescue personnel were prepared to provide assistance within a few minutes of the time when the victim slipped into the water but were ordered to wait until county officials arrived about 10 minutes later, even as the boy remained submerged. Upholding the claim of a "right to life" violation against the county and a county official, the court distinguished cases involving a failure to provide services. As the court observed, "[t]he plaintiff does not allege that the county had a policy of refusing to supply rescue services. Rather, . . . the plaintiff alleges that the county had a policy of arbitrarily cutting off private sources of rescue without providing a meaningful alternative." According to the court, "Lake County's policy not only tolerated a risk that someone might drown but actually contemplated that some persons would die for the sake of preventing harm to private rescuers."

***Sitzes v. City of West Memphis Ark.*, 606 F.3d 461 (8th Cir. 2010).** This case arose when an on-duty police officer struck another vehicle, killing the driver, Brittney Sitzes, and injuring the passenger, Shelby Sitzes. The majority did not address the "right to life" prong of the claim, but instead focuses on whether the government is culpable. The dissenting judge, however, suggested that injury as well as death might be actionable under the due process right to life, observing that "[b]ecause the actions of the state, through on-duty police officer James Wright, were the cause of Brittney's loss of life and substantial injury to her sister Shelby, the substantive due process protection of the Fourteenth Amendment may be implicated here."

***Badway v. City of Philadelphia,* No. CIV.A. 07-1333, 2009 WL 2569260 (E.D. Pa. Aug. 19, 2009).** The plaintiff alleged that Philadelphia's 9-1-1 services violated the plaintiff's rights to life and liberty. Citing the Third Circuit Court of Appeals, the court held that the plaintiff had no "'federal constitutional right to rescue services, competent or otherwise' and that

the Due Process Clause does not place an affirmative obligation on the State to provide competent rescue services."

6. Right to Safe Schools

***McQueen v. Beecher Community Schools*, 433 F.3d 460 (6th Cir. 2006).** The parents of a school shooting victim, Doe, brought a claim against the classroom teacher and other school employees. The parents argued that the teacher violated Doe's Fourteenth Amendment right not to be deprived of life without due process. The court credited this claim, noting that "it goes without saying that an individual's 'interest in preserving her life is one of constitutional dimension,'" but dismissed the case for failure to establish that the State created the danger that led to the loss of Doe's life.

V. "Life" in State Constitutions

A. Overview

Most state or district constitutions (forty-four out of fifty-two) have analogues to the federal due process right to life, with similar text.[37] Despite these similarities, the variations among these state constitutional provisions convey critical information about their application. For example, New Mexico's state constitutional due process provision states that "No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws." In contrast to the federal due process language, which restricts state power – i.e., "no state shall" -- New Mexico's provision and the due process provisions of most other states are phrased so as to grant affirmative rights to persons within the jurisdiction. In some states, such as Texas and Pennsylvania, these affirmative grants are accompanied by separate constitutional provisions that reinforce the inviolate nature of the

[37] *See* Table, Column A, *supra*, listing the states with due process provisions.

state's bill of rights guarantees, thus incorporating the concept of inalienability into these due process provisions.[38]

In addition, thirty-four state constitutions have explicit inalienable rights clauses (also sometimes called "Natural Rights" clauses) – that is, provisions that affirmatively set out inherent rights and invoke natural law, life, and happiness in language drawn from Locke and reminiscent of the federal Declaration of Independence.[39] For example, Article II Section 4 of the New Mexico Constitution provides that "[a]ll persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness."[40] In some states, inalienable rights provisions are treated as preambular, but in others, they are given the force of law, construed and enforced by courts.

Beyond these specific uses of the term "life," six constitutions include a general provision addressing dignity, including the protection of dignity of persons with disabilities (D.C.), equal protection of the laws (Illinois, Louisiana, Montana, and Puerto Rico), and dignity to determine one's own life course (Vermont). Twenty-five state constitutions provide for dignity specifically in criminal cases. This bibliography is limited to examining the term "life," but courts' treatment of dignity may be closely related and worth exploring.

A breakdown of the relevant components of state constitutions is shown in the chart below:

Trends/Groupings				
States that have a provision similar or identical to the 14th Amendment	States without any specific 14th Amendment provisions	States that have a provision for dignity in criminal cases	States that have a provision for dignity elsewhere	States with Inalienable Rights clauses
Alabama Alaska	Colorado Indiana[41]	Alaska California	District of Columbia	Alabama Alaska

Trends/Groupings				
Arizona	Kansas[42]	Florida	Illinois	Arkansas
Arkansas	Kentucky	Idaho	Louisiana	California
California	New Jersey	Illinois	Montana	Colorado
Connecticut	Ohio	Kentucky	Vermont	Florida
Delaware	Oregon	Louisiana	Puerto Rico	Georgia
District of Columbia	Wisconsin	Maryland		Hawaii
Florida		Michigan		Idaho
Georgia		Mississippi		Illinois
Hawaii		Montana		Indiana
Idaho		New Mexico		Iowa
Illinois		North Carolina		Kansas
Iowa		North Dakota		Maine
Louisiana		Ohio		Massachusetts
Maine		Oklahoma		Missouri
Maryland		Oregon		Montana
Massachusetts		Rhode Island		Nebraska
Michigan		South Carolina		Nevada
Minnesota		South Dakota		New Hampshire
Mississippi		Texas		New Jersey
Missouri		Utah		New Mexico
Montana		Virginia		North Carolina
Nebraska		Washington		North Dakota
Nevada		Wisconsin		Ohio
New Hampshire				Oklahoma
New Mexico				Oregon
New York				Pennsylvania
North Carolina				South Dakota
North Dakota				Utah
Oklahoma				Vermont
Pennsylvania				Virginia
Rhode Island				West Virginia
South Carolina				Wisconsin
South Dakota				
Tennessee				

[38] Texas Const. art. 1, § 29; Pa. Const. art. 1, § 25.

[39] These provisions are listed at Alexander C. Lemke and Alexander Macdonald, *Getting a Second Wind: Reviving Natural Rights Clauses as a Means to Challenge Unjustified Occupational Licensing Regulations*, 41 Pace L. Rev. 56, 64 n. 39 (2021).

[40] NM Const. Art. II, § 4.

[41] Indiana has a provision that is somewhat similar to the Fourteenth Amendment but it does not mention due process nor protect life, liberty or property. Ind. Const. art. 1, § 12 ("All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law.").

[42] Kansas has a provision that is somewhat similar to the Fourteenth Amendment but it does not mention due process nor protect life, liberty or property. Kan. Const. Bill of Rights § 18 ("All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.").

Trends/Groupings				
Texas Utah Vermont Virginia Washington West Virginia Wyoming Puerto Rico				

Aside from textual similarities or differences between state and federal constitutions, it is important to note that these constitutions do not serve identical roles in our governmental structure. The federal government is one of enumerated powers, defined by the federal constitution.[43] In contrast, state governments are governments of general powers.[44] This distinction informs judicial construction of federal and state constitutions, respectively, and is one of the reasons that state courts may deviate from federal approaches, in ways that are more protective of individual rights, as they construe identical or similar provisions of their state constitutional provisions.[45] This basic structural difference is an important backdrop for considering how state and federal governments have construed the term "life."

B. Books and Articles on State Constitutions and Life

[43] The Supreme Court has explored enumeration and limits of federal governmental powers since the early nineteenth century, consistently holding the federal government is limited to the powers enumerated in the Constitution yet maintains implied powers that are "necessary and proper" to carry out express powers. U.S. CONST. art. I, § 8, cl. 18. *See also McCulloch v. Maryland*, 17 U.S. 316 (1819). *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995); Nat'l Fed'n of Indep. *Bus. v. Sebelius*, 567 U.S. 519 (2012). *See generally* U.S. CONST.

[44] The Court has also continued to explore the ways in which the Tenth Amendment could be interpreted as conferring positive power on state governments immune to federal regulation. U.S. CONST. amend. X. *See, e.g., Printz v. United States*, 521 U.S. 898 (1997*); Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

[45] *See, e.g.*, William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977) ("State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law–for without it, the full realization of our liberties cannot be guaranteed."); Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 Rutgers L.J. 881 (1989) (arguing approach to state due process and equality provisions is fundamentally different than a federal approach because state constitutions can contain direct language about positive rights whereas Federal Constitution is limited and narrowly interpreted).

1. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (2d ed. 1871)

Cooley's constitutional treatise explores the balance between government power and individual rights. Cooley argues that while the United States Constitution is limited in scope, states have the power to determine what protections the state constitutions afford their citizens. Despite states' inherent discretion, Cooley notes that some aspects of a state constitution are to be "expected," like a declaration of rights for the protection of individuals. Such an "expected" declaration would necessarily include a provision assuring the absence of arbitrary and absolute power over the lives and liberty of the people, and the declaration would also contain a provision addressing the fundamental rights of its citizens: "that all men have certain inalienable rights, among which are those of enjoying and defending life and liberty…and pursuing and obtaining safety and happiness."

2. James Bopp, Jr. & Daniel Avila, *The Due Process "Right to Life" in* Cruzan *and Its Impact on "Right-to-Die" Law*, 53 U. PITT. L. REV. 193 (1991)

This article was written in response to the Supreme Court's decision in *Cruzan v. Director*, 497 U.S. 261 (1990), a landmark decision addressing the constitutional right to die. The article explores the nature and scope of the constitutional interest in life (implicated when there is state action intended to cause death) and the process that is due before the State may interfere with a person's constitutional interest in life (a balancing test between the public and private interests at stake). The authors identify several state interests "probably" compelling enough to outweigh a person's right to life: effectuating valid personal waivers, avoiding futile treatment (unless requested), avoiding burdensome treatment (unless requested), and respecting

patient autonomy. The article also discusses right-to-life developments in Florida, Nevada, Delaware, Washington, and Indiana after *Cruzan*.

3. Joseph R. Grodin*, Rediscovering the State Constitutional Right to Happiness and Safety*, 25 Hastings Const. L. Qtrly. 1 (1997)

In a deeply researched article, Professor Grodin links state constitutions' inalienable rights clauses (which also often include a right to life), to unexpected sources such as the writings of eighteenth century Swiss philosopher Jean Jacques Burlamaqui. The article also surveys the variations in the jurisprudential development of these provisions across states. Professor Grodin concludes that while some state courts have opined that these provisions are merely hortatory, the clauses should not be lightly dismissed.

4. Steven G. Calabresi & Sarah Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEXAS L. REV. 7 (2008)

This article looks to state constitutions at the time of the Fourteenth Amendment's ratification as an additional source of information for construing the Reconstruction Amendments. The authors notes that at the time of Reconstruction, there was no state level consensus on substantive due process, but "many state constitutions specifically protected as a matter of state positive law the 'natural and inalienable rights' of the people, among which was often the right 'to defend' life and liberty and 'to protect' property."

5. Steven G. Calabresi, et al., *State Bills of Rights in 1787 and 1791: What Individual Rights are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451 (2012)

This article concludes that eight out of fourteen states in 1791-- a slim majority --had state bills of rights that were substantially fuller and more rights protective and individualistic

than was the Federal Bill of Rights. The states on the authors' list are Delaware, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, Vermont, and Virginia.

6. Steven G. Calabresi, et al.*, Individual Rights under State Constitutions in 2018: What Rights are Deeply Rooted in a Modern-Day Consensus of the States?*, 94 NOTRE DAME L. REV. 29 (2018)

This article surveys state constitutional developments since 1868. By the authors' count, 38 states today have "Lockean rights clauses" in their constitutions, which incorporate a "contractarian understanding of natural rights and liberties." Virginia's pathbreaking Lockean provision was first copied by Pennsylvania and Massachusetts, then spread to other state constitutions and to the Declaration of Independence. The authors argue that these provisions support a "presumption of liberty" in constitutional law.

7. Mark Strasser, *Abortion and State Constitutional Guarantees: The Next Battleground*, 51 HOFSTRA L. REV. 231 (2022)

This article examines state constitutional provisions addressing abortion, considers relevant state case law, and concludes that the *Dobbs* decision guarantees protracted and contentious litigation. Among other things, the article considers whether an argument of self-defense might weigh in favor of access to abortion, even in states that have adopted protections for fetal life. Professor Strasser also highlights states' inalienable rights clauses.

C. Selected State Cases and State-Specific Articles

The following section compiles state court cases and commentary that address the right to life in the context of state constitutions or, in some instances, the common law. As one state court judge wrote recently, "[i]t is the common law developed by the state's attitudes, values, and evolving standards of justice that serves as the basis of interpreting its own constitutional

provisions to best protect the rights of its own citizens."[46] In our research, we favored cases from state supreme courts, though we list a handful of cases from lower state courts. We also favored cases that illuminate the scope of the right to life beyond simply mentioning it in passing along with other rights. Cases involving states' inalienable rights clauses are designated by an asterisk. Cases without an asterisk involve states' due process clauses or common law concepts of life. Articles listed in this section are those that relate to the jurisprudence of particular states. States which did not yield either relevant case law or commentary are not listed.

ARIZONA

Case:

***Rasmussen by Mitchell v. Fleming*, 154 Ariz. 207 (1987):** In a decision grounded in the common law rather than the state constitution (though citing constitutional cases from other states), the court examined Arizona's interest in preserving the life of an individual in a vegetative state. The court noted that "[a]lthough the state's interest in preserving life is justifiably strong, we believe this interest necessarily weakens and must yield to the patient's interest where treatment at issue 'serves only to prolong a life inflicted with an incurable condition.'"

Article:

Paul Bender, *Some Thoughts on the Interpretation of Arizona Constitutional Rights*, 35 Ariz. St. L.J. 295 (2003). Professor Bender discusses the independent interpretation of the Arizona Constitution, including the state's explicit right to privacy. Without citing the state's due process right to life as a specific source, he argues that the Arizona Constitution could provide broader, better-defined privacy protections than the Federal Constitution.

CALIFORNIA

Cases:

***People v. Belous*, 71 Cal. 2d 954 (1969).** The defendant doctor was criminally charged with helping a pregnant patient contact an abortion provider. At issue was whether a statute permitting abortion only when necessary to preserve the pregnant person's life was unconstitutionally vague. The majority of the court found that the criminal statute was invalid and reversed the doctor's conviction. The court discussed the constitutional parameters set by due process norms,

[46] Hon. Mark S. Coven, *The Common Law as a Guide to State Constitutional Interpretation*, 54 SUFFOLK U.L.REV. 279, 300 (2021) (citing similar observations of several state Supreme Court justices, including Judith Kaye, former Chief Judge of the New York Court of Appeals).

though without specifying whether it was relying on the California Constitution, the Federal Constitution, or both. According to the court, "a definition requiring certainty of death would work an invalid abridgment of the woman's constitutional rights. The rights involved in the instant case are the woman's rights to life and to choose whether to bear children. The woman's right to life is involved because childbirth involves risks of death." The court found that the statute had been interpreted to stop short of that line, as state courts had rejected a reading that "requires certainty or immediacy of death."

***Ballard v. Anderson*, 4 Cal. 3d 873 (1971).** In evaluating a requirement of parental consent for minors to obtain abortions, the court alluded to constitutional standards without specifying whether these standards were from the California Constitution, the Federal Constitution, or both. The court suggested that barring minors alone from medically-indicated abortions would be constitutionally irrational, since "the law has always recognized that the pregnant woman's right to life takes precedence over any interest the [S]tate may have in the unborn."

***Am. Academy of Pediatrics v. Lungren*, 16 Cal. 4th 307 (1997).** This decision declared California's parental consent law for abortion to be unconstitutional. The court made clear that its ruling was based on the California Constitution and discussed the history of independent construction of the state constitution. Though the case was brought under the state constitution's privacy clause, the court linked these concepts to the rights to bodily integrity and privacy protected by the liberty clause of the Fourteenth Amendment. The concept of "life" was only given fleeting consideration. According to the court, "[t]he right to choose whether to continue or to terminate a pregnancy implicates a woman's fundamental interest in the preservation of her personal health (and in some instances the preservation of her life)."

Article:

Rex D. Glensy, *The Right to Dignity*, 43 Colum. Hum. Rts. L. Rev. 65 (2011). The California Constitution does not include a separate right to dignity, but that right appeared in the California same-sex marriage cases. The author suggests that the California Supreme Court's use of dignity could be used as a blueprint for federal courts. The author writes:

> The use of dignity by the California Supreme Court has two elements, equally forceful and equally fundamental to an understanding of what the contours of dignity rights might entail in the United States. The first element equates dignity with validation - the respect due by virtue of having a certain status - in this case, that status of being married. The second element couples dignity with equal opportunity, i.e., that everyone ought to have the right to achieve that status acquired by the first element." *Id*. at 65.

