

On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees

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The debate as to what unenumerated rights, if any, are protected by the Constitution is directly relevant to the most controversial issues in constitutional law today—from gay marriage, to gun-control measures, to substance-control regulation, to specific personal liberties, and finally to property regulation, to name just a few. Much of the unenumerated rights debate centers on the U.S. Supreme Court’s substantive Due Process Clause case law interpreting the Fourteenth Amendment. These cases address the question of which specific rights are implicated by the protection of life, liberty, and property in the Due Process Clause of the Fourteenth Amendment. Some Justices on the U.S. Supreme Court have written or joined opinions that argue that the answer to this question can be found by looking for rights that are deeply rooted in American history and tradition at the most specific level of generality available. State constitutional case law from 1776 up to 1868 is thus potentially of great relevance to understanding American history and tradition because by 1868, the year the Fourteenth Amendment was ratified, two-thirds of the existing state constitutions contained what we refer to as “Lockean Natural Rights Guarantees,” provisions protecting life, liberty, and property and guaranteeing inalienable, natural, or inherent rights of an unenumerated rights type. In this Article, we identify and exhaustively analyze nearly a century of state case law from the time of the Founding until 1868, in which state courts interpret and apply state constitutional Lockean Natural Rights Guarantees to an enormous variety of issues. From this robust body of state constitutional case law, we conclude that the Lockean Natural Rights Guarantees in most state constitutions had great significance with respect to the abolition of slavery and the extension of civil and political rights to individuals and minority-group members living in the northern states. At the same time, with respect to property regulation, state courts struggled to give concrete meaning to the Lockean Natural Rights Guarantees in their state constitutions, and while not discounting the possibility that some regulations could violate the Guarantees, the state courts generally deferred to the legislature. This evidence suggests that “liberty,” in the context of the Fourteenth Amendment, is best understood broadly to encompass natural rights and to require that civil and political rights be extended to minorities, a

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finding of particular relevance to the debate on gay marriage. However, the range of issues potentially implicated by the Lockean Natural Rights Guarantees and inconsistent rulings in many areas also suggest that determining which specific rights are implicated by the protection of liberty posed the same challenge to state courts between 1776 and 1868 that present courts face today, and that the quest to identify unenumerated rights that are deeply rooted in American history and tradition is itself somewhat quixotic.

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I. Introduction

Over the last fifty years, some of the most widely debated Supreme Court decisions have been those which spoke of the presence or absence of unenumerated rights. This has been true of the Supreme Court’s decisions in *Griswold v. Connecticut*;¹ in *Roe v. Wade*;² in *Lawrence v. Texas*;³ and, most recently, in *United States v. Windsor*.⁴ Today, the debate as to exactly what rights the Constitution protects continues on a wide array of topics including gay marriage, gun-control legislation, substance-control legislation, and property regulation.⁵ Those who claim the Fourteenth Amendment protects unenumerated rights base their claim either on the doctrine of substantive due process or, more recently, on the Privileges or Immunities Clause of the Fourteenth Amendment.⁶ They claim that some unenumerated rights are fundamental rights substantively protected by the Due Process Clause or that they are privileges or immunities of citizenship.⁷ Many opponents argue that the Fourteenth Amendment does not protect any rights other than those that are specifically enumerated either in the Bill of Rights or in other parts of the Constitution. Other opponents concede that the Fourteenth Amendment protects unenumerated rights but debate which particular rights are protected.

The Supreme Court Justices opposing the expansion of unenumerated rights have rallied in recent years around the position that the only unenumerated, fundamental liberty interests that the Fourteenth Amendment protects are those that are deeply rooted in the nation’s history and traditions.

1. 381 U.S. 479, 484–86 (1965).

2. 410 U.S. 113, 129, 152–54 (1973).

3. 539 U.S. 558, 562, 564, 575 (2003).

4. 133 S. Ct. 2675, 2693–96 (2013).

5. See, e.g., *McDonald v. City of Chi.*, 561 U.S. 742, 767, 778 (2010) (finding that the Second Amendment “right to keep and bear arms is fundamental to [the nation’s] scheme of ordered liberty”); *Gonzales v. Raich*, 545 U.S. 1, 8 (2005) (analyzing constitutional claims regarding the use of medical marijuana); Robert J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555, 557 (1997) (addressing the “open question” of the status of fundamental property rights); Adam Liptak, *Supreme Court to Decide Marriage Rights for Gay Couples Nationwide*, N.Y. TIMES, Jan. 16, 2015, <http://www.nytimes.com/2015/01/17/us/supreme-court-to-decide-whether-gays-nationwide-can-marry.html>, archived at <http://perma.cc/KC28-A7Q4> (reporting on the Supreme Court’s recent grant of certiorari to cases regarding whether gay marriage is a fundamental right).

6. See *infra* notes 10–12 and accompanying text.

7. See *infra* notes 10–12 and accompanying text.

Thus, in *Washington v. Glucksberg*,⁸ former Chief Justice William Rehnquist wrote for five Justices that the Due Process Clause of the Fourteenth Amendment protected only fundamental liberty rights that are “objectively, deeply rooted in this Nation’s history and tradition.”⁹ More recently, in *McDonald v. City of Chicago*,¹⁰ Chief Justice John Roberts and Justices Antonin Scalia, Anthony Kennedy, and Samuel Alito took the view that Second Amendment gun rights were protected against state abridgment by the Fourteenth Amendment because the right to keep and bear arms is deeply rooted in our nation’s history and tradition.¹¹ These four conservative advocates of substantive due process received a critical fifth vote from Justice Clarence Thomas, who wrote that the Privileges or Immunities Clause of the Fourteenth Amendment protected the right to keep and bear arms but only on the ground that it was deeply rooted in American history and tradition.¹²

The endorsement in *McDonald* of unenumerated liberty rights that are deeply rooted in history and tradition urgently raises the question of *which* rights are rooted deeply in history and tradition. This question is made especially pressing because one of the five conservative Justices—Justice Anthony M. Kennedy—has on two occasions taken a more philosophical approach to the derivation of constitutionally protected liberty rights. Justice Kennedy wrote of the Due Process Clause’s protection of liberty as a transcendental concept that includes “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”¹³ Justice Kennedy embraced this view in the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹⁴ and in *Lawrence v. Texas*, where the Court struck down sodomy laws as violating the right to privacy even though the existence of those laws is without any doubt deeply rooted in history and tradition.¹⁵ Justice Kennedy seems to have thought in this case that the Texas law in question was more than a “mere meddlesome interference[] with the rights of the individual” and that it was an unreasonable “exercise of the police power” as those phrases are used in *Lochner v. New York*.¹⁶ That in turn raises a question as to whether *Lochner*-style substantive due process is deeply rooted in American history and tradition and whether unenumerated rights cases like *Pierce v. Society of*

8. 521 U.S. 702 (1997).

9. *Id.* at 720–21 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)) (internal quotation marks omitted).

10. 561 U.S. 742 (2010).

11. *Id.* at 767.

12. *Id.* at 806, 822–23 (Thomas, J., concurring in part and concurring in judgment).

13. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion)) (internal quotation marks omitted).

14. *Casey*, 505 U.S. at 851.

15. *Lawrence*, 539 U.S. at 574, 577–79.

16. 198 U.S. 45, 61 (1905); see *Lawrence*, 539 U.S. at 578–79 (holding that the Texas statute does not further a legitimate state interest that can justify its restriction on personal liberty).

*Sisters*¹⁷ and *Meyer v. Nebraska*¹⁸ were correctly decided, as well as *Skinner v. Oklahoma*,¹⁹ which seems to have quite correctly displaced *Buck v. Bell*.²⁰

The conundrum over whether the Fourteenth Amendment protects unenumerated rights is augmented by a survey that Professor Steven Calabresi and Sarah Agudo did several years ago as to what individual rights were protected in state bills of rights in 1868 when the Fourteenth Amendment was finally ratified.²¹ Professor Calabresi and Ms. Agudo's research was relied on by Justice Alito in his plurality opinion in *McDonald v. City of Chicago*.²² Professor Calabresi and Ms. Agudo found that in 1868, twenty-four of the thirty-seven state constitutions existing at that time, nearly a two-thirds majority, contained provisions guaranteeing inalienable, natural, or inherent rights of an unenumerated rights type.²³ Thus, in 1868, approximately 67% of all Americans then living resided in states that constitutionally protected unenumerated individual liberty rights.²⁴ Throughout this Article, we use the term "Lockean Natural Rights Guarantees" (or "the Guarantees") to refer to these unenumerated individual-liberty-rights guarantees.²⁵

Our goal in this Article is to uncover the original understanding of the Lockean Natural Rights Guarantees urgently, in 1868, when the Fourteenth Amendment was adopted. Were the Lockean Natural Rights Guarantees

17. 268 U.S. 510 (1925).

18. 262 U.S. 390 (1923).

19. 316 U.S. 535 (1942).

20. 274 U.S. 200 (1927); see *Skinner*, 316 U.S. at 538 (declining to distinguish the statute at issue from *Buck v. Bell* under due process and, instead, holding that the statute failed the requirements of the Equal Protection Clause).

21. Steven G. Calabresi & Sarah E. 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, 15–18 (2008). The understanding of unenumerated rights in the states is especially relevant to the meaning of the Fourteenth Amendment if one accepts the premise that "the original intent relevant to constitutional discourse" is the intent "of the parties to the constitutional compact—the states as political entities." H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 888 (1985). But see *id.* at 945–48 (explaining that by the outbreak of the Civil War, the understanding of "intent" shifted to focusing on the personal intent of individual Framers).

22. 561 U.S. 742, 777 & n.26 (2010).

23. See Calabresi & Agudo, *supra* note 21, at 88 (listing twenty-seven of the thirty-seven state constitutions as including provisions guaranteeing unenumerated rights). That article included three additional states on the list: Connecticut, Rhode Island, and Texas. *Id.* at 20 & nn.48–49. However, as explained *infra*, the Connecticut, Rhode Island, and Texas Guarantees were so atypical that it is not fully accurate to group them with the twenty-four true Lockean Natural Rights Guarantees.

24. The 67% reflects the population that resided in the twenty-four states with true Lockean Natural Rights Guarantees as of the 1870 census. This percentage was calculated from data available from the U.S. CENSUS BUREAU, POPULATION: 1790 TO 1990, at 27 tbl.16, available at <http://www.census.gov/population/www/censusdata/files/table-16.pdf>, archived at <http://perma.cc/T6UJ-4FLW>.

25. See *infra* Appendix A, for a chart of the twenty-four Lockean Natural Rights Guarantees and three quasi-Guarantees existing in 1868.

understood broadly enough to support arguments for the existence of something like the right to marry a partner of one's own choosing or the personal liberties at issue in *Pierce*, *Meyer*, or *Skinner*? Or were the Lockean Natural Rights Guarantees essentially empty rhetorical flourishes that meant little or nothing? Our conclusion after exhaustively studying the case law applying the Lockean Natural Rights Guarantees from the founding of the Republic until 1868 is that the Guarantees protected rights grounded in natural law, and in the Northern States, the Guarantees required that civil and political rights be extended to minority group members, a particularly relevant finding if one accepts the premise that, in 1868, the Fourteenth Amendment reflected the views of the Northern States. The Guarantees also suggested that a broad reading ought to be given to enumerated rights and to unenumerated, but deeply rooted, liberties enjoyed by Englishmen under that country's ancient constitution, which predated the Norman Conquest. At the same time, particularly with respect to property regulation, state courts struggled to give concrete meaning to the Lockean Natural Rights Guarantees, and while not discounting the possibility that some regulations could violate the Guarantees, the state courts generally deferred to the legislature. In this respect, the Lockean Natural Rights Guarantees were remarkably similar to Justice Kennedy's so-called "sweet mystery of life" language in *Lawrence v. Texas*,²⁶ which rightly or wrongly has been ignored by lower federal and state courts in post-*Lawrence* substantive due process cases.²⁷ As Professor Calabresi has previously argued, this "sweet mystery of life" language is unintelligible and thus unenforceable.²⁸ The same thing may be true of the grandly phrased Lockean Natural Rights Guarantees, at least as they are applied to the protection of property.

The twenty-four Lockean Natural Rights Guarantees existing in 1868 used very similar language in protecting enumerated and unenumerated individual rights. The typical Lockean Natural Rights Guarantee included three parts or elements. First, it affirmed the freedom or equality of men (or both), stating that all men are born "free and equal" or "free and independent."²⁹ Sir Edward Coke might well have said that this was an inherent right of Englishmen, and Lord Mansfield held as much in *Somerset's Case*³⁰ in 1772, a case holding that slavery was illegal in England because

26. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)); *id.* at 588 (Scalia, J., dissenting)).

27. Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1517, 1527 (2008).

28. *See id.* at 1518 (arguing that the *Lawrence* opinion is "void for vagueness").

29. *E.g.*, FLA. CONST. of 1868, declaration of rights, § 1 (using the "free and equal" language); ME. CONST. art. 1, § 1 (amended 1988) (using the "free and independent" language); *see also infra* Appendix A.

30. *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499 (K.B.); Lofft 1.

liberty was the natural state of man and that only express positive law could deprive a person of his freedom.³¹ There being no express, positive law in England that authorized the holding of a slave on board a ship in the River Thames in London, the slave was declared free under the common law in a writ of habeas corpus.³²

Second, the typical Lockean Natural Rights Guarantee guaranteed inalienable, inherent, or natural rights. Sir Edward Coke would have identified such rights with the common law of England and with the ancient constitution, which had produced it. For this reason, Coke held that royal grants of monopolies, which prevented a person from pursuing his occupational freedom, were issued in violation of the common law and that such grants of monopoly were therefore legally void.³³

And third, the typical Lockean Natural Rights Guarantee guaranteed a right to enjoy life, liberty, and property. It is possible that the enjoyment of life and liberty might be expressed by wanting to work at a job more than sixty hours a week, the right to educate one's child in a private school, or the right to procreate. If so, the Lockean Natural Rights Guarantees might support the holdings in *Lochner*, *Pierce*, *Meyer*, and *Skinner*. Many of the Guarantees further specified that the property right included specific rights for "acquiring, possessing, and protecting property," language that might implicate gun rights.³⁴ Several Guarantees went even further and constitutionally protected the right to pursue and obtain happiness or safety.³⁵ This language, too, could be read as protecting fundamental liberties. The Virginia Lockean Natural Rights Guarantee exemplifies the typical Guarantee, and contains all three elements:

That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.³⁶

31. *Id.* at 510; Lofft at 18–19.

32. *Id.*

33. The Case of the Monopolies, (1602) 77 Eng. Rep. 1260 (Q.B.) 1266; 11 Co. Rep. 84 b, 88 b.

34. *E.g.*, CAL. CONST. of 1849, art. I, § 1 ("All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness.").

35. *E.g.*, ALA. CONST. of 1868, art. I, § 1 ("That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness."); CAL. CONST. of 1849, art. I, § 1 ("All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness.").

36. VA. BILL OF RIGHTS of 1864, § 1 ("That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by

Nineteen of the twenty-four historical constitutions contain typical Guarantees, with each of these nineteen Guarantees including all three elements or parts. Fifteen of the nineteen typical Lockean Natural Rights Guarantees—the California,³⁷ Florida,³⁸ Illinois,³⁹ Iowa,⁴⁰ Kansas,⁴¹ Louisiana,⁴² Maine,⁴³ Massachusetts,⁴⁴ Nevada,⁴⁵ New Jersey,⁴⁶ Ohio,⁴⁷

any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”).

37. CAL. CONST. of 1849, art. I, § 1 (“All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness.”).

38. FLA. CONST. of 1868, declaration of rights, § 1 (“All men are by nature free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness.”).

39. ILL. CONST. of 1847, art. XIII, § 1 (“That all men are born equally free and independent, and have certain inherent and indefeasible rights; among which are those of enjoying and defending life and liberty, and of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness.”).

40. IOWA CONST. art. I, § 1 (amended 1988) (“All men are, by nature, free and equal, and have certain inalienable rights among—which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.”).

41. KAN. CONST. bill of rights, § 1 (“All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.”).

42. LA. CONST. of 1868, tit. I, art. I (“All men are created free and equal, and have certain inalienable rights; among these are life, liberty and the pursuit of happiness. To secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.”).

43. ME. CONST. art. I, § 1 (amended 1988) (“All men are born equally free and independent, and have certain natural, inherent and unalienable Rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.”).

44. MASS. CONST. pmbl. (“The end of the institution, maintenance, and administration of government, is to secure the existence of the body-politic, to protect it, and to furnish the individuals who compose it with the power of enjoying, in safety and tranquility, their natural rights, and the blessings of life”); MASS. CONST. art. I (amended 1976) (“All men are born free and equal, and have certain, natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.”).

45. NEV. CONST. art. I, § 1 (“All men are, by nature, free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness.”).

46. N.J. CONST. of 1844, art. I, § 1 (“All men are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.”).

47. OHIO CONST. of 1851, art. I, § 1 (“All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.”).

Pennsylvania,⁴⁸ South Carolina,⁴⁹ Virginia,⁵⁰ and Wisconsin⁵¹ Guarantees—generally followed this typical form without substantive variation. The remaining four typical Lockean Natural Rights Guarantees—the Delaware,⁵² New Hampshire,⁵³ Kentucky,⁵⁴ and Vermont⁵⁵ Guarantees—expanded beyond the basic three parts. The Delaware and New Hampshire Guarantees specifically included freedom of religion in their listing of individual rights.⁵⁶

48. PA. CONST. of 1838, art. IX, § 1 (“That all men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.”).

49. S.C. CONST. of 1868, art. I, § 1 (“All men are born free and equal—endowed by their Creator with certain inalienable rights, among which are the rights of enjoying and defending their lives and liberties, of acquiring, possessing and protecting property, and of seeking and obtaining their safety and happiness.”).

50. VA. BILL OF RIGHTS of 1864, § 1 (“That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”).

51. WIS. CONST. art. I, § 1 (amended 1982) (“All men are born equally free and independent, and have certain inherent rights, among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.”).

52. DEL. CONST. of 1831, pmbl. (“Through divine goodness all men have, by nature, the rights of worshipping and serving their Creator according to the dictates of their consciences; of enjoying and defending life and liberty, of acquiring and protecting reputation and property, and, in general, of attaining objects suitable to their condition, without injury by one to another; and as these rights are essential to their welfare, for the due exercise thereof, power is inherent in them; and therefore all just authority in the institutions of political society is derived from the people, and established with their consent, to advance their happiness. And they may for this end, as circumstances require, from time to time, alter their constitution of governance.”).

53. N.H. CONST. pt. 1, art. I (“All men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good.”); N.H. CONST. pt. 1, art. II (amended 1974) (“All men have certain natural, essential, and inherent rights; among which are the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and, in a word, of seeking and obtaining happiness.”); N.H. CONST. pt. 1, art. IV (“Among the natural rights, some are in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the rights of conscience.”).

54. KY. CONST. of 1850, pmbl. (“We, the representatives of the people of the State of Kentucky, in convention assembled to secure to all the citizens thereof the enjoyment of the rights of life, liberty, and property, and of pursuing happiness, do ordain and establish this Constitution for its government.”); KY. CONST. of 1850, art. XIII, § 3 (“The right of property is before and higher than any constitutional sanction; and the right of the owner of a slave to such slave, and its increase, is the same, and as inviolable as the right of the owner of any property whatever.”).

55. VT. CONST. ch. 1, art. I (amended 1921 & 1991) (“That all men are born equally free and independent, and have certain natural, inherent, and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining happiness, and safety;—therefore, no male person born in this country, or brought from over sea, ought to be holden by law to serve any person as a servant, slave, or apprentice, after he arrives to the age of twenty-one years, nor female in like manner after she arrives to the age of eighteen years, unless they are bound by their own consent after they arrive to such age, or bound by law for the payment of debts, damages, fines, costs, or the like.”).

56. DEL. CONST. of 1831, pmbl.; N.H. CONST. pt. 1, art. V.

The Kentucky Guarantee contained a separate provision specifying that its Lockean Natural Rights Guarantee did not ban human slavery,⁵⁷ while the Vermont Guarantee concluded with an extra provision specifically abolishing slavery.⁵⁸ In other words, the Framers of the Vermont constitution explicitly wrote down their conclusion that the Vermont Lockean Natural Rights Guarantee abolished slavery, a conclusion also reached by several other state courts interpreting their more general Lockean Natural Rights Guarantees.⁵⁹

Five of the atypical Guarantees contained slight variations from the typical Lockean Natural Rights Guarantees form. The Alabama,⁶⁰ Indiana,⁶¹ and Nebraska⁶² Guarantees did not include the right to property. The North Carolina Guarantee substituted the term “property” for the phrase “enjoyment of the fruits of their own labor.”⁶³ The Missouri constitution did not include a provision on the equality or freedom of men.⁶⁴ We refer to these twenty-four clauses collectively as the “Lockean Natural Rights Guarantees” throughout the remainder of this Article.

In addition to the twenty-four states with Lockean Natural Rights Guarantees in 1868, three additional state constitutions contained vaguer, atypical clauses with weak, vague language that calls to mind the Lockean Natural Rights Guarantees. Thus, the Constitution of the State of Connecticut recognized and established “the great and essential principles of liberty and free government” without specific reference to the equality or freedom of men, inalienable or natural rights, or rights beyond liberty.⁶⁵ This language is an echo of the Lockean Natural Rights Guarantee language and

57. KY. CONST. of 1850, art. XIII, § 3.

58. VT. CONST. ch. 1, art. I (amended 1921 & 1991).

59. See *infra* subpart III(A).

60. ALA. CONST. of 1868, art. I, § 1 (“That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.”).

61. IND. CONST. art. I, § 1 (amended 1984) (“We declare, 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; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well being.”).

62. NEB. CONST. of 1866, art. I, § 1 (“All men are born equally free and independent, and have certain inherent rights; among these are life, liberty, and the pursuit of happiness. To secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.”).

63. N.C. CONST. of 1868, art. I, § 1 (“That we hold it 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, the enjoyment of the fruits of their own labor, and the pursuit of happiness.”).

64. MO. CONST. of 1865, art. I, § 1 (“That we hold it to be self-evident that all men are endowed by their Creator with certain inalienable rights, among which are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.”).

65. CONN. CONST. of 1818, art. I, pmbl. (“That the great and essential principles of liberty and free government may be recognized and established, we declare, . . .”).

of Sir Edward Coke's idea that the common law guaranteed liberty of occupation,⁶⁶ or Lord Mansfield's view that men and women were born free, except where the positive law expressly said otherwise.⁶⁷ Similarly, the Rhode Island constitution recognized that religious and political freedom in general antedated its constitution and was preserved by it, but it too did not specifically refer to the equality or freedom of men, inalienable or natural rights, or rights beyond liberty.⁶⁸ The Rhode Island constitution said that:

In order effectually to secure the religious and political freedom established by our venerated ancestors, and to preserve the same for our posterity, we do declare that the essential and unquestionable rights and principles hereinafter mentioned, shall be established, maintained, and preserved, and shall be of paramount obligation in all legislative, judicial and executive proceedings.⁶⁹

This may well be a reference to the rights that Coke and Mansfield thought were inherent in the common law.

Finally, the Texas constitution stated that rights come from God, but it did not specifically refer to the equality or freedom of all men, or inalienable or natural rights, or rights beyond liberty.⁷⁰ Connecticut's quasi-Lockean Natural Rights Guarantee, the Delaware quasi-Guarantee, and the quasi-Guarantees in Rhode Island and Texas were positioned within preambular constitutional language. The courts in these states generally interpreted their Guarantees as providing fewer substantive rights as compared to other state courts, a result likely attributable to their weaker language, rather than their preambular positions within the constitutions.⁷¹

In order to determine how the twenty-four clear-cut Lockean Natural Rights Guarantees were understood and interpreted in 1868 at the time of the Fourteenth Amendment's adoption, we surveyed all state constitutional case law on these Lockean Natural Rights Guarantees from the founding of the Republic up to 1868. Using Westlaw electronic databases, we searched each state's database for key words from the version of the Guarantee existing in 1868 as well as prior versions of the Guarantee. If the opinion or reported arguments from the parties explicitly cited the Guarantee, we marked the case

66. See *supra* note 33 and accompanying text.

67. See *supra* notes 30–32 and accompanying text.

68. R.I. CONST. of 1842, art. I, pmbl. ("In order effectually to secure the religious and political freedom established by our venerated ancestors, and to preserve the same for our posterity, we do declare, that the essential and unquestionable rights and principles hereinafter mentioned, shall be established, maintained, and preserved, and shall be of paramount obligation in all legislative, judicial and executive proceedings.").

69. *Id.*

70. See TEX. CONST. of 1866, art. I, pmbl. ("That the general, great, and essential principles of Liberty and Free Government may be recognized and established we declare that . . ."); *id.* at art. I, § 2 ("All freemen, when they form a social compact, have equal rights . . .").

71. See *supra* note 23 and accompanying text; *infra* text accompanying notes 255–57, 523–29, 768.

as relevant. In addition, if the Guarantee was not formally cited but the opinion's language used Guarantee terminology, such that it was likely that the court was referring to the Guarantee, we also recorded that case as relevant. We confirmed the electronic results by cross-checking them with the West Key Number Digest entries for individual rights, civil and political rights, natural law, and others. This research method is limited to reported cases. Furthermore, it may be possible that additional relevant opinions exist but did not contain a citation to the Guarantee or use the Guarantee's language. Those hypothetical cases have not been captured.

In addition, some state courts understandably appear to have relied on their constitutions' due process clauses to protect life, liberty, and property rather than the Lockean Natural Rights Guarantees.⁷² Due process cases are not included in this analysis. Furthermore, eighteen of the thirty-seven state constitutions contained Ninth Amendment analogues,⁷³ which reserved rights to the people and are a potential source for unenumerated rights. State case law interpreting these Ninth Amendment analogues is also not captured in this Article. Finally, some opinions rely on both the Guarantees as well as a more general understanding of natural law governing conduct. We highlight each court's reasoning in the discussion below, but it is impossible to determine in some instances whether the Guarantee was dispositive in the case at hand. Although this Article does not capture pre-1868 state constitutional case law on unenumerated rights under state due process clauses or Ninth Amendment analogues, we feel confident that it is highly unlikely that other unenumerated rights would have existed absent any reference to the Lockean Natural Rights Guarantee language. That language is a more textually plausible font of unenumerated rights than is the language of a due process clause or of a Ninth Amendment analogue.⁷⁴ It seems highly unlikely to us that an unenumerated rights natural law jurisprudence would have existed in the state courts in 1868 without there being any reference to the twenty-four Lockean Natural Rights Guarantees—provisions that, as we demonstrate below, inspired the famous natural rights language of the Declaration of Independence itself.

State courts explicitly cited the Lockean Natural Rights Guarantees in their state constitutions in 103 cases. Counting both the 103 cases with explicit citations to the Guarantees or quasi-Guarantees, as well as the cases that generally evoke the terminology of the Natural Rights Guarantees, our

72. See generally John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493 (1997) (discussing the history of the Due Process Clause).

73. Calabresi & Agudo, *supra* note 21, at 89; see also John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967, 999–1022 (1993) (describing the “baby Ninth” amendments).

74. In *Our Declaratory Ninth Amendment*, Professor John Yoo cites two state court cases from the antebellum period as evidence that the so-called “baby Ninth provisions” were “powerful rights-bearing texts.” Yoo, *supra* note 73, at 1016, 1018. As discussed *infra*, the opinions in both cases relied on the Lockean Natural Rights Guarantees *in conjunction with* the Ninth Amendment analogues. See *infra* notes 671–76, 701–09 and accompanying text.

research uncovered 151 relevant opinions. In the following pages, we summarize this case law in an effort to determine what these Lockean Natural Rights Guarantees originally meant in practice prior to 1868. Did they protect substantive rights at all? Did state courts use the Guarantees to merely lend strength to rights listed elsewhere in the Constitution, or did they provide additional substantive protections? Were the Guarantees simply general preambular language that was made more explicit and was qualified by the later specific rights that were explicitly enumerated? What was the role of natural law, if any, in informing the meaning of the Guarantees' inalienable rights language?

This analysis provides a foundation to begin answering these questions, and the answer is that the Guarantees overall had great significance with respect to the abolition of slavery and the extension of civil and political rights to minorities in the Northern States but less practical legal significance with respect to property regulation. This is surprising because if the Guarantees are read as establishing the presumption of liberty that is evident in Sir Edward Coke's *Case of the Monopolies*⁷⁵ or in *Dr. Bonham's Case*,⁷⁶ one would have expected the state courts to have construed the Lockean Natural Rights Clauses more broadly. Twenty of the twenty-four states with Lockean Natural Rights Guarantees reported relevant cases. The state courts also frequently cited other state opinions demonstrating the existence of a body of case law interpreting the Guarantees. These opinions show that the Guarantees were claimed to have substantive meaning in the majority of states with Guarantees. In the words of the California Supreme Court:

[The California Natural Rights Guarantee] was not lightly incorporated into the Constitution of this State as one of those political dogmas designed to tickle the popular ear, and conveying no substantial meaning or idea; but as one of those fundamental principles of enlightened government, without a rigorous observance of which there could be neither liberty nor safety to the citizen.⁷⁷

The Massachusetts Supreme Judicial Court called the Massachusetts Natural Rights Guarantee the "corner stone" of its state constitution.⁷⁸ Many other states highlighted the Guarantees as dispositive in invalidating and striking down legislation.

The Lockean Natural Rights Guarantee cases cover a very broad range of topics, including slavery, habeas corpus, minority rights, a variety of civil and political rights, liquor laws, economic regulations, property takings, and

75. See (1602) 77 Eng. Rep. 1260 (Q.B.) 1266; 11 Co. Rep. 84 b, 88 a (critiquing how monopolies "take away and destroy" people's ability to work).

76. See (1610) 77 Eng. Rep. 638 (Ct. Com. Pl.) 639; 8 Co. Rep. 107 a, 117 b–118 a (explaining that a doctor only violates the law if the doctor practices for an extended time without a license or commits malpractice).

77. *Billings v. Hall*, 7 Cal. 3, 8 (1857).

78. *Commonwealth v. Kneeland*, 37 Mass. (20 Pick.) 206, 230 (1838).

taxes. The wide range of cases shows creative application of the Guarantees to an enormous range of topics, but it also demonstrates that there was no single shared understanding of their meaning among state courts before 1868. Nevertheless, the cases do show that the Guarantees provided many parties with substantive and enforceable rights affecting their lives and livelihoods.

The following discussion analyzes the state Lockean Natural Rights Guarantees and the resulting case law that emerged in the state courts prior to 1868. We begin with (1) a discussion describing the historical origins of the Lockean Natural Rights Guarantee language; (2) a discussion of the original Guarantee's influence on other state constitutions, the Declaration of Independence, and on the French Declaration of the Rights of Man and Citizen of 1789; and (3) a brief summary of the philosophical debates surrounding the Lockean Natural Rights Guarantee language as well as an analysis of revisions made to the Guarantees between their adoption and 1868.

We then present a survey of the Lockean Natural Rights Guarantee case law. We first present the cases in which the Lockean Natural Rights Guarantees were cited to the most dramatic effect: challenges to the constitutionality of slavery, the habeas petition of an abolitionist imprisoned under the Fugitive Slave Law, and other minority rights. In these dozens of cases, litigants successfully invoked the Guarantees in the process of gaining their freedom and access to basic rights. Perhaps this result should not be surprising considering the modern application of the Fourteenth Amendment to discrimination. Our discussion of the Lockean Natural Rights Guarantees case law continues with areas of more mixed success such as: (1) the application of the Lockean Natural Rights Guarantees to a variety of civil and political rights and (2) the application of the Guarantees to liquor laws, other business regulations, takings, property regulations, and in taxation cases. We conclude that the Lockean Natural Rights Guarantees played an important role in the pre-Fourteenth Amendment enforcement of unenumerated rights by state courts and the expansion of liberty to minorities in the Northern States, but we also found evidence that state courts found less concrete application of the rhetorical language to property regulation.

II. Historical Origins and Development of the Lockean Natural Rights Guarantees

The starting place for understanding the meaning and application of the Lockean Natural Rights Guarantees is in the history of the Guarantees themselves. In this Part, we discuss the origins of the original Lockean Natural Rights Guarantee in the Virginia Declaration of Rights of 1776. We then describe the spread of Lockean Natural Rights Guarantee language to other state constitutions and the influence of Virginia's Lockean Natural Rights Guarantee on the Declaration of Independence and the French Declaration of the Rights of Man and Citizen of 1789. This Part concludes with a few observations on the political-theory debates surrounding the

Guarantee rights and a review of amendments made to the Guarantees from the time of their adoption until 1868.

A. Framing of the Original Lockean Natural Rights Guarantee

The Virginia Declaration of Rights of 1776 was the “first true bill of rights” in American history.⁷⁹ It must have been inspired in part by the English Bill of Rights of 1689, but whereas the English Bill of Rights only protected rights against executive infringement,⁸⁰ the Virginia Declaration of Rights protected them against legislative infringement as well.⁸¹ The Virginia Bill of Rights seems also to have been inspired by statements about religious freedom and about liberty in the various colonial charters, as well as perhaps reflecting the American colonists’ enthusiasm for the views of Sir Edward Coke in the *Case of the Monopolies* or in *Dr. Bonham’s Case*, in addition to Lord Mansfield’s renunciation of slavery in *Somerset’s Case*. The Virginia Declaration of Rights of 1776 provided the first protections for individual rights adopted by a popularly elected convention,⁸² and it is fitting that it was the first state constitutional document to include a Lockean Natural Rights Guarantee. George Mason is widely considered to be the author of Virginia’s Declaration of Rights, and the first draft appears almost entirely in his handwriting.⁸³

The first traces of Virginia’s future Lockean Natural Rights Guarantee are found in a transcript of George Mason’s *Remarks on Annual Elections for the Fairfax Independent Company* in 1775, which were made just a year before the 1776 adoption of the Virginia Declaration of Rights.⁸⁴ In remarks arguing that the Fairfax Independent Company should hold annual elections for its militia officers, George Mason used the opportunity to expound on his theory of government:

We came equals into this world, and equals shall we go out of it. All men are by nature born equally free and independent. To protect the weaker from the injuries and insults of the stronger were societies first formed; when men entered into compacts to give up some of their natural rights, that by union and mutual assistance they might secure the rest; but they gave up no more than the nature of the thing required. Every society, all government, and every kind of civil compact

79. BERNARD SCHWARTZ, *THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS* 67 (1977).

80. See Bill of Rights, 1689, 1 W. & M., c. 2 (Eng.) (limiting the monarch’s ability to pass laws, levy taxes, and suppress free speech and elections).

81. See generally VA. BILL OF RIGHTS of 1776.

82. SCHWARTZ, *supra* note 79, at 67.

83. *Id.* at 69.

84. George Mason, *Remarks on Annual Elections for the Fairfax Independent Company* (Apr. 17–26, 1775), in 1 *THE PAPERS OF GEORGE MASON, 1725–1792*, at 229 (Robert A. Rutland ed., 1970) [hereinafter *PAPERS*].

therefore, is or ought to be, calculated for the general good and safety of the community. Every power, every authority vested in particular men is, or ought to be, ultimately directed to this sole end; and whenever any power or authority whatever extends further, or is of longer duration than is in its nature necessary for these purposes, it may be called government, but it is in fact oppression.⁸⁵

These remarks were his first articulation of the language that was to become Virginia's Lockean Natural Rights Guarantee.

In 1776, George Mason joined Virginia's state constitutional convention, and on May 27, 1776, he submitted the first draft of Virginia's Declaration of Rights to the convention.⁸⁶ This draft included a more full-throated version of the Lockean Natural Rights Guarantee than was ultimately adopted. The Guarantee appears at the beginning of the Virginia Declaration of Rights, and in George Mason's first draft of the Lockean Natural Rights Guarantee it states:

That all Men are born equally free and independant [sic], and have certain inherent natural Rights, of which they can not by any Compact, deprive or divest their Posterity; among which are the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursueing [sic] and obtaining Happiness and Safety.⁸⁷

This first draft of the Lockean Natural Rights Guarantee touched off an extensive debate at the Virginia state convention. Some members opposed the language fearing, quite correctly as it would turn out, that it could be used to abolish slavery. In the words of Thomas Ludwell Lee, a delegate to the convention:

[A] certain set of aristocrats, for we have such monsters here, [who upon] finding that their execrable system [of slavery] cannot be reared on such foundations, have to this time kept us at bay on the first line, which declares all men to be born equally free and independent. . . . The words as they stand are approved by a very great majority, yet by a thousand masterly fetches and stratagems the business has been so delayed that the first clause stands yet unassented to by the Convention.⁸⁸

The liberal delegates responded that no revision was required because "slaves not being constituent members of our society could never pretend to

85. *Id.* at 229–30. As the editor notes: "Because of the exactness of language used, it could be argued (but not proved) that [Mason] had a copy of these remarks before him while drafting the 1776 [Virginia Constitution]." Robert A. Rutland, *Editorial Note* to Remarks on Annual Elections for the Fairfax Independent Company (Apr. 17–26, 1775), in PAPERS, *supra* note 84, at 232, 232.

86. Robert A. Rutland, *Editorial Note* to The Virginia Declaration of Rights, in PAPERS, *supra* note 84, at 274, 275.

87. George Mason, First Draft of the Virginia Declaration of Rights (May 20–26, 1776), in PAPERS, *supra* note 84, at 276, 277.

88. Rutland, *supra* note 86, at 275 (quoting Thomas Ludwell Lee).

any benefit from such a maxim.”⁸⁹ Ultimately, the convention appeased the proslavery delegates by changing the opening line from “all men are born equally free” to “all men are by nature equally free” and deleting the word “natural” from the phrase “certain inherent natural rights” so that the Guarantee protected only “certain inherent rights.”⁹⁰ Edward Pendleton also suggested a qualifying phrase—“when they enter into a state of Society”—which was accepted by the convention.⁹¹ Historians agree that these changes were intended to reassure slaveholders that the Guarantee would not be interpreted as abolishing slavery in Virginia in 1776.⁹² The Virginia delegates could not have known that, within a few short years, other Lockean Natural Rights Guarantees would be used to successfully challenge the constitutionality of slavery, and that the Virginia courts would rely on the legislative history just mentioned to reject the argument that Virginia’s Lockean Natural Rights Guarantee banned slavery in Virginia.⁹³

The final draft of Virginia’s Lockean Natural Rights Guarantee read as follows, with the italicized and crossed out portions representing the edits to the final draft as compared to George Mason’s original proposal:

That all men are ~~born~~ *by nature* equally free and independent, and have certain inherent ~~natural~~ rights, of which, *when they enter into a state of society*, they cannot, by any compact, deprive or divest their posterity; *namely*, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.⁹⁴

Thus, on June 12, 1776, the first Lockean Natural Rights Guarantee was adopted as binding constitutional law as part of the Virginia Declaration of Rights, the first such document in American history.⁹⁵

Many scholars have speculated on the potential sources of George Mason’s theory of government as articulated in the Virginia Lockean Natural Rights Guarantee, and these scholars have identified several key influences. Perhaps most importantly, all of the Framers, including George Mason, were

89. *Id.* (quoting Edmund Randolph).

90. Brent Tarter, *The Virginia Declaration of Rights*, in *TO SECURE THE BLESSINGS OF LIBERTY: RIGHTS IN AMERICAN HISTORY* 37, 46–47 (Josephine F. Pacheco ed., 1993). At the time these changes were made, Lord Mansfield had declared in *Somerset’s Case* in Great Britain that slavery was abhorrent under natural law and that only positive law could suffice to authorize it. *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499 (K.B.) 510; Lofft 1, 19. Since positive law did not explicitly authorize slavery in England, Lord Mansfield held that a slave brought to London became free upon his arrival in England. *Id.*

91. Tarter, *supra* note 90, at 46.

92. *Id.*; accord THOMAS B. MCAFFEE, *INHERENT RIGHTS, THE WRITTEN CONSTITUTION, AND POPULAR SOVEREIGNTY* 18 (2000).

93. See *infra* Part III.

94. Compare First Draft of the Virginia Declaration of Rights, *supra* note 87, at 277, with Final Draft of the Virginia Declaration of Rights (June 12, 1776), in *PAPERS*, *supra* note 84, at 287, 287.

95. Tarter, *supra* note 90, at 46.

heavily influenced by the writings of John Locke and his theories on the natural rights of life, liberty, and property.⁹⁶ Mason endorsed the Lockean ideal that all men retain some of their natural rights after subscribing to the social compact, in contrast to the idea put forth by Thomas Hobbes and Jean-Jacques Rousseau that men surrender all their natural rights to the sovereign in exchange for security and public order.⁹⁷ George Mason appears to have borrowed almost directly from John Locke's *Second Treatise of Civil Government*, which included the statements "[t]hat all men by nature are equal" and that "[m]an being born, . . . hath by nature a power, . . . to preserve his property, that is, his life, liberty and estate."⁹⁸

The Virginia Lockean Natural Rights Guarantee's specific protection of the right of "pursuing and obtaining happiness and safety" is also striking given the later inclusion of the "pursuit of Happiness" in the Declaration of Independence.⁹⁹ Mason's inspiration for including this right is not clear. Some have speculated that the right may have originated from *Cato's Letters*, which included the statement: "Happiness is the chief End of Man."¹⁰⁰ Others believe that the happiness right was derived from Locke's *An Essay Concerning Human Understanding*, which stated that "all Men desire Happiness" and were devoted to "the pursuit of happiness."¹⁰¹

B. *Spread of the Lockean Natural Rights Guarantees and Their Impact*

Regardless of its philosophical sources, George Mason's Virginia Lockean Natural Rights Guarantee had a far reaching impact in the other states and abroad. Its extensive influence can be attributed both to its timing as the earliest state constitution and thus a natural model for subsequent drafters, as well as the fact that it seemed to capture the key features of political thought in the colonies at the time.¹⁰² In addition, its adoption in Virginia, one of the most populous colonies with many well-respected framers,¹⁰³ must have given it special credibility.

96. A.E. Dick Howard, *From Mason to Modern Times: 200 Years of American Rights*, in THE LEGACY OF GEORGE MASON 95, 98 (Josephine F. Pacheco ed., 1983).

97. HELEN HILL, GEORGE MASON: CONSTITUTIONALIST 140 (1938).

98. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 54, at 31, § 87, at 46 (C.B. Macpherson ed., 1980) (1690).

99. Compare VA. BILL OF RIGHTS OF 1776, § 1, with THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

100. Robert A. Rutland, *Editorial Note* to First Draft of the Virginia Declaration of Rights (May 20–26, 1776), in PAPERS, *supra* note 84, at 279, 279.

101. See ALLEN JAYNE, JEFFERSON'S DECLARATION OF INDEPENDENCE: ORIGINS, PHILOSOPHY AND THEOLOGY 128–29 (1998) (discussing the literature available in the colonies in 1776 on the right of happiness).

102. SCHWARTZ, *supra* note 79, at 67, 71–72.

103. See Joyce A. McCray Pearson, *The Federal and State Bills of Rights: A Historical Look at the Relationship Between America's Documents of Individual Freedom*, 36 HOW. L.J. 43, 57–60

The spread of the Lockean Natural Rights Guarantee language began almost immediately. Only one month after its passage, in July 1776, delegates at the Pennsylvania constitutional convention used a copy of the Virginia Declaration of Rights in drafting Pennsylvania's constitution.¹⁰⁴ In 1779, John Adams confirmed the influence of the Virginia Guarantee on the drafting of the Pennsylvania constitution in his diary: "The [Pennsylvania] bill of rights is taken almost verbatim from that of Virginia."¹⁰⁵ But, in a remarkable turn of history, the Pennsylvania delegates probably were working from George Mason's *first draft* of the Guarantee, which did not contain the proslavery qualifications that were ultimately included in the Virginia state constitution to appease proslavery delegates. The version published in the *Virginia Gazette* on June 1, 1776, was taken from George Mason's first antislavery draft, the draft circulated prior to the addition of the proslavery qualifiers, and it is this version that remained the source for other colonial newspapers.¹⁰⁶ A Virginia delegate likely sent a copy of the first draft to the *Pennsylvania Evening Post*, which published the piece on June 6, 1776.¹⁰⁷ Many other newspapers also published George Mason's first draft, thus "spreading the 27 May draft up and down the seaboard."¹⁰⁸

It is therefore not surprising that Pennsylvania's Lockean Natural Rights Guarantee closely tracked George Mason's first draft of the Virginia Guarantee, using the words "born equally free" and including an explicit reference to the existence of natural rights. The Pennsylvania Lockean Natural Rights Guarantee of 1776 stated:

That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.¹⁰⁹

The first draft of Virginia's Lockean Natural Rights Guarantee subsequently influenced other state conventions in their constitutional deliberations. Indeed, twenty-four states ultimately adopted a version of Mason's Lockean Natural Rights Guarantee, while three others had related language.¹¹⁰

In addition to influencing other state constitutions, the Lockean Natural Rights Guarantee in the Virginia Declaration of Rights also served as Thomas

(1993) (discussing the influence of Virginia's bill of rights and of its delegates on the federal bill of rights).