COLORADO

Case:

***Kogul v. Sonheim*, 150 Colo. 316 (1962).** A child was killed when a neighbor's machinery fell on him. The child's parents sued the neighbor for wrongful death on the theory of attractive

nuisance and won, but the parents then appealed the amount of jury verdict. The appellate court affirmed the award, but one justice dissented, finding it to be "a paltry sum to equate for the life of a four-year-old healthy boy." *Id.* at 735. The dissenting justice argued that the "right to life" under the state constitution should be considered in calculating an appropriate award. The justice admonished the majority, stating that "I cannot believe that the 'natural, essential and inalienable' right to enjoy life, given measured recognition in the Bill of Rights (Art. II, Sec. 3, Const. Colo.) is, in this case, just a beautiful aspiration and nothing more. Yet that is the effect of the majority opinion." The dissent concluded that the case should be an occasion for giving "due recognition to one of the most sacred and precious of all admitted natural rights: the right to life. A right to life, a duty to respect and honor that right: this is the ultimate, fundamental principle of a republican form of government in which the dignity of man is acknowledged and protected."

CONNECTICUT

Case:

***Moore v. Ganim*, 233 Conn. 557 (1995).** The Connecticut Supreme Court considered whether the state constitution's general welfare clause or unenumerated rights provisions mandated the State's continued provision of general assistance to the poor. The majority ruled that the benefits could be eliminated through legislative action. Alluding to two provisions of the state constitution that do not explicitly mention "life," the dissenters nevertheless would have derived such a right, arguing that "the government of Connecticut has an undeniable obligation to provide, and the poor have an undeniable right to receive, those things that are absolutely essential for humane survival: shelter, food and essential medical care. The right to minimal subsistence is one of the 'liberties, rights and privileges which . . . have [been] derived from [our] ancestors.' As such it is incorporated into the preamble of our state constitution and protected from infringement by article first, s. 10 of that charter of liberty. Indeed, this right to minimal subsistence is a right so fundamental that without it no other guaranteed rights, explicit or implicit, can be enjoyed. It is the right to life itself – the right to subsistence, sufficient for humane survival."

DELAWARE

Case:

***Matter of Tavel*, 661 A.2d 1061 (Del. 1995).** The Delaware Supreme Court affirmed the Chancery Court's decision to grant a guardian's petition to remove a life-sustaining device from an elderly person. The high court determined that an incompetent person does not lose his or her right to withhold or withdraw life-sustaining treatment when the individual becomes incompetent. The court cited *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891), stating that no "right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his [or her] own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." The Delaware court noted that this principle is one of the unalienable rights of life and liberty described in the Preamble to the Declaration of Independence, and that the same common law

right of self-determination has been implemented by the 5th Amendment to the U.S. Constitution and Article 1, s. 7 of the Delaware Constitution.

FLORIDA

Cases:

Marasso v. Van Pelt,* **77 Fla. 432 (1919). Individuals taken into custody for possession of alcoholic beverages in excess of statutory limits filed a habeas petition arguing that the state regulation violated their "right to life" under Florida's Declaration of Rights. The majority of the court upheld the regulation as a valid exercise of state police power. A concurring justice wrote extensively about the underlying rights involved in the case, including the "right to life." According to the concurrence, "[l]ife and liberty may be a condition of existence which one may not lawfully give away or part with, but it is not such a condition of existence that he may not forfeit by an infraction of the rules of society; that he may not part with by an unlawful act." A dissenting justice opined that because the right to life was protected by natural law, it was "inherent and existed before the adoption of the Constitution," and could not be taken away through operation of government regulation.

****Cason v. Baskin,*** **155 Fla. 198 (1944).** Plaintiff initiated a tort action to recover damages for an alleged invasion of the right of privacy by the publication of a book about the plaintiff's life. The Florida Supreme Court recognized this new tort and ruled for the plaintiff, quoting the statement in the well-known Warren and Brandeis article, *The Right to Privacy*: "the right to life has come to mean the right to enjoy life,—the right to be let alone." The Florida court further underscored the "positive guarantee" of rights in Section 1 of Florida's Declaration of Rights, including the right to life, and connected this to "the thought contained in that greatest of all political documents, the American Declaration of Independence," which identifies "life, liberty and the pursuit of happiness" as "inalienable rights."

HAWAII

Case:

Matter of Hawai'i Electric Light Company, Inc., **152 Hawai'i 352 (2023).** An energy company sought to obtain regulatory approval to provide energy by burning eucalyptus trees. The Hawaii Public Utility Commission ("Commission") denied approval after considering the effects of greenhouse gases and other impacts on Hawaiians' constitutional right to a clean and healthful environment. The state supreme court affirmed the Commission's decision, finding that it had acted properly. In a concurring opinion, Justice Wilson emphasized that the "right to a life-sustaining climate system is also included in the substantive due process right to 'life, liberty, and property'" enumerated in the state constitution.

IDAHO

Case:

***Planned Parenthood Great Northwest v. Idaho*, 171 Idaho 374 (2023).** Healthcare providers whose services include abortion care brought petitions against the State and certain state officials, seeking to block laws criminalizing abortions and creating a civil cause of action against abortion providers. A majority of the Supreme Court of Idaho determined that a fundamental right to abortion could not be read into the state constitution because abortion could not be considered "deeply rooted" in the history and traditions of Idaho. However, the majority did expound on the meaning of the state's inalienable rights clause, which provides protection for life, liberty, property, happiness, and safety, and which is included among the operative provisions of the state constitution. The majority concluded that while a right to abortion was not "deeply rooted," the exception to preserve the life of the mother did have significant historical weight and was consistent with the explicit wording of the state constitution. Further, the majority opined that the "right to life" might become significant in the future: "If the day comes that the legislature decides to prohibit abortion under all circumstances—without providing for legally justified abortions (i.e., the affirmative defenses) or exceptions—the Court may very well be called upon to take up the protections of the *express* right to enjoy life contained in Article I, section 1 of the Constitution . . . . This, however, is not that day." In dissent, Justice Zahn argued that Idaho has historically permitted abortion care to preserve life or health, including where pregnancy causes detrimental physical and psychological side effects. Justice Stenger also separately dissented from the opinion and found a broader right to abortion under the rights to life, liberty, happiness, and safety enshrined in the Idaho Constitution.

INDIANA

Cases:

***Clinic for Women v. Brizzi*, 837 N.E.2d 973 (Ind. 2005)**: The majority of the court upheld the State's abortion restrictions (e.g., waiting period, informed consent) under an undue burden standard, while nevertheless finding a core liberty right to abortion under the state constitution's natural rights clause. In a concurring opinion, Justice Dickson indicated that the abortion restrictions protect "the health of the pregnant women, particularly in light of the risks to women from post-abortion psychological harm." He concluded that the requirements are in "direct harmony" with Art. 1, Section 1 of the Indiana Constitution, which declares an "inalienable right of life." In dissent, Justice Boehm argued that the state's natural rights clause should be given a broad construction, encompassing the opportunity to "manage one's own life," and that the State's intrusions should not "materially burden" that right.

***Members of Medical Licensing Board of Indiana v. Planned Parenthood*, 211 N.E.3d 957 (Ind. 2023), reh'g denied, 214 N.E.3d 348 (Mem) (Ind. 2023):** The court found that the Indiana Constitution's protection for a right to life (Art. 1, Sec. 1) enshrines a fundamental right of self-protection that predated the state. The decision includes an extensive discussion of Locke and the historical context of the Indiana Constitution's Inalienable Rights Provision. According to the court, the "right to protect one's own life extends beyond just protecting against imminent death, and it includes protecting against 'great bodily harm.'" Because of this, the court concluded, the state legislature could not validly enact a statute that barred abortion when a women's life or serious health risks were involved. Nevertheless, the majority opinion upheld a statute that included only those narrow exceptions. Chief Justice Rush later wrote a separate

opinion concurring in the court's decision to deny a motion for rehearing. According to the Chief Justice, writing for herself, the state constitution's inalienable rights provision "could protect a woman's right to obtain an abortion under circumstances that extend beyond the current law," but that issue was not properly before the court.

Article:

John Maciejczyk*, Withholding Treatment from Defective Infants: "Infant Doe" Postmortem*, 59 Notre Dame L. Rev. 224 (1983). This Note discusses an Indiana case in which parents sought to cut off food and treatment for a disabled infant soon after his birth and similar unreported cases from other states. While some state courts have relied on constitutional natural rights provisions to recognize the infant's right to life, others – like Indiana – have not invoked those constitutional provisions.