104. SCHWARTZ, *supra* note 79, at 72–73.

105. *Id.* at 73.

106. Rutland, *supra* note 86, at 276.

107. *Id.*

108. *Id.*

109. PA. CONST. of 1776, art. I.

110. Calabresi & Agudo, *supra* note 21, at 88; *see also supra* note 23.

Jefferson's model for portions of the Declaration of Independence itself. Working in July of 1776, Jefferson extensively consulted two documents: the draft preamble for the Virginia constitution and George Mason's original version of the Declaration of Rights.¹¹¹ In *American Scripture*, historian Pauline Maier describes how the Declaration of Independence drafts show that Jefferson, and possibly Benjamin Franklin, carefully edited Mason's original version of Virginia's Lockean Natural Rights Guarantee to form the first sentence of the Declaration of Independence:

Jefferson began with Mason's statement "that all men are born equally free and independant," which he rewrote to say they were "created equal & independent," then (on his "original rough draft") cut out the "& independent." Mason said that all men had "certain inherent natural rights, of which they cannot, by any compact, deprive or divest their posterity," which Jefferson compressed marvelously into a statement that men derived from their equal creation "rights inherent & inalienable," then moved the noun to the end of the phrase so it read "inherent & inalienable rights." Among those rights, Mason said, were "the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety," which Jefferson again shortened first to "the preservation of life, & liberty, & the pursuit of happiness," and then simply to "life, liberty, & the pursuit of happiness."¹¹²

In fact, Maier concludes that Mason's original draft of the Virginia Declaration of Rights "had a far greater impact than either the Declaration of Independence or the Declaration of Rights that the Virginia convention finally adopted, both of which were themselves descended from the Mason draft."¹¹³

Virginia's Declaration of Rights also influenced debates on the Bill of Rights to the federal Constitution. Antifederalists, including Mason, relied on the general existence of declarations of rights in the state constitutions to argue that the federal Constitution should contain similar protections.¹¹⁴ Specifically, echoes of Virginia's Lockean Natural Rights Guarantee appeared in James Madison's June 8, 1789, speech to the House of Representatives, in which Madison made an initial proposal for the Bill of Rights.¹¹⁵ The proposed first amendment stated: "That Government is

111. PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 104 (1997).

112. *Id.* at 133–34.

113. *Id.* at 165.

114. See SCHWARTZ, *supra* note 79, at 106–08 (discussing the "broad popular response" to George Mason's *Objections to the Constitution* that advocated for a federal bill of rights).

115. 1 ANNALS OF CONG. 424, 431–37 (1789) (Joseph Gales ed., 1834); see also LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 35 (1999) (explaining that Madison culled the proposed amendments from Virginia's and other states' constitutions).

instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.”¹¹⁶ In arguing for the adoption of this amendment, Madison explicitly pointed to the bills of rights in many states containing similar provisions in various forms, all adopted to “limit and qualify the powers of Government.”¹¹⁷

In introducing this quasi-Lockean Natural Rights Guarantee, Madison also defended its impact on the protection of minority rights:

It may be thought all paper barriers against the power of the community are too weak to be worthy of attention. I am sensible they are not so strong as to satisfy gentlemen of every description who have seen and examined thoroughly the texture of such a defence; yet, as they have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community, it may be one means to control the majority from those acts to which they might be other-wise inclined.¹¹⁸

However, the proposal to emerge from the House Select Committee did not include this quasi-Lockean Natural Rights Guarantee language, and it does not appear to have re-emerged in later debates over the Bill of Rights.¹¹⁹ Although the precise reasons for the decision to exclude this language are not clear, the presence of such language in Madison’s original proposal reflects its important role in the bills of rights in state constitutions of the time.

The influence of George Mason’s first draft of the Lockean Natural Rights Guarantee was not limited to the United States.¹²⁰ Shortly after its printing in colonial newspapers, Mason’s first draft was published in England in 1776, and from there it went on to strongly influence French political debates from 1776 to 1789.¹²¹ In France, a leading intellectual, Jacques-

116. 1 ANNALS OF CONG. 433–34.

117. *Id.* at 436–37.

118. *Id.* at 437. Madison’s statement that a bill of rights might prove more effective than a mere “paper barrier” may have been influenced by his correspondence the previous year with Thomas Jefferson. Jefferson argued that a bill of rights would put a “legal check” in the “hands of the judiciary,” which “merits great confidence.” Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), available at http://www.gwu.edu/~ffcp/exhibit/p7/p7_1text.html, archived at <http://perma.cc/4D5S-RLS5>. See generally SCHWARTZ, *supra* note 79, at 116–18 (discussing the correspondence).

119. *Report of the House Select Committee*, June 28, 1789, TEACHINGAMERICANHISTORY.ORG, available at http://teachingamericanhistory.org/bor/houseselect_17890728/, archived at <http://perma.cc/4EVQ-NW3H>.

120. One scholar has even argued that Virginia’s Lockean Natural Rights Guarantee influenced the modern Universal Declaration of Human Rights adopted by the United Nations in 1948. David Little, *National Rights and Human Rights: The International Imperative*, in NATURAL RIGHTS AND NATURAL LAW: THE LEGACY OF GEORGE MASON 67, 67 (Robert P. Davidow ed., 1986).

121. Robert A. Rutland, *Editorial Note* to Committee Draft of the Virginia Declaration of Rights (May 27, 1776), in PAPERS, *supra* note 84, at 285, 286.

Pierre Brissot, described “l’immortelle declaration de l’Etat de Virginie sur la liberté des cultes.”¹²² The influence of the Virginia Declaration of Rights and of its Lockean Natural Rights Guarantee was limited to intellectual circles in France until the French Revolution of 1789 broke out thirteen years after American independence. But once the Revolution occurred, George Mason’s first draft of the Virginia Lockean Natural Rights Guarantee obviously had a huge effect on the French Revolutionary Declaration of the Rights of Man and Citizen adopted in August 1789, two years before the U.S. Bill of Rights was ratified.¹²³

Although many scholars cite only the Declaration of Independence as Lafayette’s inspiration in pushing for a declaration of individual rights, the evidence clearly shows that Lafayette was strongly influenced by the bill of rights found in *state* constitutions and by Mason’s first draft of Virginia’s Lockean Natural Rights Guarantee.¹²⁴ Several French translations of the American state constitutions were available to Lafayette and the other members of the National Convention.¹²⁵ A direct comparison of each provision of the French Declaration to the state constitutions shows nearly identical language.¹²⁶ In fact, the opening sentence of Article I in the French Declaration of the Rights of Man and Citizen is nearly an exact quote of Mason’s first draft. It states: “Men are born and remain free and equal in rights.”¹²⁷ Article II of the Declaration then goes on to list “the natural and imprescriptible rights of man,” including “liberty, property, security and resistance to oppression.”¹²⁸ In the words of one scholar: “The French Declaration of Rights is for the most part copied from the American declarations or ‘bills of rights.’”¹²⁹ The impact of the Lockean Natural Rights Guarantees truly seems to have been international. It should be noted in this regard that the current constitution of France has enshrined the 1789 Declaration of the Rights of Man and Citizen in present day French

122. Rutland, *supra* note 86, at 276.

123. See GEORG JELLINEK, *THE DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS* 18–20 (Max Farrand trans., Hyperion Press 1979) (1901) (discussing the significant influence of Virginia’s Declaration of Rights on the French Declaration of the Rights of Man and Citizens).

124. *Id.*; see also MAIER, *supra* note 111, at 168 (asserting that Lafayette’s draft and adopted version of the Declaration of the Rights of Man and Citizen were based on the state declarations of rights).

125. JELLINEK, *supra* note 123, at 18–19.

126. *Id.* at 27–42.

127. DECLARATION OF THE RIGHTS OF MAN AND CITIZEN art. I (1789) (Fr.), *translated in* Lynn Hunt, *INVENTING HUMAN RIGHTS: A HISTORY* app. at 221 (2007).

128. *Id.* art. 2.

129. JELLINEK, *supra* note 123, at 20.

constitutional law.¹³⁰ France today thus has a Lockean Natural Rights Guarantee that is judicially enforceable in its constitution.

C. *Political Theory Debates and Amendments to the Guarantees*

The principles of the Lockean Natural Rights Guarantees were not embraced universally, and their adoption by the French revolutionaries in 1789 provoked major controversy among political philosophers at the outset of the French Revolution. In 1790, Edmund Burke wrote his famous book, *Reflections on the Revolution in France*, which criticized the abstract language and values promoted by the French Declaration as meaningless and potentially dangerous:

What is the use of discussing a man's abstract right to food or to medicine? The question is upon the method of procuring and administering them. In that deliberation I shall always advise to call in the aid of the farmer and the physician, rather than the professor of metaphysics.¹³¹

In the *Rights of Man*, Thomas Paine famously responded to Edmund Burke with a full-throated defense of Enlightenment Rights provisions like the French Lockean Natural Rights Guarantee. In explaining his theory of government, Paine emphasized the continued relevance of natural rights:

Man did not enter into society to become *worse* than he was before, nor to have fewer rights than he had before, but to have those rights better secured. His natural rights are the foundation of all his civil rights.¹³²

These same debates continued in the nineteenth century with Jeremy Bentham and John Austin making important contributions to the debate on inalienable rights and positive law. Bentham famously called natural law “nonsense upon stilts.”¹³³ By the 1860s, shortly before the passage of the Fourteenth Amendment, John Stuart Mill had published *On Liberty*, a powerful defense of liberal individual rights.¹³⁴ Mill argued famously for a harm principle under which government can only intervene to prevent

130. 1958 CONST. pmbl. (Fr.) (“The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789 . . .”).

131. Edmund Burke, *Reflections on the Revolution in France*, in REVOLUTIONARY WRITINGS: REFLECTIONS ON THE REVOLUTION IN FRANCE AND THE FIRST LETTER ON A REGICIDE PEACE 3, 61 (Iain Hampsher-Monk ed., 2014) (1790).

132. THOMAS PAINE, RIGHTS OF MAN 5, 30 (Paul Negri & Ronald Herder eds., Dover Publ'ns 1999) (1791).

133. 2 JEREMY BENTHAM, *Anarchical Fallacies; Being an Examination of the Declaration of Rights Issued During the French Revolution*, in JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 489, 501 (John Bowring ed., London, Simpkin, Marshall & Co. 1843).

134. JOHN STUART MILL, ON LIBERTY (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

citizens from harming one another but not to protect them from harming themselves.¹³⁵ This exact idea is codified in the French Declaration of Rights of Man and Citizen which provides:

Liberty consists in the ability to do whatever does not harm another; hence the exercise of the natural rights of each man has no other limits than those which assure to other members of society the enjoyment of the same rights. These limits can only be determined by the law.¹³⁶

Many of these debates echo our modern disagreements regarding the nature of these basic rights and the proper interpretation of broad language on unenumerated rights. In *Michael H. v. Gerald D.*,¹³⁷ U.S. Supreme Court Justices Antonin Scalia, writing for a plurality, and William Brennan, writing in dissent, argued over whether abstract rights-protection clauses ought to be interpreted at the most specific level of generality historically available, as Justice Scalia said, or more abstractly, as Justice Brennan argued.¹³⁸

The debate between Edmund Burke, Thomas Paine, and John Stuart Mill was also likely influential in the revisions to the Lockean Natural Rights Guarantees that occurred between the adoption in 1776 of the Virginia and Pennsylvanian Lockean Natural Rights Guarantees and the twenty-four Lockean Natural Rights Guarantees as they would have been understood in 1868 when the Fourteenth Amendment was adopted. Appendix A identifies all versions for each of the twenty-four Natural Rights Guarantees existing in 1868.¹³⁹ After comparing the historical iterations of the twenty-four Guarantees, we can make a few observations. First, if a Lockean Natural Rights Guarantee appeared in the first adopted draft of a constitution, it remained in that state's constitution existing in 1868. We are not aware of any instance of a state convention permanently removing a Lockean Natural Rights Guarantee from its constitutional text between the Founding and 1868.

Second, nineteen of the twenty-four states included a Guarantee in the original versions of the state constitutions; the remaining five added their Guarantees at varying points prior to 1868. This was true of New Hampshire in 1784, of New Jersey in 1844, of Missouri in 1865, of South Carolina in 1865, and of North Carolina in 1868.¹⁴⁰ This suggests widespread admiration of the Lockean Natural Rights Guarantee language.

135. *Id.* at 80.

136. DECLARATION OF THE RIGHTS OF MAN AND CITIZEN art. IV (1789) (Fr.), *translated in* Lynn Hunt, *supra* note 127, app. at 221.

137. 491 U.S. 110 (1989).

138. *Compare id.* at 122–24 (plurality opinion) (analyzing whether persons in the particular situation of the parties to the case would have traditionally been protected by society), *with id.* at 139–41 (Brennan, J., dissenting) (criticizing the plurality for excessive specificity in defining the right to be analyzed).

139. *See infra* Appendix A.

140. *See infra* Appendix B.

Third, there was a trend during the nineteenth century toward the deleting of the term “natural rights” from the various Lockean Natural Rights Guarantees. Three states had deleted their original inclusion of natural rights in state constitutional conventions prior to the Civil War: Indiana, Ohio, and Pennsylvania.¹⁴¹ And, by 1868, only five states—Maine, Massachusetts, New Hampshire, New Jersey, and Vermont—explicitly protected natural rights in their Lockean Natural Rights Guarantees.¹⁴² Moreover, none of the nine states that either created or amended their constitutions after 1860 included natural rights in their Guarantees, to wit: Alabama, Florida, Louisiana, Missouri, North Carolina, Nebraska, Nevada, South Carolina, and Virginia.¹⁴³ It is likely that Jeremy Bentham’s view that natural law was “nonsense upon stilts” and John Austin’s embrace of legal positivism in the 1830s had an impact across the Atlantic in leading to the elimination of natural rights rhetoric.¹⁴⁴ More broadly, the elimination of natural rights language shows that there was an ongoing debate in the nineteenth century as to what the Lockean Natural Rights Guarantees should say. Thus, the language of the Lockean Natural Rights Guarantees was clearly in flux during the period leading up to the adoption of the Fourteenth Amendment in 1868.

141. The Pennsylvania, Indiana, and Ohio constitutional conventions deleted natural rights language from their Lockean Natural Rights Guarantees at some point before 1868. The following text compares their Lockean Natural Rights Guarantees as existing in 1868 with the prior version of their Guarantees that included natural rights. The crossed out text represents the deleted language and the italicized text represents added language. The Pennsylvania constitutional convention of 1790 was the first convention to delete the natural rights reference. “That all men are born equally free and independent, and have certain ~~natural~~ inherent and ~~inalienable~~ *indefeasible* rights, ~~amongst~~ *among* which are ~~those of~~ *those of* the enjoying and defending life and liberty, of acquiring, possessing, and protecting property ~~and reputation~~, and of pursuing ~~and obtaining~~ their own happiness ~~and safety~~.” Compare PA. CONST. of 1790, art. IX, § 1, with PA. CONST. of 1776, art. I. More than fifty years later, in 1851, both the Indiana and Ohio constitutional conventions removed natural rights from their Guarantees:

We declare, That all men are *created equal* ~~born equally free and independent~~; that *they are endowed by their Creator with certain* ~~and have certain natural, inherent, and~~ unalienable rights; *that among these* ~~which are the enjoying and defending life, and~~ liberty and ~~of acquiring, possessing, and protecting property, and the pursuing and obtaining~~ *pursuit of happiness and safety*

Compare IND. CONST. art. I, § 1 (amended 1984), with IND. CONST. of 1816, art. I. The Ohio constitutional convention made very similar revisions to its Lockean Natural Rights Guarantee: “All men are, ~~born equally by nature~~, free and independent, and have certain ~~natural inherent and~~ inalienable rights, ~~amongst~~ *among* which are ~~those of~~ *those of* the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and ~~seeking~~ *pursuing* and obtaining happiness and safety.” Compare OHIO CONST. of 1851, art. I, with OHIO CONST. of 1802, art. VIII, § 1. The legislative history and records of these conventions, if available, might yield interesting evidence on the rationale of these revisions. This may be one area for further study in understanding how the Lockean Natural Rights Guarantees were interpreted before 1868.

142. See *infra* Appendix B.

143. See *infra* Appendices A & B.

144. 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 31–33 (Robert Campbell ed., 5th rev. ed. 1929) (1861); BENTHAM, *supra* note 133, at 501.

Constitutional equality guarantees were later to come under siege as well thanks to the writing of Thomas Malthus, Herbert Spencer, and Charles Darwin. Social Darwinists took the idea of the survival of the fittest as suggesting that all men were not created equal and that only the most fit should survive, an idea that contributed to tragedies like the American eugenics movement and the Holocaust.¹⁴⁵ The statement of the French Revolutionary Declaration of the Rights of Man and Citizen in 1789 that “all men are born free and equal” came no longer to be believed in the late nineteenth and early twentieth centuries.¹⁴⁶ The text of the French Revolutionary Declaration, as inspired by George Mason’s first draft of the Virginia Declaration of Rights, came to be disregarded by some.¹⁴⁷

With this history in mind, we now turn to a survey of how state courts conducted the difficult task of applying the Lockean Natural Rights Guarantees to the issues of the day.

III. Slavery

One of the most striking applications of the Lockean Natural Rights Guarantees was to the controversial subject of slavery. A vibrant body of case law before 1868 explicitly cited or quoted the states’ Lockean Natural Rights Guarantees and considered whether the Guarantees effectively abolished slavery. The state courts focused on the equality or freedom language in the Guarantees: the first part of the typical Guarantee that declared all men free and equal or free and independent. In five states, state supreme courts used the Lockean Natural Rights Guarantee equality clause, that “all men are born free and equal,”¹⁴⁸ to hold that slavery was unconstitutional as well as to issue other antislavery decisions related to out-of-state contracts, fugitive slave acts, and the retroactive application of antislavery laws. Three states with Lockean Natural Rights Guarantees (Kentucky, Virginia, and New Jersey) along with Connecticut, which had a weak equality guarantee, considered this argument but rejected it. Although these courts cited some of the antislavery decisions, they declined to interpret

145. RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 90–91 (rev. ed. 1955); WILLIAM H. TUCKER, *THE SCIENCE AND POLITICS OF RACIAL RESEARCH* 133–34 (1994).

146. See, e.g., 1 JOHN C. CALHOUN, *A DISQUISITION ON GOVERNMENT AND A DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES*, in *THE WORKS OF JOHN C. CALHOUN* 1, 57–58 (Richard K. Cralle ed., New York, D. Appleton & Co. 1851) (characterizing that proposition as unfounded, false, and dangerous).

147. See William J. Barnds, *Human Rights: The International Dimension*, in *THE LEGACY OF GEORGE MASON*, *supra* note 96, at 113, 116 (crediting the Virginia Declaration of Rights as influencing the French Declaration of the Rights of Man); Rett R. Ludwikowski, *The French Declaration of the Rights of Man and Citizen and the American Constitutional Development*, 38 AM. J. COMP. L. (SUPPLEMENT) 445, 460–62 (1990) (concluding that, despite receiving significant support amongst the American public, French revolutionary documents failed to make any significant influence on American constitutional development).

148. See *supra* note 29 and accompanying text.

their Guarantees the same way. Instead, these courts focused on history and other arguments to find that their Lockean Natural Rights Guarantees did not affect the legality of slavery.

These decisions, issued beginning in 1783 and continuing until 1867, reflect the enduring nature of the fight over the legality of slavery. Critically, these American state court opinions were written with the 1772 English decision in *Somerset's Case* in mind. *Somerset's Case* was frequently cited by state court judges in Lockean Natural Rights Guarantees slavery cases. In *Somerset's Case*, the English Court of the King's Bench considered the status of James Somerset, who had been a slave in the colonies but was brought back to England by his owner.¹⁴⁹ Lord Mansfield famously declared:

The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political[;] but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory[;] it's so odious, that nothing can be suffered to support it, but positive law.¹⁵⁰

Thus, Somerset was declared free because even though the colonial laws of the American state from which he was brought to England permitted slavery, English laws could not sustain it.¹⁵¹ *Somerset's Case* said in essence that Englishmen were naturally free under the common law and that slavery could only exist where written positive law explicitly provided for it. *Somerset's Case* was of huge importance in the United States because the case was decided in 1772, four years before the Declaration of Independence made the United States an independent nation. *Somerset's Case* was thus part of the background English law, which all of the original thirteen States inherited from England.¹⁵² This common law precedent explains why the southern states pushed for a fugitive slave clause in the federal Constitution obligating the free states to return fugitive slaves to the states from which they had escaped.¹⁵³ Otherwise, under *Somerset's Case*, fugitive slaves would have become free as soon as they set foot on free state soil. In the wake of this 1772 ruling in *Somerset's Case*, state supreme courts in all of the northern and border states would have to decide for themselves whether the positive law of their own states, like the positive law and common law of England, could not support slavery. The Lockean Natural Rights Guarantees turned out to be of great relevance in answering that question.

149. *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499 (K.B.) 499; Lofft 1, 1.

150. *Id.* at 510; Lofft at 19.

151. *Id.*

152. See FRANCIS D. COGLIANO, REVOLUTIONARY AMERICA 1763–1815: A POLITICAL HISTORY 24 (2000) (emphasizing that most colonists shared a perception that they had adopted “rights of Englishmen” under English law).

153. *Id.* at 123–24; JAMES M. MCPHERSON, ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION 75 (1982).

State supreme court judges were also considering these cases in the midst of an ever-evolving domestic landscape. The sweeping and grandiose language of the Declaration of Independence and the natural rights focus of the late eighteenth century had been forced to give way in the Missouri Compromise of 1820 to a practical compromise that allowed slavery in some of the western territories while disallowing it in others. This was a sad retreat from the Northwest Ordinance of 1787 under which the Continental Congress, acting under the Articles of Confederation, had banned slavery in all the Northwest Territories, which then became the free states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and part of Minnesota.¹⁵⁴ The Missouri Compromise of 1820 allowed slavery in the southern territories obtained as a result of the Louisiana Purchase while disallowing it in the northern territories.¹⁵⁵ Jeremy Bentham's idea that natural law was "nonsense upon stilts"¹⁵⁶ was eroding the Declaration of Independence's forceful statement that "all men are created equal."

Abolitionist movements continued to argue for an end to slavery both within particular states and western territories and also nationwide.¹⁵⁷ The Constitution obliquely acknowledged the existence of slavery in the infamous Three-Fifths Clause, which counted slaves as being three-fifths of a person,¹⁵⁸ and in the Clause barring Congress from stopping the international slave trade until 1808.¹⁵⁹ As we noted above, the Constitution also supported slavery by containing a Fugitive Slave Clause under which slaves escaping to free states had to be returned to bondage.¹⁶⁰ This Clause was essential to maintaining slavery in the wake of the rule in *Somerset's Case*. Congress passed a fugitive slave law enforcing the Fugitive Slave Clause of the Constitution in 1793, and it then passed another even tougher Fugitive Slave Act in 1850 as part of the Compromise of 1850.¹⁶¹ People in the North came to hate these laws, which they felt made the North complicit in the maintenance of slavery.¹⁶² Debate in many states over the legality of slavery turned on the effect of the respective state's Lockean Natural Rights Guarantee on slavery, and state court judges in many states were called upon

154. Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 929–30 * n.6 (1995).

155. ROBERT PIERCE FORBES, *THE MISSOURI COMPROMISE AND ITS AFTERMATH* 5, 92–98 (2007).

156. BENTHAM, *supra* note 133, at 501.

157. PAM CORNELISON & TED YANAK, *THE GREAT AMERICAN HISTORY FACT-FINDER: THE WHO, WHAT, WHERE, WHEN, AND WHY OF AMERICAN HISTORY* 2–3 (2d ed. 2004).

158. U.S. CONST. art. I, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIV, § 2.

159. U.S. CONST. art. I, § 9, cl. 1.

160. U.S. CONST. art. IV, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIII.

161. CORNELISON & YANAK, *supra* note 157, at 202.

162. *See* JOYCE APPLEBY ET AL., *THE AMERICAN REPUBLIC TO 1877*, at 441 (2003) (noting that "enforcement of the [Fugitive Slave Act] led to mounting anger in the North, convincing more people of the evils of slavery").

to determine what rights, if any, their Lockean Natural Rights Guarantee conferred.

A. Slavery Unconstitutional

Five state supreme courts—the supreme courts of Vermont, Massachusetts, Indiana, Illinois, and Ohio—applied the Lockean Natural Rights Guarantee’s equality language that “all men are by nature equally free and independent” to hold that slavery was unconstitutional.¹⁶³ In each of these cases, the state courts specifically pointed to their Lockean Natural Rights Guarantee as the critical text that led them to their decisions. The state courts’ specific applications of the Lockean Natural Rights Guarantees differed. The text of the Vermont constitution included an explicit link between its Guarantee and slavery; the Massachusetts constitution was silent on the issue of slavery; and the Indiana, Illinois, and Ohio constitutions included specific antislavery articles in other parts of their state constitutions in addition to addressing it in their Lockean Natural Rights Guarantees. Despite the resulting differences in specific application, each of these state supreme courts consistently cited and explained their respective Lockean Natural Rights Guarantees to advance antislavery positions—whether by using their Guarantee alone or by applying it in conjunction with their antislavery prohibition to issue expansive rulings. In each case, the court relied on the Guarantee as being directly inconsistent with slavery and as providing substantive support for holding slavery to be unconstitutional as a matter of state constitutional law. Consequently, it is clear that the Lockean Natural Rights Guarantees played a key role in the abolitionist efforts in these states.

1. Vermont Constitution: Textual Link Between Lockean Natural Rights Guarantee and Slavery Prohibition.—In 1777, even before the federal Constitution was adopted, the framers of the Vermont constitution explicitly said in the Lockean Natural Rights Guarantee to that constitution that since all men were “born equally free,” slavery must be abolished.¹⁶⁴ Using the term “therefore,” the 1777 Vermont constitution clearly stated that the

163. It is not clear whether New Hampshire should be included in this list as well. In 1788, Jeremy Belknap, a New Hampshire historian, wrote that “the negroes in Massachusetts and New Hampshire are all *free*, by the first article in the Declaration of Rights. This has been pleaded in law, and admitted.” ARTHUR ZILVERSMIT, *THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH* 117 (1967). But no records of any judicial decisions appear to still exist. *Id.* The first reported consideration of the issue by the New Hampshire courts was not until 1837. The New Hampshire Superior Court of Judicature found that slavery was unconstitutional, but it is not clear whether it based that conclusion on the Lockean Natural Rights Guarantee or the general liberty guarantees of its state constitution. See *State v. Rollins*, 8 N.H. 550, 566 (1837).

164. VT. CONST. of 1777, ch. 1, art. 1. This language remained unchanged in future constitutions. VT. CONST. ch. 1, art. 1 (amended 1921 & 1991).

equality principle necessarily required the abolition of slavery. Article I of the Vermont constitution said in full:

That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are the enjoying and defending life and liberty; acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety. Therefore, no male person, born in this country, or brought from over sea, ought to be holden by law, to serve any person, as a servant, slave or apprentice, after he arrives to the age of twenty-one years, nor female, in like manner, after she arrives to the age of eighteen years, unless they are bound by their own consent, after they arrive to such age, or bound by law, for the payment of debts, damages, fines, costs, or the like.¹⁶⁵

Given the specificity of the language of Vermont's Lockean Natural Rights Guarantee, it is hardly surprising that the Vermont Supreme Court of Judicature relied on this article to find slavery unconstitutional in the 1802 case, *Selectmen of Windsor v. Jacob*.¹⁶⁶ The court declared that the "question under consideration is not affected by the constitution or laws of the *United States*. It depends solely upon the construction of our own State constitution"¹⁶⁷ Then, referring to Article I, which was the only constitutional clause relied on by the parties, the Vermont Supreme Court of Judicature concluded that:

Our State constitution is express, no inhabitant of the State can hold a slave; and though the bill of sale may be binding by the *lex loci* of another State or dominion, yet when the master becomes an inhabitant of this State, his bill of sale ceases to operate here.¹⁶⁸

Therefore, because slavery was unconstitutional in Vermont, the court dismissed the case for nonsuit.¹⁶⁹ The Vermont constitution was unique in its direct textual link of its Lockean Natural Rights Guarantee equality principle with the abolition of slavery, but the Massachusetts, Indiana, Illinois, and Ohio state supreme courts followed Vermont's lead, and all four courts relied on the language of the Lockean Natural Rights Guarantee in their state constitutions in mandating the abolition of slavery.

2. *Massachusetts: Lockean Natural Rights Guarantee Alone to Abolish Slavery.*—Unlike the Vermont constitution, the 1780 Massachusetts constitution did not contain any provisions specifically addressing slavery.

165. VT. CONST. of 1777, ch. 1, art. 1.

166. 2 Tyl. 192, 200 (Vt. 1802). The reporter also notes that Jacob, an assistant judge of the Supreme Court of Judicature of Vermont, did not participate in the decision because he was a party in the case. *Id.* at 198 n.†.

167. *Id.* at 200.

168. *Id.* at 199.

169. *Id.* at 201.

Instead, the Massachusetts Supreme Judicial Court relied solely on the Lockean Natural Rights Guarantee's equality guarantee that "[a]ll men are born free and equal"¹⁷⁰ to hold that slavery was unconstitutional. This landmark line of cases began in 1783, only three years after the Massachusetts state constitution was ratified and four years before the federal Constitution was written, in the case of *Commonwealth v. Jennison*.¹⁷¹ This case powerfully illustrates the driving role of the Lockean Natural Rights Guarantee in the abolition of slavery in Massachusetts.¹⁷²

In *Jennison*, the government charged Jennison with assault and battery for beating twenty-eight-year-old Quock Walker; Jennison's defense was that Quock Walker was his slave from a personal inheritance.¹⁷³ The available documents do not present any other details as to Walker's parents or their status. Summaries of the argument indicate that Walker's attorneys relied on the Lockean Natural Rights Guarantee in the new Massachusetts constitution to argue that slavery was unconstitutional. The attorney's argument is described by Professor Emory Washburn in his 1857 article:

And the black child is born as much a free child in this sense as if it were white.

Then, again, it is contended that the Constitution only determines *that those that have been born since its adoption are equal and free*. And they admit, that, since that time, everybody is born free; and they say, that, by a different construction, people will lose their property.

This is begging the question. Is he property? If so, why not treat him as you do an article of stock,—an ox or a horse?¹⁷⁴

The attorney continued by arguing that slavery was against natural law because slaves were not the same as other property.¹⁷⁵

In his instructions to the jury, Chief Justice William Cushing relied on the newly enacted Lockean Natural Rights Guarantee in saying that slavery was unconstitutional in Massachusetts:

As to the doctrine of slavery and the right of Christians to hold Africans in perpetual servitude, and sell and treat them as we do our

170. MASS. CONST. art. I (amended 1976).

171. For the history and detailed discussion of the Quock Walker cases, see generally John D. Cushing, *The Cushing Court and the Abolition of Slavery in Massachusetts: More Notes on the "Quock Walker Case,"* 5 AM. J. LEGAL HIST. 118 (1961). This ruling was actually the product of a remarkable series of three cases beginning in 1781. See generally Emory Washburn, *Extinction of Slavery in Massachusetts*, 3 PROC. MASS. HIST. SOC'Y 188 (1857) (describing the preceding cases that lead up to the decision).

172. See ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 46–50 (1975) (recounting the saga of a slave named Quock Walker and the resulting legal cases in which Massachusetts courts endeavored to reconcile state laws and natural rights).

173. Notes of Chief Justice William Cushing made during *Commonwealth v. Jennison*, in 13 PROC. MASS. HIST. SOC'Y 292, 293–94 (1874) [hereinafter Notes of Chief Justice Cushing].

174. Washburn, *supra* note 171, at 199.

175. *Id.*

horses and cattle, that (it is true) has been heretofore countenanced by the Province Laws formerly, but nowhere is it expressly enacted or established. It has been a usage—a usage which took its origin from the practice of some of the European nations, and the regulations of British government respecting the then Colonies, for the benefit of trade and wealth. But whatever sentiments have formerly prevailed in this particular or slid in upon us by the example of others, a different idea has taken place with the people of America, more favorable to the natural rights of mankind, and to that natural, innate desire of Liberty, with which Heaven (without regard to color, complexion, or shape of noses—features) has inspired all the human race. And upon this ground our Constitution of Government, by which the people of this Commonwealth have solemnly bound themselves, sets out with declaring that all men are born free and equal—and that every subject is entitled to liberty, and to have it guarded by the laws, as well as life and property—and in short is totally repugnant to the idea of being born slaves. This being the case, I think the idea of slavery is inconsistent with our own conduct and Constitution; and there can be no such thing as perpetual servitude of a rational creature, unless his liberty is forfeited by some criminal conduct or given up by personal consent or contract. . . .¹⁷⁶

After receiving these instructions, the jury voted to convict Jennison.¹⁷⁷ From this text and the notes of Chief Justice Cushing, it appears that Chief Justice Cushing believed that the 1780 constitution outlawed all slavery in Massachusetts, including the enslavement of persons born prior to the enactment of the state constitution.¹⁷⁸ One can deduce as much from the facts of the case: because Quock Walker was in his twenties at the time the 1783 case involving him was decided, he must have been born well before the 1780 constitution was adopted.¹⁷⁹ Although Chief Justice Cushing's jury instructions were unreported, the instructions were widely discussed,¹⁸⁰ and

176. *Document 15: Commonwealth v. Jennison—Charge of Chief Justice Cushing*, in *CIVIL RIGHTS AND THE AMERICAN NEGRO: A DOCUMENTARY HISTORY* 45, 45–46 (Albert P. Blaustein & Robert L. Zangrando eds., 1968) [hereinafter *Charge of Chief Justice Cushing*]. See generally Cushing, *supra* note 171 (discussing the Quock Walker cases in detail).

Interestingly, there does not appear to be any evidence that the Framers of the Massachusetts state constitution intended the Guarantee to abolish slavery. ZILVERSMIT, *supra* note 163, at 115.

177. Washburn, *supra* note 171, at 192.

178. See Notes of Chief Justice Cushing, *supra* note 173, at 294 (“This being the case, I think the idea of slavery is inconsistent with our own conduct and Constitution; and there can be no such thing as perpetual servitude of a rational creature, unless his liberty is forfeited by some criminal conduct or given up by personal consent or contract.”).

179. See *id.* (“[Q]uock, when a child about 9 months old, with his father and mother was sold by bill of sale in 1754, about 29 years ago . . .”).

180. See *Charge of Chief Justice Cushing*, *supra* note 176, at 45 (noting that no official opinions were written or reported in the Quock Walker cases). In his famous book, *Justice Accused*, Professor Robert Cover describes the question of whether the Quock Walker cases really ended slavery in Massachusetts as a “historian’s perennial football.” COVER, *supra* note 172, at 44. He

the Massachusetts Supreme Judicial Court itself cited the decision in future opinions.¹⁸¹

The Massachusetts Supreme Judicial Court continued to cite the state's Lockean Natural Rights Guarantee in subsequent decisions concerning slavery. In *Greenwood v. Curtis*,¹⁸² the Massachusetts Supreme Judicial Court ruled on the validity of a contract executed in Africa promising payment for delivery of slaves.¹⁸³ As background, Massachusetts had passed a statute in 1787 prohibiting its citizens from engaging in the slave trade.¹⁸⁴ The defendant argued that the slavery contract could not be enforced by the Massachusetts state courts because it violated the Massachusetts constitution as well as the 1787 antislavery statute.¹⁸⁵ The majority ruled for the plaintiff, relying on the doctrine that contracts executed in foreign lands must be enforced even if they would not be permitted in Massachusetts.¹⁸⁶

Only Judge Theodore Sedgwick refused to enforce the contract.¹⁸⁷ Although he was riding circuit, he submitted a separate opinion to be published in the reporter.¹⁸⁸ Throughout the opinion, his strong conviction as to the immorality of slavery is clear from the words he uses. Judge Sedgwick referred to slavery as “evil,” “horrors,” “wicked,” “immoral,” and an “atrocious cruelty and injustice.”¹⁸⁹ Judge Sedgwick first explained that

concludes, however, based on contemporary accounts, that the “general perception” was that the jury instructions were the “authoritative construction of the 1780 Bill of Rights’ free and equal clause.” *Id.* at 45.

181. See, e.g., *Inhabitants of Winchendon v. Inhabitants of Hatfield*, 4 Mass. (3 Tyng) 123, 128 (1808). As the court describes:

[I]n the first action involving the right of the master, which came before the Supreme Judicial Court, after the establishment of the constitution, the judges declared, that, by virtue of the first article of the declaration of rights [the Lockean Natural Rights Guarantee], slavery in this state was no more.

Id. A footnote to the opinion described a second case, *Littleton v. Tuttle*, in which the Court held that Tuttle was not responsible for the support of an African-American man named Jacob because he, “being born in this country, was born free.” *Id.* at 129 n.†. I could not locate the full *Littleton* opinion, but it is plausible that this reference to being “born free” is an invocation of the Massachusetts Natural Rights Guarantee language: “All men are born free and equal . . .” Lending support to this conclusion, the footnote is included directly after the description of the earlier case, which relied on the Lockean Natural Rights Guarantee. *Id.*

182. 6 Mass. (5 Tyng) 358 (1810).

183. *Id.* at 359.

184. *Id.* at 361.

185. *Id.* at 360–61.

186. *Id.* at 377–78, 380–81.

187. *Id.* at 362 n.† (Sedgwick, J., dissenting).

188. *Id.*

189. *Id.* at 363–64, 369 n.†. For example, in describing the facts, Judge Sedgwick wrote:

The voyage was undoubtedly undertaken for the purpose of procuring a cargo of slaves, in a country with which this had no contention; to seize human beings, and tear them from their native land, and all those endearing connections which alleviate the evils inseparable from our present state of existence; and to subject the miserable, unoffending sufferers to all the horrors of perpetual slavery.

the laws of nations did not require that Massachusetts enforce the contract because the contract itself was immoral:

In this view, it is pertinent to remark that, where a contract is *immoral*, or, as it is more technically termed, *malum in se*, a discussion about any *lex loci* is nugatory. It is only by the comity of nations that an action arising, not between subjects of a particular sovereignty, and without its limits, can be sustained by its courts, acting within those limits. This comity prevails amongst most civilized nations, and, as respects contracts, justice is generally administered in conformity to the laws of the country in which the cause of action arose. But it would be carrying our courtesy too far to enforce the execution of contracts in themselves vicious. No foreign nation can justly require, and no civility demands, that judges should thus become the panders of iniquity.¹⁹⁰

Judge Sedgwick then explained that English common law did not require the enforcement of this contract. He rebutted an argument that *Somerset's Case* and other precedents recognized the legality of slavery in Africa by arguing that it was not clear from the record whether slavery was in fact legal in Africa at the time the contract was executed, and he focused again on the immorality of the contract in question.¹⁹¹ Judge Sedgwick then turned to the Massachusetts state constitution. He acknowledged the “paramount” nature of the federal Constitution but noted that the state had some reserved powers.¹⁹² Specifically, he focused on the language of the Massachusetts constitution’s Lockean Natural Rights Guarantee:

By the first article of the Declaration of Rights it is declared that “all men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be recorded the right of enjoying and possessing their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.” These words have been, and may again be, construed to support wild and absurd theories; but in their most temperate meaning, I take them to be as decisive of this question, as any expressions which could be selected from the *English* language.

If the liberties of men are unalienable, they could not have been transferred under this contract; and inasmuch as there was nothing on which it could operate, it was merely void.¹⁹³

Id. at 363 n.†.

190. *Id.* at 364–65 n.†.

191. *Id.* at 368 n.†.

192. *Id.* at 369 n.†.

193. *Id.*

Therefore, Judge Sedgwick concluded that Massachusetts was not obligated to enforce the slavery contract before the court.¹⁹⁴ Although the controlling opinion found the contract to be enforceable under common law principles requiring enforcement of contracts from foreign lands, Judge Sedgwick's opinion foreshadowed the Massachusetts Supreme Judicial Court's later extension of the state constitution's Lockean Natural Rights Guarantee to cover contracts executed elsewhere, and the opinion stands out for its passionate application of the Lockean Natural Rights Guarantee as a rule against slavery.

In 1836, the Massachusetts Supreme Judicial Court again turned to the state constitution's Lockean Natural Rights Guarantee in *Commonwealth v. Aves*¹⁹⁵ to issue a momentous ruling that slaves brought into the State of Massachusetts by nonresidents could not be held in Massachusetts against their will.¹⁹⁶ This foundational holding was cited by virtually every state court opinion following 1836 that dealt with the subject of slavery. In *Aves*, a Massachusetts citizen filed a habeas petition on behalf of Med, an African-American female child.¹⁹⁷ The petition argued that Med was unlawfully restrained by Aves, whose daughter was a citizen of Louisiana and claimed that her husband had lawfully purchased Med in that state.¹⁹⁸ In his discussion of the history of slavery in Massachusetts, Chief Justice Shaw explained that

slavery to a certain extent seems to have crept in; not probably by force of any law, for none such is found or known to exist; but rather, it may be presumed, from that universal custom, prevailing through the European colonies, in the West Indies, and on the continent of America, and which was fostered and encouraged by the commercial policy of the parent states.¹⁹⁹

Slavery was subsequently abolished in Massachusetts:

How, or by what act particularly, slavery was abolished in Massachusetts, whether by the adoption of the opinion in *Sommersett's* [sic] case, as a declaration and modification of the common law, or by the Declaration of Independence, or by the constitution of 1780, it is not now very easy to determine, and it is rather a matter of curiosity than of utility; it being agreed on all hands, that if not abolished before, *it was so by the declaration of rights*.²⁰⁰

194. *Id.* at 373 n.†.

195. 35 Mass. (18 Pick.) 193 (1836).

196. *Id.* at 219.

197. *Id.* at 193.

198. *Id.* at 193–94.

199. *Id.* at 208.

200. *Id.* at 209 (emphasis added).

We can safely assume that this invocation of the declaration of rights refers to the Lockean Natural Rights Guarantee because Chief Justice Shaw referred, indirectly, to the *Jennison* case, which relied on the Lockean Natural Rights Guarantee.²⁰¹ He also focused on the Lockean Natural Rights Guarantee to ground his argument in this case:

[B]y the constitution adopted in 1780, slavery was abolished in Massachusetts, upon the ground that it is contrary to natural right and the plain principles of justice. The terms of the first article of the declaration of rights are plain and explicit. "All men are born free and equal, and have certain natural, essential, and unalienable rights, which are, the right of enjoying and defending their lives and liberties, that of acquiring, possessing, and protecting property." It would be difficult to select words more precisely adapted to the abolition of negro slavery. According to the laws prevailing in all the States, where slavery is upheld, the child of a slave is not deemed to be born free, a slave has no right to enjoy and defend his own liberty, or to acquire, possess, or protect property. That the description was broad enough in its terms to embrace negroes, and that it was intended by the framers of the constitution to embrace them, is proved by the earliest contemporaneous construction, by an unbroken series of judicial decisions, and by a uniform practice from the adoption of the constitution to the present time. The whole tenor of our policy, of our legislation and jurisprudence, from that time to the present, has been consistent with this construction, and with no other.²⁰²

The court ordered that the child be released from Aves's custody and into the care of a probate guardian.²⁰³ This line of cases illustrates the

201. *Id.* Chief Justice Shaw cites *Inhabitants of Winchendon v. Inhabitants of Hatfield*, 4 Mass. (3 Tyng) 123, 128 (1808), which in turn describes an unnamed case decided soon after the establishment of the Constitution that declared "by virtue of the first article of the declaration of rights, slavery in this state was no more." It is safe to assume that the reference is to the then well-known *Jennison* case.

202. *Id.* at 210.

203. *Id.* at 225. The Massachusetts Supreme Judicial Court reiterated its stance on the Lockean Natural Rights Guarantee's abolishment of slavery in the 1867 case *Jackson v. Phillips*. 96 Mass. (14 Allen) 539, 564 (1867). In *Jackson*, the court ruled that bequeathing money to assist fugitive slaves was a charitable gift not subject to the rule against perpetuities. It stated:

It was in Massachusetts, by the first article of the Declaration of Rights prefixed to the Constitution adopted in 1780, as immediately afterwards interpreted by this court, that the fundamental axioms of the Declaration of Independence—"that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness"—first took at once the form and the force of express law; slavery was thus wholly abolished in Massachusetts

The doctrine of our law, upon this subject, as stated by Chief Justice Shaw in delivering the judgment of the court in *Commonwealth v. Aves*, just cited, is that slavery is a relation founded in force, contrary to natural right and the principles of justice, humanity and sound policy

Massachusetts Supreme Judicial Court's use of the Lockean Natural Rights Guarantee's equality language to attack directly the existence of slavery as an institution.