IOWA

Case:

***Planned Parenthood of the Heartland v. Reynolds*, 975 N.W.2d 710 (Iowa 2022).** The Iowa Supreme Court overruled a prior decision and found that the state constitution's due process clause did not protect fundamental right to abortion. In dissent, Justice Appel opined that the Iowa Constitution's Natural Rights Clause should provide the "overarching architecture" for the construction and application of the state constitution's due process provisions. Justice Appel noted that a claim under the Natural Rights Clause of Iowa's Constitution was included in the initial complaint, but not relied on in the subsequent litigation.

Article:

Bruce Kempkes*, The Natural Rights Clause of the Iowa Constitution: When the Law Sits Too Tight*, 42 Drake L. Rev. 593 (1993). The author reviews the history of Iowa's Natural Rights Clause, situating it within the larger context of U.S. history and linking westward migration of the U.S. population with philosophical developments reflected in state constitutions. Acknowledging the breadth of the clause, the author urges litigants to make greater use of the provision.

KANSAS

Cases:

***City of Iola v. Birnbaum*, 71 Kan. 600 (1905).** The city of Iola brought a due process challenge to a state statute that provided for recovery of damages against cities on account of the acts of mobs, "whether such damages shall be loss of property or injury to life or limb." Upholding the statute, the court cited cases from New York and the U.S. Supreme Court which endorsed the idea that the due process right to life includes "all those limbs and faculties by which life is enjoyed."

***Hodes & Nauser, MDs, P.A. v. Schmidt,* 309 Kan. 610 (2019).** The Kansas Supreme Court upheld a preliminary injunction against the Kansas Unborn Child Protection from Dismemberment Abortion Act (which would have banned the dilation and evacuation abortion procedure), under the Kansas Constitution's Natural Rights Provision, Bill of Rights S. 1. The court concluded that the "inalienable natural rights" of "life, liberty, and the pursuit of happiness" referenced in the state constitution are intended for all Kansans, including pregnant women. These rights encompass self-determination regarding one's body and include the decision whether or not to keep a pregnancy. According to the court, Section 1 of the Kansas Constitution Bill of Rights sets out rights that are broader than, and distinct from, the rights in the Fourteenth Amendment to the U.S. Constitution.

***State v. Carr*, 314 Kan. 615 (2022), *cert. denied*, 143 S. Ct. 581 (2023).** In a state constitutional challenge to the death penalty, the Kansas Supreme Court interpreted the "natural right to life" as forfeitable, meaning that capital punishment does not infringe upon the "inalienable" right. The court determined that the framers of the Kansas Constitution did not intend the right to life to be absolute, and in the case of a defendant being convicted of capital murder, a defendant may forfeit their right to life. The court surveyed the legislative history of the state constitution's Bill of Rights s. 1, as well as historical influences such as Blackstone and Locke. The court concluded that "[t]his historical record indicates the drafters of section 1 never intended the term 'inalienable' to be construed as 'absolute' or 'nonforfeitable.' Instead, a careful reading of section 1, coupled with the transcripts of the convention debate, establishes that the term 'inalienable' refers only to one's ability to transfer his or her right or interest to another person. This construction is consistent with the legal meaning ascribed to the term 'inalienable.'"

Article:

Richard E. Levy, *Constitutional Rights in Kansas After Hodes & Nauser*, 68 U. Kan. L. Rev. 743 (2020): This article compares the federal interpretations of the constitutional right to privacy in the context of the right to abortion with the affirmative right to bodily autonomy grounded in the Kansas Constitution Bill of Rights s. 1, as interpreted in *Hodes & Nauser*. The author specifically notes the implications of *Hodes & Nauser* for the scope of the state constitutional right to life. According to Professor Levy, "[t]he court's conclusion that section 1 was intended to provide independent and greater protection than the United States Constitution may suggest that section 1 could be a source of independent equal protection rights and/or protections for the right to life under section 1 that could be greater than their federal counterparts." Further, the author discusses the implications of the right to life beyond the death penalty context, including the possibility of a right to make decisions about one's own healthcare.

Skylar Croy and Alexander Lemke, *An Unnatural Reading: The Revisionist History of Abortion in Hodes v. Schmidt*, 32 U. Fl. J. Law & Pub. Pol. 71 (2021). The authors argue that *Hodes & Nauser* was wrongly decided, and that it relied on a misreading of Blackstone and Coke. They urge judges to be cautious in construing and applying inalienable rights clauses.

KENTUCKY

Cases:

***DeGrella By and Through Parent v. Elston,* 858 S.W.2d 698 (Ky. 1993)**. In considering whether the mother of a patient in a vegetative state could order the discontinuation of life-sustaining treatment, the court offered dicta on Kentucky's constitutional right to life. According to the court, "at the point where the withdrawal of life-prolonging medical treatment becomes solely another person's decision about the patient's quality of life, the individual's 'inalienable right to life,' as so declared in the United States Declaration of Independence and protected by Section One (1) of our Kentucky Constitution, outweighs any consideration of the quality of the life, or the value of the life."

***Woods v. Com.*, 142 S.W.3d 24 (Ky. 2004).** The state's Cabinet for Human Resources sought to have a vegetative patient's artificial ventilation systems removed. The court held that the patient's liberty interest in being free from artificially life-prolonging medical treatment outweighed the State's interest in the patient's continued existence. In so holding, the court explicitly expanded the right to refuse medical treatment, embodied in the constitutional liberty interest, to both competent and incompetent patients. The court rejected its prior approach in *DeGrella*, which established that the withdrawal of life-supporting measures violated the right to life of a patient if such withdrawal were not based on the clearly expressed wishes of the patient. The dissent would have upheld *DeGrella*, rejecting the balancing between the constitutional right to life and liberty in favor of an inviolable right to life.

Articles:

Dominic J. Campisi, Claudia Lowder & Naznin Bomi Challa, *Heirs in the Freezer: Bronze Age Biology Confronts Biotechnology,* 36 ACTEC J. 179 (2010). These authors explore the evolution of law, philosophy, and religion in relation to advancing medical technology, focusing on the balance between the right to life and the right to liberty as articulated in *Woods*.

Rebecca Critser, *Assisted Suicide: Is the Cruzan "Unqualified State Interest in the Preservation of Human Life" A Legitimate State Interest?,* NAELA J. (Fall 2017). This article refers to *Woods*, examining the historical conflicts between the State's interest in preserving life and the individual's constitutional liberty interest in discontinuing artificial life-sustaining treatment. The author contends that courts should apply the same stringent review to the State's interest in preserving life as when they are defining the liberty interest in cases involving assisted suicide.

LOUISIANA

Article:

John Devlin, *Privacy and Abortion Rights under the Louisiana State Constitution: Could Roe v. Wade be Alive and Well in the Bayou State?,* 51 La. L.Rev. 685 (1991). This article considers whether and to what extent the Louisiana Constitution of 1974 might independently

protect a woman's right to choose an abortion should federal protection be eliminated. The article primarily focuses on the Louisiana Constitution's Privacy Clause and mentions "dignity" just to note that it is a unique provision of the state constitution.

MAINE

Case:

****In the Opinion of the Justices*, 58 ME 590 (1871).** The state legislature sought the opinion of the Maine Supreme Court on the question of whether the legislature had the authority to allow municipalities to operate corporate enterprises for their own benefit. The justices concluded that there was no such authority. But in illustrating the appropriate reading of the Maine Constitution, the justices observed that "[a]mong the rights declared natural and inherent in all human beings by our constitution, is the right to life, and that necessarily includes and carries with it a right to the means of sustaining life."

MARYLAND

Case:

***Mack v. Mack*, 329 Md. 188 (1993).** A wife sought to withhold nutrition and hydration from her husband, who was hospitalized in a persistent vegetative state. The court held that the right to refuse treatment was a common law right in Maryland, while noting that many states had found the right in state or federal privacy or liberty provisions. The court determined that in the absence of conclusive evidence regarding the patient's intent concerning continuation or withholding of artificial nutrition and hydration, it could not authorize the withholding of life support.

MASSACHUSETTS

Cases:

***Guardianship of Jane Doe*, 411 Mass. 512 (1992).** The Massachusetts Supreme Judicial Court upheld the right of a guardian ad litem to withdraw from treatment a minor ward in a persistent vegetative state. In dissent, Justice O'Connor spoke broadly about the right to life as "the most fundamental right anyone has -- the foremost right protected by the Federal and State Constitutions."