3. *Indiana, Illinois, and Ohio: Lockean Natural Rights Guarantees to Extend Existing Slavery Prohibitions.*—The Indiana, Illinois, and Ohio supreme courts invoked their state Lockean Natural Rights Guarantees in slavery cases in a slightly different way. Like Vermont and Massachusetts, these state constitutions included the typical Lockean Natural Rights Guarantee language that all men were “born equally free and independent,”²⁰⁴ but the Indiana, Illinois, and Ohio state constitutions also included a separate article specifically abolishing slavery.²⁰⁵ The antislavery articles in Indiana, Illinois, and Ohio were surely influenced by the 1787 Northwest Ordinance, which declared that “[t]here shall be neither slavery nor involuntary servitude in the said territory.”²⁰⁶ The states of Indiana, Illinois, and Ohio all had been part of the Northwest Territory prior to obtaining statehood.²⁰⁷ Thus, the basic question of whether slavery was constitutional had already been answered in these states both by the Northwest Ordinance and by the state constitutions’ explicit antislavery articles. Issues nonetheless arose concerning the retroactive application of slavery and most especially concerning fugitive slave laws. The state courts employed the Indiana, Illinois, and Ohio Lockean Natural Rights Guarantees in their state constitutions as equality guarantees alongside the specific antislavery constitutional provisions. The state courts thus extended antislavery positions even to situations not necessarily addressed by the Ordinance or the specific antislavery clauses in the Indiana, Illinois, and Ohio state constitutions.

Interestingly, each of these three states enacted their first constitution after the Massachusetts *Jennison* decision discussed above. The much-discussed *Jennison* holding should have provided fair warning to these state constitutional conventions that the equality guarantee language in a Lockean Natural Rights Guarantee could be interpreted to abolish slavery. Furthermore, the Northwest Ordinance had already abolished slavery in these states before they attained statehood. One might therefore wonder why these states chose to include specific antislavery clauses in their state constitutions in addition to the Lockean Natural Rights Guarantees. There are several

Id. at 563–64. Although this case was issued after the Thirteenth Amendment abolished slavery, the court still pointed to its own constitutional ban on slavery found in the Lockean Natural Rights Guarantee's equality language.

204. See *infra* Appendix A.

205. ILL. CONST. of 1847, art. XIII, § 16; IND. CONST. art. I, § 37 (amended 1984); OHIO CONST. of 1851, art. I, § 6.

206. See Northwest Ordinance of 1787, ch. 8, 1 Stat. 50 (1789) (reenacting the Northwest Ordinance under the federal Constitution).

207. CORNELISON & YANAK, *supra* note 157, at 357.

plausible explanations for this decision. First, the framers of these constitutions may have simply been attempting to emphasize that slavery was in fact abolished in these states. As discussed in the next subpart, a few states did not interpret their Lockean Natural Rights Guarantees as necessarily prohibiting slavery, and the Northwest Ordinance was not part of the new state constitutions. Thus, it seems likely that the framers of the Indiana, Illinois, and Ohio state constitutions simply decided to write two different bans into their constitutions out of an abundance of caution to ensure that their constitutions did in fact abolish slavery. Second, neither the separate antislavery articles nor the Northwest Ordinance provided a definitive answer to the complex issues involving comity, fugitive slaves, and whether the slavery prohibition applied retroactively to free slaves who had been purchased prior to the prohibition. Instead, the antislavery clauses in these three state constitutions simply declared that the institution of slavery would not exist within the state. However, as the case law shows, the state supreme courts of Indiana, Illinois, and Ohio all issued antislavery decisions on issues of comity, on the rights of fugitive slaves, and on retroactivity questions by relying on the Lockean Natural Rights Guarantees in conjunction with the three state constitutions' specific antislavery articles. Perhaps the framers of these state constitutions anticipated the need for more general language in their constitutions to provide a textual basis for broader antislavery decisions.

In the earliest case, the Indiana Supreme Court Judicature used its Lockean Natural Rights Guarantee in conjunction with the antislavery article to abolish slavery even in cases where the slave had been purchased prior to the enactment of Indiana's constitution. Along with the typical Lockean Natural Rights Guarantee equality language,²⁰⁸ Indiana's 1816 constitution also included Article 11, which specifically abolished slavery: "There shall be neither slavery nor involuntary servitude in this State, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted."²⁰⁹

Even though the Indiana constitution of 1816 contained this explicit Article abolishing slavery in the state, the Indiana Supreme Court relied on

208. See IND. CONST. of 1816, art. I, § 1 ("[W]e declare, That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights; among which are, the enjoying and defending life and liberty, and of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.").

It is worth noting that, by 1868, the Guarantee language had been slightly amended. Indiana's constitutional convention amended the "born equally free" clause to read "all men are created equal" and deleted the references to natural and inherent rights. The 1851 Guarantee read: "We declare, 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" IND. CONST. art. I, § 1 (amended 1984).

209. IND. CONST. of 1816, art. XI, § 7. This text was moved to Article I in the 1851 constitution. IND. CONST. art. I, § 37 (amended 1984).

the Lockean Natural Rights Guarantee in its *State v. Lasselle*²¹⁰ decision as critical textual support for holding that slavery was unconstitutional even where the slave had been purchased prior to the existence of the state.²¹¹ This case arose under a habeas corpus writ for Polly, an African-American woman being held by Lasselle.²¹² Lasselle argued that his claim over Polly was valid because he had legally purchased her in Indian Territory prior to its cession to the United States.²¹³ The court began by emphasizing the preeminence of the state constitution over historical custom and privileges granted by the Virginia legislature, which had previously controlled the territory in question:

It must be admitted that a convention, chosen for the express purpose, and vested with full power, to form a constitution which is to define, limit, and control the powers of the legislature, as well as the other branches of the government, must possess powers, at least equal, if not paramount, to those of any ordinary legislative body. From these positions it clearly follows, that it was within the legitimate powers of the convention, in forming our constitution, to prohibit the existence of slavery in the state of *Indiana*.²¹⁴

Thus, in looking only to the Indiana state constitution and “to that instrument alone,” the Indiana Supreme Court held that slavery was unconstitutional.²¹⁵ It declared:

We are, then, only to look into our own constitution, to learn the nature and extent of our civil rights; and to that instrument alone we must resort for a decision of this question. In the first article of the constitution, section 1st, it is declared, “That all men are born equally free and independent; and have certain natural, inherent, and unalienable rights; among which are, the enjoying and defending of life and liberty, and of acquiring, possessing, and protecting property; and pursuing, and obtaining happiness and safety.”²¹⁶

The court then cited two other sections in the State constitution, including Article 11, before concluding that “[i]t is evident that, by these provisions, the framers of our constitution intended a total and entire prohibition of slavery in this state; and we can conceive of no form of words in which that intention could have been more clearly expressed.”²¹⁷ The court specifically relied upon the provisions in the plural in expanding the ban on slavery to the facts of this case. It is interesting to note that this decision

210. 1 Blackf. 60 (Ind. 1820).

211. *Id.* at 62.

212. *Id.* at 60.

213. *Id.* at 60–61.

214. *Id.* at 61–62.

215. *Id.* at 62.

216. *Id.*

217. *Id.*

occurred only four years after Indiana's constitutional convention and was handed down in the same year as the Missouri Compromise.²¹⁸

The Illinois state courts also addressed the constitutionality of slavery and the state's Lockean Natural Rights Guarantee in four reported cases. Again, the Illinois Lockean Natural Rights Guarantee followed the typical form including the equality language, "[t]hat all men are born equally free and independent . . . ,"²¹⁹ and the Illinois state constitution contained a separate article abolishing slavery: "There shall be neither slavery nor involuntary servitude in this state, except as a punishment for crime whereof the party shall have been duly convicted."²²⁰ Both the Lockean Natural Rights Guarantee and the antislavery article were included in Illinois's first constitution of 1818.

In its earliest reported cases, the Illinois Supreme Court grappled with the constitutional status of fugitive slaves and slaves owned by nonresidents. In two 1843 cases, *Willard v. People*²²¹ and *Eells v. People*,²²² Illinois citizens were indicted under the Illinois Criminal Code for hiding fugitive slaves.²²³ In defense of their actions, the defendants cited the state's Lockean Natural Rights Guarantee along with the prohibition against slavery in the Illinois constitution to argue that the state's laws against harboring fugitive slaves were unconstitutional under the Illinois constitution.²²⁴ In both cases, the Illinois courts rejected this argument and focused on the law of comity to hold that fugitive slaves did not become free upon entry into Illinois,²²⁵ which is hardly surprising in light of the Fugitive Slave Clause in the federal Constitution which would have trumped Illinois law.²²⁶ But, an interesting

218. *Id.*; CORNELISON & YANAK, *supra* note 157, at 332.

219. ILL. CONST. of 1847, art. XIII, § 1. The 1818 constitution included a similar provision. ILL. CONST. of 1818, art. VIII, § 1.

220. ILL. CONST. of 1847, art. XIII, § 16. The 1818 constitution included a similar provision. ILL. CONST. of 1818, art. VI, § 1.

221. 5 Ill. (4 Scam.) 461 (1843).

222. 5 Ill. (4 Scam.) 498 (1843).

223. *Eells*, 5 Ill. (4 Scam.) at 508; *Willard*, 5 Ill. (4 Scam.) at 468–69.

224. For example, in *Willard*, the plaintiff argued:

The first section of the 8th article declares, "That all men are born equally free and independent, and have certain inherent and indefeasible rights; among which are those of enjoying and defending life and liberty, and of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."

These and other provisions show most clearly that slavery was intended to be, and is, prohibited, except in the cases above referred to. No language can be more forcible or comprehensive. There can, therefore be no law of the State sanctioning the detention of any one in slavery; for the supreme law forbids it. Slavery, then, is repugnant to the Constitution of the State, and contrary to our public policy.

Willard, 5 Ill. (4 Scam.) at 463–64.

225. *Eells*, 5 Ill. (4 Scam.) at 510–12; *Willard*, 5 Ill. (4 Scam.) at 471–72.

226. See U.S. CONST. art. IV, § 2, cl. 3, *amended* by U.S. CONST. amend. XIII (stating that a person who is legally held "to Service or Labour" under the laws of one state cannot be discharged from that "Service or Labour" by fleeing to a state where the person would be free); U.S. CONST.

dissent in *Eells* by Judge Samuel Lockwood, joined by two other justices, foreshadowed a change in Illinois case law on the question of harboring fugitive slaves.²²⁷ After reciting the Guarantee and the prohibition against slavery, Judge Lockwood declared:

From these provisions of the Constitution I deduce the following general rule, that all men, whether black or white, are in this State presumed to be free, and that every person who claims another to be his slave, under any exception or limitation of the general rule, must clearly show that the person so claimed comes within such exception.²²⁸

Thus, the dissenters relied on both provisions of the Illinois constitution to argue that the slavery ban should be extended to strike down laws against harboring fugitive slaves within the state as fundamentally inconsistent with the basic principles of the Illinois constitution. The dissenters also cited a number of cases, including Massachusetts's *Aves* decision, in support of this argument.²²⁹

Two years later, in the 1845 decision of *Jarrot v. Jarrot*,²³⁰ a majority of the Illinois Supreme Court addressed the issue that the Indiana Supreme Court of Judicature had faced in *Lasselle*: whether a slave born under the proslavery laws in existence prior to the adoption of the state constitution could constitutionally be held in slavery.²³¹ Specifically citing the *Lasselle* decision as well as the Massachusetts *Aves* case, the Illinois Supreme Court ruled that the state constitution prohibited slavery regardless of when the slave had been born.²³² As Judge Walter Scates stated in his opinion:

After so many, and such uniformity of judicial determinations upon the meaning, and the application of the Constitution and Ordinance to facts and circumstances like these before the Court, made in so benignant a spirit of humanity and justice, I cannot allow my mind to doubt of the plaintiff's "inherent and indefeasible rights," to become "equally free and independent" with other citizens, "and of enjoying and defending life and liberty and of acquiring, possessing and protecting property and reputation, and of pursuing" his "own happiness," except so far as he may, by the Constitution and laws, be restricted or denied the right of suffrage, [et]c. All philanthropists unite in deprecating the evils of slavery, and it affords me sincere

art. VI, cl. 2 (stating that the U.S. Constitution is "the supreme Law of the Land" and that all state judges are bound by the Constitution's provisions).

227. *Eells*, 5 Ill. (4 Scam.) at 514 (Lockwood, J., dissenting).

228. *Id.*

229. *Id.*

230. 7 Ill. (2 Gilm.) 1 (1845).

231. *Id.* at 5, 9.

232. *Id.* at 9, 12.

pleasure, when my duty under the Constitution and laws requires me to break the fetters of the slave, and declare the captive free.²³³

The other opinion in this case did not specifically cite the Illinois Lockean Natural Rights Guarantee, but it did refer to restrictions in the Illinois constitution generally, along with the court decision in *Lasselle* which interpreted state Guarantees, so it is likely it was influenced by Illinois's Lockean Natural Rights Guarantee as well.²³⁴

In 1852, in *Hone v. Ammons*,²³⁵ the Illinois Supreme Court used the state constitution's Lockean Natural Rights Guarantee to push its antislavery position a step farther and to invalidate a contract involving the purchase of a slave due to the fact that the slave was the consideration at the root of the contract.²³⁶ A concurring opinion by Judge Lyman Trumbull relied on both the Lockean Natural Rights Guarantee of the Illinois constitution as well as the provision against slavery:

[A] contract made in Illinois, for the sale of a person as a slave, who is at the time in this State, and to a citizen thereof, is opposed to the policy which the people of Illinois thought proper to adopt in the foundation of their State government, and in the very teeth of the express provisions of the constitution. The State constitution declares that "all men are born equally free and independent," and that "there shall be neither slavery nor involuntary servitude in this State except as a punishment for crime, whereof the party shall have been duly convicted." In a legal point of view, I would as soon think of enforcing a contract to carry into effect the African slave-trade, as that under consideration.²³⁷

The opinion cited the Massachusetts court opinion in the *Aves* case as an example of another state refusing to give effect to slavery contracts.²³⁸

Cases from the Ohio Supreme Court show a similar evolution, with the state's Lockean Natural Rights Guarantee being used to challenge the continued enslavement of slaves brought into Ohio from other states and then the laws with respect to harboring fugitive slaves themselves. The Ohio Lockean Natural Rights Guarantee followed the standard form beginning with the statement that "[a]ll men are, by nature, free."²³⁹ The Ohio state

233. *Id.* at 11.

234. *Id.* at 19–26 (opinion of Young, J.).

235. 14 Ill. 29 (1852).

236. *Id.* at 29–30.

237. *Id.* at 30 (Trumbull, J., concurring).

238. *Id.* at 32.

239. OHIO CONST. of 1851, art. I, § 1 ("All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."). The 1851 version of the Guarantee used slightly different language from the 1802 Guarantee. The 1802 Guarantee stated:

constitution also included a specific provision banning slavery, which said: “There shall be no slavery in this State; nor involuntary servitude, unless for the punishment of crime.”²⁴⁰ Both the Ohio Lockean Natural Rights Guarantee and the antislavery provision were part of Ohio’s first constitution in 1802.²⁴¹

In the 1837 case *Birney v. State*,²⁴² Birney was indicted under a criminal law for harboring a slave.²⁴³ Birney cited the Lockean Natural Rights Guarantee and the state constitution’s prohibition of slavery while arguing that the criminal statute under which he was indicted was unconstitutional.²⁴⁴ The Ohio Supreme Court dismissed the case on other grounds without addressing this argument.²⁴⁵

The Lockean Natural Rights Guarantee argument reappeared in an Ohio case almost twenty years later in *Anderson v. Poindexter*.²⁴⁶ In *Anderson*,

That all men are born equally free and independent, and have certain natural inherent and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety; and every free republican government, being founded on their sole authority, and organized for the great purpose of protecting their rights and liberties, and securing their independence—to effect these ends, they have at all times a complete power to alter, reform or abolish their government whenever they may deem it necessary.

OHIO CONST. OF 1802, art. VIII, § 1.

240. OHIO CONST. OF 1851, art. I, § 6.

241. OHIO CONST. OF 1802, art. VIII, §§ 1–2.

242. 8 Ohio 230 (1837).

243. *Id.* at 230.

244. *Id.* at 232.

245. *Id.* at 239. The plaintiff argued that:

[T]he relation of owner and property, as between man and man, can not exist under the constitution of Ohio. This instrument declares “that all men are born *equally free* and independent, and have certain natural, inherent, and unalienable rights, among which are the enjoying and defending life and liberty; acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.” It also declares as a direct consequence of these fundamental truths, “that there shall be neither slavery nor involuntary servitude in this state, otherwise than for the punishment of crimes;” and that “no alteration of the constitution shall ever take place, so as to introduce slavery or involuntary servitude into this state.” From these extracts, it appears, that the one principle which the framers were especially anxious to make prominently conspicuous, and to surround with safeguards the most impregnable, was the *equal freedom of all men*; and the one thing which they sought to brand with deepest reprobation, and to exclude forever from the institution of the state, was the *slavery of man to man*.

Id. at 231–32.

246. 6 Ohio St. 622 (1856). The court’s opinion in *Anderson* was foreshadowed in an earlier case, *State v. Hoppess*. 1 Ohio Dec. Reprint 105 (1845). In *Hoppess*, the Ohio Supreme Court considered a situation where the former slave, Watson, was voluntarily brought into Ohio by his master and, thus, did not meet the technical definition of escaping from a slave state. *Id.* at 114–15. The opinion did not explicitly reference the Lockean Natural Rights Guarantee but did explain in detail that slavery was against natural rights. *Id.* at 110–11. “Slavery is wrong inflicted by force, and supported alone by the municipal power of the State or territory wherein it exists. It is opposed

Poindexter, a slave in Kentucky, entered Ohio to perform services for his owner there.²⁴⁷ The Ohio Supreme Court declared that upon entering Ohio voluntarily and not as a fugitive, Poindexter became a free man,²⁴⁸ which would clearly seem to be the case under the rule of *Somerset's Case*. In a lengthy set of separate concurring opinions, the Ohio Supreme Court looked at Massachusetts precedent, U.S. Supreme Court rulings, Ohio statutes, and the Ohio Lockean Natural Rights Guarantee and found that upon entering Ohio voluntarily to perform services for his owner, a slave became a free man.²⁴⁹ In the concurring opinion that discussed the Ohio Lockean Natural Rights Guarantee the most specifically, an Ohio judge argued at length against comity in this case and said that the State of Ohio was not obligated by the federal Constitution to return this slave to Kentucky because his former master had voluntarily sent Poindexter to Ohio, and thus he was not an escaped slave.²⁵⁰ The Lockean Natural Rights Guarantee analysis in this opinion was, however, quite sweeping in scope:

Our policy in regard to an institution [of slavery] so unjust, and so fraught with disaster to the great mass of a free and enterprising people, has not been left to the discretion of the Legislature or the courts. Both are concluded by the express terms of our organic law. That declares what is in accordance with reason and justice, the freedom of all men. It further declares that freedom to be the natural and inalienable right of all men. Thus:

ART. I, SEC. 1. All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property.

And as if to surround with further safeguards these principles and our own policy, the following provision was incorporated into our Constitution, and is equally emphatic:

ART. I, SEC. 6. There shall be no slavery in this State, nor involuntary servitude, unless for the punishment of crime.

With these provisions in our Constitution, it can not be matter of inquiry what our policy is in regard to slavery.²⁵¹

The opinion further declared: "In Ohio, as I have already stated, the right to freedom is inalienable. It is an old principle, instinct with meaning, born of the Revolution, and embodied into our Constitution."²⁵² This of course

to the principles of natural justice and right, and is the mere creature of positive law." *Id.* Nevertheless, the court held that Watson must remain in custody. *Id.* at 117.

247. 6 Ohio St. at 623.

248. *Id.* at 631.

249. *Id.* at 633–38 (Brinkerhoff, J., concurring); *id.* at 639–57, 674–75 (Swan, J., concurring).

250. *Id.* at 640–49 (Swan, J., concurring).

251. *Id.* at 639–40.

252. *Id.* at 652–53.

was the British rule established in *Somerset's Case*, and Judge Swan excerpted multiple pages of the *Somerset* opinion as well as citations to Blackstone's *Commentaries* in support of his position.²⁵³

A few years later, in 1859, one justice on the Ohio Supreme Court expanded upon the state's Lockean Natural Rights Guarantee to argue that the Federal Fugitive Slave Act of 1850 was itself unconstitutional. In *Ex Parte Bushnell*,²⁵⁴ Justice Milton Sutliff of the Ohio Supreme Court argued in dissent that Congress did not have authority to pass a federal Fugitive Slave Act because the legal regulation of slavery was historically the province of the states under the U.S. Constitution.²⁵⁵ In saying this, Judge Sutliff relied heavily on Ohio's Lockean Natural Rights Guarantee and maintained that the Founders placed the Guarantees in state constitutions to end slavery:

It is well known that at the time of the formation of the constitution, it was the desire and expectation of the patriots and leading men in the slaveholding states, that all the slaveholding states would follow the example of Massachusetts, Pennsylvania, and those other states which had then already passed acts of emancipation, looking prospectively to the utter extinction of the system of slavery in the states.

Shortly after the declaration of independence, strenuous efforts for the final abolition of slavery were put forth by leading men in Virginia, Pennsylvania, and other states. An abolition society had been formed, of which Benjamin Franklin was president. Mr. Jefferson and other distinguished friends of universal liberty lent the cause their hearty cooperation. Virginia, it is well known, at that time held a majority of all the slaves in the southern states. But Virginia, as well as New York, had, at a session of the legislature shortly preceding the constitutional convention, introduced a bill similar to the act of emancipation passed by the legislature of Pennsylvania, looking prospectively to the final abolition and removal of the evil of slavery. Virginia had also adopted a bill of rights, containing a declaration "that all men are by nature free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property and pursuing and obtaining happiness and safety." In the first clause of the constitution of that state, there was also then

253. *Id.* at 657–66, 668–70.

254. 9 Ohio St. 77 (1859).

255. *Id.* at 229–30 (Sutliff, J., dissenting). Judge Sutliff wrote more than fifty pages to support his dissent and relied on such varied sources as the Federalist papers, a historical treatise from Virginia, the views of the Founding Fathers, and precedents from other State courts on the subject. *Id.* at 229–325.

standing a complaint against “the inhuman use of the royal negative, in refusing the state permission to exclude slaves by law.”²⁵⁶

Although the majority of the Ohio Supreme Court upheld the constitutionality of the federal Fugitive Slave Act,²⁵⁷ this lengthy dissent demonstrates powerful support for the position that the subject of slavery was exclusively within the province of the states to regulate.

Taken together, these cases are authority that a significant number of the state courts that considered the issue interpreted the Lockean Natural Rights Guarantee “equality at birth” language as abolishing slavery itself or, in conjunction with other more explicit constitutional language, as advancing antislavery efforts more generally. In particular, the early decisions from the Massachusetts Supreme Judicial Court reflect vigorous judicial efforts to give that state’s Lockean Natural Rights Guarantee real substantive meaning. The Indiana, Illinois, and Ohio supreme courts continued this effort by relying upon state Lockean Natural Rights Guarantees even in the face of contrary federal laws and comity considerations and even where their separate antislavery clauses did not require more general antislavery decisions, as was the case with laws about harboring fugitive slaves or voiding out-of-state contracts where the slave was the consideration for the contract. In sum, the Lockean Natural Rights Guarantees were an important component, together with other more explicit constitutional language in several state constitutions, in legal efforts to abolish slavery and to advance the abolitionist agenda in these states. This begins to suggest that the Lockean Natural Rights Guarantees were thought to be especially relevant to the question of the legality of slavery.

B. *Slavery Constitutional*

Three states (Kentucky, Virginia, and New Jersey) rejected Lockean Natural Rights Guarantee arguments that were made against the constitutionality of slavery.²⁵⁸ A fourth state, Connecticut, also issued a

256. *Id.* at 237–38.

257. *Id.* at 198–99 (majority opinion).

258. Two other cases from this period potentially interpreted state Lockean Natural Rights Guarantees. In the 1797 case *Respublica v. Blackmore*, the Pennsylvania Supreme Court also reported a Lockean Natural Rights Guarantee argument. 2 Yeates 234, 235 (Pa. 1797). The claimant is quoted as stating:

[O]n elementary principles, slavery itself might be questionable under the 1st section of the 9th article of the state constitution, which declares, that “all men are born equally free and independent.” . . . But the same clause guards and secures property, and regards the right of acquiring, possessing and protecting it, as inherent and indefeasible. The slaves among us were no parties to this compact.

Id. (internal citation omitted). The court, however, did not address this argument and instead used a registration statute to free the slaves in question. *Id.* at 239–40.

The Maine Supreme Judicial Court also issued a ruling in the 1820 case *Inhabitants of Hallowell v. Inhabitants of Gardiner*. 1 Me. 93 (1820). The court considered a complicated set of facts to

ruling holding that its very watered-down equality guarantee did not abolish slavery in that state. The slave petitioners in these cases, often citing Massachusetts precedent, argued that the courts in these states should interpret their state's identical Lockean Natural Rights Guarantee to hold slavery unconstitutional or to provide additional rights to slaves. The Kentucky, Virginia, and New Jersey courts acknowledged the multiple decisions from other state courts holding that the Lockean Natural Rights Guarantees in those states abolished slavery, but the Kentucky, Virginia, and New Jersey courts relied on history, settled practice, and other interpretive tools to find that slavery in their states was consistent with their state constitutional Lockean Natural Rights Guarantee.

The Connecticut Supreme Court of Errors (now the Connecticut Supreme Court), in the 1837 case *Jackson v. Bulloch*,²⁵⁹ interpreted that state's weak equality guarantee as meaning that the Connecticut state constitution did not abolish slavery because it only applied to persons within the "social compact."²⁶⁰ The Connecticut constitution did not contain a Lockean Natural Rights Guarantee, but it did include general equality language. The first section of the Declaration of Rights stated: "[T]hat all men, when they form a social compact, are equal in rights; and that no man, or set of men, are entitled to exclusive public emoluments or privileges from the community."²⁶¹ The Connecticut court opinion looks to us as if it was obviously wrongly decided even given this weak equality language and the absence of a Lockean Natural Rights Guarantee.

In this case, Nancy Jackson used a writ of habeas corpus to challenge her continued status as a slave two years after *Bulloch*, a slaveholder in Georgia, brought her with him to Connecticut.²⁶² The court began its discussion with citations to the opinions in *Aves*, *Somerset*, and other cases to support its declaration that slavery was "contrary to the principles of natural right and to the great law of love; that it is founded on injustice and fraud, and can be supported only by the provisions of positive law"²⁶³ Having established this, the Connecticut court next considered whether the state constitution abolished slavery. It construed the language guaranteeing

determine whether a slave's free wife and child should be considered free inhabitants of Gardiner, such that the town would be liable to support them. *Id.* at 93–94. The court rejected the slave's Lockean Natural Rights Guarantee argument that the wife and child were entitled to support because the slave could not inherit the property in Gardiner, and therefore, the family never formally inhabited the area. *Id.* at 99–102. Although the plaintiffs argued that the wife and child were entitled to support based on their "inalienable rights," it is not clear that the court used the Guarantee in its ruling. *Id.* at 94.

259. 12 Conn. 38 (1837).

260. *Id.* at 42–43.

261. *Id.*

262. *Id.* at 39.

263. *Id.* at 40–41.

that all men “are equal in rights” as applying only “when they form a social compact”²⁶⁴.

The language [of the Connecticut constitution] is certainly broad [said the Connecticut court]; but [it is] not as broad as that of the bill of rights in Massachusetts, to which it has been compared. It seems evidently to be limited to those who are parties to the social compact thus formed. Slaves cannot be said to be parties to that compact, or to be represented in it.²⁶⁵

Therefore, the “equal in rights” guarantee of the Connecticut constitution did not apply to slaves, according to the Connecticut court because slaves were not parties to the social compact. The Connecticut court also emphasized that slavery had been recognized by the legislature at various points during Connecticut’s history.²⁶⁶ The court did not explain how slavery came to be legal under the positive law of the State of Connecticut, but the court did say that

[i]t probably crept in silently, until it became sanctioned, by custom or usage. Did it depend entirely upon custom or usage, perhaps it would not be too late to enquire, whether a custom so utterly repugnant to the great principles of liberty, justice and natural right, was that *reasonable* custom, which could claim the sanction of law. But we find, that for nearly a century past, the system of slavery has been, to a certain extent, recognised, by various statutes, designed to modify, to regulate, and, at last, abolish it; and thus, we think, it has received the implied sanction at least of the legislature.²⁶⁷

Even though the court rejected the constitutional arguments against the legality of slavery in Connecticut, it ultimately held in favor of Nancy Jackson, ruling that she had been imported into Connecticut in violation of statutes prohibiting the importation of slaves into Connecticut.²⁶⁸ This bottom line result in the slavery case at hand in favor of freedom is itself important.

The Kentucky, Virginia, and New Jersey state courts reached similar conclusions to those reached in Connecticut even though their state constitutions, unlike Connecticut’s, had specific Lockean Natural Rights Guarantees. The Kentucky Court of Appeals (the highest state court at the time) considered the constitutionality of slavery in light of its Lockean Natural Rights Guarantee, but it focused on the property rights of slave

264. *Id.* at 42–43.

265. *Id.* at 43.

266. *Id.* at 42.

267. *Id.* This statement about the “great principles of liberty” might be a reference to the Lockean Natural Rights Guarantee included in the Preamble to the Declaration of Rights: “That the great and essential principles of liberty and free government may be recognized and established, we declare” CONN. CONST. of 1818, art. I, pmbl.

268. *Jackson*, 12 Conn. at 52.

owners rather than on the rights of slaves.²⁶⁹ The Kentucky Lockean Natural Rights Guarantee did not follow the typical form. It did not include an equality guarantee or any references to inalienable, natural, or inherent rights. The 1799 version of Kentucky's Lockean Natural Rights Guarantee merely "secure[d] to all the citizens thereof the enjoyment of the right of life, liberty, and property, and of pursuing happiness."²⁷⁰ The Kentucky Guarantee was amended prior to 1868,²⁷¹ but the opinion discussed below was issued when the 1799 version of the Lockean Natural Rights Guarantee was in effect.

In 1828, in *Jarman v. Patterson*,²⁷² the Kentucky Court of Appeals found that a statute allowing the taking of slaves "going at large" in the town of Richmond was constitutional as a regulation of property.²⁷³ From context, it appears that "going at large" referred to a slave outside the presence of and beyond the obvious control of the owner.²⁷⁴ The Kentucky Court of Appeals dismissed any possible claim by the slave to freedom by saying that "there are no rights secured to slaves [in Kentucky] by the constitution, except the right of trial by a petit jury in charges of felony."²⁷⁵ The opinion expressed concern over potential infringement of a slave owner's "security of the enjoyment of life, liberty and property,"²⁷⁶ and it did not address the issue of whether slaves are born free. However, the Kentucky Court of Appeals did conclude that the regulation in question was within "the discretion of the legislature, in controlling property [including slaves] for public purposes, and to avoid public injuries."²⁷⁷ Thus, the Kentucky Court of Appeals found the regulation to be a permissible regulation of private property.²⁷⁸

The Virginia and New Jersey state supreme courts both held that their state constitutions' Lockean Natural Rights Guarantees did not abolish

269. The Kentucky Court of Appeals issued a second decision on slavery in the 1836 case *In re Bodine's Will*, 34 Ky. (4 Dana) 476 (1836). The court reviewed the slave Jenny's right to appear as a person in probate court to challenge the execution of a will emancipating her. *Id.* at 476–77. The court ruled that although slaves are legally considered property until emancipation, they are also "human being[s]," and the court "recognizes their personal existence, and, to a qualified extent, their natural rights." *Id.* at 477. Thus, in this situation, Jenny had the legal capacity to sue in probate court regarding her argued emancipation under the will in question. *Id.* Although the court did not explicitly cite the Lockean Natural Rights Guarantee, these references to natural rights suggest that it may be referring to the Guarantee at least in part.

270. KY. CONST. of 1799, pmbl.

271. The 1850 constitution seemed to guard against any abolitionist interpretations by including a second provision: "The right of property is before and higher than any constitutional sanction; and the right of the owner of a slave to such slave, and its increase, is the same, and as inviolable as the right of the owner of any property whatever." KY. CONST. of 1850, art. XIII, § 3.

272. 23 Ky. (7 T.B. Mon.) 644 (1828).

273. *Id.* at 645.

274. *Id.* at 644–45.

275. *Id.* at 645.

276. *Id.* at 646.

277. *Id.*

278. *Id.*

slavery. Unlike the Connecticut constitution's vague equality guarantee or Kentucky's atypical version of the Lockean Natural Rights Guarantee language, both the state constitutions of Virginia and of New Jersey included standard form Lockean Natural Rights Guarantee language with a statement that all men are born equal or equally free, a guarantee of inherent or inalienable rights, and a list of rights, including life, liberty, and property.²⁷⁹

The Virginia Supreme Court of Appeals first addressed the issue in its 1806 opinion in the case of *Hudgins v. Wright*.²⁸⁰ In this case, the appellees argued for their freedom, claiming that the family was of Native American descent and therefore could not be held in slavery.²⁸¹ Judge George Wythe in the Richmond District Court of Chancery ruled in their favor.²⁸² Although the full opinion is not available, references to it indicate that Wythe ruled, in part, based on the Virginia constitution's Lockean Natural Rights Guarantee.²⁸³ However, the Virginia Supreme Court of Appeals rejected this argument on appeal:

I do not concur with the chancellor in his reasoning on the operation of the first clause of the [Lockean Natural Rights Guarantee], which was notoriously framed with a cautious eye to this subject, and was meant to embrace the case of free citizens, or aliens only; and not by a side wind to overturn the rights of property, and give freedom to those very people whom we have been compelled from imperious circumstances to retain, generally, in the same state of bondage that they were in at the revolution, in which they had no *concern, agency or interest*.²⁸⁴

279. The Virginia Guarantee stated:

That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

VA. BILL OF RIGHTS of 1864, § 1. This language remained unchanged from the 1776 constitution.

VA. BILL OF RIGHTS of 1776, § 1.

The New Jersey Guarantee used similar language: "All men are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. CONST. of 1844, art. 1, § 1. The New Jersey Guarantee was added to the state constitution during the convention preceding the 1844 constitution. *Compare* N.J. CONST. of 1776 (lacking any Guarantee language), *with* N.J. CONST. of 1844, art. 1, § 1 (containing the Guarantee language).

280. 11 Va. (1 Hen. & M.) 134 (1806).

281. *Id.* at 134.

282. *Id.*

283. *Id.* at 134, 141; *see also* COVER, *supra* note 172, at 50–55 (discussing the historical context of *Hudgins* and speculating on the motives of Judge Wythe and the Virginia Supreme Court of Appeals).

284. *Hudgins*, 11 Va. (1 Hen. & M.) at 141.

The opinion did not specifically refer to the Lockean Natural Rights Guarantee's legislative history wherein the text was specifically rewritten to try to make it consistent with the legality of slavery,²⁸⁵ but it did say that the Lockean Natural Rights Guarantee "was notoriously framed with a cautious eye to this subject,"²⁸⁶ which may indicate that the court was aware of the history of the adoption of Virginia's Lockean Natural Rights Guarantee, which had happened only about thirty years prior to the publication of the court's opinion. Although the Virginia court rejected a Lockean Natural Rights Guarantee argument against the constitutionality of slavery on the facts of this case, it did in the end affirm the freedom of the particular family whose freedom was in question on the grounds that the physical appearance of the family in question indicated that they were in fact Native Americans and not African-Americans.²⁸⁷

In the 1833 case *Betty v. Horton*,²⁸⁸ the Virginia Supreme Court of Appeals addressed the question of the legal status of slaves brought into Virginia following the adoption of a 1792 statute prohibiting the future importation of slaves into Virginia.²⁸⁹ The Supreme Court of Appeals refused to rely on the Massachusetts opinion construing that state constitution's Natural Rights Guarantee.²⁹⁰ As the concurring opinion explained:

[The Massachusetts Lockean Natural Rights Guarantee], it would seem, is the only provision in the laws or constitution of that state, upon this interesting subject. Looking to the actual state of that commonwealth, and knowing, as we all know, that its slaves were few in number, at the time of the adoption of its constitution, we should be disposed to take this declaration less as an abstraction, than we must regard that which is contained in our own bill of rights.²⁹¹

So, instead of basing its decision in this case on Lockean Natural Rights Guarantee language, the court instead relied on the Virginia statute prohibiting importation of slaves to find that the slave in this case was a free man.²⁹²

The New Jersey Supreme Court of Judicature construed the New Jersey Lockean Natural Rights Guarantee in an 1845 case, *State v. Post*,²⁹³ decided

285. See *supra* subpart II(A).

286. *Hudgins*, 11 Va. (1 Hen. & M.) at 141.

287. *Id.* at 144.

288. 32 Va. (5 Leigh) 615 (1833).

289. *Id.* at 615–16.

290. *Id.* at 621–22; *id.* at 622–23 (Tucker, J., concurring).

291. *Id.* at 622 (Tucker, J., concurring). Two judges also noted that they did not have the full reports of the applicable Massachusetts decisions. *Id.* at 621–22 (majority opinion); *id.* at 623 (Tucker, J., concurring). "But without their reports here, we should, perhaps, venture too far to rest our decision upon the *Massachusetts* constitution." *Id.* at 623 (Tucker, J., concurring).

292. *Id.* at 621 (majority opinion).

293. 20 N.J.L. 368 (1845).

only a year after a Lockean Natural Rights Guarantee was added to the New Jersey constitution.²⁹⁴ In *State v. Post*, the New Jersey Supreme Court of Judicature confronted the question of “whether the constitution, adopted in 1844, abolished slavery in New Jersey.”²⁹⁵ In deciding this question, two separate opinions considered and rejected a Lockean Natural Rights Guarantee argument that the 1844 New Jersey constitution abolished slavery broadly. The first opinion described the Guarantee as an “abstract proposition, the precise meaning and extent of which it is somewhat difficult clearly to comprehend.”²⁹⁶ According to Judge James Nevius, the use of the words “free and independent” in the New Jersey Lockean Natural Rights Guarantee could not be interpreted to mean completely free and independent because all societies are constrained by their governments and civil societies.²⁹⁷ The judge therefore stated that the New Jersey Lockean Natural Rights Guarantee had to be interpreted in the context of the “condition and laws of the society.”²⁹⁸ Thus, he explained:

Had the convention intended to abolish slavery and domestic relations, well known to exist in this state and to be established by law, and to divest the master of his right of property in his slave and the slave of his right to protection and support from the master, no one can doubt but that it would have adopted some clear and definite provision to effect it, and not have left so important and grave a question, involving such extensive consequences, to depend upon the doubtful construction of an indefinite abstract political proposition.²⁹⁹

The opinion also compared New Jersey’s Lockean Natural Rights Guarantee to the Declaration of Independence.³⁰⁰ It noted that even though the Declaration of Independence uses sweeping language similar to the New Jersey Lockean Natural Rights Guarantee, the New Jersey constitution itself recognizes that slavery exists, and multiple state and federal courts had upheld slavery at the time this particular case arose in New Jersey.³⁰¹ Judge Nevius concluded by looking to other state interpretations of Lockean Natural Rights Guarantee language, and he pointed out that several states, including Virginia, had concluded that their Lockean Natural Rights Guarantees did not prohibit slavery.³⁰²

A second opinion in this case by Judge Joseph Randolph relied on a slightly different argument and emphasized the position of the New Jersey Lockean Natural Rights Guarantee within the New Jersey Bill of Rights:

294. *Id.* at 368–69.

295. *Id.* at 368.

296. *Id.* at 372 (opinion of Nevius, J.).

297. *Id.* at 374.

298. *Id.*

299. *Id.* at 375.

300. *Id.* at 375–76.

301. *Id.*

302. *Id.* at 377–78.

In coming to a just understanding of this clause, its position must first be considered. It is not necessarily a portion of the constitution, properly so called; but merely the first section of the bill of rights, or preamble to that instrument. . . .

Yet strictly speaking, it is but a preamble, setting forth the reasons or the principles on which the following instrument is based; though in some instances, as in the clause respecting imprisonment for debt, which was an amendment to the original report, assuming a mandatory character. The first clause, however, which is that now under consideration, as well as the clause following, have no such feature; they seem to make a kind of preface of general abstract principles for the whole; and so far as political action is concerned, the constitution would have been perfect without them. They intend generally to assert the principles on which men, in a state of nature enter into civil government; and in that sense, all men are considered free and independent to act, and to have certain valuable rights, which, by way of superlative, are styled “unalienable;” not that they cannot really be transferred, because when men enter into a state of society, they give up a portion of their rights to secure the remainder, and the aggregate rights and powers of society are only composed of the rights and powers of its individual members, or rather of such of them as are surrendered. The same idea is more clearly expressed in the bill of rights of the State of Connecticut, which says, “all men, when they form a social compact, are equal in rights.” It certainly never could have been intended otherwise, either by the framers or the adopters of the instrument, both of whom I consider may be consulted for its meaning, whenever light may be thrown by them on the doubtful or obscure passage.³⁰³

Judge Randolph also emphasized the legislative history of the convention, attributing meaning to the choice by the State of New Jersey to say only that men are “by nature free” rather than saying that they are “born equally free”:

This clause, as originally reported, stood thus: “all men are born *equally free* and independent,” . . . ; the words, “born equally,” were stricken out and those “by nature” inserted; showing that the convention intended, that the clause should be understood, not as if it read, that, at that time, all men were born free or equally free; but merely that by or in a state of nature, they had its freedom and independence; and whilst that state continued, their rights were unalienable. A member of the convention, who conceived a different idea on this subject, while the clause was under consideration, proposed the following amendment, “on entering into society, men give up none of their rights, they only adopt new modes by which they are better secured.” This however was rejected by ayes 4, nays 39

303. *Id.* at 379–80 (opinion of Randolph, J.).

A contrary understanding of this passage, from that now maintained, would lead to strange conclusions. All men, that is men of every description, young or old, male or female, whether in a state of nature or society, are not only free, but entirely independent of each other, and all others; consequently the bonds that bind together, not only the master and servant, but the other domestic relations of parent and child, guardian and ward, husband and wife, are all snapped asunder, and each atom of human existence, the moment it is *freed*, by the impulse of life, becomes independent, and possessed of rights, that cannot be aliened under any circumstance, even for its own preservation; and whatever be his follies or his crimes, neither his life nor his liberty, can be impaired; for society can derive no rights from citizens, who have not the capacity of parting with them. This certainly would be carrying out first principles in a way, that the people of New Jersey never contemplated. They considered (and with them the convention, and, as I believe, the constitution itself agreed) that at the adoption of the constitution, things were to be taken as they then existed, without doing violence to public feeling; and that the very utmost force that could be given to the clause in question, was that of a mere guide to future, and not a restriction to past legislation.³⁰⁴

Finally, Judge Randolph considered Lockean Natural Rights Guarantee case law from other states, and he cited the Virginia state court decision discussed above as support for his position while distinguishing the Vermont and Massachusetts Lockean Natural Rights Guarantee case law.³⁰⁵ He noted that the Vermont Lockean Natural Rights Guarantee explicitly abolished slavery following its statement of the equality guarantee and that the Massachusetts Lockean Natural Rights Guarantee said that all men were “born” free rather than that they were “by nature” free.³⁰⁶ Therefore, the New Jersey court in this case rejected the plaintiff’s petition and ordered that he remain in slavery.³⁰⁷

This body of case law illustrates the vital impact that the Lockean Natural Rights Guarantee equality language had in the states on the question of the constitutionality under state law of slavery. The Vermont constitution’s equality language required that slavery be abolished, and the Massachusetts Supreme Judicial Court relied solely on its state constitution’s Lockean Natural Rights Guarantee equality language to reach the same conclusion. Over a period of decades, the states of Indiana, Illinois, and Ohio applied their Lockean Natural Rights Guarantees, alongside specific antislavery provisions, to reject comity considerations and to reach antislavery outcomes.

304. *Id.* at 380–81 (citations omitted).

305. *Id.* at 381–83.

306. *Id.* at 381–82.

307. *Id.* at 377–78 (opinion of Nevius, J.).

In *Justice Accused*, Professor Robert Cover cited case law from Massachusetts, Virginia, and New Jersey to conclude that state courts interpreted the Lockean Natural Rights Guarantees (which he termed “free and equal clause[s]”) in accordance with the “purposes and motives associated with the men who wrote [the Lockean Natural Rights Guarantees].”³⁰⁸ Our research has shown that the Lockean Natural Rights Guarantees had a far greater impact on the slavery debate in many more states than Professor Cover recognized. Moreover, the shift in Illinois’s interpretation of its Lockean Natural Rights Guarantee with respect to fugitive slave laws and the strong dissent in Ohio with respect to the federal Fugitive Slave Act may cast new light on Professor Cover’s conclusion that state court judges simply interpreted the Lockean Natural Rights Guarantees to reflect the intent of their authors and prevailing popular sentiment.

On the other hand, some state courts in Connecticut, Kentucky, Virginia, and New Jersey rejected the antislavery interpretation of the Lockean Natural Rights Guarantees. By focusing on societal conditions and the abstract meaning of the Lockean Natural Rights Guarantees in those states, as well as subtle differences in wording, these state courts reasoned that their Lockean Natural Rights Guarantee language did not apply to slavery. Even so, these cases offer indirect proof of the impact of the Lockean Natural Rights Guarantees. Because the Lockean Natural Rights Guarantees were successfully used to free slaves in other states, this group of state supreme courts appears to have found it necessary to explicitly reject that application in their own states. Despite the differences in outcome, all of these state courts recognized their state Lockean Natural Rights Guarantees and the potential power of the equality guarantee.

IV. Lockean Natural Rights Guarantees and the Right to a Writ of Habeas Corpus

The question of the original understanding of the meaning of a Lockean Natural Rights Guarantee arose in another slavery-related case in the State of Wisconsin in 1854. In this case, the Wisconsin Lockean Natural Rights Guarantee did not directly concern slavery, but the issue of helping fugitive slaves was in the background of a case in which an individual sought a writ of habeas corpus. We describe this case below.

The case involved here was a decision of the Wisconsin Supreme Court in 1854 called *In re Booth*.³⁰⁹ The Wisconsin Supreme Court in this case considered the power of state courts to hear habeas claims in situations where a state citizen was held in custody by federal officials, and the Wisconsin Supreme Court held that a state court could review the holding of an

308. COVER, *supra* note 172, at 43–60.

309. 3 Wis. 1 (1854).

individual in *federal* custody in order to protect the liberty of its state citizens.³¹⁰ Importantly, this decision of the Wisconsin Supreme Court was overturned by the United States Supreme Court ruling in *Ableman v. Booth*.³¹¹

In re Booth began on March 10, 1854, when a group of U.S. marshals and a Kentucky slave owner captured Joshua Glover, an escaped slave, in the free State of Wisconsin.³¹² Although the U.S. marshals attempted to keep the news of Glover's capture and imprisonment in federal custody secret, the news quickly spread to abolitionists in the state, including Sherman Booth.³¹³ Booth published a handbill announcing and protesting the arrest and helped to gather a crowd in front of the courthouse to denounce the holding of Joshua Glover in federal custody.³¹⁴ A crowd of people carrying axes and a battering ram then stormed the jailhouse and freed Glover from the custody of the U.S. marshals, and Glover promptly escaped to freedom in Canada where he was beyond the reach of the fugitive slave laws.³¹⁵ Booth, a citizen of Wisconsin, was then arrested by federal officials and was charged for violating the 1850 Fugitive Slave Act enacted by the federal government.³¹⁶ Booth then sued in the Wisconsin state courts asking for a writ of habeas corpus from the state courts freeing him from federal custody.³¹⁷ Booth's suit in the Wisconsin state courts for release on habeas corpus subsequently led to the Wisconsin state supreme court's opinion in *In re Booth*.³¹⁸

In three separate opinions, the Wisconsin Supreme Court affirmed its authority to release Wisconsin citizens illegally imprisoned by federal officials under the federal Fugitive Slave Act in accordance with the habeas jurisdiction of the Wisconsin state courts.³¹⁹ Two Wisconsin Supreme Court opinions referred to Wisconsin's obligation to enforce the right to "liberty" of Wisconsin state citizens.³²⁰ It is not clear from which text the Wisconsin State Supreme Court derived this right of liberty, but it may very well have been from the Wisconsin State Constitution's Lockean Natural Rights

310. *Id.* at 7–10.

311. 62 U.S. (21 How.) 506, 526 (1858).

312. Jeffrey Schmitt, Note, *Rethinking Ableman v. Booth and States' Rights in Wisconsin*, 93 VA. L. REV. 1315, 1323 (2007).

313. *Id.*

314. *Id.* at 1323–24.

315. *Id.* at 1324–25.

316. *Id.* at 1328.

317. *Id.* at 1329–30.

318. *Id.*

319. *In re Booth*, 3 Wis. 157, 175–78 (1854) (opinion of Whiton, C.J.); *id.* at 189 (opinion of Crawford, J.); *id.* at 217–18 (opinion of Smith, J.).

320. *Id.* at 176 (opinion of Whiton, C.J.); *id.* at 191–92 (opinion of Smith, J.). The third opinion by Judge Crawford relied on the argument that the federal court did not have jurisdiction over the alleged crimes because they were crimes against the state. *Id.* at 178–80, 189 (opinion of Crawford, J.).

Guarantee, which explicitly stated: “All men are born equally free and independent, and have certain inherent rights, among these are life, liberty, and the pursuit of happiness”³²¹

The first state supreme court opinion was written by Chief Judge Edward Whiton, who argued that the power of state courts to review the legality of the federal government’s imprisonment of state citizens was necessary if the state courts were to be able to fulfill their duty of safeguarding liberty.³²² Chief Judge Whiton said that:

It will not be denied that the supreme court of a state, in which is vested by the constitution of the state, the power to issue writs of *habeas corpus*, and to decide the questions which they present, has the power to release a citizen of the state from illegal imprisonment. Without this power, the state would be stripped of one of the most essential attributes of sovereignty, and would present the spectacle of a state claiming the allegiance of its citizens, without the power to protect them in the enjoyment of their personal liberty upon its own soil.³²³

In a separate opinion, Judge Abram Smith explicitly stated that he was relying on the Wisconsin state constitution for his authority, and he argued that the duty to protect liberty was “inherent” in state sovereignty³²⁴:

The states never yielded to the federal government the guardianship of the liberties of their people. In a few carefully specified instances they delegated to that government the power to punish, and so far, and so far only, withdrew their protection. In all else they reserved the power to prescribe the rules of civil conduct, and continued upon themselves the duty and obligation to protect and secure the rights of their citizens declared to be inalienable, viz: “Life, liberty and the pursuit of happiness.”³²⁵

It is not clear what state constitutional text is being referred to in Judge Smith’s quotation of the phrase “life, liberty and the pursuit of happiness” because that language appears in both the Wisconsin Lockean Natural Rights Guarantee as well as in the U.S. Declaration of Independence. But because Judge Smith said that he was relying on the Wisconsin state constitution, it is very likely that the Wisconsin Lockean Natural Rights Guarantee is the source of the quotation. Regardless, the opinion repeatedly emphasizes the importance of the state courts as guardians of liberty: “As the state judiciary is the power to which the guardianship of individual liberty is intrusted, it follows that it must have the right to inquire into such conformity,

321. WIS. CONST. art. I, § 1 (amended 1982 & 1986).

322. *Booth*, 3 Wis. at 176 (opinion of Whiton, C.J.).

323. *Id.*

324. *Id.* at 193–94 (opinion of Smith, J.).

325. *Id.* at 204–05.

unrestricted by, and independent of, the power which demands his imprisonment.³²⁶ Therefore, the Wisconsin Supreme Court ordered that Booth be released under Wisconsin's claimed power to review the legality of the holding of Booth in federal custody on a state writ of habeas corpus directed to the federal officials who had imprisoned Booth.³²⁷

On appeal, however, the U.S. Supreme Court reversed the Wisconsin Supreme Court in *Abelman v. Booth*.³²⁸ In an opinion authored by Chief Justice Roger Taney, a notorious defender of slavery in all contexts,³²⁹ the U.S. Supreme Court disavowed the power of state courts to issue writs of habeas corpus against federal officials who had imprisoned state citizens.³³⁰ Chief Justice Taney argued that there would be chaos in the Union if every state could, in effect, determine the outcome of federal cases occurring within its borders by issuing state writs of habeas corpus to those held in federal imprisonment.³³¹ The U.S. Supreme Court did not refer to the Wisconsin state constitution's Lockean Natural Rights Guarantee justification, but it denied that the Wisconsin state courts could free individuals in federal custody on a state writ of habeas corpus:

[N]o State can authorize one of its judges or courts to exercise judicial power, by *habeas corpus* or otherwise, within the jurisdiction of another and independent Government. And although the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States.³³²

Citing the Supremacy Clause, the opinion continued its explanation of the supremacy of the United States Constitution over state constitutions, and it emphatically concluded that the Wisconsin state court did not have authority to free federal prisoners from federal custody in this state case.³³³ A few decades later, the supremacy of federal jurisdiction was reaffirmed in *Tarble's Case*,³³⁴ which again held that state courts did not have the authority to free federal prisoners from federal custody by issuing state court habeas corpus rulings.³³⁵

In sum, the Wisconsin Supreme Court sought in its *In re Booth* opinion to assert the power to free Booth, who had helped a fugitive slave escape from federal custody, from being himself federally imprisoned on the

326. *Id.* at 205.

327. *Id.* at 189 (opinion of Crawford, J.).

328. 62 U.S. (21 How.) 506, 526 (1859).

329. For example, Chief Justice Taney wrote the majority opinion in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

330. *Abelman*, 62 U.S. (21 How.) at 515–16.

331. *Id.* at 514–15.

332. *Id.* at 515–16.

333. *Id.* at 517–19, 523–24.

334. 80 U.S. (13 Wall.) 397 (1871).

335. *Id.* at 403–04, 411–12.

grounds that the Wisconsin state constitution required it to protect liberty. Although the opinions do not state whether or not the court derived this duty from the Wisconsin state constitution's Lockean Natural Rights Guarantee, the court did explicitly rely on state constitutional guarantees of liberty, which are consistent with reliance on the Wisconsin state constitution's Lockean Natural Rights Guarantee.

V. Lockean Natural Rights Guarantees and Minority Rights

In another striking line of cases, the Maine Supreme Judicial Court used Maine's Lockean Natural Rights Guarantee, which appeared in the state constitution, to extend additional rights to minority groups, including the right to enter contracts, the right to citizenship, and the right to vote. Maine's Lockean Natural Rights Guarantee followed the typical form with all three parts, including an "all men are born equally free" clause; a granting of natural, inherent, and inalienable rights; and a listing of those rights including life, liberty, property, safety, and happiness.³³⁶ Of particular interest, two cases issued on the same day in 1857 paint a picture of an outraged Maine Supreme Court aggressively fighting the *Dred Scott*³³⁷ decision and using its state constitution's Lockean Natural Rights Guarantee to expand minority rights.

In 1842, the Maine Supreme Judicial Court issued a decision in *Murch v. Tomer*,³³⁸ applying its Lockean Natural Rights Guarantee in the Maine constitution to protect the rights of Native Americans to participate in the making of contracts.³³⁹ Peol Tomer, a member of the Penobscot Indian tribe, argued that he was not liable for a contract because as a Native American he could not legally enter into a contract in the first place.³⁴⁰ The court acknowledged that Maine did have limits on the right of Native Americans to enter into contracts, including by providing for some legal limitations such as the appointing of state agents to care for and manage Indian lands.³⁴¹ The court noted that in other states, like Massachusetts, contracts with Native Americans were invalid.³⁴² However, the Maine Supreme Judicial Court reached a different result after relying on Maine's Lockean Natural Rights Guarantee, which said that all persons within the State of Maine are equal and that all persons are guaranteed the right to acquire, possess, and protect

336. ME. CONST. art. 1, § 1 (amended 1987).

337. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

338. 21 Me. 535 (1842).

339. *Id.* at 538.

340. *Id.* at 535.

341. *Id.* at 536–37.

342. *Id.* at 537.

property.³⁴³ Specifically, quoting the Lockean Natural Rights Guarantee, the Supreme Judicial Court of Maine said that:

[The Native Americans living in Maine] are, however, human beings, born and residing within our borders. . . . Our constitution, moreover, says that “all men are born equally free and independent; and have certain natural, inherent and unalienable rights; among which is, that of acquiring, possessing, and protecting property.” Why, then, should the condition of an Indian differ from that of other individuals born and reared upon our own soil?³⁴⁴

Thus, the Supreme Judicial Court of Maine held that the state’s Lockean Natural Rights Guarantee provided Native Americans the right to participate in contracts, and it therefore held that Tomer was liable for the contract in question.³⁴⁵

The Maine Supreme Judicial Court returned to the issue of minority rights in 1857, issuing two remarkable opinions on the same day, finding African-Americans to be citizens of Maine and holding that they had the right to vote.³⁴⁶ First, in *Opinion of the Supreme Judicial Court*,³⁴⁷ the Supreme Judicial Court of Maine responded to an interrogatory from the senate asking whether “‘free colored persons, of African descent, having a residence established in some town in this state’ . . . are men, women, children, paupers, persons under guardianship, or unnaturalized foreigners.”³⁴⁸ The Supreme Judicial Court of Maine began its opinion by focusing on the state constitution’s use of the term “citizens of the United States,” thus equating Maine citizenship with citizenship in the United States, assuming residency requirements.³⁴⁹ It cited other judicial decisions, such as *Dred Scott v. Sandford*, that had found that African-American residents were not citizens of the United States, but the Supreme Judicial Court of Maine said that those decisions “do not, however, affect the question now before us.”³⁵⁰

The Supreme Judicial Court of Maine then looked to history and found that free African-Americans were considered to be citizens at the time the Maine constitution was adopted.³⁵¹ As evidence, it cited the original state

343. *Id.*

344. *Id.*

345. *Id.* at 538.

346. A third opinion issued on this day suggested that African-Americans had the right to run for public office, but it did not explicitly rely on the constitution’s Lockean Natural Rights Guarantee in its reasoning. See *Opinion of Judge Davis*, 44 Me. 576, 595 (1857). In response to a senate interrogatory, the court relied on its earlier findings that African-Americans were citizens of the United States and of the State of Maine but did not explicitly invoke the Lockean Natural Rights Guarantee again. *Id.*

347. 44 Me. 507 (1857).

348. *Id.* at 507.

349. *Id.*

350. *Id.* at 508.

351. *Id.* at 515–16.

constitutions from New York, New Jersey, North Carolina, and Massachusetts, which did not constrain African-American civil rights.³⁵² As further evidence, the Supreme Judicial Court of Maine cited records from an 1820 Maine state constitutional convention in which a proposal was rejected to include “Negroes” along with Indians as persons not taxed.³⁵³ The court reprinted a statement by a delegate to the 1820 constitutional convention, Holmes, who referred to the State of Maine’s Lockean Natural Rights Guarantee saying that

I know of no difference between the rights of the negro and the white man; God Almighty has made none—our declaration of rights has made none. That declares that “all men” (without regard to colors) “are born equally free and independent.”³⁵⁴

The court concluded that “we are of the opinion that our constitution does not discriminate between the different races of people which constitute the inhabitants of our state.”³⁵⁵ Although the Maine Supreme Judicial Court said that its analysis was not affected by the *Dred Scott* decision, its holding suggests that the Maine Supreme Judicial Court viewed the State of Maine’s Lockean Natural Rights Guarantee as being more expansive than federal guarantees of civil rights.

On the same date in 1857, Judge John Appleton announced a second opinion of the Supreme Judicial Court of Maine, *Opinion of Judge Appleton*,³⁵⁶ which left little doubt as to the Maine Supreme Judicial Court’s view of the *Dred Scott* decision. *Opinion of Judge Appleton* answered a senate interrogatory presenting the issue of whether African-Americans had the right to vote in Maine.³⁵⁷ The opinion began by proclaiming that

[t]he constitution of Maine recognizes as its fundamental idea, the great principle upon which all popular governments rest—the *equality of all before the law*. It confers citizenship and entire equality of civil and political rights upon all its native born population.³⁵⁸

Before proceeding, the Supreme Judicial Court of Maine noted that this opinion raised the fundamental question of “whether a sovereign state is restricted by the constitution of the United States as to those of its native born population upon whom it may confer the right of citizenship.”³⁵⁹

As in the previous opinion of the Supreme Judicial Court of Maine, the court in this case relied heavily on historical evidence. It cited the original

352. *Id.* at 510–14.

353. *Id.* at 515.

354. *Id.* (internal quotation marks omitted).

355. *Id.*

356. 44 Me. 521 (1857).

357. *Id.* at 521–22.

358. *Id.* at 522.

359. *Id.*

state constitution, the Declaration of Independence's guarantee of freedom, and various state court decisions that recognized freedom at birth of inhabitants without regard to ancestry.³⁶⁰ The Supreme Judicial Court of Maine concluded that "colored freemen were regarded as citizens, and [were] entitled to the right of suffrage, in most of the states, during the whole period of the revolution."³⁶¹ In one brief paragraph, the Supreme Judicial Court of Maine also cited language from Maine's Lockean Natural Rights Guarantee, finding that "[t]he right[s] of personal security, personal liberty, and to acquire and enjoy property, are natural and inherent."³⁶²

The opinion devoted most of its arguments to a direct attack on the correctness of the U.S. Supreme Court's *Dred Scott* decision. Reciting the federal Constitution's Preamble, which asserts the sovereignty of "we the people of the United States," and reiterating that the phrase "we the people" at the time of the Constitution's adoption included people of all races, the Maine Supreme Judicial Court delivered this criticism of the U.S. Supreme Court's *Dred Scott* decision:

As the free blacks were in some of the states citizens, and entitled to vote, by what rules of construction can any portion of the "people" (which certainly must include all who were legally competent to act on the question of its acceptance or rejection,) be deprived of previously existing rights? What language can be found indicating the purpose of forming a new and hybrid class unknown to any system of law—neither citizens, aliens nor slaves—a class owing allegiance to the state and bound to obey its laws, and yet without their protection, "having rights which no white man was bound to respect." No express words can be found, showing an intention of thus dividing the free native born inhabitants into classes, and of conferring all rights upon one portion, and of depriving the other of those previously belonging to them. No words can be found from which by any construction, however forced, any such implication can arise.³⁶³

Continuing its criticism of *Dred Scott*, the Maine Supreme Judicial Court said that Chief Justice Taney's conclusion in *Dred Scott* that Congress has exclusive control over citizenship was incorrect as a matter of history and constitutional interpretation and would lead to "absurd" results.³⁶⁴ The court reiterated that there was no support for Chief Justice Taney's conclusion that free African-Americans were not citizens: "The framers of the constitution made no such article. The people adopted no such article. Interpolation is no judicial duty."³⁶⁵ Thus, in a free-ranging discussion, the Maine Supreme

360. *Id.* at 521–25, 528.

361. *Id.* at 538.

362. *Id.* at 522.

363. *Id.* at 545.

364. *Id.* at 569–71.

365. *Id.* at 557.

Judicial Court asserted that free African-Americans throughout the country should be considered to be citizens with the right to vote.³⁶⁶

Going even farther, the Maine Supreme Judicial Court concluded that the *Dred Scott* opinion was not “obligatory” on state courts.³⁶⁷ It then lauded the *Dred Scott* dissenters and included a thinly veiled criticism of the Taney opinion, saying that the dissenting Justices showed “a fullness of learning and a cogency of argumentation rarely equaled[,] . . . demonstrat[ing the] right to citizenship [of free African-Americans] in the land of their birth.”³⁶⁸ Judge Appleton concluded by finding that free African-Americans were guaranteed citizenship under the Maine constitution, and thus according to the Privileges and Immunities Clause of Article IV, Section Two of the U.S. Constitution, must be considered as being citizens under the federal Constitution with the right to vote.³⁶⁹

Finally, in another case in another state, the Supreme Court of Ohio addressed the relationship of a Natural Rights Guarantee in the Ohio state constitution to minority rights in the case of *Woodson v. State ex rel. Borland*.³⁷⁰ In *Woodson*, the plaintiff had called two witnesses on his behalf, but they were disqualified from testifying after visual “inspection” by the court because the court said they were mulattos and were thus not allowed to testify in court because of their race.³⁷¹ In response, the plaintiff challenged an Ohio state law that prohibited testimony in the Ohio state courts by African-Americans or mulattos, arguing that it violated the State of Ohio’s Lockean Natural Rights Guarantee.³⁷² In the plaintiff’s words:

We ask the attention of the court to the first section of the bill of rights, which constitutes the eighth article, “All men have certain natural, inherent, and inalienable rights, [. . .] amongst which are the enjoying and defending life and liberty, acquiring possession of and protecting property, and pursuing and obtaining happiness and safety.” How can these rights be enjoyed, or exercised, if the legislature may at pleasure deprive any man or every man of the testimony necessary to defend his life, or liberty, or property—testimony unimpeached, of crime, incapacity, or interest?³⁷³

Unfortunately, in a brief opinion, the Supreme Court of Ohio did not address this argument and dismissed the case on jurisdictional grounds.³⁷⁴ The plaintiff was correct, however, in our opinion, in arguing for the

366. *Id.* at 575–76.

367. *Id.* at 559.

368. *Id.*

369. *Id.* at 575–76.

370. 17 Ohio 161 (1848).

371. *Id.* at 163.

372. *Id.* at 168.

373. *Id.*

374. *Id.* at 169.

unconstitutionality of this Ohio law under that state's Lockean Natural Rights Guarantee.

The Supreme Judicial Court of Maine's application of Lockean Natural Rights Guarantee language to race discrimination issues does show that Lockean Natural Rights Guarantees were, at least in some cases, the source of substantive rights for minorities. The Maine Supreme Judicial Court extended the application of Maine's Lockean Natural Rights Guarantee well beyond the question of slavery and construed it to serve as the constitutional basis for contract rights, citizenship, and the right to vote for racial minorities. The Supreme Judicial Court of Maine's reliance on Lockean Natural Rights Guarantee language in the face of a contrary U.S. Supreme Court decision in *Dred Scott* further highlights the role the Guarantees could be said to play in banning race discrimination.

VI. Civil and Political Rights

Fourteen cases further illustrate the breadth of pre-1868 state case law interpreting the Lockean Natural Rights Guarantees.³⁷⁵ These cases address a wide variety of topics, including: (1) freedom of religion; (2) the right of marriage; (3) the involuntary confinement and transportation of the poor; (4) retroactive legislation; (5) the constitutionality of statutes imposing or exempting tort liability; and (6) miscellaneous other civil and political rights. Advocates and courts in a number of states relied on the Lockean Natural Rights Guarantee language in state constitutions as providing substantive grounding for an extensive range of civil and political rights. It is clear that the sweeping language of the state constitutional Lockean Natural Rights Guarantees lent itself to creative application by litigants to many individual rights issues with varying degrees of success.

A. *Freedom of Religion*

Three cases reported by the Maine, Massachusetts, and New Hampshire state supreme courts related to Lockean Natural Rights Guarantees and the freedom of religion. Although undoubtedly additional cases regarding religion were argued and adjudicated on the basis of freedom of religion clauses, these cases are unique in that the Lockean Natural Rights Guarantees were explicitly discussed in each decision alongside the applicable freedom of religion provisions. The inclusion of the Lockean Natural Rights Guarantee discussion indicates that even though the freedom of religion clauses were more obviously applicable to freedom of religion issues, the courts recognized that the Lockean Natural Rights Guarantees could also be relevant in preserving the basic liberty or inalienable rights that formed the foundation of the state constitutions. In each case, the opinions recognized

375. Nine additional cases invoked the language of the Guarantees, referring to liberty or natural or unalienable rights, but did not explicitly cite the Guarantees. See *infra* notes 481–83 and accompanying text.

the importance of the state Lockean Natural Rights Guarantee and its relevance to the freedom of religion issue in question, but the courts ultimately ruled against the plaintiff. Although the decisions did not therefore expand religious freedom, their serious consideration and discussion of the relevance to these cases of the Lockean Natural Rights Guarantees demonstrates that these state courts viewed the Guarantees as an important feature of their state constitutions.

In 1826, the Maine Supreme Judicial Court reported the case of *Waite v. Merrill*,³⁷⁶ which addressed freedom of religion in the context of a contract dispute.³⁷⁷ After leaving the Shaker community, the plaintiff sued for compensation for services performed and sought to invalidate a contract that designated all of his property as joint property of the community.³⁷⁸ The contract also stipulated that should any member leave the community, he would not be permitted to make any claims against the community.³⁷⁹

Relying on Maine's Lockean Natural Rights Guarantee, the plaintiff argued that the contract violated his property rights.³⁸⁰ He claimed that by forbidding personal ownership of property, the contract he had signed had violated the Maine Lockean Natural Rights Guarantee's provision for the "right to acquire and possess property."³⁸¹ The defendant responded that the contract was no different from typical public-property arrangements.³⁸² In such a typical public-property arrangement, every citizen of a town is expected to contribute to common property, which the citizen then loses if he moves to a different town.³⁸³ By analogy, defendants argued that in the Shaker community each member must contribute to the community's joint

376. 4 Me. 102 (1826).

377. *Id.* at 116–18.

378. *Id.* at 117.

379. *Id.*

380. *Id.* at 111. The plaintiff made a second argument that the contract violated his liberty of conscience by "enslav[ing] the mind and person." *Id.* at 113. The plaintiff referenced only general principles of liberty, so it is not clear whether this argument was based on Maine's Lockean Natural Rights Guarantee or a more general liberty concept. *Id.* The court rejected this argument and found that the existence of the contract was itself an expression of the liberty right. In the court's words:

It is said the covenant is void because it is in derogation of the inalienable right of liberty of conscience. To this objection the reply is obvious; the very formation and subscription of this covenant is an exercise of the inalienable right of liberty of conscience. . . . We must remember that in this land of liberty, civil and religious, conscience is subject to no human law; its rights are not to be invaded or even questioned, so long as its dictates are obeyed, consistently with the harmony, good order and peace of the community.

Id. at 119–20. Again, the court did not provide a source for its invocation of the "inalienable right of liberty," so it is unknown whether or not it was relying on the Guarantee. *Id.*

381. *Id.* at 111.

382. *Id.* at 114–15.

383. *Id.* at 115.

property, and upon leaving the community, the member loses those contributions.³⁸⁴

The court, correctly in our view, rejected the plaintiff's arguments and ultimately ruled to uphold the contract. It responded directly to the plaintiff's "acquire and possess property" Guarantee argument as follows:

It is said that it is void, because it deprived the plaintiff of the constitutional power of acquiring, possessing and protecting property. The answer to this objection is, that the covenant only changed the mode in which he chose to exercise and enjoy this right or power; he preferred that the avails of his industry should be placed in the common fund or bank of the society, and to derive his maintenance from the daily dividends which he was sure to receive. If this is a valid objection, it certainly furnishes a new argument against banks, and is applicable also to partnerships of one description as well as another.³⁸⁵

As a result, the contract was found to be valid, and the complainant was not allowed to recover any property.³⁸⁶ The Maine Supreme Judicial Court correctly prioritized freedom of religion and conscience, including the freedom to enter into communal property arrangements with a religious community and viewed state interference with such private dealings suspiciously.³⁸⁷

In *Commonwealth v. Kneeland*,³⁸⁸ the Massachusetts Supreme Judicial Court interpreted its Lockean Natural Rights Guarantee in response to a challenge to the state's blasphemy statute.³⁸⁹ Abner Kneeland, an avowed pantheist, published a statement in his newspaper that the Universalists' God was "nothing more than a mere chimera of their own imagination."³⁹⁰ Kneeland defended himself by arguing that the Massachusetts blasphemy statute was unconstitutional.³⁹¹

The majority opinion upheld the statute without addressing the Lockean Natural Rights Guarantee argument, reasoning that the statute was passed soon after the adoption of the Massachusetts constitution and that many other states also had statutes criminalizing blasphemy.³⁹² The dissenting opinion,

384. *Id.*

385. *Id.* at 118.

386. *Id.* at 124.

387. *See id.* at 119–20 (highlighting the primacy of the "inalienable right of liberty of conscience" and the importance of allowing individuals to worship God "according to the dictates of their consciences").

388. 37 Mass. (20 Pick.) 206 (1838).

389. *Id.* at 209–10. The blasphemy statute provided that "the denial of God, his creation, government, or final judging of the world, made willfully, that is, with the intent and purpose to calumniate and disparage him and impair and destroy the reverence due to him, is blasphemy." *Id.* at 206.

390. *Id.* at 207.

391. *Id.* at 208.

392. *Id.* at 217–18.

however, specifically addressed Kneeland's Lockean Natural Rights Guarantee argument but rejected its application to the blasphemy statute:

The first article, the corner stone of the constitution, contains the following political expressions: "All men are born free and equal, and have certain natural, essential, and unalien able [sic] rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property." The rights of *enjoying* liberty and life, of *acquiring* and *possessing* property, are not less valuable or less deserving of constitutional protection than the liberty of the press; nor are they guarded by less strong or explicit language; yet no rational man can suppose that the legislature is restrained from determining, for what *deeds*, *property*, *liberty*, and even *life*, shall be forfeited. It cannot for a moment be doubted that the legislature has the general power, in their wisdom and discretion, to determine what *acts* shall be deemed crimes, and to prescribe for them such punishment as they may judge proper, either by *fine*, by *imprisonment*, or by *the taking of life*.³⁹³

The dissent was not persuaded by the Lockean Natural Rights Guarantee argument, but it did recognize the Lockean Natural Rights Guarantee as the "corner stone" of the state's constitution.³⁹⁴ Although the dissent argued that the statute should be unconstitutional under the constitution's freedom of religion clauses,³⁹⁵ the majority ruled that it was a permissible exercise of power.³⁹⁶

Finally, the New Hampshire Supreme Judicial Court addressed the Lockean Natural Rights Guarantee's relationship to religion in the 1868 case of *Hale v. Everett*.³⁹⁷ This opinion, which is over two hundred pages long, addressed the issue of whether towns could authorize expenditures for non-Protestant religious teachings.³⁹⁸ The town of Dover provided funds and stock to build a Unitarian church, but shortly after its establishment, the pastor allegedly disavowed central Christian teachings and his association with the Unitarian church.³⁹⁹ After the pastor was chosen for a subsequent year, several town wardens took possession of the church arguing that it no longer met the conditions of the town's grant.⁴⁰⁰

Although much of the parties' arguments addressed whether the pastor's beliefs should be considered Unitarian or not, the opinion begins by quoting New Hampshire's Lockean Natural Rights Guarantee: "Among the natural

393. *Id.* at 230 (Morton, J., dissenting).

394. *Id.*

395. *Id.* at 238.

396. *Id.* at 221 (majority opinion).

397. 53 N.H. 9 (1868).

398. *Id.* at 60.

399. *Id.* at 13–15.

400. *Id.* at 15–16.

rights, some are in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the RIGHTS OF CONSCIENCE.”⁴⁰¹ The opinion clarified that these “unalienable rights” received the strongest possible protection:

The framers of the constitution were very careful to state and declare the distinction between mere civil or political rights, although they were “natural, essential, and inherent” rights belonging to “all men” (Art. II) [the Lockean Natural Rights Guarantee], and the “rights of conscience,” which had the additional quality and excellence of being “unalienable.” These merely civil or political rights could be surrendered to the government or to society (Art. III) in order to secure the protection of other rights, but the rights of conscience could not be thus surrendered; nor could society or government have any claim or right to assume to take them away, or to interfere or intermeddle with them, except so far as to protect society against any acts or demonstrations of one sect or persuasion which might tend to disturb the public peace, or affect the rights of others.⁴⁰²

Thus, the Lockean Natural Rights Guarantee was read as according the rights of conscience even more protection than the rights of life, liberty, property, and happiness because the rights of conscience contained the extra qualification of being “unalienable.” However, the majority held that the pastor must preach Christianity in order to fulfill the terms of the land grant and that this requirement did not violate his inalienable rights found in the state constitution’s Lockean Natural Rights Guarantee, but that the requirement was merely a permissible condition attached to the land grant to which the pastor had no inherent legal right.⁴⁰³

B. Right of Marriage

The Lockean Natural Rights Guarantee of the State of Vermont was discussed in the context of an 1829 Vermont Supreme Court case. In that case, the Vermont Supreme Court issued a ruling on the right to marriage that contained a reference to the natural rights guaranteed by the Vermont Guarantee, although it did not cite the Guarantee explicitly. Vermont’s Lockean Natural Rights Guarantee in 1829 was unchanged since its original adoption in 1793. The Vermont constitution’s Lockean Natural Rights Guarantee followed the typical form with three parts, including a statement that “all men . . . have certain natural, inherent, and inalienable rights.”⁴⁰⁴

401. *Id.* at 52.

402. *Id.* at 61.

403. *Id.* at 76–78, 80–81.

404. VT. CONST. ch.1, art. I (amended 1921 & 1991); *see also infra* Appendix A.

In *Overseers of the Poor of the Town of Newbury v. Overseers of the Poor of the Town of Brunswick*,⁴⁰⁵ the Vermont Supreme Court addressed whether or not a marriage conducted in Canada without the proper solemnization was valid.⁴⁰⁶ The case arose when the town of Brunswick ordered the “pauper” Nathaniel Harriman removed from the town.⁴⁰⁷ He claimed to be married to Lydia, and if she were determined to be his wife, the overseers of the poor in Brunswick would be required to support Lydia and her children.⁴⁰⁸ The town argued that they were not married because twenty-two years earlier while in Canada, Nathaniel and Lydia had not followed the proper procedure of having a clergy member solemnize their marriage.⁴⁰⁹ They were informed at the time by the justice of the peace that he could not declare them man and wife without this solemnization.⁴¹⁰ Complicating matters, sometime after their move to Vermont the British Parliament passed a statute retroactively legalizing Canadian marriages without solemnization.⁴¹¹ In sweeping language regarding the right to marry, the Vermont Supreme Court declared that the right

[t]o marry is one of the natural rights of human nature, instituted in a state of innocence for the protection thereof; and was ordained by the great Lawgiver of the universe, and not to be prohibited by man. Yet, human forms and regulations in marriages are necessary for the safety and security of community; but those forms and regulations are to be within the reach of every person wishing to improve them; and if they are not, other forms and customs will be substituted; and such was the case in this instance.⁴¹²

In support of its claim that marriage was a natural right, the court implied that if legal marriage was not available to the community, people would substitute other procedures, which would be undesirable.⁴¹³ It concluded that the key factors for legal marriage were “the declaration of the man or woman, the continued understanding of friends, and cohabitation.”⁴¹⁴ Thus, the Supreme Court of Vermont ruled that the town was required to support Nathaniel Harriman as well as “those who have a matrimonial or natural right to be supported by him.”⁴¹⁵ The Vermont Supreme Court’s

405. 2 Vt. 151 (1829).

406. *Id.* at 158–59.

407. *Id.* at 152.

408. *Id.* at 159.

409. *Id.* at 155.

410. *Id.* at 152.

411. *Id.* at 158–59.

412. *Id.* at 159.

413. *Id.* The Vermont Supreme Court further supported the validity of the marriage in question by citing various historical marriage procedures. Specifically, it referred to procedures preceding Pope Innocent III in which Christian solemnization of marriage did not exist, and marriage ceremonies consisted solely of the man leading the woman to his habitation. *Id.* at 159–60.

414. *Id.* at 160.

415. *Id.* at 160–61.

reasoning that marriage was a “natural right” echoed the natural right guarantee in the state’s Guarantee, but because the court did not cite the Lockean Natural Rights Guarantee for this argument, it is unclear whether it was referring to the Lockean Natural Rights Guarantee or to a more general understanding of natural law or natural rights. Either way, this opinion supports the idea that prior to 1868 inherent, unenumerated rights were sometimes supported by the courts.

C. Involuntary Confinement and Transportation of the Poor

In two cases, state courts addressed the role of the Lockean Natural Rights Guarantees in the involuntary physical confinement or transportation of the poor once they had been committed to the state’s care. In both cases, the plaintiffs argued that the state’s treatment of them violated their rights under their state constitutions’ Lockean Natural Rights Guarantee. First, in *Town of Londonderry v. Town of Acton*,⁴¹⁶ the Vermont Supreme Court ruled on the constitutionality of the practice of removing paupers from a town.⁴¹⁷ Under Vermont statutes at the time, towns were authorized to forcibly remove those who could not support themselves without being public charges.⁴¹⁸ In this case, the town of Londonderry sought to remove Elisha Johnson to his birthplace, Acton.⁴¹⁹ Interestingly, the court relied on the Vermont Lockean Natural Rights Guarantee’s right to property, rather than on its right to liberty, in finding that this removal would be unconstitutional.⁴²⁰ The Court did not find that the statute, in general, was unconstitutional, but it held instead that the specific instance of removing a landowner from his property deprived him of the right to enjoy, acquire, and possess property.⁴²¹ In the words of the Vermont Supreme Court:

This involves the question whether a person owning and residing on his real estate can be the subject of removal. If this can be done, it has been well said that nothing would have a greater tendency to reduce men to pauperism than to remove them from their homes and property, and thus compel them to dispose of that property at any price they could get, and that it would in fact operate as a confiscation of their property. Indeed, it would contravene the first article of our bill of rights [the Lockean Natural Rights Guarantee], which enumerates among the natural, inherent, and unalienable rights, the enjoying, acquiring and possessing property.⁴²²

416. 3 Vt. 122 (1830).

417. *Id.* at 122.

418. *Id.* at 130.

419. *Id.* at 122.

420. *Id.* at 129–30.

421. *Id.* at 130.

422. *Id.* at 129–30.

The court also cited the Magna Carta and historical English cases as support for the protection of landowners to be able to stay on their own land.⁴²³ The statute, as applied to landowners, was thus found to be in violation of Vermont's Lockean Natural Rights Guarantee and was held to be unconstitutional.⁴²⁴

The Supreme Judicial Court of Maine also faced the issue of the removal of impoverished citizens in the *Case of Nott*.⁴²⁵ In contrast to Vermont's removal practices, the Maine statutes authorized towns to commit the poor to workhouses.⁴²⁶ In this case, Adeline Nott addressed a petition of habeas corpus to the master of the workhouse, arguing that his commitment to the workhouse without trial or hearing violated Maine's Lockean Natural Rights Guarantee:

[I]t violates the spirit and genius of the constitution and laws of the land. The constitution declares that "all men are born equally free and independent, and have certain natural inherent and unalienable rights, among which are those of defending life and liberty." But how can it be said that the citizen of this State can enjoy liberty, if at any time he may be committed by two others, to a dungeon, without a hearing, without a trial—without even a *complaint on oath*, and the imprisonment being, as by the law it may be, *for life*.⁴²⁷

In an unsympathetic response, the Supreme Judicial Court of Maine ruled that such committal was constitutional.⁴²⁸ It did not specifically address the Guarantee argument, but reasoned:

The objects of public bounty, must necessarily be more or less subject to the public control. It is not unreasonable that they should be made to contribute to their own support, by some suitable employment. This cannot often be effected, without subjecting them to a degree of coercion and restraint, which would be an invasion of the rights of any citizen, competent to take care of himself.⁴²⁹

The court went on to compare the poor to insane persons who cannot enjoy the rights of citizens.⁴³⁰ Thus, the court seemed to conclude that the Lockean Natural Rights Guarantee protections of the Maine constitution did not apply when the beneficiaries of public aid were committed to a workhouse.

423. *Id.* at 130–32.

424. *Id.* at 132–33.

425. 11 Me. 208 (1834), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

426. *Id.* at 209.

427. *Id.*

428. *Id.* at 210.

429. *Id.*

430. *Id.*

In both of these cases, the impoverished plaintiffs argued that the states' actions violated the Lockean Natural Rights Guarantee protections in their respective state constitution. But only the Vermont Supreme Court granted relief to the plaintiff on the grounds that his involuntary removal from the town violated his property rights, while the Maine Supreme Judicial Court rejected the liberty argument against committing the plaintiff to a workhouse.⁴³¹ The contrast between these cases may suggest that the state courts enforced the Lockean Natural Rights Guarantee's property rights protections more seriously than the liberty guarantee in protecting the poor.

D. *Retroactive Legislation*

Two opinions from the Maine Supreme Judicial Court illustrate its interpretation of the Guarantee as a ban on retroactive legislation or on legislation granting special benefits to a particular person. The Maine constitution was unique in that it did not contain a retroactivity clause. Despite this omission, the Maine Supreme Judicial Court found retroactive legislation to be unconstitutional by applying the state's Lockean Natural Rights Guarantee. Like many of the other state courts, the Maine Supreme Judicial Court used the Maine constitution's Lockean Natural Rights Guarantee as a type of catch-all phrase by which it could strike down what it viewed as unjust legislation, even when there was no specific constitutional provision prohibiting it.

First, in *Proprietors of the Kennebec Purchase v. Laboree*,⁴³² the Maine Supreme Judicial Court focused on the retrospective application of a

431. The Pennsylvania and Massachusetts supreme courts also addressed involuntary confinement in a different context. In *Ex Parte Crouse*, the Pennsylvania Supreme Court adjudicated a father's habeas petition on behalf of his daughter challenging her confinement in a "House of Refuge." 4 Whart. 9, 9 (Pa. 1839). The court also addressed the argument that the child's confinement was an "abridgement of indefeasible rights" by reasoning that her confinement was similar to normal schooling. *Id.* at 11. Therefore, the court ruled that her confinement was constitutional. *Id.* at 11–12. Although the opinion did not cite the Guarantee directly, it is possible that the opinion was interpreting the meaning of the "indefeasible rights" guaranteed in the Pennsylvania Lockean Natural Rights Guarantee.

The Massachusetts Supreme Judicial Court issued an opinion in *Commonwealth v. Badlam* in response to a habeas petition. 26 Mass. (9 Pick.) 362, 362 (1830). In this case, a married woman argued that her imprisonment for debt was unconstitutional because her husband had legal control over all of the property. *Id.* In a two-paragraph per curiam opinion, the court dismissed her argument:

It is urged that imprisonment for debt is unconstitutional; and that it is contrary to the unalienable rights of man; and other arguments have been used, which would be more properly addressed to a legislative body than to a court of justice. The immemorial practice in this Commonwealth has been to imprison for debt, and there is nothing against it in our constitution.

Id. at 363. Again, it is not clear whether the court was referring to the unalienable rights guaranteed by the Guarantee or not.

432. 2 Me. 275 (1823).

statute.⁴³³ The case involved a property dispute over a portion of land occupied by tenants without a formal title.⁴³⁴ The Maine legislature had passed an 1821 statute declaring constructive possession permissible and abolishing the distinction between possession with a formal title and without title.⁴³⁵ If the statute were applied, the tenants in this particular case would almost certainly win.⁴³⁶ If not, the decision would be much more complicated and would turn instead on whether the tenants had fulfilled the common law requirements of adverse possession.⁴³⁷ But, the court noted that although the Maine constitution did not contain a retroactivity clause that applied in civil cases, the application of this statute in a civil case retrospectively would violate the constitution's Lockean Natural Rights Guarantee, as well as the provision defining the legislative power and the takings clause.⁴³⁸ The court thus construed the state's Lockean Natural Rights Guarantee in light of retrospective laws: "By the spirit and true intent and meaning of this section, every citizen has the right of possessing and protecting property according to the *standing laws* of the state in force *at the time of his acquiring it*, and *during the time* of his continuing to possess it."⁴³⁹ Indeed, the court declared that it was the "design of the framers [in including the Lockean Natural Rights Guarantee] . . . to guard against the retroactive effect of legislation upon the property of the citizens."⁴⁴⁰ The court did not strike down the legislation entirely but prohibited any retroactive application of the legislation in this civil case.⁴⁴¹ Finding the statute inapplicable, the court then remanded the claim for a new trial with jury instructions on the common law of adverse possession existing at the time of the claim.⁴⁴² The case is particularly striking because the U.S. Constitution's Ex Post Facto Laws Clause forbids only retroactive criminal laws and not retroactive civil laws.⁴⁴³

In the second opinion on retroactive application of civil laws, *Lewis v. Webb*,⁴⁴⁴ the Maine Supreme Judicial Court struck down legislation granting an individual petitioner the right to appeal an insolvency determination even though the applicable time limit had passed.⁴⁴⁵ Again, the court cited the legislative grant of power in the constitution, and then the court focused on

433. *Id.* at 286–88.

434. *Id.* at 275–76.

435. *Id.* at 277.

436. *Id.* at 280, 283.

437. *Id.* at 281.

438. *Id.* at 292–95.

439. *Id.* at 290 (internal quotation marks omitted).

440. *Id.*

441. *Id.* at 294–95.

442. *Id.* at 297–98.

443. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390–91 (1798).

444. 3 Me. 326 (1825).

445. *Id.* at 335–37.

the Lockean Natural Rights Guarantee's equality language to invalidate the law granting a special benefit to one person:

[Public laws] are considered as the guardians of the life, safety and rights of each individual in society. In these, each man has an interest, while they remain in force, and on all occasions he may rightfully claim their protection; and all have an equal right to make this claim, and enjoy this protection; because, according to the first section in our declaration of rights, "All men are born equally free and independent; and have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." On principle then it can never be within the bounds of legitimate legislation, to enact a special law, or pass a resolve dispensing with the general law, in a particular case, and granting a privilege and indulgence to one man, by way of exemption from the operation and effect of such general law, leaving all other persons under its operation. Such a law is neither just or reasonable in its consequences. It is our boast that we live under a government of laws and not of men. But this can hardly be deemed a blessing unless those laws have for their immovable basis the great principle of constitutional equality.⁴⁴⁶

Thus, the Maine Supreme Judicial Court found the retroactive civil law objectionable under the state constitution's Lockean Natural Rights Guarantee because it did not provide rights or benefits equally.⁴⁴⁷ Although the court did not specifically mention attainder in these opinions, its concern for retroactive civil legislation applying to one particular person certainly reflects attainder as well as ex post facto law concerns, even though the Maine constitution did not include a specific ex post facto provision.⁴⁴⁸

E. Statutes Imposing or Excusing Liability

In two cases, state supreme courts considered the application of their Lockean Natural Rights Guarantees to statutes that imposed or excused liability for particular torts. First, in *Boston, Concord & Montreal Railroad v. State*,⁴⁴⁹ the New Hampshire Supreme Court upheld the constitutionality of legislation subjecting railroads to liability for deaths resulting from negligence.⁴⁵⁰ The railroad company argued that this statute exceeded the legislature's power and contravened the state constitution's Lockean Natural Rights Guarantee protecting "the natural, essential and inherent right of

446. *Id.* at 335–36.