***Kligler v. Att'y Gen.*, 491 Mass. 38 (2022).** The Massachusetts Supreme Judicial Court ruled that physician-assisted suicide implicates neither the common-law right to be free of nonconsensual invasion of one's bodily integrity nor the right to privacy, and therefore upheld criminalization of the practice. The court also took the opportunity of this case to discuss Massachusetts' distinct approach to interpreting the state constitution. The opinion cites provisions of the Massachusetts Constitution relating to the right to life but does not rely on them.

MINNESOTA

Case:

***In the Guardianship of Tschumy*, 853 N.W.2d 728 (Minn. 2015).** In a case upholding a guardian's authority to make an end-of-life decision for a ward, the Minnesota Supreme Court observed that "the state does not deprive an individual of life by failing to ensure that every possible technological medical procedure will be used to maintain that life." The court did not cite the Minnesota Constitution, which does not have a natural rights clause, but briefly mentioned the concepts of due process and the right to privacy.

MISSOURI

******State ex rel. Westfall v. Mason*, 594 S.W.2d 908 (Mo. 1980).** On retrial of a defendant in a capital murder case, the judge decided not to allow the prosecution to seek the death penalty. The state supreme court reversed on appeal. In concurrence, Justice Donnelly noted the Missouri Constitution's protection of the "natural right to life" (Art. I, § 2) but opted to exercise judicial restraint by not imposing his personal opposition to the death penalty.

****State v. Newlon*, 627 S.W.2d 606 (Mo. 1982).** A defendant convicted of capital murder was sentenced to death and, among other things, challenged the constitutional validity of the death penalty. The court rejected the claims made under both the U.S. Constitution and the Missouri Constitution. The majority wrote that the Missouri Constitution's "natural right to life" (Art. I, § 2) protects the "life," "happiness," and "security" of citizens "generally," but it does not prohibit the death penalty, which can be imposed in appropriate cases consistent with the state constitution's due process clause and other provisions.

****State v. Bolder*, 635 S.W.2d 673 (Mo. 1982); **State v. Smith*, 649 S.W.2d 417 (Mo. 1983).** In both of these cases, a defendant was convicted of capital murder and sentenced to death. Relying on prior Missouri case law, the court rejected the constitutional challenges to the death penalty, including challenges under the Missouri Constitution's "natural right to life" (Art. I, § 2).

***Cruzan by Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. 1988), aff'd sub nom. *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 110 S. Ct. 2841 (1990).** A serious car accident left Nancy Cruzan in a "persistent vegetative state." Her parents, as co-guardians, requested that the hospital terminate artificial hydration and nutrition, but the hospital refused to do so without a court order. In the Missouri Supreme Court, the majority focused on the "liberty" aspect of the federal Due Process Clause, as well as the common law right to refuse medical treatment and discussed the State's countervailing interests in the preservation of life and the sanctity of life. The majority rejected the idea that a diminished quality of life would affect the weight given the State's interests and determined that the State's interest in preserving life outweighed other considerations. Among the three justices writing separate dissents, Justice Blackmar would have privileged family and medical decisions over the State's purported interest in life. The U.S. Supreme Court subsequently affirmed the state court's decision, indicating that the prevailing

weight given the State's interests in preserving life was permissible when addressing the situation of an incompetent person.

MONTANA

Cases:

***Armstrong v. State*, 296 Mont. 335 (1999).** The Montana Supreme Court affirmed that a woman has the right to obtain a pre-viability abortion from a healthcare provider of her choice. While the court rested its decision on the right to individual privacy under Montana Constitution Article II, §10, the court also indicated that procreative autonomy is protected by the fundamental right to dignity set out in Article II, § 4, which states "the dignity of the human being is inviolable." According to the court, this provision "demands that people have for themselves the moral right and moral responsibility to confront the most fundamental questions about the meaning and value of their own lives, and the intrinsic value of life in general, answering to their own conscience and convictions."

***In re Mental Health of KGF*, 306 Mont. 1 (2001).** This case discusses what constitutes effective counsel for a severely mentally ill person who is subject to an involuntary civil commitment proceeding. The court confirmed that the due process protections afforded to such individuals "must serve to protect the fundamental individual liberty interests of dignity and integrity" as identified under the Montana Constitution's Dignity Clause and relevant statutes.

***Baxter v. State*, 224 354 Mont. 234 (2009).** The Montana Supreme Court examined the constitutionality of applying Montana homicide statutes to physicians who provide aid in assisted suicide. The majority found for the plaintiffs on statutory grounds. However, a concurring opinion from Justice Warner addressed the dignity clause at length, stressing that it is not just an aspirational provision, but "is in fact a concrete right guaranteed by the Constitution." In dissent, Justice Rice argued that the dignity provision is simply an introduction to the concepts of equal protection that also appear in Article II, § 4.

Articles:

Matthew O. Clifford & Thomas P. Huff, *Some Thoughts on the Meaning and Scope of Montana's Dignity Clause with Possible Applications*, 61 Mont. L. Rev. 301 (2000). This influential article has been repeatedly cited by the Montana Supreme Court. The authors examine the history and context of Montana's Dignity Clause at length. They conclude that the clause recognizes that "human beings have dignity because they have intrinsic worth as individuals, and their dignity is found, in one form or another, in their capacity to live self-directed and responsible lives."

James E. Dalner & D. Scott Manning, *Death with Dignity in Montana*, 65 Mont. L. Rev. 309 (2004). Analyzing the text and constitutional history of Montana's Dignity Clause, the authors conclude that the right to dignity is inviolable, individual, related to equal protection, and applicable to all people, even those outside of protected classes.

Vicki C. Jackson*, Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse,* 65 Mont. L. Rev. (2004). Professor Jackson traces the transnational origins of Montana's Dignity Clause to the Universal Declaration of Human Rights.

NEW JERSEY

Cases*:*

***Matter of Quinlan*, 70 N.J. 10 (1976).** The court considered a guardian's request to discontinue life support for his daughter who was in a persistent vegetative state. The court concluded that, in light of the patient's privacy interests, life support could be withdrawn in consultation with medical experts. Acknowledging the State's interest in perpetuating life, the court observed that the right to life "is explicitly recognized in our Constitution of 1947 which provides for 'certain natural and unalienable rights, among which are those of enjoying the defending life.'" According to the court, "[o]ur State government is established to protect such rights."

***Right to Choose v. Byrne*, 91 N.J. 287 (1982).** The majority held that a state statute limiting Medicaid funding to abortions necessary to save the life of the mother violated the New Jersey Constitution but upheld a limitation that restricted funding only to abortions deemed medically necessary to preserve the mother's life or health. The court left open the question of whether a right to health was protected by the state constitution's inalienable rights clause. Concurring in part, Justice Pashman indicated that he would have found that a right to health was constitutionally protected. According to Justice Pashman, health "is a fundamental individual right. Indeed, there is no significant difference between the right to health and the right to life itself. May the State actively impair the health of its citizens in the absence of a state interest of overwhelming importance? To ask the question is to answer it. The State may not do anything that jeopardizes the health of our citizens unless its actions are necessary to achieve a compelling state interest."

***Senna v. Florimont*, 196 N.J. 469 (2008).** The court considered whether an operator of a boardwalk game of chance, whose employees broadcast over a loudspeaker that a nearby boardwalk competitor was a cheat, was entitled to the heightened protection of the actual malice standard. The court held that "false and defamatory verbal broadsides impugning the honesty of a business competitor, fall into the category of commercial speech that is not entitled to heighted protection under the actual-malice standard." In reaching its decision, the court observed that "[t]he right of a person to be secure in his reputation against unwarranted attacks such as slanders and libels is a part of the right of enjoying life and pursuing and obtaining safety and happiness'" protected by the state constitution's inalienable rights clause.

NEW MEXICO

Cases:

***Reed v. State ex rel. Ortiz,* 124 N.M. 129, cert. granted, judgment rev'd sub nom. *New Mexico, ex rel. Ortiz v. Reed,* 118 S. Ct. 1860 (1998).** Ohio sought the extradition of Timothy

Reed, a jailhouse lawyer and activist, who fled from Ohio to New Mexico. New Mexico denied the extradition request because the court found that Reed was not a fugitive, and that Ohio officials would deprive Reed of his liberty and possibly life without procedural due process. While the case concerned a denial of procedural due process, the court endorsed a broad view of the state's constitutional protections, noting that "our Constitution can offer not only to protect life, but also the 'more expansive' guarantee of obtaining safety." The New Mexico Supreme Court's decision was subsequently overturned by the U.S. Supreme Court on the ground that the court had overreached, and that the merits of Reed's case should be evaluated in Ohio and not New Mexico.