447. *Id.* at 336–37.

448. Article I, Section Ten of the federal Constitution prevents the states from adopting retroactive criminal laws. U.S. CONST. art. I, § 10, cl. 1.

449. 32 N.H. 215 (1855).

450. *Id.* at 225–27.

acquiring, possessing and protecting property.”⁴⁵¹ However, the New Hampshire Supreme Court upheld the statute as being well within the bounds of state legislative authority. Reasoning that railroads already had an obligation to avoid loss of life, the court explained that the statute “merely regulates the existing rights and duties of corporations, or provides new modes of enforcing acknowledged obligations.”⁴⁵² The court further noted that there was no problem of partial application because the law applied to the entire railroad class of common carriers not just this particular railroad company.⁴⁵³

The California Supreme Court considered a statute on government immunity from suit in the case of *Parsons v. City & County of San Francisco*.⁴⁵⁴ In *Parsons*, the plaintiff sued San Francisco for injuries after he fell on a public street in disrepair, and the government relied on an immunity statute for its defense.⁴⁵⁵ The immunity statute of 1856 stated that the City and County of San Francisco was not liable for injuries resulting from street damages that had existed for a period of less than twenty-four hours.⁴⁵⁶ It did allow recovery from the city and county if the street damages had been left unaddressed for longer than twenty-four hours.⁴⁵⁷ The California Supreme Court held that this statute did not violate the State of California’s Lockean Natural Rights Guarantee:

We do not think that this section is a violation of the State or National Constitution; or that it prevents any person from enjoying the inalienable rights of life and liberty, or acquiring, possessing, and protecting property, or pursuing and obtaining safety and happiness, as declared by the first section of the State Constitution; or that it has the effect of taking the property of the plaintiff for public use without compensation. The statute, while relieving the city from liability, affords an ample remedy against those whose acts or negligence were the cause of the injury; and there is evidently no violation of any constitutional right in such a provision.⁴⁵⁸

Therefore, the government was not liable for the plaintiff’s injuries because it had immunity.⁴⁵⁹

451. *Id.* at 217 (internal quotation marks omitted).

452. *Id.* at 225–26.

453. *Id.* at 226–27.

454. 23 Cal. 462 (1863).

455. *Id.* at 463–64.

456. *Id.*

457. *Id.* at 464.

458. *Id.* at 465.

459. *Id.*

F. Miscellaneous Civil and Political Rights

Four other cases applied the state Lockean Natural Rights Guarantees to important situations related to civil and political rights. First, in the 1828 case of *Beard v. Smith*,⁴⁶⁰ the Kentucky Court of Appeals relied on the Virginia Lockean Natural Rights Guarantee for guidance in interpreting a compact between Kentucky and Virginia resolving disputed boundary lands.⁴⁶¹ Chief Judge George Bibb first established the framework for the analysis by describing the “[p]olitical doctrine recognized at the adoption of the compact,”⁴⁶² which included the Declaration of Independence as well as the Virginia Lockean Natural Rights Guarantee:

The declaration of Virginia, in the first, second and third articles of the bill of rights prefixed to her form of government, is not less emphatic and explicit, as to the natural and unalienable rights of man; the first article declares that all men “have certain inherent rights, of which, when they enter into a state of society, they can not, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”⁴⁶³

He then relied on the principles in the Guarantee to guide his interpretation of the compact:

The compact was made by and between people who recognized those truths, and those principles. In construing this compact then, neither the unalienable rights of self government which belong to the people of Kentucky of the one party, nor that good faith and regard for private rights and interests, exempt from retrospective legislation, which was pledged to Virginia of the other party, should be forgotten.⁴⁶⁴

Judge Bibb cited the Lockean Natural Rights Guarantee yet again in explaining his holding:

The valid claims against the government will be held and remain valid, into whosoever hands they may lawfully pass, secured under the laws of Kentucky by the pledge of faith and moral sentiment, by the security resulting from the organization and moral action of the government, guaranteed by that universal sentiment of respect for private property, which belongs to the nature of civilized man, and under the sanction of that sentiment contained in the constitution of the United States. This construction will avoid the absurdity of endeavoring to fix upon the people, forever, a government, or its laws, which are inadequate, or contrary to the common benefit, protection

460. 22 Ky. (6 T.B. Mon.) 430 (1828).

461. *Id.* at 435, 502–03.

462. *Id.* at 474.

463. *Id.* at 475.

464. *Id.*

and security of the community. By the declaration of rights made by Virginia, in 1776, and prefixed to the organization of the government, she declared, “that all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they can not by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”⁴⁶⁵

Thus, in construing a compact between the states, the Kentucky Court of Appeals looked to the Lockean Natural Rights Guarantee as an important indicator of each state’s political doctrine and therefore a useful guide to interpreting the compact. Although this opinion resulted from an isolated and unusual fact pattern, the Kentucky court’s effort to ensure that its interpretation was consistent with the Lockean Natural Rights Guarantee language demonstrates the centrality of the Lockean Natural Rights Guarantee in that court’s view of the state constitution.

Second, the California Supreme Court implied the right to vote from California’s Lockean Natural Rights Guarantee in the 1866 case *Knowles v. Yates*.⁴⁶⁶ In an election for sheriff decided by only five votes, the appellants

465. *Id.* at 502–03.

466. 31 Cal. 82, 87–88 (1866). The Lockean Natural Rights Guarantees were explicitly invoked by litigants in two other cases related to voting rights and elections, but the state court opinions ruled on other grounds. In the first case, the Wisconsin Supreme Court considered the validity of procedures used to elect the governor. Attorney General *ex rel.* Bashford v. Barstow, 4 Wis. 567, 826 (1855). In arguing that the statutory procedure of submitting returns to the clerks and boards rather than to state canvassers should be enforced, the plaintiff emphasized that the people had given sovereignty to the government to protect their rights and cited the Lockean Natural Rights Guarantee:

In our system of government, the people are the source of all political power; and as a matter of course, all governments “derive their just powers from the consent of the governed.” This is the universally received American principle, and it is fully recognized in the first section of the “declaration of rights” [the Wisconsin Lockean Natural Rights Guarantee] in our constitution. . . .

In this sense, the people are sovereign; but that is not the sovereignty which acts daily in the exercise of sovereign power. The people, as such, cannot act on all occasions. Hence the people establish what is called government, and invest it with so much sovereignty as they may deem proper; and this sovereign power being thus delegated to, and invested in the government, that government becomes what is called the sovereign state.

Id. at 651 (opinion of Smith, J.); *id.* at 834 (majority opinion). Unfortunately, the plaintiff did not elaborate on precisely how the Lockean Natural Rights Guarantee related to the voting dispute but simply urged the courts to invalidate election results that did not follow applicable statutory procedures. *Id.* at 581. The court’s opinion did not specifically address the Lockean Natural Rights Guarantee, although it ruled that votes not following the statutory procedure were invalid. *Id.* at 834–35 (majority opinion).

In the second case, the Alabama Supreme Court evaluated the constitutionality of a statute changing the state treasurer’s election from an annual election to a biennial election. *Collier v. Frierson*, 24 Ala. 100, 108 (1854). Quoting Alabama’s Lockean Natural Rights Guarantee, the

sought to invalidate the votes cast in a number of precincts alleging “irregular[] . . . conduct.”⁴⁶⁷ In order to establish its jurisdiction over the case, the California Supreme Court argued that the right to vote was guaranteed by the state constitution because it was implied from the State of California’s Lockean Natural Rights Guarantee:

The Constitution of this State was created and adopted by a free people, in order to secure to themselves and their posterity the blessings of liberty. In the declaration of rights the great fundamental truths that “all men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property; and pursuing and obtaining safety and happiness,” are distinctly announced; and it is declared that all political power is inherent in the people; that government is instituted for the protection, security and benefit of the people, and that no person shall be deprived of life, liberty or property without due process of law. The Constitution secures to the citizen the right of suffrage, without which he could not exert his political power, and without which he would be impotent to secure to himself the full enjoyment of life, liberty and property.⁴⁶⁸

Because the right to vote was guaranteed by the state constitution’s Lockean Natural Rights Guarantee, the state supreme court held that it had jurisdiction over the voting dispute in question.⁴⁶⁹ The court went on to consider the allegations of voting misconduct, ultimately finding that the votes from the disputed precincts were invalid due to the use of irregular procedures.⁴⁷⁰ This case shows that the inclusion of Lockean Natural Rights Guarantee language in the California constitution was seen as safeguarding the central feature of a democracy: the right to vote and to participate in elections.

plaintiff argued that the statute was unconstitutional because it did not follow the proper procedure for constitutional amendments:

The constitution prescribes the mode of changing it. Until that mode is resorted to, it stands, in the language of its preamble, “to promote the general welfare, and to secure to ourselves and to our posterity the rights of life, liberty and property”: it stands a check against any law, save in the manner prescribed; it is the prescribed will, above and beyond any reach of constructive change. This peculiar security is the distinctive feature of a republic, the essential and marked difference between a monarchy and a republic.

Id. at 106. The supreme court did not specifically address the Natural Rights Guarantee but focused on the importance of precisely following the amendment procedures. It ruled that the treasurer must remain annually elected, and therefore the treasurer’s term was only one year. *Id.* at 104–05, 111.

467. *Knowles*, 31 Cal. at 83–84.

468. *Id.* at 87.

469. *Id.* at 88.

470. *Id.* at 91.

Third, the Pennsylvania Supreme Court cited the Pennsylvania constitution's Lockean Natural Rights Guarantee in a discussion of the right to protect reputation in the case of *Commonwealth v. Duane*.⁴⁷¹ In this case, Duane was criminally prosecuted for a libelous statement about a former governor of the state.⁴⁷² The opinion does not disclose what Duane said about the governor. But, after Duane's arrest, the Pennsylvania legislature passed a statute decriminalizing libel for examinations of the government and providing that truth is a defense in such cases for libel claims.⁴⁷³ The government argued that this new statute was unconstitutional because it prevented citizens from protecting their reputation, as it said was guaranteed by the Pennsylvania constitution's Lockean Natural Rights Guarantee:

By the first section of the ninth article [the Lockean Natural Rights Guarantee], the constitution declares that all men have an indefeasible right to acquire, possess, and protect reputation: and by the seventh section, in prosecutions for the publication of papers investigating the official conduct of officers, the truth thereof may be given in evidence. The one is intended as a security to reputation; the other as a regulation of the means of protection, so as to make them consist with the interests of truth and the public. Together they imply that nothing shall be done to prevent either the acquisition or vindication of character.⁴⁷⁴

The court responded to this argument by pointing to the continued existence of civil remedies:

Although their argument was rather faintly urged, it is proper to take notice of it. By the first section of the ninth article it is declared, that all men have a right of acquiring, possessing, and protecting property and *reputation*; and it is supposed that the protection of reputation will be less perfect, when the punishment of libels by indictment is taken away. It may be so; and I fear it will be so. But it is sufficient to remark, that the civil remedy by *action* is still left unimpaired, and that the proceeding by indictment is not the *right* of the *injured party*, but of the *public*.⁴⁷⁵

471. 1 Binn. 601, 604 (Pa. 1809).

472. *Id.* at 601.

473. *Id.* at 601–02.

474. *Id.* at 603–04. In 1809, the Pennsylvania Lockean Natural Rights Guarantee included a specific protection for reputation: “That all men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.” PA. CONST. of 1790, art. IX, § 1. This text remained unchanged in the 1838 constitution. See *infra* Appendix B.

475. *Duane*, 1 Binn. at 606–07.

Therefore, because no judgment had yet been pronounced in Duane's case, the court held that the intervening statute was constitutional, and it put an end to Duane's prosecution.⁴⁷⁶

Fourth, the Kentucky Court of Appeals rejected a Lockean Natural Rights Guarantee challenge and upheld legislation that exempted the three-year period of 1824–1827 from counting in tolling the statute of limitations period in the 1829 case *Davis v. Ballard*.⁴⁷⁷ The court's decision declared that the statute extending the statute of limitations in this case did not violate any aspect of the Kentucky or federal Constitution, including the Lockean Natural Rights Guarantee in the Kentucky constitution.⁴⁷⁸ In its opinion, the court specifically discussed the meaning of Kentucky's Lockean Natural Rights Guarantee:

The present constitution of Kentucky, was adopted at a time, when the natural, civil, and political rights of men, were well understood. . . .

The enjoyment of life, liberty, and property, and the right to pursue happiness, embrace all the comforts and pleasures which man's physical, intellectual, and moral nature is capable of acquiring, by the application and exercise of the various faculties with which he is endowed, and all that the world can afford him. The right to pursue happiness, includes the right to use all means necessary for its attainment, by the proper exercise of our faculties. The acquisition of property, to some extent at least, is indispensable to our most limited ideas of happiness. Food and raiment are property; and without food and raiment, existence can not be preserved many days. Whether our acquisitions shall be limited to a bare subsistence, or shall be multiplied to the accumulation of every luxury, will depend upon the degree of labor employed, and the success of the business to which it may be directed; but it equally results, whether we have much or little, that one of the objects in the formation of the constitution, was to secure the enjoyment of that which we do possess and own. "We, the representatives of the people of the state of Kentucky, in convention assembled, to secure to all the citizens thereof, the enjoyment of the rights of life, liberty, and property, and of pursuing happiness, do ordain and establish this constitution for its government," is the language of the preamble.⁴⁷⁹

However, because the statute of limitations adjustment did not take Ballard's property, impair his right to contract, or affect any of the rights guaranteed by the constitution, the court upheld the act as a valid public-policy measure designed for the public good.⁴⁸⁰

476. *Id.* at 608–09.

477. 24 Ky. (1 J.J. Marsh.) 563, 579–82 (1829).

478. *Id.* at 580–81.

479. *Id.* at 567–68.

480. *Id.* at 581–82.

In addition to these cases, a number of other interesting cases address civil and political rights but do not explicitly cite the Lockean Natural Rights Guarantees, relying instead on a general argument that the state constitution guarantees liberty or other natural or inalienable rights. State courts employed these general references in the context of legislative limitations,⁴⁸¹ the permissible actions a citizen can take to defend his life or recover his property,⁴⁸² and emigration.⁴⁸³ Although these cases do not specifically cite the Guarantees, they show the far-reaching nature of the state court's consideration of liberty and natural or unalienable rights for a very broad range of fact patterns.

481. In the 1817 case, *Trustees of Dartmouth College v. Woodward*, the New Hampshire Superior Court of Judicature held that the legislature's action to add new members to Dartmouth College's board of trustees was constitutional. 1 N.H. 111, 137 (1817). It reasoned that because Dartmouth was a public corporation and a creature of the State, the only limits to legislative power were "the fundamental principles of all government and the unalienable rights of mankind." *Id.* at 114, 119. It is not clear whether this reference to "unalienable rights" is referring to New Hampshire's Lockean Natural Rights Guarantee. Two years later, Dartmouth College, led by Daniel Webster, successfully won a reversal in the Supreme Court. *See Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 651, 654 (1819) (ruling that the college was a private corporation based on its original pre-Revolution charter, and thus the federal Constitution's Contract Clause prohibited the government from interfering with that original contract).

482. First, in *State v. Walker*, the Ohio Court of Common Pleas instructed the jury in a murder case that the self-defense was "the great natural, unsundered, and inalienable right of every man in society." 8 Ohio Dec. Reprint 353, 356 (Ct. Com. Pl. 1850). It is unclear whether the court was referring to the Guarantee. While attending the circus, Walker was involved in a fight with two constables, although they did not announce themselves as officers before or during the altercation. *Id.* at 353. In the course of the fight, Walker fatally stabbed one officer with a bowie knife. *Id.* The jury voted to acquit Walker. *Id.* at 354. At the time of this case, the 1802 constitution was in effect, which contained a Lockean Natural Rights Guarantee stating: "That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety" OHIO CONST. of 1802, art. VIII, § 1. The Guarantee was modified in the 1851 constitution: "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety." OHIO CONST. of 1851, art. I, § 1.

In *Heacock v. Walker*, the Supreme Court of Judicature of Vermont instructed the jury that "[t]o recapture property of which a person hath been unlawfully deprived, is a natural right, sanctioned by the laws; but he must retake his property without breach of the peace, 'for the public peace is a superior consideration to any man's property.'" 1 Tyl. 338, 342 (Vt. 1802). Walker used "force and arms" to forcibly repossess a horse from Heacock, claiming that it rightfully belonged to him. *Id.* at 338. The jury ultimately ruled for Walker. *Id.* at 343. Again, the court referred only to natural rights generally, which is part of New Hampshire's Lockean Natural Rights Guarantee, but did not explicitly cite the Guarantee. *Id.* at 342.

483. The Virginia Supreme Court of Appeals described the right of emigration as an "inherent" right in *Murray v. McCarty*, where it ruled that McCarty had remained a citizen of Virginia, and thus his importation of Murray into the state was illegal. 16 Va. (2 Munf.) 393, 397, 400 (1811). In 1792, Virginia passed a statute prohibiting further importation of slaves. *Id.* at 393 n.1. In 1802, McCarty, a Virginia resident, left Virginia for Maryland. *Id.* at 394. The court concluded that because McCarty had never ceased to be a citizen of Virginia, his importing of Murray into the state was illegal. *Id.* at 400. Thus, the court ruled for Murray's freedom. *Id.*

One particular case stands out for the state court's reliance on its own constitution in the face of intense federal pressure and then the court's almost immediate reversal of its opinion. In *Kneedler v. Lane*,⁴⁸⁴ the Pennsylvania Supreme Court during the U.S. Civil War relied on the Pennsylvania state constitution's guarantees of liberty to declare the federal draft unconstitutional.⁴⁸⁵ The Pennsylvania Supreme Court then reversed its injunction against the federal draft only a month later after a change in the court's membership!⁴⁸⁶ In the first decision, a narrow majority found that the federal draft violated the State of Pennsylvania's reserved rights, the state's power to form a militia, and the liberty of Pennsylvania citizens found in the "bill of rights to our state constitution."⁴⁸⁷ Thus, the Pennsylvania Supreme Court in its initial decision granted an injunction against the enforcement in Pennsylvania of the federal draft during the Civil War.⁴⁸⁸

However, Chief Justice Walter Lowrie's term as a judge on the court expired one month after this decision, and the newly appointed judge, Judge William Strong, issued an order with the support of the newly seated Judge Daniel Agnew overruling the injunction against the federal draft.⁴⁸⁹ Judge Strong wrote that, "[a]nd now, to wit, January 16th 1864, it is ordered by the court, that the orders heretofore made in all these cases be vacated; and the motions for injunctions are overruled."⁴⁹⁰ Another judge in the case, however, Judge George Woodward, could hardly contain his despair over this outcome. Judge Woodward first described the failure of the defendants to even appear at the first hearing or to appeal while Chief Justice Lowrie was in office:

But though the court sat at Pittsburg [sic] a week after each judge had delivered an opinion, and the interlocutory decree had been entered, and though the commission of Chief Justice Lowrie did not expire until the first Monday of December, yet no motion or effort was made by the defendants to prepare the record to be reviewed; no reargument was asked for in this court, no explanation or apology for the non-appearance of the defendants was offered.

.....

This proceeding is so extraordinary, that I have felt it my duty to mark the several stages of its progress⁴⁹¹

Judge Woodward then attacked the court's decision to reverse the previous ruling in no uncertain terms:

484. 45 Pa. 238 (1863).

485. *Id.* at 245–46, 252.

486. *Id.* at 300.

487. *Id.* at 259–61 (Woodward, J., concurring).

488. *Id.* at 252 (majority opinion).

489. *Id.* at 300.

490. *Id.* at 295, 300.

491. *Id.* at 325 (Woodward, J., dissenting).

I have said all the citizens of the commonwealth were bound to respect that decree. I include, of course, the judges of this court. A dissenting judge is as much bound by the decrees and judgments of the majority, regularly entered, as the majority themselves. . . .

. . . .

The time and manner of bringing forward this motion would seem to indicate that it was a sort of experiment upon the learned judge who has just taken his seat as the successor of Judge Lowrie. Does anybody suppose it would have been made if Judge Lowrie had been re-elected? I presume not. Are we to understand, then, that whenever an incoming judge is supposed to entertain different opinions on a constitutional question from an outgoing judge, every case that was carried by the vote of the retiring judge is to be torn open, rediscussed, and overthrown? God save the Commonwealth, if such a precedent is to be established!⁴⁹²

Following his position as associate justice on the Pennsylvania Supreme Court, Judge Strong returned to private practice and then was appointed to the U.S. Supreme Court, where he served with great distinction from 1870 to 1880.⁴⁹³ The lengthy and separate opinions issued in this case reflect a divided court conscious of its impact on a divisive and political issue. The connection to the Pennsylvania state Lockean Natural Rights Guarantee in this episode is tenuous because the judges do not explicitly cite the provision, but it is clear that they placed great value on the liberty protections in the state constitution, even to the point of striking down a federal draft in the midst of the Civil War.

In sum, litigants and state courts creatively invoked the Lockean Natural Rights Guarantees as supporting a broad range of civil and political rights in the years prior to the adoption of the Fourteenth Amendment in 1868. The cases described above illustrate that many state courts were willing to find substantive rights in their state constitutions' Lockean Natural Rights Guarantees for a variety of actions, and they often did not adopt rigid definitions or limits in applying those state constitutional Guarantees. In these cases, the Lockean Natural Rights Guarantees in question were interpreted as flexible provisions that ensured basic political and civil rights to state citizens.

VII. Rights Related to Legal Procedures

In this Part, we describe the state case law in regard to rights related to legal procedures. In these seven cases, state supreme courts applied the state constitutional Lockean Natural Rights Guarantees to evaluate the

492. *Id.* at 326, 329.

493. *Strong, William (1808–1895)*, BIOGRAPHICAL DIRECTORY U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=S001021>, archived at <http://perma.cc/A8R9-BSU5>.

constitutionality of various legislative enactments affecting the legal process directly. Alongside other provisions in their state constitutions, state judiciaries used the Guarantees to (1) prevent legislative encroachment on the appeals process; (2) address legislative interference with final judgments; and (3) preserve basic procedural rights during criminal trials. In a majority of these cases, the courts actually struck down the state legislation in question or ordered that the litigant be afforded the procedural right requested. This shows that, at times, the state courts flexibly interpreted state constitutional Lockean Natural Rights Guarantees to limit legislative power, particularly when it encroached upon the legal process and guarantees of fair legal procedures.

A. *The Right of Appeal*

The Indiana and Louisiana state supreme courts applied their Lockean Natural Rights Guarantees in considering legislation that affected the right to appeal in those states.⁴⁹⁴ The Indiana Supreme Court of Judicature struck down a statute that limited the right to appeal whereas, in contrast, the Louisiana Supreme Court upheld such a statute and described its state Lockean Natural Rights Guarantee as offering only weak protection of rights.

First, in the 1856 case *Madison & Indianapolis Railroad Co. v. Whiteneck*,⁴⁹⁵ the Indiana Supreme Court of Judicature evaluated a statute that imposed a monetary penalty and a reduction in the amount of any judgment against plaintiffs who appealed suits for damages resulting from trains striking and killing their animals.⁴⁹⁶ The plaintiff had sued the railroad for “the value of a heifer killed by a locomotive” and then appealed the original judgment.⁴⁹⁷ The Indiana Supreme Court of Judicature took the opportunity to expound on the meaning of the Lockean Natural Rights Guarantee in the Indiana state constitution as a limit on the state legislature’s power:

May the judiciary pronounce a law void because of repugnance to the fundamental principles of the government declared in the constitution as being prohibited by implication, though not in express words? Or because of repugnance to the clear scope and intention, the spirit, of

494. The New Hampshire Supreme Judicial Court struck down a similar statute in *East Kingston v. Towle*, where it held that the legislation in question violated the “principle[s] of natural justice.” 48 N.H. 57, 61, 63 (1868). The legislation authorized town selectmen to determine damages against a person whose dog killed someone else’s livestock. *Id.* at 58. The dog owner would have no part in the process. *Id.* Thus, relying on natural justice principles, the court found that the legislature had exceeded the scope of its authority. *Id.* at 63. Although the court did not cite the state constitution for evidence of natural rights, the language mirrored the New Hampshire Lockean Natural Rights Guarantee’s protection of “natural, essential and inherent rights.” N.H. CONST. pt. 1, art. 2 (amended 1974).

495. 8 Ind. 217 (1856).

496. *Id.* at 218–19.

497. *Id.* at 217.

express restrictions, as being impliedly embraced by them? These are now the questions. For example, the first section of the article of the bill of rights, declares that all men are endowed with unalienable rights, among which are life, liberty, [etc]. Now, how broad a meaning is to be given to this section? With what view or object was it inserted in the constitution? What should be its interpretation?⁴⁹⁸

The opinion continued with an extensive discussion of the history of European monarchies, and it argued that the American Revolution reacted against absolutism and tyranny in Europe with the nation's Founders using the Declaration of Independence to pointedly endorse the idea that human beings all have certain inherent rights.⁴⁹⁹ This idea confirmed the opinions of Sir Edward Coke and of Lord Mansfield that the natural state of mankind under the ancient constitution of England and under the common law was one of freedom except where the law explicitly provided otherwise.⁵⁰⁰

Men with minds liberalized, enlightened, and invigorated by the perusal of recovered ancient learning, and hearts warmed by the eloquence of ancient freedom, entered upon the study of the science of the rights of man, and arrived at the conclusion that he was possessed of such by nature, which it was tyranny in government to invade.⁵⁰¹

The Indiana Supreme Court of Judicature specifically referred to the work of Buchanan, Harrington, Milton, Sidney, Fletcher, and Vane, as well as Thomas Paine, Burke, Lieber, and James Mackintosh in its discussion.⁵⁰² It declared that the United States, as a nation, had endorsed this view of natural law in the Declaration of Independence holding "these truths to be self-evident," and that this view was affirmed in the Lockean Natural Rights Guarantees of the various states, including in the Lockean Natural Rights Guarantee of the Indiana state constitution.⁵⁰³ After citing the Lockean Natural Rights Guarantees in other states' constitutions, the Indiana Supreme Court asked:

[W]hat force should be conceded to the [Lockean Natural Rights Guarantee]? The purpose for which it was intended appears to be plain enough, and also the great importance attached to it. The monarchies of *Europe* maintained the doctrine that the people had no natural rights, and, hence, might rightfully be controlled at will and without limit by the government. The people in this country denied the doctrine and determined to emancipate themselves from it.

498. *Id.* at 222–23.

499. *Id.* at 223–26.

500. *See supra* notes 30–32 and accompanying text.

501. *Whiteneck*, 8 Ind. at 224.

502. *Id.* at 224–25.

503. *Id.* at 225–27.

. . . .
 . . . That security they designed should be perpetuated by their constitutions, and particularly by [the Lockean Natural Rights Guarantee].⁵⁰⁴

Thus, the Indiana Lockean Natural Rights Guarantee was read by the court as being a “fundamental provision,” which constrained the legislature from violating natural rights.⁵⁰⁵ The court reiterated its duty to enforce the Lockean Natural Rights Guarantee as a check against the legislature by declaring:

Having thus ascertained the intention of the section in question, it is the duty of the Court, so far as consistent with its language, to give effect to it accordingly. The mere demarkation [sic] on parchment of the constitutional limits, is not a sufficient guard against the encroachments of tyrannical legislation.⁵⁰⁶

Curiously, despite the extensive discussion of natural rights,⁵⁰⁷ the court did not expressly say that the right to appeal, without paying a penalty for having done so, was a natural right. Nevertheless, the majority held that the Indiana statute in question imposing a penalty for appealing a case was unconstitutional.⁵⁰⁸

In contrast, the Supreme Court of the State of Louisiana reached a different result, upholding legislation imposing a fine for frivolous appeals in the 1839 case *Davis v. Jonti*,⁵⁰⁹ one of only two published decisions citing the Louisiana state constitution’s Lockean Natural Rights Guarantee.⁵¹⁰ The state supreme court’s brief opinion merely describes the Louisiana legislation in question as imposing a fine for “frivolous appeals,” and the court’s opinion does not further explain how the legislation in question worked.⁵¹¹ The court rejected the defendant’s constitutional argument stating: “Our constitution states its object to be to secure to all the citizens of the state, the enjoyment of the right of life, liberty and property, and yet citizens are every day imprisoned and fined, and sometimes even deprived of life.”⁵¹² Thus, the

504. *Id.* at 227.

505. *Id.*

506. *Id.* at 229.

507. The opinion included a numbered listing of what types of legislation would be permissible and which types of legislation might violate the natural rights guaranteed by the Guarantee. *Id.* at 233–35. The dissenting judge pointed out that this discussion was not necessary to the holding. *Id.* at 237–38 (Gookins, J., dissenting).

508. *Id.* at 236.

509. 14 La. 95, 96 (1839).

510. *Id.*; see also *infra* note 700.

511. *Davis*, 14 La. at 96.

512. *Id.* At this time, the Louisiana Lockean Natural Rights Guarantee stated:

In order to secure to all citizens thereof the enjoyment of the right of life, liberty and property, do ordain and establish the following constitution or form of government,

court seemed to reason that the Louisiana Lockean Natural Rights Guarantee should not be interpreted as providing any substantive protection, and the court held that the legislation in question was in fact constitutional.⁵¹³ This decision directly contradicts the Indiana Supreme Court's *Madison* decision described above, but the two statutes are arguably different because of the Louisiana statute's application only to "frivolous" appeals.⁵¹⁴ Perhaps not coincidentally, the subsequent Louisiana constitution passed in 1845 did not include a Lockean Natural Rights Guarantee.⁵¹⁵ In fact, Lockean Natural Rights Guarantee language was not included in the four Louisiana state constitutions of 1845, 1852, 1861, and 1864, but a Lockean Natural Rights Guarantee reemerged in the Reconstruction Era constitution of Louisiana in 1868,⁵¹⁶ after the Thirteenth Amendment had made slavery unconstitutional.⁵¹⁷

B. *Legislative Interference with Final Judgments*

In two cases, state supreme courts addressed state legislative attempts to interfere with final judgments issued by courts. First, in *Denny v. Mattoon*,⁵¹⁸ the Massachusetts Supreme Judicial Court invoked the Massachusetts Lockean Natural Rights Guarantee's protection of property rights to strike down Massachusetts state legislation invalidating a judicial opinion.⁵¹⁹ In this bankruptcy case, Judge Horace Hodges had issued an order that was later declared invalid for lack of jurisdiction.⁵²⁰ The case was then reheard by another judge in a different county, Judge Charles Mattoon, who issued a separate order considered to be the binding order.⁵²¹ However, shortly thereafter, the legislature of the State of Massachusetts passed a statute declaring that Hodges's decision was actually the valid and controlling decision.⁵²² The Massachusetts Supreme Judicial Court described several provisions of the state's constitution as providing independent grounds to

and do mutually agree with each other to form ourselves into a free and independent State, by the name of the State of Louisiana.

LA. CONST. of 1812, pmbl.

513. *Davis*, 14 La. at 96.

514. Compare *Madison & Indianapolis R.R. Co. v. Whiteneck*, 8 Ind. 217, 236 (1856) (holding the appeal penalty statute unconstitutional), with *Davis*, 14 La. at 96 (holding the "frivolous" appeals penalty statute constitutional).

515. LA. CONST. of 1845, pmbl.

516. Compare LA. CONST. of 1868, tit. 1, art. 1 ("All men are created free and equal, and have certain inalienable rights; among these are life, liberty, and the pursuit of happiness . . ."), with LA. CONST. of 1864 (containing no similar Guarantee language), LA. CONST. of 1861 (same), and LA. CONST. of 1852 (same).

517. U.S. CONST. amend. XIII.

518. 84 Mass. (2 Allen) 361 (1861).

519. *Id.* at 366–68.

520. *Id.* at 362.

521. *Id.*

522. *Id.* at 363.

strike down the legislation in question.⁵²³ The Massachusetts Supreme Judicial Court relied on the state constitution's separation of powers principles and its due process clause.⁵²⁴ The court also cited the Massachusetts Lockean Natural Rights Guarantee's property protections as justification for striking down the legislature's interference in state judicial decisions:

[This legislation] takes away from a subject his property, not by due process of law or the law of the land, but by an arbitrary exercise of legislative will. Under our Constitution the right of the legislature to interfere with vested rights and to deprive persons of their estate is not left to implication. Not only is the right of acquiring, possessing and protecting property declared to be among the essential and unalienable rights of all men [i.e., the Lockean Natural Rights Guarantee], but also, by the twelfth article of the Declaration of Rights, the great principle is enunciated that no subject shall be deprived of his property or estate but "by the judgment of his peers, or the law of the land."⁵²⁵

Therefore, the court concluded that the Massachusetts legislation unconstitutionally deprived the debtor of his property, which was protected by the state constitution's Lockean Natural Rights Guarantee.⁵²⁶

In *G. & D. Taylor & Co. v. Place*,⁵²⁷ the Rhode Island Supreme Court invoked its very watered-down quasi-Lockean Natural Rights Guarantee to inform its reading of the separation of powers-like provisions in the Rhode Island constitution and to strike down Rhode Island legislation that opened judgments against garnishees and set aside verdicts.⁵²⁸ The opinion first declared that "[i]t is hardly necessary . . . to use arguments or to cite authorities to show that thus to set aside a verdict and grant a new trial in a suit at law . . . is the exercise of judicial power."⁵²⁹ After noting the history, precedents, and state constitutional language implying the separation of powers, the court concluded that the legislation was "judicial power of the most eminent and controlling character."⁵³⁰ The Rhode Island Supreme Court then turned to the weak Guarantee-like language to add weight to its reading of the separation of powers provisions. As discussed previously, the Rhode Island Guarantee language did not specify any particular rights but simply emphasized that the state constitution must be of "paramount obligation in all legislative, judicial and executive proceedings."⁵³¹ The

523. *Id.* at 365–66.

524. *Id.* at 366–67.

525. *Id.* at 381.

526. *Id.* at 382.

527. 4 R.I. 324 (1856).

528. *Id.* at 325–26, 364.

529. *Id.* at 331.

530. *Id.* at 332–39.

531. R.I. CONST. of 1841, art. 1, pmbl.; *see also supra* Appendix A.

Place court invoked this language to argue that enforcing Rhode Island's weak separation of powers principles must be seen as a "paramount obligation" not a "mere 'parchment barrier' against the enterprising ambition of the legislative department of the government."⁵³² The Rhode Island Supreme Court used the state's weak Lockean Natural Rights Guarantee-like constitutional language to emphasize its obligation to enforce other principles in its constitution.⁵³³ These two cases demonstrate the state courts' flexible applications of their Lockean Natural Rights Guarantee or weak quasi-Guarantee language to limit legislative power and to preserve the judicial power of the courts.

C. *Procedural Rights During Legal Proceedings*

Three additional cases applied state constitutional Lockean Natural Rights Guarantees to preserve other basic procedural rights during legal proceedings. Two cases applied state Lockean Natural Rights Guarantees to ensure procedural protections for criminal defendants during their trials.⁵³⁴

532. *Place*, 4 R.I. at 345, 354.

533. *Id.* at 345–47.

534. The Lockean Natural Rights Guarantee was arguably invoked in five additional criminal cases. In the Vermont Supreme Court of Judicature's 1802 case, *State v. J.H.*, the court quashed an arrest warrant based on testimony that was taken without an oath. 1 Tyl. 444, 445, 448 (Vt. 1802). The court highlighted the "unalienable rights" guarantee in the state constitution:

By our successful struggles for independence, from colonies we have become a nation; and it is curious to observe, that all the State Constitutions bear the marks of our former political servitude. The evils we feared or experienced as colonists, are scrupulously guarded against by bills of unalienable rights, when to the reflecting mind it is apparent, that few or none of those evils are experienced or to be apprehended in our state of sovereignty.

Id. at 447.

In 1851, the Maine Supreme Judicial Court referred to language in the Guarantee while giving jury instructions in *State v. Smith*. 32 Me. 369, 372 (1851). The defendant was being prosecuted for murder in the death of a woman following an abortion attempt. *Id.* at 370. The chief justice instructed the jury: "If you disregard the law, the promises which it makes to the citizen, of life, liberty and the pursuit of happiness, become unreliable." *Id.* at 372. Life, liberty, and the pursuit of happiness were included in Maine's Lockean Natural Rights Guarantee, but the court did not cite the Guarantee specifically. ME. CONST. art. 1, § 1 (amended 1988).

In the third case, in 1853 before the Pennsylvania Supreme Court, the defendant in *Purcell v. Commonwealth* argued that his absence during sentencing was unconstitutional because it deprived him of an "inherent and inalienable right[]" to be present. 1 Walk. 243, 245 (Pa. 1853). It is not clear whether this one-sentence opinion was referring to the inherent and inalienable rights secured by Pennsylvania's Guarantee. PA. CONST. of 1790, art. IX, § 1.

In the fourth case, *Caldwell v. State*, the Alabama Supreme Court reviewed a conviction for murder. 1 Stew. & P. 327, 327 (Ala. 1832). The defendant argued that the court did not have jurisdiction over the crime because it occurred on lands belonging to the Creek Indian tribe. *Id.* at 327–28. The court held that it did have jurisdiction, which was necessary to enforce the "inalienable rights" of Alabama citizens. *Id.* at 435, 440 (opinion of Taylor, J.). But it is unlikely that the court was referring to the Guarantee because the version in the constitution at the time (the 1819 constitution) did not include a reference to inalienable rights. ALA. CONST. of 1819, pmbl.

In the final case, the Pennsylvania Supreme Court arguably used its Guarantee language to describe the importance of protection from double jeopardy in its 1822 opinion in *Commonwealth*

One additional case applied a Lockean Natural Rights Guarantee to provide procedural protections during a civil proceeding.

In the first case regarding criminal defendants' rights during trial, *Commonwealth v. Anthes*,⁵³⁵ the Massachusetts Supreme Judicial Court cited the Massachusetts Lockean Natural Rights Guarantee in striking down an 1855 statute which gave the jury the authority in all criminal cases to decide "both the law and the fact involved in the issue."⁵³⁶ The majority of the Supreme Judicial Court emphasized that it is the judiciary that has the sole authority to decide questions of law in order to ensure the equal application of all of the laws to every citizen.⁵³⁷ Along with an extensive discussion of common law tradition and other Massachusetts Declaration of Rights provisions, including provisions guaranteeing due process rights, trial rights, and the impartial administration of justice, the Supreme Judicial Court also cited the Massachusetts Lockean Natural Rights Guarantee contained in the preamble as providing a constitutional basis for this principle:

Another leading idea which pervades the whole system—Preamble, Declaration of Rights and Frame of Government—is the absolute necessity to the peace, harmony and tranquility of the citizens of a free government that the laws under which they live be fixed and settled. [The Framers] manifestly had in view the consideration often alluded to in works popular at the time, expatiating on the misery and wretchedness of a people where the laws are uncertain, vague and fluctuating, prescribing one rule to one man and a different one to another, this day punishing and tomorrow exempting from punishment, under the same circumstances, so that no man, be he ever so honest, can know by what rule of law to square his conduct, faithfully perform his social duty, and avoid the penalties of the law.⁵³⁸

Thus, the Massachusetts Supreme Court relied on the state constitution's Lockean Natural Rights Guarantee, along with other constitutional guarantees, to require that the laws be applied equally to all state citizens and that the judiciary be the decider of issues of law in criminal cases.⁵³⁹

v. *Cook*. 6 Serg. & Rawle 577, 595–96 (Pa. 1822). In describing the meaning of the prohibition against double jeopardy, the court emphasized the importance of the principle by describing it as a "general great and essential principle[] of liberty." *Id.* at 596. Although it did not explicitly cite the Lockean Natural Rights Guarantee, it is likely that these terms were used to refer to the Guarantee language in Pennsylvania's Preamble: "That the general, great and essential principles of liberty and free government may be recognized and unalterably established, we declare." PA. CONST. of 1790, art. IX. This language was unaltered in the 1838 constitution. PA. CONST. of 1838, art. IX, pmbl.

535. 71 Mass. (5 Gray) 185 (1855).

536. *Id.* at 236.

537. *Id.* at 191–92.

538. *Id.* at 223–24. This discussion also cited statements by President Adams and Beccaria's *On Crimes and Punishment* in support of this principle. *Id.* at 224–25.

539. *Id.* at 235–36.

A similar issue arose in the State of Virginia in 1827 in a case called *Word v. Commonwealth*.⁵⁴⁰ In that case, a criminal defendant invoked the Virginia constitution's Lockean Natural Rights Guarantee to argue for his right to appear at trial in his own defense.⁵⁴¹ Counsel for the juvenile criminal argued that the right to appear at trial in your own defense was guaranteed by Virginia's Lockean Natural Rights Guarantee:

[I]t will be impossible to find any reason of policy, much more any reason of law, why the privilege of the citizen to defend his *property*, upon the question of fact before the jury, against the claim of his neighbour, or an amercement at the suit of the commonwealth, should be more restricted, (in the regard in which we are now considering it), than his privilege to defend his *liberty* or his *life* in prosecutions for crime. To allow the distinction, will be to reverse the known principle of the common law, which allowed counsel to the parties in a civil action and to those who were accused of misdemeanours, and denied counsel to persons accused of felonies—counsel, I mean, to argue the questions of fact upon the evidence before the jury. *Property*, if it be not as valuable, is just as sacred a right, as *liberty* or *life*. All civilized nations so regard it; and the bill of rights of *Virginia*, particularly, ranks in the same class, and secures on the same footing, “the enjoyment of *life* and *liberty*, with *the means of acquiring and possessing property*, and obtaining happiness and safety.” Surely, this court will not give its sanction to a distinction between the means of *acquiring* and *possessing*, and the means of *defending*, property: and surely, too, the *plus* or *minus* cannot vary the principle.⁵⁴²

The Virginia state court in this case simply concluded that criminal proceedings against juveniles should “be conducted in the same manner as against persons of full age” and that every criminal has the right to be heard.⁵⁴³ The Virginia court did not address the Lockean Natural Rights Guarantee argument and other points made in this case by counsel, saying that “[w]e deem it unnecessary, however, to enter more at large into an investigation of the subject, since we have no difficulty in deciding [it].”⁵⁴⁴ It is nonetheless revealing that a litigant relied on Lockean Natural Rights Guarantee language in arguing for a criminal procedural right.

Litigants also invoked the Lockean Natural Rights Guarantees in civil legal proceedings.⁵⁴⁵ In *Berger v. Smull*, the Pennsylvania Supreme Court

540. 30 Va. (3 Leigh) 743 (1827).

541. *Id.* at 759.

542. *Id.* at 754–55.

543. *Id.* at 759.

544. *Id.* at 760.

545. In addition to the case discussed here, several other cases invoked Lockean-like guarantees related to legal process rights in civil legal proceedings. First, in *Hunt v. Lucas*, the defendant challenged Massachusetts legislation requiring him to submit an affidavit to the court within ten days of receiving legal service in order to avoid a default judgment. 99 Mass. 404, 404–05 (1868).

held that the Pennsylvania Act of 1842 requiring defendants to verify their answers in creditor–debtor proceedings with an oath did not violate the indefeasible rights guaranteed by the Guarantee.⁵⁴⁶ The plaintiff argued that

[The Lockean Natural Rights Guarantee in the Pennsylvania constitution] is to be taken as pervading all legislation, as completely as do the doctrines of the common law, from which it was derived. Whether a given proceeding is criminal or penal, is to be judged, not by its name or form, but by its effects upon those “indefeasible rights” of “life and liberty,” “property and reputation,” so carefully defined and secured in [the Pennsylvania constitution].⁵⁴⁷

The Pennsylvania Supreme Court did not specifically respond to the litigant’s Lockean Natural Rights Guarantee argument. Instead, it upheld the statute on the grounds that the oath requirement did not create any “conclusive effect” and was instead “only evidence” that the court would use

The opinion does not specify what type of service that defendant received, only that it was “legal.” *Id.* at 404. The defendant argued that this requirement violated the inalienable right to protect property:

By the Constitution, all men have certain inalienable rights, of which they can be lawfully deprived neither by legislators nor by courts. One of these is the right of protecting property. When that property is menaced by suit brought, every citizen has the right of protecting it in court without denial or needless hindrance; and can be deprived of it only in accordance with the settled course of judicial proceeding, and by the ultimate decision of the court upon the matter of law, and of the jury upon the matter of fact.

Id. at 405. Although the defendant did not cite the specific Lockean Natural Rights Guarantee section of the constitution, his use of the terms “inalienable rights” and “protecting property” appear to be referring to the language of the Massachusetts Lockean Natural Rights Guarantee. MASS. CONST. pt. 1, art. 1 (amended 1976). The Massachusetts Supreme Judicial Court did not specifically address the Guarantee argument and held that the statute was constitutional. *Id.* at 412. It explained that the new pleading requirement was no different from other pleading requirements historically upheld. *Id.* at 410. The court itself seemed to be in favor of the procedural change, noting that affidavits were helpful because they “ha[ve] proved to be expedient and useful.” *Id.* at 412.

In *Wilkins v. Treynor*, the plaintiff dismissed his action of replevin against the defendant, reinstated the action to assess his damages, and then demanded a jury trial as his “inalienable” right. 14 Iowa 391, 392 (1862). The Iowa Supreme Court held that the right to jury trial can be waived or forfeited in certain circumstances, and the plaintiff had lost this right when he dismissed the original action. *Id.* at 393.

In *Insurance Co. of Valley of Virginia v. Barley’s Administrator*, the Virginia Supreme Court of Appeals called the “right of parties to make and accept confessions of judgment, and thereby to terminate litigation between them . . . a right inherent in the members of society” and “one of a fundamental character.” 57 Va. (16 Gratt.) 363, 365–67 (1863).

The New Hampshire Supreme Judicial Court considered the appropriate procedures for the appointment of guardians in *Kimball v. Fisk*, 39 N.H. 110, 116–17 (1859). The court expressed concern over the guardian’s appointment, stating that “in a case involving the right to liberty and the control and enjoyment of a man’s property, nothing should be left to presumptions.” *Id.* at 118. Because the probate court acted within its jurisdiction, the court refused to invalidate the proceedings. *Id.* at 119–20, 123. It is not clear whether this statement about enjoyment of property refers to the Lockean Natural Rights Guarantee.

546. 39 Pa. 302, 315–16 (1861).

547. *Id.* at 309.

in adjudicating the dispute.⁵⁴⁸ Therefore, it concluded that no natural or constitutional rights of the citizen were violated by the statute.⁵⁴⁹

Litigants invoked their state constitutions' Lockean Natural Rights Guarantees to argue for procedural rights on a variety of subjects. In cases of legislative overreach, state courts applied the Guarantees as a constitutional basis to invalidate legislation that disrupted basic judicial functions, like the right to appeal or to final judgments. These cases suggest that state courts did sometimes interpret the Lockean Natural Rights Guarantees to protect the legal process and that their meaning was flexible enough to invalidate legislation that invaded the judicial sphere of power. In these respects, the cases here foreshadowed the U.S. Supreme Court's decision in *Plaut v. Spendthrift Farm, Inc.*,⁵⁵⁰ in which Justice Scalia's opinion for the Court denied the legislature power to reopen final judicial judgments.⁵⁵¹

VIII. Liquor Laws

In this Part, we describe what turns out to be a very large body of case law applying the Lockean Natural Rights Guarantees to liquor laws. Eight different state supreme courts adjudicated constitutional challenges to liquor laws, issuing opinions explicitly citing some portion of the Lockean Natural Rights Guarantees of their respective state constitutions. In every state except Indiana, the liquor laws were upheld as reasonable exercises of the police power to promote the public benefit. Nevertheless, the repeated challenges to the constitutionality of liquor-regulation laws in many states suggest a widespread perception that alcohol regulation could potentially infringe upon the rights of liberty or property protected by state constitutional Lockean Natural Rights Guarantees. This also informs our understanding of how the Framers of the Fourteenth Amendment viewed liberty and property in relation to substance control and is thus clearly of relevance to modern debates about the outlawing of controlled substances such as homegrown medical marijuana.⁵⁵² Although we limit this Article to summarizing historical evidence, the potential relevance of this case law to modern debates on whether there is a constitutional right in some situations to use marijuana and other drugs is clear.

A. *Liquor Laws Unconstitutional*

In a series of cases, the Indiana Supreme Court of Judicature consistently struck down Indiana state liquor laws as unconstitutional under

548. *Id.* at 316.

549. *Id.* at 315–17.

550. 514 U.S. 211 (1995).

551. *Id.* at 227–28.

552. See *Gonzales v. Raich*, 545 U.S. 1, 16–19 (2005) (upholding the federal Controlled Substances Act by a vote of six to three against an enumerated powers challenge).

the Indiana Lockean Natural Rights Guarantee. Unlike the majority of the liquor law cases in other states, the Indiana Supreme Court of Judicature evaluated and struck down the laws in question under the liberty guarantee of Indiana's Lockean Natural Rights Guarantee rather than relying on its protections for property. Indiana's Lockean Natural Rights Guarantee was a variation from the typical form in that it only explicitly included the rights to "life, liberty, and the pursuit of happiness," and it therefore did not explicitly protect the right to property.⁵⁵³ This probably explains the court's unique focus on liberty interests in its alcohol-related decisions.

In the earliest case, *Herman v. State*,⁵⁵⁴ the defendant used a habeas petition to argue that an Indiana liquor-regulation statute was unconstitutional.⁵⁵⁵ Herman was arrested for violating an Indiana state liquor law, which prohibited the manufacture and sale of "whisky, ale, porter, and beer," with an exception for medicinal use.⁵⁵⁶

The Indiana Supreme Court of Judicature looked to the state constitution, and specifically to the Lockean Natural Rights Guarantee of the Indiana constitution, to assess the constitutionality of the statute:

The first section of the first article declares, that all men are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. Under our constitution, then, we all have some natural rights that have not been surrendered, and which government cannot deprive us of, unless we shall first forfeit them by our crimes; and to secure to us the enjoyment of these rights, is the great end and aim of the constitution itself.⁵⁵⁷

The court then considered what was specifically protected by the Guarantee and made a sweeping declaration on the nature of the liberty and pursuit of happiness rights:

We lay down this proposition, then, as applicable to the present case; that the right of liberty and pursuing happiness secured by the constitution, embraces the right, in each *compos mentis* individual, of selecting what he will eat and drink, in short, his beverages If the constitution does not secure this right to the people, it secures nothing of value. If the people are subject to be controlled by the legislature

553. Indiana's Lockean Natural Rights Guarantee states:

We declare, 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; that all power is inherent in the People; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well being.

IND. CONST. art. 1, § 1 (amended 1984).

554. 8 Ind. 545 (1855).

555. *Id.* at 545.

556. *Id.* at 547.

557. *Id.* at 556–57.

in the matter of their beverages, so they are as to their articles of dress, and in their hours of sleeping and waking. And if the people are incompetent to select their own beverages, they are also incompetent to determine anything in relation to their living, and should be placed at once in a state of pupillage to a set of government sumptuary officers; eulogies upon the dignity of human nature should cease; and the doctrine of the competency of the people for self-government be declared a deluding rhetorical flourish.⁵⁵⁸

The *Herman* court also looked to historical evidence to support its interpretation of the Lockean Natural Rights Guarantee of the Indiana constitution. The Indiana Supreme Court of Judicature cited legislative history from the state's constitutional convention noting that the prohibition of alcohol was proposed at the constitutional convention and that this proposal was repeatedly rejected.⁵⁵⁹ The Indiana Supreme Court of Judicature also pointed out that "fifty distilleries and breweries, in which a half a million of dollars was invested, and five hundred men were employed" existed when the constitution was adopted.⁵⁶⁰ Finally, the Indiana Supreme Court described the consumption and use of liquor throughout history, including in Europe, Egypt, Spain, and in the history of Anglo-Saxon and Danish culture.⁵⁶¹ (This alone is striking given recent debates on the U.S. Supreme Court about the propriety of consulting foreign law.) Therefore, the Indiana Supreme Court of Judicature concluded that the law prohibiting the manufacture of liquor was an unconstitutional violation of the Lockean Natural Rights Guarantee liberty provision.⁵⁶²

A few months later, the Indiana Supreme Court of Judicature reiterated its stance on the liberty rights contained in its Lockean Natural Rights Guarantee in *Beebe v. State*.⁵⁶³ Roderick Beebe was held in custody for violating the prohibition against liquor and sued on a writ of habeas corpus claiming that the law was unconstitutional.⁵⁶⁴ Judge Samuel Perkins's opinion explained that the Indiana Lockean Natural Rights Guarantee provided substantive natural law rights to Indiana citizens:

The first section of the first article declares, that "all men are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness." Under our constitution, then, we all have some rights that have not been surrendered, which are consequently reserved, and which government can not deprive us of unless we shall first forfeit them by our crimes; and to secure to us

558. *Id.* at 558–59.

559. *Id.* at 559.

560. *Id.*

561. *Id.* at 560.

562. *Id.* at 567.

563. *Beebe v. State*, 6 Ind. 501, 518 (1855) (opinion of Perkins, J.), *overruled in part by* *Schmitt v. F.W. Cook Brewing Co.*, 187 Ind. 623, 628–69 (1918).

564. *Id.* at 501.

the enjoyment of those rights is the great aim and end of the constitution itself.

It thus appears conceded that rights existed anterior to the constitution; that we did not derive them from it, but established it to secure to us the enjoyment of them. And it here becomes important to ascertain with some degree of precision what these reserved natural rights are. To do this we must have recourse to the common law, as the section was undoubtedly inserted in the constitution with reference to it. Counsel, in the argument of this cause, on the part of the state, it is true, deny the existence of any such rights in *Indiana*. Our answer is, the constitution above quoted has settled the point here; and a legislature, acting under that instrument, is estopped by its solemn declaration to deny the existence of the natural rights there asserted. That assertion, while it remains, is binding within the territory of *Indiana*.⁵⁶⁵

Judge Perkins also responded to the State's argument that alcohol prohibition laws were necessary to preserve the public health, stating that "as a beverage, [alcohol] is not necessarily hurtful, any more than the use of lemonade or ice-cream. . . . It is the abuse, and not the use, of all these beverages that is hurtful."⁵⁶⁶ He analogized liquor to other items that can be abused, including axes or firearms, which can be abused to kill people, and fists, which can be abused to fight.⁵⁶⁷ He concluded that Indiana's legislature had "overstepped" its authority with the liquor law.⁵⁶⁸

In a separate opinion, Judge William Stuart interpreted the Lockean Natural Rights Guarantee as implying a right to property:

To prevent misconception, the first section of the bill of rights is quoted entire:

"SEC. 1. We declare, 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; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety and well-being. For the advancement of these ends, the people have, at all times, an indefeasible right to alter and reform their government."

According to all publicists, the right to hold and enjoy private property is among the unalienable rights. In the constitution of 1816, the right "of acquiring, possessing and protecting property," was expressly enumerated.

⁵⁶⁵. *Id.* at 510.

⁵⁶⁶. *Id.* at 520 (citation omitted).

⁵⁶⁷. *Id.*

⁵⁶⁸. *Id.* at 519.

It becomes important, therefore, to inquire, in what sense are the rights of life, liberty and property said to be unalienable?⁵⁶⁹

He then held that because the law prevented manufacturing liquor, it invaded the property rights secured by the Indiana constitution.⁵⁷⁰ The *Beebe* precedent was then implemented in six additional Indiana cases striking down liquor laws as unconstitutional.⁵⁷¹ This constitutes one of the most striking instances in American history of the invocation of a Lockean Natural Rights Guarantee.

The Indiana Supreme Court's invalidation of alcohol control laws calls to mind Sir Edward Coke's and Lord Mansfield's arguments in *The Case of the Monopolies*, *Dr. Bonham's Case*, and *Somerset's Case*, in all of which these famous English judges argued for what Professor Randy Barnett calls a "Presumption of Liberty."⁵⁷² Professor Barnett's argument is powerfully supported by the Indiana Supreme Court's decisions in these liquor-law Lockean Natural Rights Guarantee cases.

B. *Liquor Laws Constitutional*

Nonetheless, in a majority of states liquor laws were upheld in the face of Lockean Natural Rights Guarantee challenges. This was the outcome in particular in the states of Iowa, Vermont, Massachusetts, Delaware, Maine, Alabama, and Ohio.⁵⁷³ Although the state courts in these states acknowledged that their state constitutions contained certain Lockean Natural Rights Guarantee property protections, the state courts in question nonetheless concluded that various alcohol-control laws fit comfortably within the state's general police power to regulate property for public health and safety.

In a leading case, *Santo v. State*,⁵⁷⁴ the Iowa Supreme Court ruled in 1855 that the state's liquor law did not violate the property rights secured by

569. *Id.* at 523 (opinion of Stuart, J.).

570. *Id.* at 538.

571. *Hollenbaugh v. State*, 11 Ind. 556, 557 (1859); *O'Daily v. State*, 10 Ind. 572, 572 (1858); *Turner v. State*, 10 Ind. 60, 60 (1858); *Crossinger v. State*, 9 Ind. 557, 557 (1857); *Eigenmann v. State*, 9 Ind. 510, 510 (1857); *O'Daily v. State*, 9 Ind. 494, 494–95 (1857). It is not clear why these cases continued to reach the Indiana Supreme Court of Judicature. Each case contains a single sentence opinion applying the prior precedents finding the liquor law unconstitutional.

572. RANDY E. BARNETT, *LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 259 (2004).

573. The Connecticut Supreme Court of Errors also upheld that state's liquor law prohibiting any person from owning or keeping alcohol with intent to sell it in *State v. Wheeler*, 25 Conn. 290, 298–99 (1856). Although the defendant argued that it violated "fundamental principles of civil liberty," the court held that the legislature was exercising "the power possessed by every sovereign state, to provide by law, as it shall deem fit, for the health, morals, peace and general welfare of the state." *Id.* at 297–98. The defendant may have been referring to Connecticut's generic liberty guarantee of "the great and essential principles of liberty and free government," CONN. CONST. of 1818, art. 1, but the court did not address the liberty argument.

574. 2 Iowa 165 (1855).

the Iowa constitution's Lockean Natural Rights Guarantee.⁵⁷⁵ Santo challenged the 1855 Act for the Suppression of Intemperance, which allowed the state to seize liquor and other alcohol intended for sale.⁵⁷⁶ The attorney general defended the Act, arguing:

It is contended that the law violates section 1st of the "bill of rights;" that it restricts the right of acquiring, possessing, and protecting property. To this, I answer, that while all men possess these rights under the constitution, yet no man can, in the exercise of what he conceives to be *his* constitutional rights, use his property, or enjoy it, in such a manner as to debar others of their rights. When the public good demands it, all are required to surrender certain natural rights, for the mutual benefit of the whole people. It is no violation of this section of the bill of rights, for the legislature to say, that one man shall not sell to another unwholesome bread, or meat, or that he shall not manufacture and sell intoxicating liquors; because, in the exercise of the discretionary power vested in the people of the state, by the constitution, they have the right to say what laws shall be enacted for the "*benefit, security, and protection of themselves, and for the public good.*"⁵⁷⁷

In its opinion upholding the Iowa statute, the court endorsed the State's argument and expressed its faith in the legislature to pass laws for the public benefit:

[T]o the objections based on the constitutional provisions concerning the right to acquire and protect property The legislative power is the supreme judge and guardian of the public health, safety, happiness, and morals; and if the traffic in certain property is held detrimental and dangerous to these, it may be prohibited, and such property illicitly held, kept or used, may be declared forfeited, and being forfeited, may be destroyed; and this is not taking private property for public use, in any sense which any one attaches to the constitution.⁵⁷⁸

Therefore, the court concluded that the statute allowing seizure of alcohol intended for sale was constitutional.⁵⁷⁹ The Iowa Supreme Court applied this precedent to a subsequent constitutional challenge to Iowa's liquor laws in its 1856 decision in *Sanders v. State*.⁵⁸⁰ Thus, the Iowa

575. *Id.* at 214–15.

576. *Id.* at 167.

577. *Id.* at 184–85.

578. *Id.* at 216–17.

579. *Id.* at 219.

580. 2 Iowa 230, 277 (1856). The court did not specifically address *Sanders*'s specific Lockean Natural Rights Guarantee argument: "How can a man acquire property in a more legitimate manner, than by purchase? Yet he is restrained from purchasing, by reason of a penal statute prohibiting the sale of the article of property, which the declaration of rights says he may *acquire, possess and protect.*" *Id.* at 235.

Supreme Court held that the state's liquor laws were constitutional.⁵⁸¹

The Vermont Supreme Court weighed in on the liquor laws debate in the 1855 case of *Lincoln v. Smith*,⁵⁸² where it upheld an 1852 state statute prohibiting traffic in liquor and authorizing the seizure of alcohol kept for the purpose of sale.⁵⁸³ In this case, Lincoln argued that the seizure of one barrel of rum and eight barrels of cider from his home was an unconstitutional violation of the Lockean Natural Rights Guarantee of the Vermont constitution.⁵⁸⁴ In response, the Vermont Supreme Court explained that Lincoln's Guarantee rights were subject to legislative regulation:

This article declares that all men have certain, natural, inherent and inalienable rights, among which is the enjoying and defending of life and liberty, and of acquiring, possessing and protecting property. This article seems to be a recitation of some of the natural rights of men before entering into the social compact. But these rights may be controlled or modified by the laws of the land. In the language of Judge BLACKSTONE, "they are absolute and inherent rights without any control, or diminution; save only by the laws of the land." It might as well be claimed, that the law punishing murder with death, or the laws restraining the liberty of the subject for any of the lesser offences, are violations of this article in the bill of rights, as the act in question provided, in other respects it is a valid law. The right to life, liberty and property are all placed in the same connection; and certainly the two former are as sacred as the latter; although they have not seemed at all times to have called out the same legal acumen in their behalf, as the latter.⁵⁸⁵

In addition, the Iowa Supreme Court had previously made similar, but more abbreviated, statements in the 1853 case *Our House, No. 2 v. State*. 4 Greene 172, 174 (Iowa 1853). Our House challenged its indictment under a statute that outlawed the sale of liquor by the glass and, thus, effectively prohibited dram shops. *Id.* at 173–74. The court upheld the statute as providing a public benefit:

The statute is intended as a great public benefit. It seeks to abolish a general and growing evil, which is having a most degrading effect upon the moral and physical condition of our race. It seeks to keep men from the common use of those intoxicating and poisonous beverages which so frequently lead to the ruin of property, character and health, and are proved to be the leading incentives to crime. It seeks to promote the general welfare, by prohibiting an excessive vice . . . from which can be traced most of the outrages upon those unalienable rights of life, liberty, property, safety and happiness, which our constitution claims to protect.

Id. at 174. Although the Guarantee is not cited specifically, the reference to the unalienable rights of life, liberty, property, safety, and happiness is likely referring to the Guarantee's listing of those rights. IOWA CONST. of 1846, art. 2, § 1.

581. *Sanders*, 2 Iowa at 277.

582. 27 Vt. 328 (1855).

583. *Id.* at 332–33, 362–63.

584. *Id.* at 331–33.

585. *Id.* at 340–41.

As a result, the statute prohibiting the keeping of liquor for sales was found to be constitutional.⁵⁸⁶

This decision relying on Blackstone to essentially eliminate Vermont's Lockean Natural Rights Guarantee and its presumption of liberty seems to us to be wrong in that the framing generation was far more influenced by the presumption of liberty made by the common law in such leading cases written by Sir Edward Coke and Lord Mansfield as *The Case of the Monopolies*, *Dr. Bonham's Case*, and *Somerset's Case*.⁵⁸⁷ Blackstone was a Tory while Coke, Lord Mansfield, and the American revolutionaries were all Whigs.⁵⁸⁸

The courts in the State of Delaware reached a similar result. In 1856, in *State v. Allmond*,⁵⁸⁹ the Delaware Court of General Sessions of the Peace and Jail Delivery upheld the Delaware Act of 1855, which prohibited the sale of liquor for any purpose other than "mechanical, chemical and medicinal."⁵⁹⁰ Allmond challenged his indictment, arguing that the legislature did not have the power to restrict sales of liquor.⁵⁹¹ Citing the Lockean Natural Rights Guarantee in the Delaware constitution, he argued that legislation must fulfill one of the stated goals of government: "[E]njoying and defending life and liberty, of acquiring and protecting reputation and property, and in general, of attaining objects suitable to their condition, without injury by one to another."⁵⁹² He argued that because the state prohibited both the buying and selling of liquor, it destroyed the value of his property as well as his inherent right to acquire alcohol.⁵⁹³ According to Allmond, this "was unquestionably the same thing substantially as the destruction of the property itself."⁵⁹⁴

The court firmly rejected the argument that the right to sell was inherent in the right to property: "The vendible quality of a thing is not of the substance of the thing in such sense that they may not be lawfully separated, and the right to have or own a thing does not oblige the State to furnish a market for its sale."⁵⁹⁵ It found in addition that the state's police power was not only consistent with the Lockean Natural Rights Guarantee but also that it affirmatively helped to preserve the rights protected by the Guarantee:

The innate or natural rights are comprehensively referred to in our Bill of Rights, which is believed to embrace, to the full extent, this idea of a higher law, or the existence of rights paramount to the

586. *Id.* at 362–63.

587. *See supra* note 573 and accompanying text.

588. For an introduction to English constitutional political theories that gave rise to American revolutionary thinking, see generally David N. Mayer, *The English Radical Whig Origins of American Constitutionalism*, 70 WASH. U. L.Q. 131 (1992).

589. 7 Del. (2 Houst.) 612 (Ct. General Sessions 1856).

590. *Id.* at 613.

591. *Id.*

592. *Id.* at 614–15 (internal quotation marks omitted).

593. *Id.* at 615.

594. *Id.* at 616.

595. *Id.* at 641.

constitution itself. “Through Divine Goodness (says the preamble to the constitution) all men have by nature the rights of worshipping and serving their Creator according to their consciences, of enjoying and defending life and liberty, of acquiring and protecting reputation and property, and in general of attaining objects suitable to their condition, without injury one to another, and as these rights are essential to their welfare, for the due exercise thereof, power is inherent in them.”

But the great law of social self preservation is equally a paramount law essential to the enjoyment of the natural rights thus declared to belong to “all men[.]” Freedom of conscience cannot be secured; life and liberty cannot be enjoyed and defended; nor property and reputation acquired and protected, unless society has the power to compel its members to respect these rights by imposing sanctions, which, in the due course of law, shall even take away from those who would prevent others from the enjoyment of them, the rights thus declared to be natural rights, and which in fact constitute the existence of the social system.⁵⁹⁶

Thus, the court affirmed the police power of the Delaware state legislature to enact statutes that “prevent the acquisition of such kinds of property as it considers so dangerous as to require such prohibition.”⁵⁹⁷ It analogized the Delaware liquor-control law to regulations on “[p]oisonous drugs; unwholesome food; infected goods; demoralizing books or prints; combustible and explosive substances; dangerous animals; and every species of property.”⁵⁹⁸

The Massachusetts Supreme Judicial Court also found that that state’s liquor-control laws were constitutional exercises of the state’s police power. In the earliest Massachusetts case, *Commonwealth v. Blackington*,⁵⁹⁹ the court upheld an 1836 statute requiring that vendors of alcohol be licensed under the statutory scheme.⁶⁰⁰ The court rejected the defendant’s Lockean Natural Rights Guarantee argument, and compared the regulation to other, less controversial licensing schemes:

The first argument of the defendant was founded on the preamble of the constitution, which announces one of its great objects to be, to secure to individuals the power of enjoying in safety and tranquility their natural rights, one of the most important of which is, that of acquiring, possessing and protecting property. This is one of those general truths, which both legislators and people should keep constantly in view, and therefore properly finds its place in a declaration of rights. But it is by no means repugnant to any salutary

596. *Id.* at 631–32.

597. *Id.* at 632–33.

598. *Id.* at 641.

599. 41 Mass. (24 Pick.) 352 (1837).

600. *Id.* at 352, 358–59.

laws, designed to regulate the means of acquiring property; and a large proportion of all the laws which have been passed, since the adoption of the constitution, have related, more or less directly, to the acquisition, preservation and transmission of property.⁶⁰¹

In upholding the Massachusetts liquor control law, the court specifically analogized the liquor law to inspection laws for agricultural products and to laws regulating the practice of skilled professions, including doctors, lawyers, ferrymen, steamboat operators, railroad, and others.⁶⁰²

About two decades later in *Fisher v. McGirr*,⁶⁰³ the Massachusetts Supreme Judicial Court expanded this logic to uphold an 1852 statute prohibiting the manufacture and sale of liquor and authorizing the seizure and confiscation of alcohol violating the statute.⁶⁰⁴ The court reiterated the police power of the legislature to enact statutes for the general good stating: "We have no doubt that it is competent for the legislature to declare the possession of certain articles of property, either absolutely, or when held in particular . . . circumstances, to be unlawful, because they would be injurious, dangerous or noxious"⁶⁰⁵ The Supreme Judicial Court then compared the liquor law to regulations on gunpowder and food storage.⁶⁰⁶

However, the Massachusetts Supreme Judicial Court did reject some portions of the liquor control act, including portions of its enforcement procedures such as a provision authorizing seizure on the basis of statements from only three persons, the deprivation of the rights of citizens to have an opportunity to question these persons, and the granting to justices of the peace of jurisdiction to hear these cases.⁶⁰⁷ It quoted the Massachusetts Lockean Natural Rights Guarantee, along with several other articles from the Declaration of Rights, in its criticism of the act's procedures for forfeiture.⁶⁰⁸ The Supreme Judicial Court of Massachusetts reiterated that "frequent recurrence to [these maxims] is absolutely necessary to preserve the advantages of liberty, and maintain a free government."⁶⁰⁹ Therefore, the court found that the prohibition of the keeping of liquor for sale and its forfeiture were constitutional, but the court required additional procedural safeguards beyond those adopted by the legislature to ensure that legal property interests were protected.⁶¹⁰

601. *Id.* at 357.

602. *Id.* at 357–58.

603. 67 Mass. (1 Gray) 1 (1854).

604. *Id.* at 21, 47–48.

605. *Id.* at 27.

606. *Id.*

607. *Id.* at 42–44.

608. *Id.* at 32.

609. *Id.* at 33.

610. *Id.* at 35–36. The following year, the Massachusetts Supreme Court again upheld the liquor law in *Commonwealth v. Clapp*. 71 Mass. (5 Gray) 97, 100 (1855). Eustis Clapp, the

The Supreme Judicial Court of Maine employed a reasonableness standard to uphold its state liquor law. In an 1830 opinion, *Lunt's Case*,⁶¹¹ the court found that an 1821 statute regulating the sale of certain liquors and imposing licensing and duties requirements was constitutional.⁶¹² The defendants argued that the statute violated the Guarantee's right of "acquiring, possessing and protecting property."⁶¹³ The court ruled that "[t]he legislature has a right to impose reasonable limitations and duties upon the sale of spirituous liquors."⁶¹⁴ This reasonableness discussion by the Maine Supreme Judicial Court may have foreshadowed *Lochner's* reasonableness standard,⁶¹⁵ which in the New Deal era became what we today call rational basis review.⁶¹⁶

More than twenty years later, the Maine Supreme Judicial Court again ruled on the constitutionality of a liquor law in *Preston v. Drew*.⁶¹⁷ In a creative maneuver to avoid the property constitutional challenge, the Maine legislature simply declared that alcohol did not constitute property subject to recovery.⁶¹⁸ The Supreme Judicial Court of Maine first cited the state constitution's Lockean Natural Rights Guarantee, along with its due process clause, in describing the property rights protected by the Maine constitution.⁶¹⁹ It then upheld the legislature's designation of alcohol as a controlled substance, relying heavily on the legislature's determination that liquor was dangerous and harmful to the public good: "The State, by its legislative enactments, operating prospectively, may determine that articles injurious to the public health or morals, shall not constitute property, within its jurisdiction."⁶²⁰ The Supreme Judicial Court recognized the implications of granting power to the legislature to outlaw controlled substances, and the court noted in dicta that the legislature was not permitted to declare that legal possessions did not constitute property.⁶²¹ So, for example, if the alcohol in question was possessed for private use and was not intended for sale, the Supreme Judicial Court said that the state could not declare that the mere

defendant, argued that the liquor law should be unconstitutional under the Lockean Natural Rights Guarantee language "of acquiring, possessing and protecting property," which included the right to buy and sell liquor. *Id.* at 99 (internal quotation marks omitted). The court did not address the Lockean Natural Rights Guarantee argument specifically but relied on the fact that previous liquor laws regulating buying and selling of liquor were found to be valid. *Id.* at 100.

611. 6 Me. 412 (1830).

612. *Id.* at 413–14.

613. *Id.* at 412–13 (internal quotation marks omitted).

614. *Id.* at 412.

615. *Lochner v. New York*, 198 U.S. 45, 56 (1905).

616. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 486–88 (1955).

617. 33 Me. 558 (1852).

618. *Id.* at 560.

619. *Id.*

620. *Id.*

621. *Id.* at 561.

possession of alcohol without the intention to sell it violated the law, and the state could not declare that it was not property.⁶²² However, in the case at hand, because the liquor was intended for sale and its possession was thus illegal, the citizen had no grounds for complaint.⁶²³

In 1859, the Alabama Supreme Court upheld an Alabama statute prohibiting sales of alcohol near a university in *Dorman v. State*.⁶²⁴ The defendant in this case first cited the Lockean Natural Rights Guarantee as a constitutional basis for an asserted property right: "In the preamble to our constitution the people say, that it was ordained in order to establish justice, insure tranquillity, provide for the common defense, promote the general welfare, and insure to themselves and their posterity the rights of life, liberty and property."⁶²⁵ He then argued that the statute prohibiting sales of alcohol violated the property right, which "consists in the free use, enjoyment, and disposal of [property] There can be no property, in the legal or popular sense of the term, where neither the owner nor the person representing him has the power of sale and disposition."⁶²⁶ The Alabama Supreme Court avoided addressing this question directly, holding instead that because the Alabama statute only prohibited sales near the university, "[a] substantial and valuable right of sale within the State is preserved."⁶²⁷ It also acknowledged that extensive liquor regulation might unconstitutionally deprive citizens of their property:

When, in the constitutional sense of these terms, is a citizen "deprived of his property?" The answer to this question demands the ascertainment of that shadowy line separating regulation from destruction, which courts have found so much difficulty in defining, and which is, perhaps, destined forever to remain in the catalogue of disputed boundaries.⁶²⁸

622. *Id.* at 562–63.

623. *Id.* at 560. Just a few years later, the Maine Supreme Judicial Court cited *Preston* in *Lord v. Chadbourne*, where it ruled that the plaintiff should have been able to submit evidence of his liquor in his argument for compensation. 42 Me. 429, 442, 444–45 (1856). The plaintiff argued that under the Lockean Natural Rights Guarantee "all men have the right of acquiring, possessing and protecting property." *Id.* at 432. Without referencing the Guarantee explicitly, the court agreed that he should have been able to submit evidence in the trial to gain compensation. *Id.* at 444–45. The court cited *Preston* in its decision, but it appears that it believed that the plaintiff may have possessed the liquor lawfully and, thus, was entitled to present evidence for compensation. *Id.* at 442–45.

624. 34 Ala. 216, 217, 237, 245 (1859).

625. *Id.* at 218.

626. *Id.* at 220.

627. *Id.* at 243.

628. *Id.* at 238.

However, the court concluded that the regulation in question did not cross this line because it only affected the area near the university.⁶²⁹ Thus, the court found that the regulation was constitutional.⁶³⁰

Finally, in the case *Miller v. State*,⁶³¹ the Ohio Supreme Court found that an 1854 statute prohibiting liquor sales in Ohio was constitutional.⁶³² The plaintiffs argued that by completely prohibiting the sale of liquor in Ohio, the statute violated the Ohio constitution's Lockean Natural Rights Guarantee of an inalienable right to acquire, possess, and protect property.⁶³³ However, the Ohio Supreme Court held that the law in question was permissible because it merely regulated alcohol and did not prohibit it entirely:

In support of these views, counsel, in addition to the section before quoted from the schedule, cite the first, nineteenth, and twentieth sections of the bill of rights, by which it is declared, among other things, that all men have the inalienable right of "acquiring, possessing, and protecting property;" that "private property shall ever be held inviolate, but subject to the public welfare," and that "this enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people."

We are unable to perceive that either of these provisions of the constitution, or any of its other provisions, is violated by the law in question. In saying this, we by no means affirm that the legislature has the power to wholly prohibit traffic in intoxicating liquors. . . . [F]or the law is not prohibitory, nor does it interfere, in any degree, with any right of property. It belongs to that class of legislative acts commonly called "police laws," and is framed with a view to regulate, and not to destroy. It seeks to do, by constitutional means, what the assembly is expressly authorized to do, provide against the evils resulting from the traffic in intoxicating liquors.⁶³⁴

The court analogized the liquor law to other permissible police power regulations like market laws, license laws, and Sabbath laws.⁶³⁵ For these reasons, the Ohio Supreme Court found that the statute at issue in this case was constitutional.⁶³⁶

With the exception of the Indiana Supreme Court, the state courts almost universally rejected the Lockean Natural Rights Guarantees as constitutional limitations on liquor laws. Most state supreme courts upheld alcohol control

629. *Id.* at 243.

630. *Id.* at 245.

631. 3 Ohio St. 475 (1854).

632. *Id.* at 485–86.

633. *Id.* at 485.

634. *Id.* at 485–86.

635. *Id.* at 486.

636. *Id.* at 485–87.

laws as being, under the circumstances, reasonable exercises of the legislature's police power to promote the general welfare. These cases also show that most state courts and litigants conceived of the liquor laws as regulations of property rights rather than as being restrictions on liberty rights. Thus, these cases may suggest that the Supreme Court was right in *Lochner v. New York* when it held that even fundamental constitutional rights are always subject to reasonable exercises of the police power.⁶³⁷ In the state courts prior to 1868, this was true of Lockean Natural Rights Guarantees insofar as they implicated the exercise of the police power to regulate and prohibit alcohol.

IX. Other Business Regulations

The Lockean Natural Rights Guarantees were also utilized by litigants seeking to invalidate state statutes regulating their businesses or professions. The majority of these litigants focused on the protection of property in the various Lockean Natural Rights Guarantees and argued that the regulations in question deprived them of this "inalienable right[]." ⁶³⁸ Three cases related to laws prohibiting businesses from operating on the Sabbath, and three others specifically addressed the South's post-Civil War use of loyalty oaths as a prerequisite for practicing a profession or for voting. An additional four cases ruled on other business regulations. In nearly every case, the state court considered the Lockean Natural Rights Guarantee to be relevant but nevertheless upheld the business regulation in question.

Thus, this set of cases illustrates both that the Lockean Natural Rights Guarantees were seen by many as a key limitation to legislative regulation and that while the courts accepted that the Lockean Natural Rights Guarantees provided substantive rights, in practice, they did not use them to limit the legislature's ability to regulate businesses. Accordingly, the judiciary's deference to the legislature during this time period indicates that the Lockean Natural Rights Guarantees were not interpreted as strong limits on legislative regulation, and it suggests that the federal judicial activism in *Lochner* and its progeny was something of a departure from this deferential tradition. These cases may also provide an historical basis for the federal and state courts' application of rational basis review to economic regulations, as is illustrated in the paradigm deference case of *Williamson v. Lee Optical of Oklahoma, Inc.*⁶³⁹

A. Sabbath Laws

The New Hampshire and California state supreme courts separately addressed the constitutionality of laws prohibiting activities or business from

637. *Lochner v. New York*, 198 U.S. 45, 56 (1905).

638. See, e.g., LA. CONST. of 1868, art. 1 (referring to "certain inalienable rights").

639. See 348 U.S. 483, 486–88 (1955) (stating that a law regulating prescription eyewear needs only to be "rational," rather than "in every respect logically consistent," to be constitutional).

being conducted on the Sabbath. It is important to note that the state courts in the three cases described below did not rely solely on those state constitutions' Lockean Natural Rights Guarantees but instead considered the Lockean Natural Rights Guarantees alongside other relevant provisions, including freedom of religion clauses. The opinions illustrate that these courts thought that the state constitutional Lockean Natural Rights Guarantees were one of several constitutional provisions relevant to the Sabbath law issue. In addition, there are certainly other Sabbath law cases from this time period that did not reference the Lockean Natural Rights Guarantees. In both New Hampshire and California, the state courts ultimately held that the Sabbath laws in question were permissible.

First, in 1817, the New Hampshire Superior Court of Judicature issued a ruling in *Mayo v. Wilson*⁶⁴⁰ on the constitutionality of a 1799 statute authorizing "selectmen and tythingmen to arrest persons, suspected of travelling unnecessarily on the Lord's day."⁶⁴¹ The plaintiff argued, in part, that the statute was unconstitutional.⁶⁴² The court framed its discussion by citing the New Hampshire constitution's Lockean Natural Rights Guarantee:

The second article of the bill of rights declares, that all men have certain natural, essential, inherent rights, among which are the enjoying and defending life and liberty, and acquiring, possessing and defending property; but the third article declares, that, when men enter into a state of society, they surrender up some of their natural rights to that society. All society is founded upon the principle, that each individual shall submit to the will of the whole. When we become members of society, then, we surrender our natural right, to be governed by our own wills in every case, where our own wills would lead us counter to the general will.⁶⁴³

The court then used this framework in its interpretation of the other sections of the New Hampshire constitution, analyzing their protections alongside the importance of the general will of the people as expressed in the constitution.⁶⁴⁴ For example, in analyzing the New Hampshire constitution's due process provision, the court found that the Sabbath statute did not violate the constitutional protection of property because this restriction was a product of the general will of the lawmaking authorities of the State of New Hampshire.⁶⁴⁵ Thus, the court seemed to view the Lockean Natural Rights Guarantee, which it interpreted as being subject to being overridden by the

640. 1 N.H. 53 (1817).

641. *Id.* at 53–54.

642. *Id.* at 55.

643. *Id.* at 57.

644. *Id.* at 58–59.

645. *Id.*

general will of the people of the state,⁶⁴⁶ as a lens through which to interpret the entire New Hampshire constitution. The court upheld the Sabbath statute, finding that it did not violate any part of the state constitution.⁶⁴⁷

Decades later, the California Supreme Court addressed the same issue in *Ex Parte Newman*.⁶⁴⁸ In this case, the defendant was convicted of selling goods on the Sabbath under an 1858 California state statute that provided “for the better observance of the Sabbath” and that prohibited doing business on the Sabbath.⁶⁴⁹ The chief justice’s opinion in *Ex Parte Newman* first discussed the Sabbath statute in terms of the freedom of religion clause, finding that it violated the constitution’s protection of religion.⁶⁵⁰ It then focused on the State of California’s Lockean Natural Rights Guarantee, reiterating that the Guarantee granted California citizens substantive rights:

It is said that [the Lockean Natural Rights Guarantee] is a common-place assertion of a general principle, and was not intended as a restriction upon the power of the Legislature. This Court has not so considered it. . . .

. . . .

It is the settled doctrine of this Court to enforce every provision of the Constitution in favor of the rights reserved to the citizen against a usurpation of power in any question whatsoever, and although in a doubtful case, we would yield to the authority of the Legislature, yet upon the question before us, we are constrained to declare that, in our opinion, the Act in question is in conflict with the [Lockean Natural Rights Guarantee], because, without necessity, it infringes upon the liberty of the citizen, by restraining his right to acquire property.⁶⁵¹

Thus, the majority held that California’s Lockean Natural Rights Guarantee protection of the right to acquire property prevented the legislature from restraining individuals from doing business on the Sabbath!⁶⁵²

Judge Nathaniel Burnett’s concurring opinion in this case specifically answered the argument that the California constitution’s Lockean Natural Rights Guarantee was unenforceable:

It was urged, in argument, that the provision of the [Lockean Natural Rights Guarantee], asserting the “inalienable right of acquiring, possessing, and protecting property,” was only the

646. *See id.* at 57–59 (describing how the natural rights of citizens are governed by the will of society).

647. *Id.* at 60.

648. 9 Cal. 502, 505 (1858), *overruled in part by Ex Parte Andrews*, 18 Cal. 679 (1861).

649. *Id.* at 505, 515 (internal quotation marks omitted).

650. *Id.* at 511.

651. *Id.* at 510–11.

652. *Id.* at 511.

statement in general terms, on a general principle, not capable in its nature of being judicially enforced.

It will be observed that [if the Lockean Natural Rights Guarantee] asserts a principle not susceptible of practical application, then it may admit of a question whether any principle asserted in this declaration of rights can be the subject of judicial enforcement. But that at least a portion of the general principles asserted in that article can be enforced by judicial determination, must be conceded. This has been held at all times, by all the Courts, so far as I am informed.⁶⁵³

He then elaborated on the substantive property guarantees contained in the Lockean Natural Rights Guarantee:

The right to acquire must include the right to use the proper means to attain the end. The right itself would be impotent without the power to use its necessary incidents. The Legislature, therefore, can not prohibit the proper use of the means of acquiring property, except the peace and safety of the State require it. And in reference to this point, I adopt the reasons given by the Chief Justice, and concur in the views expressed by him.⁶⁵⁴

Therefore, the California Supreme Court held that the statute prohibiting business on the Sabbath was an unconstitutional restriction on the Lockean Natural Rights Guarantee property rights.⁶⁵⁵

However, the California Supreme Court's bold holding in *Ex Parte Newman* was short lived. In 1861, the legislature passed a second statute entitled "An Act For the Observance of the Sabbath."⁶⁵⁶ The California Supreme Court completely reversed its prior ruling in the new case of *Ex Parte Andrews*,⁶⁵⁷ upholding the constitutionality of the new statute and concluding that it violated neither the freedom of religion clauses nor the Lockean Natural Rights Guarantee.⁶⁵⁸ The opinion began by acknowledging that several different judges had previously "commented" on the topic when the 1858 law on the same subject was under review.⁶⁵⁹ But without further explanation, the California Supreme Court proceeded to disavow its prior opinion in its entirety.⁶⁶⁰

Citing a string of opinions from other state courts, the California Supreme Court first argued that every other state had found Sabbath laws to be in accordance with their state constitutions.⁶⁶¹ With regard to the Lockean

653. *Id.* at 516 (Burnett, J., concurring).

654. *Id.* at 517.

655. *Id.* at 511 (majority opinion).

656. 18 Cal. 678, 680 (1861).

657. *Id.* at 678.

658. *Id.* at 681–83.

659. *Id.* at 681.

660. *Id.* at 681–82.

661. *Id.* at 681.

Natural Rights Guarantee “acquiring property” argument, the California Supreme Court reasoned that the state legislature had the police power regulatory authority to “repress whatever is hurtful to the general good” as was determined by the state legislature.⁶⁶² In a broad grant of authority, the California Supreme Court granted the legislature power to impose regulations to avoid physical as well as moral harms:

If from physical causes the carrying on of particular pursuits—as in certain mines or some mechanical branches which generate disease—is hurtful to health, it is within the power of Government to regulate the business so as to obviate or mitigate such results. And of both the evil and the remedy the Legislature is the judge; and why should the power be less or different when the evil is moral instead of physical? The Legislature has not only the power to regulate, but the power to suppress particular branches of business which it considers immoral and prejudicial to the general good, as gambling, lotteries, etc. The duty of government comprehends the moral as well as the physical welfare of the State; and in this instance it is asserted, on behalf of this law, that the passage of it is essential to the welfare of the people, both moral and physical.⁶⁶³

Therefore, the California legislature’s regulation of the conducting of business on the Sabbath was held to be well within its capacity to regulate the acquisition of property for the public good and not in violation of California’s Lockean Natural Rights Guarantee.⁶⁶⁴

These state supreme court decisions regarding Sabbath laws indicate a broad recognition of and deference to state legislative regulatory power. In fact, nearly fifty years later, Justice Oliver Wendell Holmes, Jr. used the example of the constitutionality under state and federal constitutional law of Sunday closing laws as an example of the sweeping ability of the police power to overcome constitutional rights in his *Lochner* dissent:

It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. . . . Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions

662. *Id.* at 682.

663. *Id.* at 683.

664. *Id.* at 685–86.

natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.⁶⁶⁵

B. *Test Oaths*

In four cases, state courts addressed the constitutionality of state statutes requiring members of various professions to take oaths in order to participate in their professions. A pre-Civil War Alabama case struck down a test oath relying solely on the Lockean Natural Rights Guarantee, but subsequent state court decisions issued during the Reconstruction period rejected this argument and upheld test oaths except when under the direct order of the Supreme Court. The U.S. Supreme Court struck down the constitutionality of test oaths in the 1866 case *Ex Parte Garland*,⁶⁶⁶ issued during Reconstruction, a time when many state governments were imposing loyalty oaths as a prerequisite for participation in various aspects of public life.⁶⁶⁷ In *Ex Parte Garland*, the U.S. Supreme Court struck down an 1865 congressional statute, which functionally prohibited former Confederate officials from participating in government or practicing law before the United States federal courts.⁶⁶⁸ The U.S. Supreme Court found that the law was equivalent to a bill of attainder in that it retroactively punished conduct.⁶⁶⁹

The first state case on this topic was a pre-Civil War case in Alabama decided before the U.S. Supreme Court ruling. In the 1838 case, *In re Dorsey*,⁶⁷⁰ the Alabama Supreme Court relied on substantive protections in Alabama's Lockean Natural Rights Guarantee to strike down an 1828 statute requiring that attorneys take an oath that they had not participated in a duel since January 1, 1826.⁶⁷¹ Judge Henry Goldthwaite declared:

The first section of the declaration of rights, announces the great principle which is the distinctive feature of our government, and which makes it to differ from all others of ancient or modern times: "All freemen, when they form a social compact, are equal in rights, and no man, or set of men, are entitled to exclusive separate public emoluments or privileges, but in consideration of public services."

665. *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting).

666. 71 U.S. (4 Wall.) 333, 381 (1866).