***Morris v. Brandenburg,* 376 P.3d 836 (N.M. 2016).** The New Mexico State Supreme Court considered whether the state constitution protected the right to suicide with the aid of a physician. The court held that physician aid in dying was not a fundamental or important right under the state constitution's inalienable rights clause, Art. II, s. 4, nor did it violate the state's due process clause. Acknowledging that the inalienable rights clause had been "sparsely interpreted," the court declined "to recognize Article II, s. 4 as protecting a fundamental interest in hastening another person's death because such an interest is diametrically '[o]pposed' to the express interest in protecting life." The court further stated that although New Mexico's Const. Art. II, § 4 provides for a more expansive guarantee of obtaining safety than the guarantee under the U.S. Constitution, the right to suicide is not encompassed in that right.

Article:

Marshall J. Ray*, What Does the Natural Rights Clause Mean to New Mexico*, 39 N.M. L. Rev. 375 (2009). This article outlines the various meanings assigned to the Natural Rights Clause in New Mexico's Constitution and reviews how it has been interpreted in case law. Applications of the clause include the categories of inherent property rights as a means of overcoming state sovereign immunity, challenges to economic regulations, arguments to expand state constitutional protections of individual rights beyond those from the U.S. Constitution, conflation of the natural rights clause with the due process clause, and challenges to broad restrictions on property and individual liberty. The author concludes that there is no clear jurisprudence interpreting the natural rights clause.

NEW YORK

Cases:

***Bertholf v. O'Reilly*, 74 N.Y. 509 (1878).** This civil damage act was brought against a landlord who allowed liquor to be sold on his hotel premises, and whose intoxicated son drove the plaintiffs' horse to its death. The defendant landlord argued that the civil damage act was unconstitutional. The New York Court of Appeals ultimately upheld the act. In considering the claim, the court opined that the state constitution's due process clause (Art. 1, sec. 6) "is not construed in any narrow or technical sense" and that "[t]he right to life includes the right of the individual to his body in its completeness and without dismemberment."

***Schloendorff v. Society of New York Hospital*, 211 N.Y. 125 (1914):** A physician removed a malignant tumor without his patient's consent. In a case sounding in tort, Judge Benjamin Cardozo observed that, "Every human being of adult years and sound mind has a right to determine what shall be done with his own body."

***In re. Westchester Co. Medical Ctr.*, 72 N.Y.2d 517 (1988):** A hospital sought permission to insert a feeding tube into a patient who was unable to provide consent. Deciding the case under the common law, the New York Court of Appeals observed: "Every person has a right to life, and no one should be denied essential medical care unless the evidence clearly and convincingly shows that the patient intended to decline the treatment under some particular circumstances." The dissenting justice noted that this right was also protected under constitutional law, without distinguishing between federal and state constitutions.

NORTH CAROLINA

Article:

Richard Dietz, *Factories of Generic Constitutionalism*, 14 Elon L. Rev. 1 (2022). This article reviews unique textual provisions of the North Carolina Constitution, including the inalienable rights clause, and notes the state courts' reluctance to depart from federal legal frameworks. Judge Dietz describes the origins of the inalienable rights clause in the North Carolina Constitution of 1868, attributing some of the drafting to Albion Tourgee, an abolitionist lawyer famous for representing Homer Plessy in the U.S. Supreme Court.

NORTH DAKOTA

Case:

***Wrigley v. Romanick*, 988 N.W.2d 231 (N.D. 2023).** The Supreme Court of North Dakota enjoined a broad abortion ban, holding that "North Dakota's history and traditions, as well as the plain language of its Constitution, establish that the right of a woman to receive an abortion to preserve her life or health was implicit in North Dakota's concept of ordered liberty before, during, and at the time of statehood." The majority opinion acknowledged that preserving the life or health of the woman includes providing an abortion when necessary to prevent severe, life altering harm. Justice Tufte's concurrence asserted that preservation of "life or health" is not an affirmative obligation of the State, but an application of right to self-defense protected by Art. I, § 1 of the North Dakota Constitution. According to Justice Tufte, the fundamental right to preserve one's life does not depend on balancing interests in the woman's life and the unborn human life because courts have long understood that a woman has an inalienable right to employ deadly force against another person when necessary to protect herself against death or serious bodily injury. Justice McEvers' concurrence discussed the different orientations of state versus federal constitutions. Citing Thomas Cooley and U.S. Supreme Court precedent, he asserted that "we can assume the drafters understood courts would construe broad descriptions protecting life, liberty, and security of a person liberally. They nonetheless chose at the outset to enshrine broad guarantees of freedom in N.D. Const. art. I, § 1."

OHIO

Case:

***Steele v. Hamilton Cty. Community Mental Health Bd.*, 90 Ohio St.3d 176 (2000).** A hospital sought to administer antipsychotic medication to an involuntarily-committed, mentally-ill patient without the patient's informed consent. The Ohio Supreme Court held that a court may issue an order permitting the administration of such medication against a patient's wishes without a finding that the patient is dangerous when the court finds by clear and convincing evidence that the patient lacks the capacity to give or withhold informed consent regarding treatment, the medication is in the patient's best interest, and no less intrusive treatment will be as effective in treating the mental illness. In reaching the decision, the court quoted the state constitution's inalienable rights clause and noted that "personal security, bodily integrity, and autonomy are cherished liberties" and "rights inherent in every individual." The court reaffirmed the principle that "'[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body,'" citing *Schloendorff v. Soc. of N.Y. Hosp*. (N.Y. 1914).

OKLAHOMA

Case:

***Okla. Call v. Drummond*, 2023 OK 24 (2023).** The court held that a woman's right to obtain an abortion is protected not only under the due process section of the Oklahoma Constitution, but also through the "inherent right to life" under Art. II § 2 of the state constitution. The court, however, limited the right to circumstances where termination of the pregnancy is necessary to preserve the woman's life. Specifically, the court determined that a woman has an inherent right to choose to terminate her pregnancy if at any point in the pregnancy the woman's physician has determined to a reasonable degree of medical certainty or probability that the continuation of the pregnancy will endanger the woman's life due to the pregnancy itself or due to a medical condition that the woman is either currently suffering from or likely to suffer from during the pregnancy.

OREGON

Articles:

Hans Linde, *Without 'Due Process': Unconstitutional Law in Oregon*, 49 Or. L. Rev. 125 (1970). The author, a professor at the University of Oregon who later served on the Oregon Supreme Court, notes that the Oregon Constitution does not include a due process clause. Instead, Linde observes, the constitutional provision in Oregon dealing with speedy justice and procedural fairness (Art. 1, s. 10) derives from Chapter 40 of Magna Carta, rather than Chapter 39, and does not mention "life." Accordingly, Linde argues that the Oregon Constitution should be construed independently of federal precedents and that the state constitution should be the first line of defense for civil liberties in the state. Published seven years before Justice William

Brennan's influential work on state constitutions, this article is credited as the opening salvo in the movement toward independent state constitutional construction.

Claudia Burton & Andrew Glade, *A Legislative History of the Oregon Constitution of 1857 – Part I (Articles I & II),* 37 Willamette L. Rev. 469 (2001). The authors rely on newly obtained records reflecting Oregon's constitutional drafting process. According to these notes, the debates around the adoption of Oregon's Inalienable Rights Clause (which does not explicitly address "life") suggest that it was intended to recognize inherent rights that pre-dated the existence of the constitutional compact. The drafters of Oregon's Constitution were particularly influenced by structure and protections set out in the Indiana constitution, while also consulting aspects of the Iowa, Wisconsin, and Maine Constitutions during the drafting process.

PENNSYLVANIA

Cases:

***Crawford v. Commonwealth*, 277 A.3d 649 (Pa. Cmmw. Ct. 2022).** Petitioners challenged the constitutionality of several firearms statutes enacted by the Commonwealth, some of which preempted less stringent local gun laws. Petitioners alleged that, pursuant to Art. I, § 1 of the Pennsylvania Constitution, they have a fundamental right to "enjoy and defend life and property" and that the statutes in question rendered them unable to protect themselves. The court rejected this argument and reviewed the state statutes under the rational basis test because the "right to protect one's own life" is not a fundamental right subject to strict scrutiny.