667. HAROLD M. HYMAN, *A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION* 177 (1973).

668. *Garland*, 71 U.S. (4 Wall.) at 376–77, 381.

669. *Id.* at 377.

670. 7 Port. 293 (Ala. 1838).

671. *Id.* at 338–43, 354. "As this is a case *sui generis*, and of great importance, involving the constitutional power of the legislature, to pass the act of eighteen hundred and twenty-six, and in which the judges of the Supreme court delivered their opinions *seriatim*." *Id.* at 300. The oath stated: "'I, —, do solemnly swear, that I have neither directly nor indirectly given, accepted, or knowingly carried a challenge, in writing or otherwise, to, [et]c.—or aided or abetted in the same, since the first day of January, eighteen hundred and twenty-six.'" *Id.* at 347–48.

This is no empty parade of words: it means, and was intended to guarantee to each citizen, all the rights or privileges which any other citizen can enjoy or possess. Thus, every one has the same right to aspire to office, or to pursue any avocation of business or pleasure, which any other can. As this general equality is thus expressly asserted and guaranteed as one of the fundamental rights of each citizen, it would seem to be clear, that the power to destroy this equality must be expressly given, or arise by clear implication, or it can have no legal existence.⁶⁷²

The opinion then considered the specific sections of the state constitution that allowed for disqualification and found that the dueling oath was not justified by any of these grants of power to the legislature.⁶⁷³ Judge Goldthwaite's rationale is particularly interesting in light of Professor John Yoo's invocation of the concurring opinion from Judge Ormond as the "most striking reading" of a Ninth Amendment analogue protecting natural rights.⁶⁷⁴ Thus, the Alabama Supreme Court struck down the state statute in question that required that attorneys take oaths against dueling as a condition for admission to the bar.⁶⁷⁵

Several decades passed before the next state test oath cases arose under state constitutional law. The first loyalty oath case to arise in the states following the Civil War occurred before the Supreme Court's *Ex Parte Garland* ruling. The California Supreme Court ruled on the constitutionality of a test oath for attorneys in the 1863 case *Cohen v. Wright*.⁶⁷⁶ The California legislature had passed an 1863 statute entitled "An Act to exclude Traitors and Alien Enemies from the Courts of Justice in Civil Cases."⁶⁷⁷ Among other arguments, the appellant argued that this statute was unconstitutional under California's Lockean Natural Rights Guarantee because it prevented attorneys from protecting their property in court.⁶⁷⁸ In its decision, the court emphasized the importance of the Guarantee and its centrality to the theory of American government:

[I]t is urged that Sec. 1 of Art. 1, declaring that "all men have the inalienable right by nature of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing safety and happiness," is violated by this act, as litigants are prevented from protecting their lives, liberty, and property, by the aid of the Courts, and that it has the effect of taking the property of one man and giving it to another, thus depriving the litigant of his property without due

672. *Id.* at 360–61 (opinion of Goldthwaite, J.).

673. *Id.* at 363–66.

674. Yoo, *supra* note 73, at 1016; *see also* *Dorsey*, 7 Port. at 371–73, 387 (opinion of Ormond, J.) (relying on various provisions in the Alabama constitution to support the holding).

675. *Dorsey*, 7 Port. at 354 (majority opinion).

676. 22 Cal. 293, 306 (1863).

677. *Id.* at 301 (internal quotation marks omitted).

678. *Id.* at 300.

process of law. The great natural right to life, liberty, and property, is fully recognised by this section of the Constitution. These rights are guaranteed to all who do not infringe upon the rights of others, or forfeit them by crime. They are not in any way impaired by the act in question, for all persons have the same right to enjoy and defend their lives and liberties, and to acquire, possess, and protect their property, as before. . . . These great rights are founded in the law of nature, but nature has provided no Courts in which contested claims can be litigated or admitted rights can be enforced. Hence arises one of the necessities of a Government, which is instituted for the very purpose of protecting and securing these natural rights⁶⁷⁹

However, the California Supreme Court rejected the attorney's argument in this case and held that the government had an obligation to protect the rights protected by the Guarantee only when the citizen fulfilled his "correlative duty of obedience and support to the Government."⁶⁸⁰ Thus, the legislature was justified in "closing [the court's] doors against traitors," and the test oath was accordingly upheld as being constitutional by the California Supreme Court.⁶⁸¹ This decision must be understood as having been issued in light of the enormous disruption of civil government caused by the Civil War, and in our view, it therefore ought not to be seen as having much precedential significance.

The Missouri Supreme Court also addressed the constitutionality of test oaths in three Civil War-era cases spanning the period from 1865 to 1867. First, in an 1865 case, *State v. Cummings*,⁶⁸² the Missouri Supreme Court upheld the use of loyalty oaths for preachers, stating that they did not infringe upon any recognized rights in the constitution.⁶⁸³ The court quoted Missouri's Lockean Natural Rights Guarantee in its opinion but simply stated that "[w]e do not see that any one is forbidden to enjoy the fruits of his labor, but in doing so he must conform to the law."⁶⁸⁴ Thus, the court found the test oath for preachers to be constitutional.⁶⁸⁵

The United States Supreme Court reversed this decision the following year in *Cummings v. State*,⁶⁸⁶ a companion case to *Ex Parte Garland*.⁶⁸⁷ As in *Ex Parte Garland*, the Supreme Court focused on the retroactive nature of the oath and compared it to a bill of attainder.⁶⁸⁸ Strikingly, some of the

679. *Id.* at 324–25.

680. *Id.* at 325.

681. *Id.* at 325–26.

682. 36 Mo. 263 (1865), *rev'd*, 71 U.S. (4 Wall.) 277 (1866).

683. *Id.* at 271, 275.

684. *Id.* at 275.

685. *Id.* at 279.

686. 71 U.S. (4 Wall.) 277 (1866).

687. *Id.* at 332 (Miller, J., dissenting).

688. *Id.* at 323, 325–27.

language in the U.S. Supreme Court's opinion echoed the Lockean Natural Rights Guarantee argument made in the state courts below, as the following passage in the U.S. Reports makes clear:

The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.⁶⁸⁹

However, the U.S. Supreme Court explicitly relied on the bill of attainder provisions in the U.S. Constitution, which apply to the states as well as to Congress, to reverse the Missouri decision below and to hold that requiring a test oath for preachers was unconstitutional.⁶⁹⁰ There is, of course, no Lockean Natural Rights Guarantee in the federal Constitution, which the U.S. Supreme Court could have relied on, and the Missouri state courts have the last word on the meaning of Missouri's state constitutional Lockean Natural Rights Guarantee.

One year later, the Missouri Supreme Court sharply limited the *Cummings* decision by refusing to apply the precedent in *Blair v. Ridgely*,⁶⁹¹ which upheld the requirement of a test oath for voting.⁶⁹² The court acknowledged the U.S. Supreme Court's bill of attainder concerns as well as the guarantees of "life, liberty, and property" in the state constitution, although it did not specifically cite the Lockean Natural Rights Guarantee:

The illustrious author of the Declaration of Independence embodies the same in estimable axioms, when he declares that "all men are endowed by their Creator with certain inalienable rights, among which are life, liberty, and the pursuit of happiness." Essentially the same principles are inserted in the amendments to the Constitution of the United States, and in the bills of rights of the respective States. The right, then, to life, liberty, and private property, is natural, absolute, and vested, and belongs as well to the individual in a state unconnected with society, as in the most carefully guarded and well arranged system of government.⁶⁹³

689. *Id.* at 321–22.

690. *Id.* at 325, 332.

691. 41 Mo. 63 (1867).

692. *Id.* at 180. This same year, however, the Missouri Supreme Court followed the *Cummings* precedent in the *Murphy & Glover Test Oath Cases*. 41 Mo. 339, 379–80 (1867). Not surprisingly, in this case, the defendant focused his arguments on the prohibition against attainder, and the Missouri Supreme Court found the statute unconstitutional on those grounds. *Id.* at 342–43, 388. The opinion also relied on the protection of "liberty" although it did not specify the source for this right. *Id.* at 367.

693. *Blair*, 41 Mo. at 173.

Nevertheless, the Missouri Supreme Court held that a test oath in this case was permissible because the right to vote was not encompassed in the protections of life, liberty, or property, and was not a natural right.⁶⁹⁴ Perhaps most surprisingly, the Missouri Supreme Court acknowledged the U.S. Supreme Court's rulings finding test oaths unconstitutional but rejected them.⁶⁹⁵ It claimed that the Supreme Court precedents were not applicable because they addressed the civil right to practice a profession rather than the political right to vote.⁶⁹⁶ It was common in the 1860s to grant civil rights more extensively than political rights, like the right to vote.⁶⁹⁷ Therefore, the Missouri Supreme Court concluded that the political right to vote was not protected from being made conditional on the taking of an oath, and the prerequisite of a test oath was thus held to be constitutional.⁶⁹⁸ Thus, the Missouri Supreme Court maintained that the state had the right to impose test oaths in certain situations notwithstanding the contrary opinions of the U.S. Supreme Court. The test oath cases illustrate that despite an early decision relying on the Lockean Natural Rights Guarantees to strike down a test oath, the Guarantees were largely ineffective in protecting citizens from test oath requirements during the chaos that followed the Civil War. The state courts appeared very willing to defer to the state legislatures on test oath requirements in the lawless environment of the 1860s. In our opinion, these test oath cases ought not to be given much weight given the extraordinary experience of the Civil War.

C. *Miscellaneous Regulations*

Four other business regulations were adjudicated in various states producing state court rulings on Lockean Natural Rights Guarantee arguments.⁶⁹⁹ With the exception of one case, the state courts concluded that

694. *Id.* at 175–78.

695. *Id.* at 178.

696. *Id.* at 173–74, 178.

697. See generally Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEXAS L. REV. 1, 70–75 (2011) (describing the differences between political and civil rights).

698. *Blair*, 41 Mo. at 168, 180.

699. State supreme courts upheld business regulations in three additional cases. In the 1840 case *Pontchartrain Railroad Co. v. Orleans Navigation Co.*, the Louisiana Supreme Court upheld a business regulation granting one company exclusive rights to construct a railroad from New Orleans to Lake Pontchartrain in the face of the plaintiff's Lockean Natural Rights Guarantee argument. 15 La. 404, 412–13 (1840). The defendants argued that granting the exclusive rights violated Louisiana's Lockean Natural Rights Guarantee:

It is inconsistent with the constitution of the United States, made, as the sovereign people in convention said, to establish justice; it is even contrary to the spirit and intent of our own constitution, which was “*ordained and established to secure to all the citizens the enjoyment of the right of life, liberty and property.*”

Id. at 411. The court did not specifically address this argument but ruled that the charter granting this exclusive right was valid. *Id.* at 412–13.

the various legislative business regulations that they reviewed were constitutionally permissible, and that the regulations did not violate the state's Guarantee.

In the only case to strike down a state legislative business regulation, *Billings v. Hall*,⁷⁰⁰ the California Supreme Court addressed the constitutionality of an 1856 statute that was entitled "an Act for the protection of actual settlers, and to quiet land-titles in this State."⁷⁰¹ This statute provided that when title holders of land ejected tenants or others occupying their land, they were required to reimburse them for the value of improvements made to the land.⁷⁰² After addressing the defendant's other arguments, the court focused on California's Lockean Natural Rights Guarantee language:

[The Lockean Natural Rights Guarantee] declares that "all men are by nature free and independent, and have certain inalienable rights, amongst which are those of enjoying and defending life and liberty, acquiring possession, protecting property, and pursuing and obtaining safety and happiness." This principle is as old as the Magna Charta. It lies at the foundation of every constitutional government, and is necessary to the existence of civil liberty and free institutions. It was not lightly incorporated into the Constitution of this State as one of those political dogmas designed to tickle the popular ear, and conveying no substantial meaning or idea; but as one of those fundamental principles of enlightened government, without a rigorous observance of which there could be neither liberty nor safety to the citizen.⁷⁰³

The California Supreme Court concluded in this case that because the title bearer of property in land had not contributed to improvements made on the land, the state land law statute in question was unconstitutional as applied because it was "repugnant to the plainest principles of morality and justice It divests vested rights, attempts to take the property acquired by

Two other cases also upheld business regulations in the context of inalienable rights or property rights, but these opinions did not specifically cite the Lockean Natural Rights Guarantees. In *Shelton v. Mayor of Mobile*, the Alabama Supreme Court upheld a statute prohibiting the "hawking and peddling about the streets of the city of meat, game, poultry, vegetables, [or other marketplace goods]." 30 Ala. 540, 540–42 (1857) (internal quotation marks omitted). The court found that it was not against the "common right" because it was a reasonable regulation and did not completely prevent the plaintiff from selling meat. *Id.* at 541.

The Florida Supreme Court also upheld a statute regulating "pilotage" licenses within the state in *Cribb v. State*. 9 Fla. 409, 417–18 (1861). The court concluded that it had the "inherent right and power over her citizens and of controlling her inhabitants or residents while they remain as residents" to exercise police power for the "common welfare of all" but did not specifically cite the Lockean Natural Rights Guarantee. *Id.* at 417.

700. 7 Cal. 1, 15–16 (1857).

701. *Id.* at 3.

702. *Id.*

703. *Id.* at 6.

the honest industry of one man, and confer it upon another, who shows no meritorious claim in himself.”⁷⁰⁴ The court continued with a lengthy discussion of Locke’s political philosophy and concluded that the legislature had limited powers because the people retained certain rights listed in the Lockean Natural Rights Guarantee for themselves.⁷⁰⁵ Therefore, the court concluded that the California statute requiring title bearers to reimburse those they ejected from their lands was unconstitutional as applied.⁷⁰⁶

In his article on Ninth Amendment analogues, Professor Yoo cites a concurring opinion from Judge Burnett, in which Judge Burnett cites the state’s Ninth Amendment analogue to protect “certain inherent and inalienable rights of human nature that no government can justly take away.”⁷⁰⁷ However, Judge Burnett then cites California’s Lockean Natural Rights Guarantee as enumerating the content of those rights: “[A]mong the inalienable rights declared by our Constitution as belonging to each citizen[], is the right of ‘acquiring, possessing, and protecting property.’”⁷⁰⁸ This opinion suggests that the interpretation of California’s Ninth Amendment analogue was linked to the Lockean Natural Rights Guarantee.

About a decade later, the California Supreme Court revisited the state’s Lockean Natural Rights Guarantee as it related to business regulations in *Ex Parte Shrader*.⁷⁰⁹ In this case, it upheld a city provision prohibiting slaughterhouses within city limits.⁷¹⁰ The city acted under authority from the state legislature, which had passed a statute authorizing cities to make regulations “necessary or expedient for the preservation of the public health and the prevention of contagious diseases.”⁷¹¹ The court rejected the defendant’s Lockean Natural Rights Guarantee argument:

As to the other objection, that the order interferes with the constitutional right of the petitioner to acquire, possess and protect property, both his capacities and rights in that regard are untouched by the order. Voluntary obedience to the order would have involved neither a surrender of the right nor a disuse or suspension of the capacity, and disobedience to it on the part of the prisoner has been visited with no description of civil disability.⁷¹²

704. *Id.* at 10–11.

705. *Id.* at 9–14.

706. *See id.* at 13–14 (arguing that a statute which forces title bearers to pay those they ejected from their lands falls outside the bounds of government power under a social contract).

707. Yoo, *supra* note 73, at 1018 (citing *Billings*, 7 Cal. at 17 (Burnett, J., concurring)).

708. *Billings*, 7 Cal. at 16 (Burnett, J., concurring).

709. 33 Cal. 279, 282 (1867).

710. *Id.* at 284–85.

711. *Id.* at 280–81 (internal quotation marks omitted).

712. *Id.* at 282.

It further analogized the case to *Ex Parte Andrews*, in which the court had found Sabbath laws to be constitutional,⁷¹³ and it reiterated that the state legislature had the power to regulate business, so long as it did not deprive citizens of their property entirely.⁷¹⁴ The court concluded that the city's regulation of slaughterhouse locations was within its regulatory power and that it did not violate the right to property.⁷¹⁵ Only six years later, the U.S. Supreme Court would revisit similar regulations in the City of New Orleans, Louisiana, in the famous *Slaughter-House Cases*.⁷¹⁶

In an 1859 case entitled *State v. Freeman*,⁷¹⁷ the New Hampshire Supreme Judicial Court ruled that a regulation requiring restaurants to close at ten o'clock at night was constitutional.⁷¹⁸ The restaurant owner cited the State of New Hampshire's Lockean Natural Rights Guarantee to argue that the ordinance interfered with his property rights: "The objection is that the ordinance deprives the citizen of the right guaranteed to him by the constitution, of 'acquiring' 'property' by the prosecution of a lawful business."⁷¹⁹ The court found that the ordinance in question was perfectly constitutional, saying that it was a reasonable regulation of property rights in the following language:

It is one thing to deprive a party of his rights, and quite another to regulate and restrain their exercise in such a manner as the common convenience and safety may require. If it is permissible to interfere in any way with the private right to carry on and manage his lawful business at such time and place, and in such manner as suits himself, we are unable to see anything unreasonable in requiring places of public entertainment to be closed at seasonable hours.⁷²⁰

Thus, the court concluded that mandating closing times was permissible because it was a regulation on property not a deprivation of property.⁷²¹

In the final case on this topic, *New Albany & Salem Railroad Co. v. Tilton*,⁷²² the Indiana Supreme Court of Judicature considered an Indiana state statute that required railroad companies to either fence their tracks or to reimburse owners for damage to animals injured or killed by trains.⁷²³ In this case, the plaintiff sued the railroad for \$100, which he alleged was the value of a mare killed by the railroad company's locomotive.⁷²⁴ The Indiana

713. See *supra* notes 657–65 and accompanying text.

714. *Shrader*, 33 Cal. at 282 (citing *Ex Parte Andrews*, 18 Cal. 678 (1861)).

715. *Id.* at 284–85.

716. 83 U.S. (16 Wall.) 36, 38–43 (1872).

717. 38 N.H. 426 (1859).

718. *Id.* at 426, 428.

719. *Id.* at 427.

720. *Id.* at 428.

721. *Id.*

722. 12 Ind. 3 (1859).

723. *Id.* at 5.

724. *Id.* at 3.

Supreme Court of Judicature upheld the state statute at issue, explaining that the language in the Indiana Lockean Natural Rights Guarantee providing for the “pursuit of happiness” required compensation for damaged property:

One of the “unalienable rights” of man is the “pursuit of happiness,” included in which, as generally understood, is the right to acquire and quietly enjoy property. Yet by these acts of congress, this unalienable right to acquire property is, to a certain extent, infringed; the right of the individual is treated as secondary and subordinate to the general welfare.

If the legislative body possesses the power to regulate the enjoyment, by the citizen, of an unalienable right, we cannot well conceive how such body could grant to a few of the citizens of the state, when organized into a body politic, rights of a higher dignity or more sacred character than those generally recognized as unalienable.

Viewing in this light the questions involved in the case at bar, we are, we repeat, clearly of opinion that the statute, should be considered as a police regulation, and, as such, is valid and binding upon all railroads, whether constructed under charters granted before or after its publication.⁷²⁵

Thus, the court found the state statute requiring reimbursement for property damage was affirmatively necessary to fulfill the Guarantee’s “pursuit of happiness” language, as well as constitutional under the property protections. The statute was a constitutional exercise of the police power.⁷²⁶

From Sabbath laws to test oaths and slaughterhouse regulations, litigants invoked the Lockean Natural Rights Guarantee protections to argue that the regulations of businesses should be treated as being unconstitutional under state constitutional Lockean Natural Rights Guarantees. Yet, although state courts acknowledged the existence of property rights, the state courts generally permitted the legislature to impose reasonable regulations on businesses and justified the regulations as necessary for the common welfare and as permissible exercises of the police power. A review of these cases suggests that the *Lochner* dissenters may very well have been right, and that the majority opinion in that case was wrong, with respect to the level of scrutiny historically afforded to regulations of business in American constitutional law. This history lends some support to the idea that the rational basis test of *Nebbia v. New York*⁷²⁷ and *Williamson v. Lee Optical Co.* is more deeply grounded in U.S. constitutional practice than is the

725. *Id.* at 8. As previously explained, the Indiana Lockean Natural Rights Guarantee did not explicitly protect property, which may explain the state court’s reliance on the “pursuit of happiness” language. See *supra* note 554 and accompanying text.

726. *Tilton*, 12 Ind. at 8.

727. 291 U.S. 502 (1934).

reasonableness test of *Lochner*.⁷²⁸ These cases do not take account, however, of the presumption of liberty that the United States inherited from such English cases as *The Case of the Monopolies*, *Dr. Bonham's Case*, and *Somerset's Case*.⁷²⁹ Sir Edward Coke and Lord Mansfield most certainly did not, in these foundational cases, employ a mere rational basis test.

X. Property Transfer Regulations

In eight cases, state courts adjudicated disputes over the role of the Lockean Natural Rights Guarantees with respect to legislative and judicial restrictions on property transfers. These cases concerned two main topics: the purchase and sale of real property and the use of property to satisfy debts. In each case, one party challenged the regulation, claiming that it interfered with his constitutional right to “acquire, possess, and protect property,” as provided by the Lockean Natural Rights Guarantee. Without exception, the courts upheld the regulations, finding that they were not so invasive so as to violate constitutional property rights.

A. Regulation of Property Transfers

Six cases addressed the role of the Lockean Natural Rights Guarantees in regulating the buying, selling, and inheritance of properties.⁷³⁰ In each case, the courts found that the regulations in question were permissible and did not violate the state's Lockean Natural Rights Guarantee of the right to acquire, possess, and protect property.

First, in *Commonwealth v. Franklin*,⁷³¹ the earliest case to consider regulations on property transfers, the Pennsylvania Supreme Court considered an indictment charging the defendants with conveying land on “pretended title[s],” rather than Pennsylvania state land grants as required by

728. Compare *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955) (analyzing whether law is “a rational way” to correct a perceived wrong), and *Nebbia*, 291 U.S. at 537 (analyzing whether a law has “a reasonable relation to a proper legislative purpose”), with *Lochner v. New York*, 198 U.S. 45, 56 (1905) (analyzing the constitutionality of a law based on whether the law is a “fair, reasonable and appropriate exercise of the police power”).

729. See *supra* note 573 and accompanying text.

730. The Virginia Supreme Court of Appeals also ruled on the regulation of property transfers in the 1834 case *Richmond v. Judah*. 32 Va. (5 Leigh) 305, 307–08 (1834). Judah sued the City of Richmond to return the \$178 that he had overpaid in taxes based on a misunderstanding of law. *Id.* at 308. The court upheld the city's refusal to refund the money, and one judge noted:

Some bounds are, therefore, set to the right of reclamation, by that power, from which is derived the right of property, and which assumes the sovereign authority to prescribe rules for its enjoyment. It reminds us of what we are too apt to forget, that our right of property is not inherent, but derived merely from the regulations of society.

Id. at 323 (opinion of Tucker, P.). The judge did not refer to Virginia's Lockean Natural Rights Guarantee “certain inherent rights” language, but this statement may suggest some limitations to the property right. VA. BILL OF RIGHTS of 1864, § 1.

731. 4 U.S. (4 Dall.) 254 (Pa. 1802).

a 1795 state statute.⁷³² From context, it appears that these “pretended” titles were derived from pre-Revolutionary War British deeds.⁷³³ The defendants argued that the statute requiring state land grants violated the Lockean Natural Rights Guarantees, but the attorney general responded that the state regulates property:

The act has been said to be a violation of the [Lockean Natural Rights Guarantee] of the state constitution, which declares, “that all men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.”

We answer, property is a creature of society; and the right, in all its modifications, of acquisition, possession and transfer, is regulated by positive law.⁷³⁴

Without explanation, the Pennsylvania Supreme Court simply ruled that the indictment was valid, implying its agreement with the attorney general that the regulation was constitutional.⁷³⁵

In *Doe ex dem. Chandler v. Douglass*,⁷³⁶ the Indiana Supreme Court of Judicature addressed a much more specific regulation on property sales.⁷³⁷ In 1819, the Indiana legislature had passed a statute permitting an estate administrator to sell land into town lots on behalf of juvenile heirs.⁷³⁸ Years later, in 1846, juvenile heirs brought this suit challenging the administrator’s authority to sell the lands and arguing that the 1819 statute was unconstitutional.⁷³⁹ The court cited the Lockean Natural Rights Guarantee contained in Article I, § 1 as providing property rights⁷⁴⁰ but found that the statute in question was valid:

[Constitutional provisions] restrain the legislature from passing a law impairing the obligation of a contract, from the performance of a judicial act, and from any flagrant violation of the right of private property. This last restriction, we think clearly contained in [the Lockean Natural Rights Guarantee] of our constitution. Does the act

732. *Id.* at 255–56.

733. *See id.* at 255 (describing the “pretended title” as being from before the Revolutionary War and not deriving its authority from “this commonwealth”).

734. *Id.* at 258–59.

735. *Id.* at 265.

736. 8 Blackf. 10 (Ind. 1846).

737. *Id.* at 11.

738. *Id.*

739. *Id.*

740. Indiana’s Lockean Natural Rights Guarantee was substantially modified in the 1851 Constitution. *See* IND. CONST. art. I, § 1 (amended 1984). This case refers to the version found in the 1816 constitution, which guaranteed “certain natural, inherent, and unalienable rights; among which are the enjoying and defending life and liberty, and of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.” IND. CONST. of 1816, art. I, § 1.

involved in this case, come within any of these restrictions? That it does not, is clearly settled by judicial authorities, if any question can be settled by such authorities, and those entitled to the highest consideration. Legislative acts, some of them precisely analogous to, and others equally obnoxious to the same constitutional objections with, that under consideration, have been sanctioned, under constitutions containing the same provisions bearing upon the question as our own⁷⁴¹

Thus, the court concluded that the legislative act in question regulating property transfers was valid.⁷⁴²

The Iowa Supreme Court applied that state constitution's Lockean Natural Rights Guarantee to inheritance laws in the 1852 case *Stemple v. Herminghouser*.⁷⁴³ In this case, one of Stemple's children living in Iowa filed a petition arguing that Stemple's other children residing in Prussia could not inherit any interest in Stemple's lands.⁷⁴⁴ The Iowa Supreme Court upheld the common law rule that a nonresident alien cannot inherit land by descent and prohibited the Prussian residents from receiving their inheritance.⁷⁴⁵ In a lively dissent, Judge George Greene lambasted the common law "inheritable blood" rule as "readily indorsed by the selfish dictates of crowned heads, to which the property would escheat"⁷⁴⁶ and argued that it was incompatible with Iowa's state constitution:

The reason for this prerogative of the crown ceased with our declaration of independence and our republican forms of government. From that time the rights of all, both native and alien, were encouraged and protected by our more equal, just and catholic systems of law. Our constitution and laws are made for the *people*, whose persons or property may come within their supervision, and not for the citizen or resident only. The rights of property in a non-resident are distinctly recognized by our laws. The first article of our state constitution declares, that "all men have certain unalienable rights; among which

741. *Doe ex dem. Chandler*, 8 Blackf. at 12.

742. *Id.*

743. 3 Greene 408, 411 (Iowa 1852). The Indiana Supreme Court of Judicature also issued a decision addressing statutes governing inheritance. In *Noel v. Ewing*, the Indiana Supreme Court of Judicature held a statute mandating specific apportionment of estates to widows to be constitutional. 9 Ind. 37, 54 (1857). However, the dissent argued that each person should be able to dispose of property as they wished: "It seems, also, that the right to dispose of property by will, is now becoming to be regarded as a natural right, though *Blackstone* and *Paley* do not so admit it." *Id.* at 61 (Perkins, J., dissenting). Although the judge did not cite Indiana's Guarantee specifically, Indiana's Lockean Natural Rights Guarantee at this time used the "natural rights" language and may have influenced this dissent. See *supra* note 741.

744. *Stemple*, 3 Greene at 408.

745. *Id.* at 411.

746. *Id.* at 412 (Greene, J., dissenting).

are those of *acquiring, possessing and protecting property*, and obtaining safety and *happiness*.”

What dearer or more unalienable right has a parent than that of acquiring and protecting property for his offspring? What contributes more to his pursuit of happiness. Surely, under such a declaration of rights, so comprehensive and universal in its application, there can be neither reason, propriety, nor justice in thus excluding the non-resident child from the property acquired for him by his resident father. In Iowa, at least, this relic of despotism and injustice should have no vitality as a principle of common law.⁷⁴⁷

Judge Greene argued that Iowa’s Lockean Natural Rights Guarantee nullified the common law rule prohibiting a nonresident alien from inheriting land,⁷⁴⁸ but the Iowa Supreme Court’s majority continued to enforce the rule.⁷⁴⁹

In the next case addressing regulations of property transfers, *Lessee of Good v. Zercher*,⁷⁵⁰ the Ohio Supreme Court enforced an Ohio state statutory requirement that when a married woman transfers land to her husband, the deed must include a set of declarations regarding the voluntary nature of the transfer.⁷⁵¹ Elizabeth Zercher argued that the transfer of her property to her husband, George Zercher, was invalid because the deed did not include the required voluntary declaration.⁷⁵² The defendant relied on a different statute, passed five years after the transfer in question, which permitted legal transfers of land from a wife even when the declaration was not included in the deed.⁷⁵³

Because the deed was incomplete, the court ruled that the transfer was “a nullity” and that Elizabeth had not been divested of her land.⁷⁵⁴ The Ohio Supreme Court reasoned that the second statute was not intended to apply retroactively to validate previous transfers.⁷⁵⁵ The court further argued that the legislature did not have the power to validate this deed because the deed did not legally exist since it had failed the proper legal requirements upon its execution.⁷⁵⁶ Finally, the Ohio Supreme Court relied on Ohio’s Lockean Natural Rights Guarantee:

It is the principal object of our political organization to secure each individual in the enjoyment of his natural rights. And the chief glory of every citizen, however humble or weak, is to feel, in the

747. *Id.* at 412–13.

748. *Id.* at 413–14.

749. *Id.* at 411.

750. 12 Ohio 364 (1843).

751. *Id.* at 365, 369.

752. *Id.* at 364–65.

753. *Id.* at 366–67.

754. *Id.* at 367.

755. *Id.*

756. *Id.*

omnipotence of constitutional protection, that there is no power under God can deprive him of his property or his rights. . . . The right of property is coupled with the right of life, since the day that man first ate his bread in the sweat of his brow. Hence it is declared in the Constitution that the rights of acquiring, possessing, and protecting property are natural, inherent, and inalienable.⁷⁵⁷

Therefore, the court held that the original deed was invalid and that the legislature's subsequent statute could not constitutionally divest Zercher of her land.⁷⁵⁸

The Maine Supreme Judicial Court also ruled on property regulations related to a wife's rights in the 1847 case *Given v. Marr*.⁷⁵⁹ In this case, the demandant was divorced from her husband, John Given, following his desertion.⁷⁶⁰ She argued that she was entitled to inherit the land, but Rufus Marr argued that Given had conveyed the mortgage note to him prior to his departure.⁷⁶¹ In resolving this conflict, the Maine Supreme Court relied on its construction of the Maine constitution's Lockean Natural Rights Guarantee:

By article 1, sect. 1, of the constitution of Maine, "all men are born equally free and independent, and have certain natural, inherent, and inalienable rights, among which are those of enjoying and defending life and liberty, *acquiring, possessing and protecting* property." Of this section there has been a judicial construction in this State, where the Court say, "by the spirit and true intent, and meaning of this section, every citizen has the right of possessing and protecting property, according to the *standing laws* of the State, in force, *at the time of acquiring it, and during the time*, of his continuing to possess it." And again, "It cannot by a *mere act of the Legislature*, be taken from *one man* and vested in *another directly*, nor can it by the *retrospective operation* of laws, be indirectly transferred from one to another, or be subjected to the government of principles in a court of justice, which must necessarily produce the same effect."⁷⁶²

The court then analyzed the laws in effect at the time of Marr's desertion, which occurred prior to the passage of the statute authorizing divorce for desertion.⁷⁶³ Thus, it ruled that Marr's wife was not entitled to inherit the land due to divorce, and the court awarded the property to Given.⁷⁶⁴

757. *Id.* at 367–68.

758. *Id.* at 369.

759. 27 Me. 212, 218 (1847).

760. *Id.*

761. *Id.* at 219–20.

762. *Id.* at 220–21 (citation omitted).

763. *Id.* at 221–24.

764. *Id.* at 224–25.

Finally, the California Supreme Court addressed a wife's property rights in *Dow v. Gould & Curry Silver Mining Co.*⁷⁶⁵ The plaintiff, Mrs. Mary A. Dow, sued for 48 shares of Gould & Curry stock, alleging that she still owned the stock.⁷⁶⁶ She argued that the deed transferring the stock was invalid because her husband had power of attorney in the sale, and only she had signed the power of attorney document not her husband.⁷⁶⁷ She relied on a state statute requiring that a wife's husband join in writing any instrument conveying property.⁷⁶⁸ Among other arguments, the defendant claimed that this requirement was an unconstitutional infringement on the wife's right to property.⁷⁶⁹

The California Supreme Court held that requiring the husband to join legal instruments conveying his wife's property was constitutional.⁷⁷⁰ The court reasoned that the wife still had a right to property and that the legislature was acting within its permissible scope of authority in regulating that right.⁷⁷¹ The California Supreme Court also pointed to common law requirements regulating a wife's transfer of her property to support this conclusion, and it explained that such requirements exist to "guard and protect the interests of the wife."⁷⁷² The court specifically concluded that the statute in question was constitutional "notwithstanding the constitutional declaration of the inalienable right, pertaining alike to all persons, of 'acquiring, possessing and protecting property.'"⁷⁷³

B. Creditor-Debtor Property Regulations

Two additional cases upheld the rights of creditors to sell debtor property or impose liens on property for unpaid debts.⁷⁷⁴ First, in 1826, the Kentucky Court of Appeals issued a ruling in *Kirby v. Chitwood's Administrators*⁷⁷⁵ upholding an administrator's sale of an estate's property in

765. 31 Cal. 629, 647–48 (1867).

766. *Id.* at 631.

767. *Id.* at 634–35.

768. *Id.* at 635.

769. *Id.* at 636.

770. *Id.* at 647.

771. *Id.*

772. *Id.* at 643.

773. *Id.*

774. The Delaware High Court of Errors and Appeals also issued a ruling on the payment of debts in the 1821 case *Douglass v. Stephens*. 1 Del. Ch. 465, 479 (1821) (opinion of Johns, C.J.). As Chancellor Nicholas Ridgely recognized: "The rights of enjoying and defending life and liberty, of acquiring and protecting reputation and property,—and, in general, of attaining objects suitable to their condition, without injury to another, are the rights of a citizen; and all men by nature have them." *Id.* at 470 (opinion of Ridgely, C.). From the text, it is not clear whether he was specifically referencing Delaware's Lockean Natural Rights Guarantee. However, the majority of the court did not specifically address this argument and instead ruled that the citizen preference was permissible. *Id.* at 479 (opinion of Johns, C.J.).

775. 20 Ky. (4 T.B. Mon) 91 (1826).

order to pay debts owed by the estate.⁷⁷⁶ The juvenile heirs to the estate challenged the administrator's sale, arguing that they had not consented to it.⁷⁷⁷ Quoting from the State of Kentucky's Lockean Natural Rights Guarantee, the Kentucky Court of Appeals ruled that the sales in question were necessary to protect the creditor's property rights:

[A]s the constitution is adopted for the express purpose of securing to the citizens, "the enjoyment of the right of life, liberty and property," the end would not be answered if the debtor should be allowed to keep the "property" of the creditor, and also the fund to which he had trusted; and as the general laws reaching that fund were adopted by the consent of the community, in accordance with the objects and purposes of the constitution, every individual is estopped to say that he does not consent to this disposition of his estate for the purpose of paying his debts.⁷⁷⁸

Thus, the court held that the administrator's sales of the property in question were legally justified to fulfill the creditor's right to property under the state constitution's Lockean Natural Rights Guarantee.⁷⁷⁹

The Maine Supreme Judicial Court addressed the question of a creditor's right to debtor property in the 1851 case *Spofford v. True*.⁷⁸⁰ In this case, the Maine Supreme Judicial Court upheld a Maine statute regarding land sales.⁷⁸¹ The statute allowed the seller to take a lien on the lumber to be produced from the land purchased until the buyer paid the purchase price in full.⁷⁸² Here, the seller sued the purchaser for the value of the timber produced, claiming that the purchase price was never paid.⁷⁸³ The Maine Supreme Judicial Court ruled that the statute did not violate Maine's Lockean Natural Rights Guarantee and analogized it to a common law lien:

The statute in its prospective operation, and in this case it can have no other, is no abridgment of the rights of the citizen, secured to him, by the constitution of the State, in Art 1, sec. 1, of "acquiring, possessing and protecting property." It subjects the property to the payment of debts, which the owner has directly or indirectly caused or authorized, in its improvement, under a knowledge, that the property is so charged. In principle it in no respect differs from the lien at common law, in favor of mechanics, who have bestowed labor upon the article which it attaches.⁷⁸⁴

776. *Id.* at 95–96.

777. *Id.* at 91–92.

778. *Id.* at 95.

779. *Id.* at 95–96.

780. 33 Me. 283, 291–92 (1851).

781. *Id.* at 292.

782. *Id.* at 290–91.

783. *Id.* at 285.

784. *Id.* at 291–92.

The court concluded that the seller's lien on the logs was valid.⁷⁸⁵

In these cases related to property regulations, litigants and courts used state constitutional Lockean Natural Rights Guarantees to emphasize the protection of private property rights, just as the state constitutional Lockean Natural Rights Guarantees were used to emphasize the protection of private property rights in the takings cases, which we discussed in the prior Part of this Article. But, without exception, in this group of cases the state courts found that the property rights in question were not absolute and that legislative regulations on property transfers and creditor-debtor transactions were within the legislature's authority to enact. The courts did not deny the possibility that some regulations reviewed might, in theory, violate the property rights provided by the state constitutional Lockean Natural Rights Guarantee, but the state courts deferred to the state legislatures with respect to all of the regulations challenged in these cases. Although the takings cases discussed in the previous Part acknowledged the possibility that some regulatory takings might violate state constitutional protections for private property rights, this set of cases, which upheld state regulations on property transfers and creditor-debtor transactions without exception, suggests that the state courts often deferred to state legislatures even where regulations encumbered the full exercise of property rights.

XI. Lockean Natural Rights Guarantees and Powers of Taxation

A surprising body of case law addressed the relationship of the Lockean Natural Rights Guarantees to various taxation situations. Eleven cases specifically cited or quoted state constitutional Lockean Natural Rights Guarantees in adjudicating the constitutionality of various taxation schemes. In many of these cases, the litigants invoked the property protection found in their state constitutions' Lockean Natural Rights Guarantee, arguing that their right to property was violated by an imposed tax. Like many of the cases discussed in this Article, these taxation cases included both general taxation schemes and fact patterns based on current events, especially railroad construction and enlistment during the Civil War. With a few exceptions, the state courts upheld the legislature's taxation schemes, ruling that they did not violate the Guarantees' property protections.

A. *General Taxation Schemes*

In four cases, state supreme courts considered the authority of state or local governments to impose general taxation schemes on state citizens. With the exception of one case, the state courts found that the Lockean Natural Rights Guarantees did not prohibit the taxation practice in question.⁷⁸⁶

⁷⁸⁵ *Id.* at 292.

⁷⁸⁶ In addition to the cases discussed in this subpart, the Virginia Supreme Court of Appeals summarily upheld a taxation scheme in the face of the plaintiff's Lockean Natural Rights Guarantee

In the only case to invalidate a tax on the basis of the Lockean Natural Rights Guarantee,⁷⁸⁷ in 1837 the Supreme Judicial Court of Maine used the state's Lockean Natural Rights Guarantee to strike down a town's taxation scheme in *Hooper v. Emery*.⁷⁸⁸ Under an 1837 federal statute, the town of Biddeford received a refund of surplus tax money previously paid to the federal government.⁷⁸⁹ A subsequent state statute specified that each city, town, or organized plantation was permitted to appropriate or loan its portion of the refund, provided it "receiv[ed] safe and ample security" for the

arguments. In *Justices of Harrison County v. Holland*, the Virginia Supreme Court of Appeals upheld a state statute declaring that Simpson's creek would become a public highway for navigation purposes and requiring owners of land alongside the creek to construct dams with certain dimensions or modify their existing dams accordingly. 44 Va. (3 Gratt.) 236, 236, 250 (1846). The act further provided that the county should use public funds to reimburse the owners for their expenditures on these dams. *Id.* at 236. In response to a claim for reimbursement, the county relied on the Lockean Natural Rights Guarantee to argue that the state legislature did not have the authority to impose this tax. The county argued:

The foundation principle of English liberty is security of persons and property. The principle upon which our revolution was commenced, prosecuted and perfected, was security of persons and property; and it would have been strange, therefore, if in establishing the principles of our institutions, and giving form to the government, this great cardinal principle had been forgotten, or had failed to be carefully guarded and secured. Accordingly we find that the first article of the Bill of Rights declares the indefeasible right of the citizen to "the enjoyment of life and liberty, with the means of acquiring and possessing property." The government to be established is not to be a government devised for the purpose of limiting the acquisition of property, or of artfully drawing it from its possessor; but its object and purpose is to afford encouragement and facility to its acquisition, and security to the possession of it.

Id. at 243. However, the opinion itself did not cite the Lockean Natural Rights Guarantee; the Virginia Supreme Court of Appeals summarily affirmed the constitutionality of the act. *Id.* at 250.

787. Two other cases invalidated taxation schemes by invoking general inalienable or natural rights without relying specifically on a Lockean Natural Rights Guarantee. First, the Missouri Supreme Court held that the city could not impose taxes for its own local purposes on any lands outside of its geographical limits in *Wells v. City of Weston*. 22 Mo. 384, 387–88 (1856). The plaintiff argued that the taxation of his lands violated his "inalienable right of life, liberty and the pursuit of happiness," but it is not clear whether he was referencing the Missouri Lockean Natural Rights Guarantee. *Id.* at 386. Second, the Ohio Supreme Court ruled that Cincinnati lacked the proper authorization to impose a tax upon those bringing provisions to sell in the market. *Mays v. City of Cincinnati*, 1 Ohio St. 268, 279 (1853). Using language similar to the Guarantee, the court stated:

The power to tax is one of the highest attributes of sovereignty. It involves the right to take the private property of the citizen without his consent, and without other compensation than the promotion of the public good. Such interference with the natural right of acquisition and enjoyment gaurantied [sic] by the constitution, can only be justified when public necessity clearly demands it. Being a sovereign power, it can only be exercised by the general assembly, when delegated by the people in the fundamental law; much less can it be exercised by a municipal corporation without a further unequivocal delegation by the legislative body.

Id. at 273. Thus, it ruled that the city could not impose the tax. *Id.* at 279. Again, the court did not explicitly cite the Guarantee but did recognize the right to acquire property.

788. 14 Me. 375, 380 (1837).

789. *Id.* at 375.

money.⁷⁹⁰ The Biddeford town selectmen voted to redistribute the money in question by dividing it among every inhabitant and family residing in Biddeford.⁷⁹¹ The plaintiff, a resident of Biddeford, sued to recover his share of the town's surplus, and the selectmen defended against the suit by arguing that their resolution to redistribute the money was unenforceable because it did not provide "safe and ample security" for the money as required by state legislation.⁷⁹²

The Maine Supreme Judicial Court agreed with the town's ruling that the redistribution of money back to families violated the requirement that the money be kept with "safe and ample security."⁷⁹³ The court went further by invoking the Guarantee's protection of property to declare redistribution of tax money to be unconstitutional:

To contend, that towns have the power to assess and collect money for the purpose of distributing it again according to numbers violate[s] "the principles of moral justice." For if the right to assess and collect money is without limit, it would not be difficult to continue the process of collection and division until the whole property held by the citizens of the town, had passed into, and out of the treasury; and until an equalization of property had been effected Such a construction would be destructive of the security and safety of individual property; and subversive of individual industry and exertion. It would authorize a violation of what is asserted in our "declaration of rights" to be one of the natural rights of men, that of "acquiring, possessing and protecting property."⁷⁹⁴

Therefore, the court held that the town did not have the authority to redistribute the surplus tax money under either the authorizing legislation as well as the state constitution.⁷⁹⁵

The Supreme Court of Ohio upheld the City of Cincinnati's five dollar tax on draymen in the 1846 case *City of Cincinnati v. Bryson*.⁷⁹⁶ In context, this tax appears to have targeted the liquor industry because "drays" were

790. *Id.* at 376.

791. *Id.* at 375, 379.

792. *Id.* at 375–76, 378.

793. *Id.* at 379–80.

794. *Id.*

795. *Id.* at 339–80, 382. However, the Maine Supreme Judicial Court did allow the legislature some flexibility in its tax schemes in the 1854 case *Inhabitants of Winslow v. County Commissioners of Kennebec*. 37 Me. 561 (1854). The court upheld the town's requirement that all inhabitants present a list of their estates to the town for the purpose of assessing taxes. *Id.* at 562–63. It reasoned that the list was required for administering a tax scheme, and taxation was necessary "[f]or the purpose of defending our constitutional and 'unalienable rights.'" *Id.* at 562. From the opinion, it is not possible to determine whether the use of "unalienable rights" was a reference to the Maine Lockean Natural Rights Guarantee.