***Rideout v. Hershey Med. Ctr.*, 1995 WL 924561 (Pa. Com. Pl. Dec. 29, 1995).** Parents challenged a hospital's unilateral decision to withdraw life-sustaining treatment from their daughter, arguing that it violated their daughter's constitutional liberty and privacy rights. The court found that by unilaterally discontinuing life support, the hospital infringed upon the decedent's particularized interest in her own life. But since only a decision to *reject* medical treatment (as opposed to a decision to continue or request treatment) implicates a liberty/privacy interest, the parents failed to state a proper claim. The court suggested that the claim might have been sustained had the parents alleged, "under either the state or federal constitutions, that Brianne's life interest was deprived in this case." However, the court emphasized that the due process right to life did not impose an affirmative obligation on the state to provide treatment.

SOUTH CAROLINA

Case:

***State v. Green*, 118 S.C. 279 (1921).** This case held that spring guns were an inappropriate means of defending one's property. The court quotes the America Law Reports for the proposition that "Life may be taken, as we have seen, only in the protection and preservation of life, not when mere property rights are at stake." The case does not cite a specific provision of the state constitution, and the principle of proportionality is generally derived from the 8thth Amendment's bar on cruel and unusual punishment rather than the due process clause.

SOUTH DAKOTA

Case:

***State v. Scougal*, 3 S.D. 55 (1892):** The court found that an Act for the organization of state banks was unconstitutional insofar as it prohibited individual citizens from exercising the powers of banking. According to the court, the "legislature exceeded its power in attempting to prohibit all individual citizens from continuing to carry on the business of banking." Invoking the state constitution's inherent rights clause, the court explained that "[t]he right of enjoying and defending life and liberty, of acquiring and protecting property, and the pursuit of happiness, includes the right to pursue any lawful calling, occupation, or business, and the right to choose the means of acquiring property and the pursuit of happiness, not inconsistent with constitutional provisions or the rights of others."

TENNESSEE

Case:

***Planned Parenthood v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000).** The Tennessee Supreme Court found that the state constitution protects the right to secure an abortion, applying strict scrutiny. The decision does not address the scope of protections for the "right to life" under the state constitution's due process clause. However, the court does opine that the Tennessee Constitution Art. 1, §1, which cites "safety" and "happiness," confirms that "the State clearly has a compelling interest in maternal health from the beginning of the pregnancy." The opinion contrasts this with language in *Roe v. Wade* suggesting that under the federal constitution, interest in maternal health was no longer compelling after the first trimester. The Tennessee court's holding was effectively overruled with the addition in 2014 of Art. 1, § 36 to the state constitution, which provides that "Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion."

TEXAS

Case:

***T.L. v. Cook Children's Medical Center*, 607 S.W.3d 9 (Tex. App. – Fort Worth 2020).** T.L., an infant patient, and her mother appealed from the denial of a temporary injunction to enjoin Cook Children's Medical Center (CCMC) from discontinuing T.L.'s life-sustaining treatment, thereby causing her natural death, over her mother's objection. The court of appeals, in dicta, said the voluntariness of the decision to remove life-sustaining treatment implicates the patient's right to life: "CCMC essentially argues that, because both types of euthanasia passively result in a natural death, the voluntariness of the decision does not implicate the patient's right to life. Nothing could be further from the truth. The entire constitutional premise of *Cruzan*, as confirmed by *Vacco* and *Glucksberg*, is that the liberty interest a terminally ill patient has in individual autonomy may overcome a state's interest in preserving her life and thereby her right

to voluntarily refuse life-sustaining treatment. There is simply no constitutional equivalent for involuntarily depriving a terminally ill patient of her life against her wishes."

VERMONT

***Beecham v. Leahy*, 130 Vt. 164 (1972):** The Vermont Supreme Court found that a statute imposing criminal penalties on doctors performing abortions except when a woman's life was at issue, violated the state constitution's due process provisions. Women were not subject to punishment, and were free to obtain abortions, but the restrictions on doctors made that right illusory. In striking down the criminal penalties, the court asked, "[w]here is that concern for the health of the pregnant woman when she is denied the advice and assistance of her doctor?" The court further noted that the unconstitutional law "deprives a woman of medical aid, even though she may be afflicted in body or mind, or both, short of imminent death, in relation to the exercise of a right recognized and allowed by the very same statute. "

***In re G.K.*, 147 Vt. 174 (1986).** In discussing the state's inherent rights clause, the court held that periodic review of involuntary and indeterminate treatment orders by way of patient-initiated applications for discharge did not satisfy due process. The court indicated that states should bear the burden of periodic review because a patient's liberty and freedom are at issue.

***State v. Martin*, 184 Vt. 23 (2008).** The court discussed the state's inherent rights clause in the context of a felon's bodily integrity and held that a Vermont statute requiring nonviolent felons to provide DNA samples for inclusion in federal and state DNA databases is permissible because the statute's purpose – to use DNA sampling and analysis to assist in identifying persons at future crime scenes – serves special needs beyond normal law enforcement.

***In re G.G.*, 204 Vt. 148 (2017).** The court discussed dignitary interests in the context of a patient's authority over their medical decisions and held that the involuntary medication inserted into the patient's body did not violate his procedural due process rights because he was not competent to make decisions about his own medication. Without citing a particular provision of the Vermont Constitution, the court repeatedly recognized the dignity and autonomy of the patient. The court emphasized that the State may override a patient's dignity and autonomy only where the patient is not competent to make decisions for themselves.

VIRGINIA

Case:

****Paris v. Commonwealth*, 35 Va. App. 377 (2001)**. The court rejected the claim under the Virginia Constitution's inherent rights clause that the defendant's "acts of oral sodomy on his fifteen-year-old nephew are protected by rights to 'the enjoyment of life and liberty' and 'the pursuing and obtaining happiness.'" Protection for such acts was not contemplated by the framers, the court observed.

WASHINGTON

Article:

Brian Snure, *A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington State Constitution*, 67 Wash. L. Rev. 669 (1992). Article 1, Section 32, a unique provision of the Washington Constitution, provides for a "recurrence to fundamental principles" as a means of protecting individual rights and free government. Since the adoption of the state constitution in 1889, Section 32 has been used infrequently by Washington's legal community. The Comment examines the role of Section 32 in constitutional analysis by distilling four fundamental principles from the state constitution's structure and the historical and legal environment existing in 1889. From these principles, the Comment concludes that the framers of the Washington Constitution intended that Section 32 be used to expand the scope of individual rights protected by the U.S. Constitution.

WEST VIRGINIA

Case:

****Women's Health Center of West Virginia v. Panepinto*, 191 W.Va. 436 (1993).** The West Virginia Supreme Court struck down, on state constitutional grounds, a statute banning the use of state Medicaid funds for abortions, except in limited circumstances. Noting the state's inherent rights clause, the court wrote, "[t]he provision of enhanced guarantees for 'the enjoyment of life and liberty ... and safety' by our state constitution both permits and requires us to interpret those guarantees independent from federal precedent." (This holding was effectively overruled by a subsequent amendment to the state constitution).

WISCONSIN

Case:

***Professional Guardianships, Inc. v. Ruth E.J.*, 540 N.W.2d 213 (Wis. App. (1995).** A guardian was appointed for an incompetent ward. The ward's doctors stated that the only chance for the ward's recovery was electroconvulsive treatment, and the guardian applied for the treatment. The trial court dismissed the application on the ground that the relevant statute did not grant authority to order such treatment without the patient's consent. The Wisconsin Court of Appeals found that the statute denied the ward her right to equal protection and in the alternative, that the statute denied the ward "lifesaving treatment in violation of her constitutional right to life . . . because it prevents her from obtaining the only remaining medical option likely to reverse her condition."

VI. "Life" In International Human Rights and Comparative Law

The "right to life" is a key provision of the Universal Declaration of Human Rights (UDHR), a foundational document that is universally accepted around the world and portions of

which are deemed to have the status of customary international law.[47] "Life" is also protected under treaty, including the International Covenant on Civil and Political Rights (ICCPR), a widely accepted treaty to which the United States is a party.[48]

In 2018, the United Nations Human Rights Committee, the expert body which oversees the interpretation of, and compliance with, the ICCPR, issued a General Comment that defines "life" under the ICCPR as the "supreme right," a "prerequisite for the enjoyment of all other rights."[49] The General Comment examines state obligations to protect and respect the right to life in a number of contexts, including protection of the environment, criminal penalties and torture, proliferation of weapons, and war. With respect to abortion, the General Comment explains that States parties to the ICCPR must ensure that restrictions on abortion do not jeopardize the lives of pregnant people, subject them to physical or mental pain or suffering, discriminate against them or arbitrarily interfere with their privacy.[50] The Human Rights Committee has applied these concepts in several decisions, described below.

In addition to international law, comparative law also provides examples of jurisprudential applications of a right to life. These comparators utilize a definition of "life" that protects not only pregnant persons' lives, but also respects their dignity, autonomy, and right to enjoyment of their lives. The material listed below provides a starting place for research in this area.

A. Human Rights Committee: General Comment 36 and HRC Decisions

1. International Legal Materials

[47] UDHR, *supra* n. 17. *See* Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 290 (1996); Hersch Lauterpacht, International Law and Human Rights 61 (Praeger 1950) (noting the general acceptance of the Universal Declaration).
[48] ICCPR, *supra* n. 19.
[49] U.N. Hum. Rts. Comm., General Comment No. 36, ¶ 1, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019) [hereinafter General Comment No. 36].
[50] *Id*. at ¶8.

***Gen. Comment 36 on the Right to Life*, U.N. Doc. CCPR/C/GC/36 (Oct. 31, 2018).** This General Comment replaced the U.N. Human Rights Committee's earlier General Comments concerning "life" under international human rights law. According to the current General Comment, States parties to the ICCPR must provide "safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or where the pregnancy is not viable." While States parties may adopt reasonable regulations relating to abortion, they must not impose restrictions on abortion which subject women and girls to physical or mental pain or suffering, discriminate against them, arbitrarily interfere with their privacy, or place them at risk of undertaking unsafe abortions. The Comment states that governments should not apply criminal sanctions to women and girls who undergo abortion or to medical service providers who assist them in doing so. Further, the Comment state that governments should remove existing barriers that deny effective access to safe and legal abortion, refrain from introducing new barriers to abortion, and prevent the stigmatization of those seeking abortion.

Human Rts. Committee*, Toussaint v. Canada Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol Concerning Communication No. 2348/2014*, ¶ 11, U.N. Doc. CCPR/C/123/D/2348/2014 (2018). This decision notes that "the right to life concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity," and holds that the right to life requires, at a minimum, that governments have the "obligation to provide access to existing health care services that are reasonably available and accessible, when lack of access to the health care would expose a person to a reasonably foreseeable risk that can result in the loss of life."

Human Rts. Committee*, Teito v. New Zealand Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol Concerning Communication No. 2728/2016*, ¶ 9.4, U.N. Doc. CCPR/C/127/D/2728/2016 (2020). The Human Rights Committee urged an expansive definition of the right to life, noting that the right cannot be properly understood if it is interpreted in a restrictive manner, and that the protection of that right requires States parties to adopt positive measures.

2. Articles

Sarah Joseph, *Extending the Right to Life Under the International Covenant on Civil and Political Rights: General Comment 36*, 19 Hum. Rts. L.Rev. 347 (2019). This article provides an in-depth review of General Comment 36, explaining the process by which it was developed and the substance of its provisions.

Ginevra Le Moli, *The Human Rights Committee, Environmental Protection and the Right to Life*, 69 Int'l & Comp. L. Q. 735 (2020). This article reviews the significance of General Comment 36 for environmental rights, analyzing two recent decisions of the Human Rights Committee that apply the General Comment to address environmental degradation and human dignity.

B. Comparative Law

1. Cases

***Lakshmi Dhikta v. Government of Nepal*, Writ Petition No. WO-0757, 2067 (2009) (Supreme Court of Nepal).** The Supreme Court of Nepal grounded the right to access safe and legal abortion services in a constellation of rights contained in Nepal's Constitution, including the right to live with dignity and personal liberty, and held that these human rights place affirmative obligations on the government to ensure access to abortion. The court directed the government to introduce a comprehensive abortion law based on international human rights principles, and to create a fund to cover the cost of reproductive health services, including abortion, for women living on low incomes or women without income.

***PAK and Salim Mohammed v. the Attorney General and 3 Others* (Petition No. E009 of 2020) (2022) (Kenya).** The High Court of Kenya in Malindi affirmed that abortion care is a fundamental right under the Constitution of Kenya and that arbitrary arrests and prosecution of patients and health care providers for seeking or offering abortion care is illegal. In reaching its decision, the High Court analyzed the right to life under the Constitution of Kenya, drawing, in part, on UN Human Rights Committee's General Comment 36 and noting that the right to life obligates governments to ensure women and girls do not have to undertake unsafe abortions, as well as to take affirmative steps to provide access to abortion.

***X. v. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi and Anr*., the Supreme Court of India, civil appeal no. 5802, judgment of September 29, 2022.** The Supreme Court of India held that unmarried women are entitled to an abortion up to 24 weeks of pregnancy under India's Medical Termination of Pregnancy (MTP) Act, which creates exceptions to criminalization of abortion in India and articulates circumstances in which abortion is permissible. In interpreting the MTP Act in this way, the court drew upon constitutional values including the right to reproductive autonomy, the right to live a dignified life, the right to equality, and the right to privacy, grounded in Article 21 of India's Constitution. The court reiterated that the right to dignity is a core component of the right to life and liberty under India's Constitution, and that the government's positive obligations to protect the right to life and health include the obligation to increase access to reproductive healthcare such as abortion. The court's understanding is grounded in an understanding of India's obligations under international human rights law, including the right to life, the right to health, and the right to non-discrimination.

AI 148/2017 (Mexico Supreme Ct., 2021): Access to abortion in Mexico was greatly expanded when the Supreme Court found several provisions of the Penal Code of the State of Coahuila of Zaragoza unconstitutional. Applying a gendered perspective, the court concluded it was unconstitutional to criminally punish a woman who voluntarily chooses to end her pregnancy. The court determined that the constitutional right to human dignity included a woman's right to choose what to do with her own body, and to decide her destiny without the interference of the State. Relying on international jurisprudence, including General Comment 36, the court further emphasized that the right to privacy protected the decision to become a mother. The court recognized that the right to privacy included the right to have one's own moral values and beliefs, without imposition from the state. The court also grounded its decision on the right to

equality before the law. The court further established pregnant people had a right to choose an abortion based on the right to health, including psychological and emotional health. Finally, the court found the articles criminalizing abortion in Coahuila's penal code did not accomplish the intended legislative purpose, namely preventing abortion from occurring. Instead, the criminalization of abortion only resulted in increased risks to the life and health of the woman, criminalizing poverty and failing to assist pregnant individuals that find themselves with an unplanned pregnancy.

Mexico Supreme Court, Sept. 7, 2023: The Mexican Supreme Court decriminalized abortion nationwide, building on its earlier decision regarding the State of Coahuila. According to the court, "the criminalization of abortion constitutes an act of violence and discrimination based on gender, as it perpetuates the stereotype that women and pregnant individuals can only exercise their sexuality for procreation and reinforces the gender role that imposes motherhood as a compulsory destiny." The ruling affirms that federal authorities cannot criminalize any woman, transgender person, or non-binary person seeking abortion services at federal healthcare institutions anywhere in Mexico. The ruling also affirms that healthcare personnel cannot be prosecuted for providing abortion services. As of this writing, the full written opinion is not yet available from the court.

2. Article

Kathleen Marie McGean, *The Roots of Rights: Where do Courts Find Constitutional Support for a Woman's Right to Choose or a Fetal Right to Life*, 51 GA. J. INT'L & COMP. L. 197 (2022). This article examines sources of abortion rights in comparative contexts, with particular focus on Mexican jurisprudence regarding the right to life that encompasses a "right to live well."

VII. CONCLUSION

This annotated bibliography demonstrates that there has been relatively little scholarly or judicial attention to developing the scope of the right to life under state and federal constitutions, and its establishing meaning for "persons born." Ancient texts such as Magna Carta, common law treatises, dictionary definitions, and legislative debates all point to a broader meaning of, and role for, the "right to life" – a role that has been hinted at but not yet widely embraced in U.S. case law. International human rights law and comparative examples further demonstrate the ways in which a right to life might be developed and applied to advance individual dignity, safety, and enjoyment of life. This annotated bibliography is a starting place for building a new phase of state and federal constitutional development in this area.