796. 15 Ohio 625, 626, 643 (1846).

low, flat-bed wagons used for liquor deliveries.⁷⁹⁷ The court held that the tax was permissible because the city already had the authority to license drays and “the authority to license carries with it the power to impose the terms and conditions upon which it shall be granted.”⁷⁹⁸ In this case, the terms and conditions for the drayman’s license were the payment of the fee.⁷⁹⁹ In dissent, Justice Nathaniel Read distinguished between taxation of property, which was permissible, and taxation of labor, which he argued was unconstitutional.⁸⁰⁰ Specifically, he relied on the right to acquire property found in Ohio’s Lockean Natural Rights Guarantee:

The constitution has declared that the right to acquire property is a natural, inherent, and unalienable right.

Labor is the exercise of the right of acquisition. Hence, the legislature has no right to tax or interrupt such right. To talk of granting a license to a man for the privilege of pursuing honest labor, is an insult to the age, and belongs to a period of despotic barbarism, and is fit only to be addressed to vassals and slaves. Every person, by natural right and under our constitution, has the right to pursue honest labor without permission or license to do so from any source, except from that great and good God who gives him health and strength.⁸⁰¹

Thus, although the majority of the court held that the city had the power to impose taxation upon draymen, the dissent framed its argument in terms of the state’s Lockean Natural Rights Guarantee, maintaining that labor free from taxation was implied from the Guarantee’s provision of the right to acquire property.⁸⁰²

One of the Ohio Courts of Common Pleas invalidated a licensing and taxation scheme for taverns in *Extract from Judge Lawrence’s Charge to the Grand Jury*.⁸⁰³ The opinion explicitly relied on Judge Read’s dissent in *Cincinnati v. Bryson* and affirmed his logic that taxing labor violated the state constitution’s Lockean Natural Rights Guarantee.⁸⁰⁴ In fact, it quoted the above excerpted portion of the *Bryson* case.⁸⁰⁵ This case is particularly interesting because of its apparent inconsistency with the Ohio Supreme Court decisions discussed in the liquor laws Part, which had upheld various liquor laws.⁸⁰⁶ The outcome of this case suggests that property rights protect

797. D.J. SMITH, DISCOVERING HORSE-DRAWN VEHICLES 91–93 (1994).

798. *Bryson*, 15 Ohio at 643.

799. *Id.*

800. *Id.* at 646 (Read, J., dissenting).

801. *Id.* at 651.

802. *Id.* at 651–52.

803. Extracts from Judge Lawrence’s Charge to the Grand Jury, 2 Ohio Dec. Reprint 491 (Ct. Com. Pl. 1861).

804. *Id.* at 493–94.

805. *Id.* at 493.

806. See *supra* notes 632–37 and accompanying text.

labor from taxation, even if the labor is an area otherwise permissibly regulated by the state's police power.

Ten years later, the Ohio Supreme Court again upheld a taxation provision in *Matheny v. Golden*,⁸⁰⁷ where it held that a tax exemption provision in the incorporation charter of Ohio University was constitutional.⁸⁰⁸ In dissent, Chief Justice Thomas Bartley cited the State of Ohio's Lockean Natural Rights Guarantee:

Now, the constitution of 1802, under which the law incorporating the Ohio University was enacted, not only enjoined "a frequent recurrence to the *fundamental principles of civil government*, as absolutely necessary to preserve the blessings of liberty," and declared, as one of "the natural, inherent, and inalienable rights of the people, that they have *at all times a complete power to alter, reform, or abolish* their government, whenever they may deem it necessary."⁸⁰⁹

Thus, he argued that the citizens of Ohio should not be bound by this charter.⁸¹⁰

B. *Taxation for Railroads*

Four reported cases addressed the use of taxes to support the railroad industry. In this series of cases, the state courts considered the use of tax money to buy subscriptions to railroad stock and directly assist a railroad in constructing tracks. Without exception, the state courts upheld these taxation schemes in the face of Lockean Natural Rights Guarantee challenges, suggesting deference to the popularly elected legislature or the popular vote authorizing the tax expenditures. However, strong dissents from the Kentucky, Florida, and Ohio courts invoking the Guarantees suggest that some judges viewed the Guarantees as a limitation on the taxation power of the state.

In 1853, the Pennsylvania Supreme Court issued a landmark opinion in *Sharpless v. Mayor of Philadelphia*,⁸¹¹ upholding Philadelphia's use of taxation for the purpose of subscribing to railroad stock.⁸¹² Sharpless argued that the taxation was unconstitutional because it took private property for a private purpose, which violated the citizens' property rights.⁸¹³ In response, the government argued that the constitution did not impose any limits on

807. 5 Ohio St. 361 (1856).

808. *Id.* at 373–74.

809. *Id.* at 433 (Bartley, C.J., dissenting).

810. *Id.*

811. 21 Pa. 147 (1853).

812. *Id.* at 158, 173–74.

813. *Id.* at 151–52.

using tax money to subscribe to railroad stock.⁸¹⁴ The court agreed.⁸¹⁵ With regards to the State of Pennsylvania's Lockean Natural Rights Guarantee, Judge George Woodward explained:

When, therefore, "the right of acquiring, possessing, and protecting property," is asserted, it does not mean to exempt property from taxation, since without taxation civil government cannot exist. Nor does it mean to exempt it from the prerogative of *eminent domain*, for the right to take private property for public use, is elsewhere expressly asserted, and without this also government cannot exist prosperously, if indeed at all. The acquisition, protection, and defence guaranteed, must be consistent with and subordinate to these first principles, else one part of the constitution destroys the other, and so the government is dissolved. I am clearly of opinion, that this section cannot be set up against a tax law. Nor is there any clause in the Declaration of Rights, which restrains the legislative power of taxation. I know this may seem to some a startling proposition, but, rightly considered, there is nothing alarming in it.⁸¹⁶

In a separate opinion, Chief Justice Jeremiah Black simply stated: "It does not violate the right of acquiring, possessing, and protecting property, secured by [the Lockean Natural Rights Guarantee]. The right of property is not so absolute but that it may be taxed for the public benefit."⁸¹⁷ In sum, the court found that the Lockean Natural Rights Guarantee's property rights did not affect the city's ability to use tax money in this way.⁸¹⁸ The Pennsylvania

814. *Id.* at 157.

815. *Id.* at 173.

816. *Id.* at 184 (opinion of Woodward, J.).

817. *Id.* at 173 (opinion of Black, C.J.).

818. However, in its 1858 decision in *Mott v. Pennsylvania Railroad Co.*, the Pennsylvania Supreme Court did impose a limit on the legislature's use of taxation to benefit the railroads. 30 Pa. 9, 33-34 (1858). An 1857 act provided for the public sale and auction of the Main Line and stipulated that if the Pennsylvania Railroad Company were the purchaser, it would be exempt forever from the "payment of all tonnage taxes, and all other taxes whatever, except for school, city, county, borough, and township purposes." *Id.* at 9. The Pennsylvania Supreme Court invalidated the act and described it as creating "one of the most magnificent exhibitions of a 'mock auction' that the world has ever witnessed!" *Id.* at 26. In his concurring opinion, Judge Walter Lowrie relied on "inherent and inalienable rights," although he did not explicitly cite Pennsylvania's Lockean Natural Rights Guarantee:

As individuals must, in the nature of things, have certain inherent and inalienable rights, in order to be individuals; so society must have its inherent and inalienable rights, in order to be a society. This is a natural and scientific necessity. The social right and power of government is essentially inherent and inalienable, because man is naturally social, and there can be no society without government.

Id. at 35 (Lowrie, J., concurring). Thus, the court held that a legislature could not exempt a railroad from taxation forever. *Id.* at 34 (majority opinion).

court and other state courts cited this precedent in subsequent cases addressing taxation for railroads.⁸¹⁹

Perhaps most dramatically, the opinion had an impact on the Pennsylvania constitution itself. Just four years after this ruling, in 1857, the constitution was amended to prohibit “any county, city, borough, township, or incorporated district . . . to become a stockholder in any company, association or corporation.”⁸²⁰ According to the Pennsylvania Supreme Court: “It is well known that the evils pointed out by our Supreme Court in the leading case of *Sharpless v. The Mayor* . . . [,] as necessary to be remedied only by constitutional law, led to the amendment of 1857.”⁸²¹

The Kentucky, Florida, and Iowa state courts also upheld the uses of taxes to subscribe to railroad stock.⁸²² However, powerful dissents in the Kentucky, Florida, and Ohio cases suggest that some members of the state courts were persuaded by the Lockean Natural Rights Guarantee argument against such taxes. First, the Court of Appeals of Kentucky issued a ruling upholding taxation used to subscribe to railroad stock in the 1852 case, *Slack*

819. For example, in 1853, the Pennsylvania Supreme Court issued a second opinion on the City of Reading’s use of tax funding to subscribe to the stock of the Lebanon Valley Railroad Company. *Moers v. City of Reading*, 21 Pa. 188, 199 (1853). The court summarily dismissed the Lockean Natural Rights Guarantee argument, noting that it “ha[d] been already decided in the case of *Sharpless v. Philadelphia*,” and focused instead on a set of arguments related to the railroad’s charter. *Id.* at 200.

820. PA. CONST. of 1838, art. XI, § 7 (1857).

821. *Speer v. Sch. Dirs. of Blairsville*, 50 Pa. 150, 157 (1865).

822. The Alabama, Virginia, and Ohio state courts also upheld taxation to subscribe to railroad stocks but did not specifically address the litigants’ Lockean Natural Rights Guarantee arguments. First, the Alabama Supreme Court ruled in *Gibbons v. Mobil & Great Northern Railroad Co.* that the taxation was permissible because it fulfilled a public purpose. 36 Ala. 410, 439, 449 (1860). The appellant argued that the taxation violated “the 1st and 13th sections of the bill of rights; the former declaring, that ‘no set of men are entitled to exclusive, separate public emoluments or privileges, but in consideration of public services,’” which formed part of Alabama’s Lockean Natural Rights Guarantee at the time. *Id.* at 430. The Alabama Supreme Court held that the taxation was constitutional. *Id.* at 439.

Second, in the 1837 Virginia case *Goddin v. Crump*, the citizen challenger argued that Richmond’s taxation for subscribing to railroad stock violated the Lockean Natural Rights Guarantee right to property: “The bill of rights, art. 1. ranks among the inherent inalienable rights of men in a state of society, the right to the means of acquiring and possessing property.” 35 Va. (8 Leigh) 120, 141 (1837). Specifically, he argued that it unconstitutionally taxed a particular area (Richmond) for the benefit of the entire area around the transportation line. *Id.* at 142. The Virginia Supreme Court of Appeals did not address the Lockean Natural Rights Guarantee argument; it ruled that Richmond had exercised its taxation power constitutionally because cities have the authority to exercise certain corporate powers, including subscribing to private stock. *Id.* at 155–56 (opinion of Tucker, P.).

The Ohio Supreme Court reached a similar decision upholding a county’s subscription to one hundred dollars of railroad stock in *Griffith v. Crawford County Commissioners*. 20 Ohio 609, 621 (1851). After reciting the Guarantee and declaring that it contained the “general, great, and essential principles of liberty and free government,” Griffith argued that the subscription served only a private purpose and therefore taxing for this purpose was unconstitutional. *Id.* at 612–14. In a brief opinion, the majority dismissed Griffith’s motion, citing procedural irregularities, and held that it did not have jurisdiction to issue a ruling on the merits. *Id.* at 620–23.

*v. Maysville & Lexington Railroad Co.*⁸²³ The majority did not cite or refer to the Lockean Natural Rights Guarantee in its opinion. This decision is most notable for its dissent, which presented nearly forty pages of argument against the tax and included a reference to Kentucky's Lockean Natural Rights Guarantee.⁸²⁴ Explaining that the legislature "has no right to take from one citizen the honest earnings of his lawful industry . . . and give it to another citizen, or to a corporation (which amounts to the same thing)," Judge Hise argued that the tax deprived the Maysville citizens of their natural rights to property, which existed with or without the state constitution.⁸²⁵ Citing Kentucky's Lockean Natural Rights Guarantee, he stated:

It is substantially prohibited in the solemn declaration made in convention, as contained in the short but comprehensive preamble to the constitution of 1799, ordaining and establishing the same, as instituted expressly to "*secure* to all the citizens the enjoyment of the rights of life, liberty, and *property*, and of pursuing happiness." Now, the act in question defeats the purpose, as thus expressed, for which the government was formed; for, instead of *securing* to the citizen the enjoyment of the rights of property, etc., they destroy that security; not only so, but take it from him without compensation, against his will, to give it to a corporation. . . . The legislation in question disregards, therefore, one of the most important objects for which the government was formed; that is, to secure the rights of property. If it is permitted that the citizen's property be taken from him, against his will, and without compensation, and be given to others by any sort of device or indirection, however it may be disguised or cloaked over by verbosity in language, complexity of machinery, and by the substitution of delusive and misleading terms and phraseology . . . then will the enjoyment of the rights of property, and, in fact, the satisfactory enjoyment of life itself ("for you take away my life, if you take the means whereby I live withal"), be rendered insecure and worthless in this community.⁸²⁶

Thus, the dissent argued that the tax was unconstitutional because it violated the property rights guaranteed by Kentucky's Guarantee.⁸²⁷

Similarly, the Florida Supreme Court approved a statute authorizing the use of public money to purchase stock in railroads in the 1856 case *Cotten v. County Commissioners of Leon County*.⁸²⁸ The dissent, however, invoked the state's Lockean Natural Rights Guarantee to argue that the taxation violated the right to property:

823. 52 Ky. (13 B. Mon.) 1, 4, 38 (1852).

824. *Id.* at 93 (Hise, J., dissenting).

825. *Id.* at 92–93.

826. *Id.* at 93–94.

827. *Id.*

828. 6 Fla. 610, 621–22 (1856).

“All freemen are declared equal by our Constitution and to have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation.”

Can it be that the right of possessing and protecting property does not exist as against a corporation? Is a proposition to be tolerated, or course of reasoning to be sanctioned which either in its terms or in its conclusions would secure to a corporation superior privileges, or guaranty to it greater rights than those enjoyed by the citizen? Assure protection to a corporation which is denied to the citizen—a protection not of natural persons but of fictitious beings, not of individuals, but of a class—create not merely aristocratic distinctions, but an oligarchy of wealth, the most odious of all influences and the most antagonistic to the essence of free institutions.⁸²⁹

Thus, although the majority held that the tax was constitutional,⁸³⁰ the dissent relied on the state constitution’s Lockean Natural Rights Guarantee to argue that it violated the right to property.⁸³¹

A dissenter on the Iowa Supreme Court also invoked that state’s Lockean Natural Rights Guarantee to argue that the taxation scheme should be invalidated in the 1853 case, *Dubuque County v. Dubuque & Pacific Railroad Co.*⁸³² The taxation scheme in this case was slightly different: Dubuque County used its tax revenue to directly contribute to railroad construction.⁸³³ The majority held that nothing in the state constitution prevented the citizens from voting to spend their tax money on railroad construction or on any other improvements within the county.⁸³⁴ However, the dissent invoked the Lockean Natural Rights Guarantee of the Iowa constitution to argue that the taxation scheme in this case was unconstitutional:

The constitution declares “that all men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property.” If this property is to be held by the citizen, subject to the will of the majority, and if by that majority it can be taxed, sold, and appropriated towards building works of internal improvement, where is the enjoyment, possession and protection guaranteed by this article of the constitution? Is a man protected in the possession of his property when public clamor may at any time

829. *Id.* at 648–49 (Baltzell, C.J., dissenting).

830. *Id.* at 621–22 (majority opinion).

831. *Id.* at 648–49 (Baltzell, C.J., dissenting).

832. 4 Greene 1 (Iowa 1853), *overruled in part by* *Stokes v. Cnty. of Scott*, 10 Iowa 166 (1859).

833. *Dubuque Cnty.*, 4 Greene at 1–2.

834. *Id.* at 2–3.

demand it for what a majority may please to call public purposes? Do the people of Iowa hold their land by so feeble a tenure?⁸³⁵

The dissent further predicted that if the court allowed tax money to be used for public improvements like the railroad, there would be nothing to prevent future money from being used “to erect manufacturing establishments, to sustain a line of steamboats, keep up a line of stages or telegraphic communication.”⁸³⁶ Therefore, according to the dissent, the constitution required that tax expenditures be strictly limited to direct protections of life, liberty, and property.⁸³⁷

C. *Taxation for Enlistment Bounties*

In three cases occurring in 1865, the final year of the American Civil War, the Pennsylvania, Wisconsin, and Massachusetts state courts found that imposing state taxes for the purpose of providing bounties to those who enlisted in military service was constitutional. First, in *Speer v. School Directors of Borough of Blairsville*,⁸³⁸ the Pennsylvania Supreme Court addressed the constitutionality of such so-called “Bounty Laws.”⁸³⁹ This series of state statutes authorized boroughs to acquire debt in order to provide a \$300 bounty to each person enlisting in federal military service.⁸⁴⁰ The bounties were designed to help each borough meet its enlistment quota established by the federal government and to avoid a forced conscription.⁸⁴¹ William Speer argued that the taxes in question would benefit only those who would have been drafted into military service and that the public should not have to bear the burden of supporting private individuals.⁸⁴² The government responded that the tax in question served an important public purpose: the “holier[] purpose of preserving . . . liberties and the Union.”⁸⁴³ In finding the tax to be constitutional, the Pennsylvania Supreme Court agreed that the tax benefitted the general public.⁸⁴⁴ Although the court did not specifically cite the Lockean Natural Rights Guarantee of the Pennsylvania constitution, it did rely on the constitutional guarantee of the right to pursue happiness, which was included in the text of the state constitutional Lockean Natural Rights Guarantee: “The pursuit of happiness is our acknowledged fundamental right, and that, therefore, which makes a whole community unhappy, is certainly a

835. *Id.* at 11 (Kinney, J., dissenting).

836. *Id.* at 10.

837. *Id.* at 9.

838. 50 Pa. 150 (1865).

839. *Id.* at 150–51.

840. *Id.* at 151.

841. *Id.* at 158.

842. *Id.* at 152.

843. *Id.* at 157.

844. *Id.* at 164.

social evil to be avoided if it can be.”⁸⁴⁵ Thus, taxation to provide bounties for enlistment fell within the legislature’s authority because it benefitted the whole public.⁸⁴⁶

The Wisconsin Supreme Court addressed a nearly identical issue in *Brodhead v. City of Milwaukee*,⁸⁴⁷ a case in which the court upheld a City of Milwaukee tax to raise money to pay enlistment bounties.⁸⁴⁸ The Wisconsin Supreme Court focused on the same question as did the *Speer* court, which was whether or not the tax in question benefitted the whole public.⁸⁴⁹ The first paragraph of the decision in this case cites Pennsylvania’s *Speer* case in support of its decision to find the tax constitutional, and the Wisconsin Supreme Court quotes extensively from the Pennsylvania court’s decision.⁸⁵⁰ The Wisconsin Supreme Court held that the pursuit of happiness is a fundamental right of the whole community and that that right was furthered by taxation to provide enlistment bounties.⁸⁵¹ As in *Speer*, the State of Wisconsin’s Lockean Natural Rights Guarantee specifically refers to the right to pursue happiness: “All men are born equally free and independent, and have certain inherent rights; among these are life, liberty, and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.”⁸⁵² Thus, it seems likely that the court relied, in part, on the state constitution’s Lockean Natural Rights Guarantee in rendering its decision.

In the third case, *Freeland v. Hastings*,⁸⁵³ the Massachusetts Supreme Judicial Court upheld taxation for the purpose of repaying citizens who had contributed money to pay for enlistment bounties.⁸⁵⁴ The petitioners cited the Massachusetts constitution’s Lockean Natural Rights Guarantee to argue that the tax in question was unconstitutional: “This act is retrospective in its operation; and violates the provision securing the right of acquiring, possessing and protecting property [under the state constitution’s Lockean Natural Rights Guarantee].”⁸⁵⁵ The Massachusetts Supreme Judicial Court did not address this argument specifically, but it upheld the constitutionality of the tax in question, reasoning that if it was constitutional to impose a tax for directly paying bounties, it was also constitutional to impose the tax for repaying those who provided bounties.⁸⁵⁶

845. *Id.* at 160.

846. *Id.* at 164.

847. 19 Wis. 624 (1865).

848. *Id.* at 651.

849. *Id.* at 651–52.

850. *Id.* at 651, 655–58.

851. *Id.* at 656–57.

852. WIS. CONST. art. 1, § 1 (amended 1982 & 1986).

853. 92 Mass. (10 Allen) 570 (1865).

854. *Id.* at 586.

855. *Id.* at 574.

856. *Id.* at 579–80.

By applying the private property protections of the state constitutional Lockean Natural Rights Guarantees in the context of taxation, litigants were able to constitutionally challenge various taxation schemes, which might otherwise have gone unchallenged. By and large, the state courts ruled against these claims and accepted the challenged taxation as being constitutional. However, the consistency with which litigants raised and relied on Lockean Natural Rights Guarantee arguments, as well as the reliance of dissenting justices on such arguments, suggests the importance of the Lockean Natural Rights Guarantees as a potential limitation on the taxation power of state governments.

XII. Conclusion

In the time period before 1868, state constitutional Lockean Natural Rights Guarantees were invoked and considered in written opinions by state supreme courts across the country more than one hundred times. Such cases arose in nearly every state whose constitution contained a Lockean Natural Rights Guarantee. From George Mason's 1776 draft of the Virginia Declaration of Rights at the very beginning of the American Revolution up through the final resolution in the 1860s of the divisive issue of slavery, dozens of Lockean Natural Rights Guarantee arguments were made. These arguments include claims involving civil rights, political rights, legal procedures, business regulations, and property rights. Lockean Natural Rights Guarantees were an important tool for litigants in protecting their rights, and state courts relied on them frequently to protect substantive rights. Our exhaustive survey of the state constitutional case law makes it crystal clear that the Lockean Natural Rights Guarantees did mean *something*. They did not function as simply vague, preambular language but were instead applied with varying degrees of judicial vigor to decide some of the most challenging and controversial issues of the day.

The precise meaning of the Lockean Natural Rights Guarantees is debatable because different state supreme courts reached different conclusions on many of the issues presented. But in a few areas, the case law is consistent enough to draw some very important conclusions. First, the Lockean Natural Rights Guarantees protected the rights of minority group members in a way that was especially significant in light of the political climate of the day. Even before the original Lockean Natural Rights Guarantee was adopted, the framers of Virginia's Declaration of Rights noted the potential applicability of its equality guarantee to the issue of slavery. The framers of subsequent state bills of rights or constitutions must have been aware of this application as well, and almost immediately state supreme courts began to enforce the Lockean Natural Rights Guarantees to invalidate slavery and to advance the abolitionist agenda. Although an antislavery interpretation of the Lockean Natural Rights Guarantees was not followed universally, it is a fact that, as a general matter, the Lockean Natural Rights Guarantees were of great benefit to the antislavery movement as a whole.

Lockean Natural Rights Guarantees were applied in a habeas case to protect a violator of the Fugitive Slave Act and by the Maine Supreme Court to grant citizenship and the right to vote to African-Americans in direct contradiction to prevailing U.S. Supreme Court precedents. The commitment of state supreme courts to apply the Lockean Natural Rights Guarantees to protect minority rights is clear, and this judicial commitment remains evident in the antidiscrimination application of the Fourteenth Amendment today.

Second, although the Lockean Natural Rights Guarantees were frequently invoked in an effort to invalidate state liquor laws, on the whole state supreme courts were not receptive to this argument and consistently upheld the laws. Indeed, these opinions often used broad language to describe the state's police power to impose regulations for the general welfare and the judiciary's deference to the legislature on these matters. Although the Lockean Natural Rights Guarantees generally included protections for both liberty and property, almost all state supreme courts considered the liquor laws to be property regulations. Only the Indiana Supreme Court viewed the laws as an imposition on liberty, which perhaps explains its outlier position as the only state supreme court to invalidate the liquor laws on Lockean Natural Rights Guarantee grounds.

Third, courts often cited the Lockean Natural Rights Guarantees in economic cases, including cases involving laws regulating business like Sabbath laws, test oaths, laws regulating property, and taxation laws. In these cases, the state supreme courts again issued very consistent rulings. In nearly every case, the courts acknowledged that the Lockean Natural Rights Guarantees protected rights but then proceeded to defer to the legislature to regulate those rights. Therefore, the courts did not rely on the Lockean Natural Rights Guarantees as strong limitations on legislative powers and were content to allow the legislature flexibility and discretion in regulating those issues.

Fourth, state supreme courts cited the Lockean Natural Rights Guarantees in a wide variety of individual civil rights cases, including cases involving the freedom of religion, the right to marry, the involuntary confinement of and transportation of the poor, cases challenging retroactive legislation, statutes imposing or excluding liability, and cases involving a variety of other civil and political rights. Most state courts agreed that the Lockean Natural Rights Guarantees were relevant to the outcome of these individual civil rights cases, but the state courts often disagreed on what outcomes were dictated by their respective state constitutions.

This survey of more than one hundred cases is comprehensive and exhaustive with respect to state court reliance on Lockean Natural Rights Guarantees between 1776 and 1868, but it also suggests a number of questions which deserve further research. One interesting question that merits further research would involve examining the legislative history of the state constitutional conventions that adopted and modified each state's respective Lockean Natural Rights Guarantee. This could offer valuable

insight as to the original meaning of the Lockean Natural Rights Guarantees and the original understanding as to unenumerated rights in each state. Second, our analysis here suggests the value more generally of research into state court case law on state constitutional provisions. In particular, in the context of substantive due process and in pursuing the quest to understand which rights, if any, are “deeply rooted in our history and tradition,”⁸⁵⁷ our analysis here suggests the value of further research into state case law on state constitutional provisions that are Ninth Amendment analogues, on the “fundamental principles”⁸⁵⁸ provisions which appear in many state constitutions in the period between 1776 and 1868, and on state constitutional due process clauses as they were construed between 1776 and 1868. Such research could shed additional light on how the Framers of the Fourteenth Amendment understood the concepts of life, liberty, and property and on the role of courts in enforcing rights in these areas.

While further research into the questions mentioned above is needed, this Article does begin to suggest some answers to several of the unenumerated individual rights questions that are the source of modern-day federal constitutional law debates. The existence of this body of state constitutional case law on unenumerated individual constitutional rights itself suggests that unenumerated individual constitutional rights not only existed in state constitutional case law prior to 1868 but also that such rights were considered to be important enough to be dispositive in many states as to the question of slavery and as to the protection of other rights held by African-Americans. The Fourteenth Amendment’s equality concern with all forms of discrimination is thus entirely consistent with the historical state case law under the Lockean Natural Rights Guarantees.

In addition, several state supreme courts applied the Lockean Natural Rights Guarantees to an enormous variety of topics, suggesting an understanding during this time that the Lockean Natural Rights Guarantees protected a vast range of unenumerated rights. Almost universally, the state courts deferred to the legislative branch with respect to economic and business regulations, but state courts did show a willingness to consider the constitutionality of regulatory takings, even though no state court actually ruled for the plaintiff in any of these cases. This suggests that it may be appropriate as a matter of original meaning for courts to evaluate the legality of regulatory takings.

Finally, with respect to use of Lockean Natural Rights Guarantees to protect civil and political rights, the implication of the state case law between 1776 and 1868 is somewhat mixed. The array of different rights that the state courts thought were affected by the Lockean Natural Rights Guarantees is striking. However, the inconsistent rulings in the various states suggest that the quest to identify unenumerated rights that are deeply rooted in American

857. *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997).

858. See *supra* text accompanying notes 77, 498, 704, and 810.

history and tradition is itself somewhat quixotic. It is not clear that either the framers of the Lockean Natural Rights Guarantees themselves or the state supreme courts, which applied the Lockean Natural Rights Guarantees between 1776 and 1868, ever reached a consensus as to their meaning. In fact, state constitutional Lockean Natural Rights Guarantees were amended during this time, and some of the most prominent scholars of the day debated one another as to their meaning. Prior to 1868, the general sweeping language of the Lockean Natural Rights Guarantees defied easy explanation, lent itself to extensive debate, and inspired lengthy discussions on the definition and application of the Lockean Natural Rights Guarantees. This same statement remains true today.

**Appendix A: Lockean Natural Rights Guarantees
and Quasi-Guarantees in 1868**

State	Version in use in 1868 [Placement (Year adopted): Text]
Alabama	ART. I, § 1 (1868): That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.
California	ART. I, § 1 (1849): All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness.
Connecticut	ART. I, PREAMBLE (1818): That the great and essential principles of liberty and free government may be recognized and established, we declare, . . .
Delaware	PREAMBLE (1831): Through divine goodness all men have, by nature, the rights of worshipping and serving their Creator according to the dictates of their consciences; of enjoying and defending life and liberty, of acquiring and protecting reputation and property, and, in general, of attaining objects suitable to their condition, without injury by one to another; and as these rights are essential to their welfare, for the due exercise thereof, power is inherent in them; and therefore all just authority in the institutions of political society is derived from the people, and established with their consent, to advance their happiness. And they may for this end, as circumstances require, from time to time, alter their constitution of governance.
Florida	DECLARATION OF RIGHTS, § 1 (1868): All men are by nature free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness.
Illinois	ART. XIII, PREAMBLE (1848): That the general, great, and essential principles of liberty and free government may be recognized and unalterably established, we declare: . . . ART. XIII, § 1 (1848): That all men are born equally free and independent, and have certain inherent and indefeasible rights; among which are those of enjoying and defending life and liberty, and of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness.
Indiana	ART. I, § 1 (1851): We declare, 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; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well being.

Iowa	ART. I, § 1 (1857): All men are, by nature, free and equal, and have certain inalienable rights among—which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.
Kansas	BILL OF RIGHTS, § 1 (1859): All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.
Kentucky	PREAMBLE (1850): We, the representatives of the people of the State of Kentucky, in convention assembled to secure to all the citizens thereof the enjoyment of the rights of life, liberty, and property, and of pursuing happiness, do ordain and establish this Constitution for its government. ART. XIII, § 3 (1850): The right of property is before and higher than any constitutional sanction; and the right of the owner of a slave to such slave, and its increase, is the same, and as inviolable as the right of the owner of any property whatever.
Louisiana	TIT. I, ART. I (1868): All men are created free and equal, and have certain inalienable rights; among these are life, liberty and the pursuit of happiness. To secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.
Maine	ART. I, § 1 (1819): All men are born equally free and independent, and have certain natural, inherent and unalienable Rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.
Massachusetts	PREAMBLE (1780): The end of the institution, maintenance, and administration of government, is to secure the existence of the body-politic, to protect it, and to furnish the individuals who compose it with the power of enjoying, in safety and tranquility, their natural rights, and the blessings of life . . . PT. 1, ART. I (1780): All men are born free and equal, and have certain, natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.
Missouri	ART. I, § 1 (1865): That we hold it to be self-evident that all men are endowed by their Creator with certain inalienable rights, among which are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.
Nebraska	ART. I, § 1 (1866): All men are born equally free and independent, and have certain inherent rights; among these are life, liberty, and the pursuit of happiness. To secure these

	rights, governments are instituted among men, deriving their just powers from the consent of the governed.
Nevada	ART. I, § 1 (1864): All men are, by nature, free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness.
New Hampshire	PT. 1, ART. I (1792): All men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good. PT. 1, ART. II (1792): All men have certain natural, essential, and inherent rights; among which are the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and, in a word, of seeking and obtaining happiness. PT. 1, ART. IV (1792): Among the natural rights, some are in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the rights of conscience.
New Jersey	ART. I, § 1 (1844): All men are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.
North Carolina	ART. I, § 1 (1868): That we hold it 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, the enjoyment of the fruits of their own labor, and the pursuit of happiness.
Ohio	ART. I, § 1 (1851): All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.
Pennsylvania	ART. IX, PREAMBLE (1838): That the general, great and essential principles of liberty and free government may be recognized and unalterably established, we declare . . . ART. IX, § 1 (1838): That all men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

Rhode Island	ART. I, PREAMBLE (1842): In order effectually to secure the religious and political freedom established by our venerated ancestors, and to preserve the same for our posterity, we do declare, that the essential and unquestionable rights and principles hereinafter mentioned, shall be established, maintained, and preserved, and shall be of paramount obligation in all legislative, judicial and executive proceedings.
South Carolina	ART. I, § 1 (1868): All men are born free and equal—endowed by their Creator with certain inalienable rights, among which are the rights of enjoying and defending their lives and liberties, of acquiring, possessing and protecting property, and of seeking and obtaining their safety and happiness.
Texas	ART. I, PREAMBLE (1866): That the general, great, and essential principles of Liberty and Free Government may be recognized and established we declare that . . . ART. I, § 2 (1866): All freemen, when they form a social compact, have equal rights; and no man, or act of men, is entitled to exclusive separate public emoluments or privileges, but in consideration of public services.
Vermont	CH. 1, ART. 1 (1793): That all men are born equally free and independent, and have certain natural, inherent, and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining happiness, and safety;—therefore, no male person born in this country, or brought from over sea, ought to be holden by law to serve any person as a servant, slave, or apprentice, after he arrives to the age of twenty-one years, nor female in like manner after she arrives to the age of eighteen years, unless they are bound by their own consent after they arrive to such age, or bound by law for the payment of debts, damages, fines, costs, or the like.
Virginia	BILL OF RIGHTS, § 1 (1864): That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.
Wisconsin	ART. I, § 1 (1848): All men are born equally free and independent, and have certain inherent rights, among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

Appendix B: Development of Lockean Natural Rights Guarantees and Quasi-Guarantees until 1868

State	1868 Version [Placement (Year adopted): Text]	Prior Versions [Placement (Year adopted): Text]
Alabama	ART. I, § 1 (1868): That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.	ART. I, § 1 (1865): That no man, and no set of men, are entitled to exclusive separate public emoluments or privileges, but in consideration of public services. ART. I, § 1 (1861): That all freemen, when they form a social compact, are equal in rights; and that no man or set of men are entitled to exclusive, separate public emoluments or privileges, but in consideration of public services. ART. I, § 1 (1819): That all freemen, when they form a social compact, are equal in rights; and that no man, or set of men, are entitled to exclusive, separate public emoluments or privileges, but in consideration of public services.
California	ART. I, § 1 (1849): All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness.	No prior constitution.
Connecticut	ART. I, PREAMBLE (1818): That the great and essential principles of liberty and free government may be recognized and established, we declare, . . .	No prior constitution.
Delaware	PREAMBLE (1831): Through divine goodness all men have, by nature, the rights of worshipping and serving their Creator according to the dictates of their consciences, of enjoying and defending life and liberty, of acquiring and protecting reputation and property, and, in general, of attaining objects suitable to their condition, without injury by one to another; and as these rights are essential to their welfare, for the due exercise thereof, power is inherent in them: and therefore all just authority in the institutions of political society is derived from the people, and established with their consent, to advance their happiness. And they may for this end, as circumstances require, from time to time, alter their constitution of governance.	PREAMBLE (1792): Through divine goodness, all men have by nature, the rights of worshipping and serving their Creator according to the dictates of their consciences, of enjoying and defending life and liberty, of acquiring and protecting reputation and property, and in general of attaining objects suitable to their condition, without injury by one to another; and as these rights are essential to their welfare, for the due exercise thereof, power is inherent in them; and therefore all just authority in the institutions of political society is derived from the people, and established with their consent, to advance their happiness; and they may for this end, as circumstances require, from time to time, alter their constitution of government. DECLARATION OF RIGHTS, § 2 (1776): That all Men have a natural and unalienable Right to worship Almighty God according to the Dictates of their own Consciences and Understandings; and that no Man ought or of Right can be compelled to attend any religious Worship or maintain any Ministry contrary to or against his own free will and Consent, and that no Authority can or ought to be vested in, or assumed by any Power whatever that shall in any Case interfere with, or in any Manner control the Right of Conscience in the free Exercise of Religious Worship.

State	1868 Version [Placement (Year adopted): Text]	Prior Versions [Placement (Year adopted): Text]
Florida	DECLARATION OF RIGHTS, § 1 (1868): All men are by nature free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness.	<p>ART. I, PREAMBLE (1865): That the great and essential principles of liberty and free government may be recognized and established, we declare: . . .</p> <p>ART. I, § 1 (1865): That all freemen, when they form a government, have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.</p> <p>ART. I, PREAMBLE (1861): That the great and essential principles of liberty and free government may be recognized and established, we declare: . . .</p> <p>ART. I, § 1 (1861): That all freemen, when they form a social compact, are equal, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty; of acquiring, possessing, and protecting property and reputation; and of pursuing their own happiness.</p> <p>ART. I, PREAMBLE (1839): That the great and essential principles of liberty and free government, may be recognized and established, we declare: . . .</p> <p>ART. I, § 1 (1839): That all freemen, when they form a social compact, are equal; and have certain inherent and indefeasible rights; among which are those of enjoying and defending life and liberty; of acquiring, possessing, and protecting property and reputation; and of pursuing their own happiness.</p> <p>ART. VIII, PREAMBLE (1818): That the general, great, and essential principles of liberty and free government may be recognized and unalterably established, we declare, . . .</p> <p>ART. VIII, § 1 (1818): That all men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, and of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.</p>
Illinois	<p>ART. XIII, PREAMBLE (1848): That the general, great, and essential principles of liberty and free government may be recognized and unalterably established, we declare: . . .</p> <p>ART. XIII, § 1 (1848): That all men are born equally free and independent, and have certain inherent and indefeasible rights; among which are those of enjoying and defending life and liberty, and of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness.</p>	<p>ART. XIII, PREAMBLE (1848): That the general, great, and essential principles of liberty and free government may be recognized and unalterably established, we declare: . . .</p> <p>ART. XIII, § 1 (1848): That all men are born equally free and independent, and have certain inherent and indefeasible rights; among which are those of enjoying and defending life and liberty, and of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness.</p>

Indiana	<p>ART. I, § 1 (1851): We declare, 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; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well being.</p>	<p>ART. I, § 1 (1816): That the general, great and essential principles of liberty and free Government may be recognized and unalterably established: We declare, That all men are born equally free and independent, and have certain natural inherent, and unalienable rights; among which are the enjoying and defending life and liberty, and of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.</p> <p>ART. I, § 2 (1816): That all power is inherent in the people; and all free Governments are founded on their authority, and instituted for their peace, safety and happiness. For the advancement of these ends, they have at all times an unalienable and indefeasible right to alter or reform their Government in such manner as they may think proper.</p> <p>ART. II, § 1 (1846): All men are by nature free and independent, and have certain unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness.</p> <p>ART. II, § 1 (1844): All men are by nature free and independent, and have certain unalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness.</p>
Iowa	<p>ART. I, § 1 (1857): All men are, by nature, free and equal, and have certain inalienable rights among— which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.</p>	
Kansas	<p>BILL OF RIGHTS, § 1 (1859): All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.</p>	<p>No prior constitution.</p>
Kentucky	<p>PREAMBLE (1850): We, the representatives of the people of the State of Kentucky, in convention assembled to secure to all the citizens thereof the enjoyment of the right of life, liberty, and property, and of pursuing happiness, do ordain and establish this Constitution for its government.</p> <p>ART. XIII, § 3 (1850): The right of property is before and higher than any constitutional sanction; and the right of the owner of a slave to such slave, and its increase, is the same, and as inviolable as the right of the owner of any property whatever.</p>	<p>PREAMBLE (1799): We, the representatives of the people of the State of Kentucky, in convention assembled, to secure to all the citizens thereof the enjoyment of the right of life, liberty, and property, and of pursuing happiness, do ordain and establish this Constitution for its government.</p> <p>ART. XII, PREAMBLE (1792): That the general, great and essential principles of liberty and free government may be recognized and established, We declare—</p> <p>ART. XII, § 1 (1792): That all men when they form a social compact, are equal, and that no man or set of men are entitled to exclusive separate public emoluments or privileges from the community, but in consideration of public service.</p>

State	1868 Version [Placement (Year adopted): Text]	Prior Versions [Placement (Year adopted): Text]
Louisiana	<p>TIT. 1, ART. I (1868): All men are created free and equal, and have certain inalienable rights; among these are life, liberty and the pursuit of happiness. To secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.</p>	<p>(1864): No Lockean Natural Rights Guarantee</p> <p>(1861): No Lockean Natural Rights Guarantee</p> <p>(1852): No Lockean Natural Rights Guarantee</p> <p>(1845): No Lockean Natural Rights Guarantee</p> <p>PREAMBLE (1811): [I]n order to secure to all the citizens thereof the enjoyment of the right of life, liberty and property, do ordain and establish the following constitution or form of government, and do mutually agree with each other to form ourselves into a free and independent state, by the name of the State of Louisiana.</p>
Maine	<p>ART. I, § 1 (1819): All men are born equally free and independent, and have certain natural, inherent and unalienable Rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.</p> <p>PREAMBLE (1780): The end of the institution, maintenance, and administration of government, is to secure the existence of the body-politic, to protect it, and to furnish the individuals who compose it with the power of enjoying, in safety and tranquility, their natural rights, and the blessings of life</p>	<p>No prior constitution.</p>
Massachusetts	<p>PT. 1, ART. I (1780): All men are born free and equal, and have certain, natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.</p>	<p>No prior constitution.</p>

Missouri	ART. I, § 1 (1865): That we hold it to be self-evident that all men are endowed by their Creator with certain inalienable rights, among which are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.	ART. XIII, PREAMBLE (1820): That the general, great, and essential principles of liberty and free government may be recognized and established, we declare, . . .
Nebraska	ART. I, § 1 (1866): All men are born equally free and independent, and have certain inherent rights; among these are life, liberty, and the pursuit of happiness. To secure these rights, governments are instituted among men, denying their just powers from the consent of the governed.	No prior constitution.
Nevada	ART. I, § 1 (1864): All men are, by nature, free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness.	No prior constitution.
New Hampshire	PT. 1, ART. I (1792): All men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good. PT. 1, ART. II (1792): All men have certain natural, essential, and inherent rights; among which are the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and, in a word, of seeking and obtaining happiness. PT. 1, ART. IV (1792): Among the natural rights, some are in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the rights of conscience.	PT. 1, ART. I (1783): All men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent, and instituted for the general good. PT. 1, ART. II (1783): All men have certain natural, essential, and inherent rights; among which are the enjoying and defending life and liberty—acquiring, possessing and protecting property—and in a word, of seeking and obtaining happiness. PT. 1, ART. IV (1783): Among the natural rights, some are in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the rights of conscience. (1776): No Lockean Natural Rights Guarantee
New Jersey	ART. I, § 1 (1844): All men are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.	(1776): No Lockean Natural Rights Guarantee

State	1868 Version [Placement (Year adopted): Text]	Prior Versions [Placement (Year adopted): Text]
North Carolina	ART. I, § 1 (1868): That we hold it 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, the enjoyment of the fruits of their own labor, and the pursuit of happiness.	DECLARATION OF RIGHTS, § 3 (1776): That no man or set of men are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public service.
Ohio	ART. I, § 1 (1851): All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.	ART. VIII, § 1 (1802): That all men are born equally free and independent, and have certain natural inherent and unalienable rights, amongst which are the enjoying and defending of life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety; and every free republican government being founded on their sole authority, and organized for the great purpose of protecting their rights and liberties, and securing their independence—to effect these ends, they have at all times a complete power to alter, reform, or abolish their government whenever they deem it necessary.
Pennsylvania	ART. IX, PREAMBLE (1838): That the general, great and essential principles of liberty and free government may be recognized and unalterably established, we declare . . . ART. IX, § 1 (1838): That all men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.	ART. IX, PREAMBLE (1790): That the general, great and essential principles of liberty and free Government may be recognized and unalterably established, We declare, . . . ART. IX, § 1 (1790): That all men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness. PREAMBLE (1776): Whereas all government ought to be instituted and supported for the security and protection of the community as such, and to enable the individuals who compose it, to enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man CH. 1, ART. I (1776): That all men are born equally free and independent, and have certain natural, inherent and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.

Rhode Island	<p>ART. I, PREAMBLE (1842): In order effectually to secure the religious and political freedom established by our venerated ancestors, and to preserve the same for our posterity, we do declare, that the essential and unquestionable rights and principles hereinafter mentioned, shall be established, maintained, and preserved, and shall be of paramount obligation in all legislative, judicial and executive proceedings.</p> <p>ART. I, § 1 (1868): All men are born free and equal—endowed by their Creator with certain inalienable rights, among which are the rights of enjoying and defending their lives and liberties, of acquiring, possessing and protecting property, and of seeking and obtaining their safety and happiness.</p>	<p>No prior constitution.</p> <p>ART. IX, § 1 (1865): All power is originally vested in the people, and all free governments are founded on their authority, and are instituted for their peace, safety and happiness.</p> <p>ART. IX, § 1 (1861): All power is originally vested in the people, and all free governments are founded on their authority, and are instituted for their peace, safety and happiness.</p> <p>ART. IX, § 1 (1790): All power is originally vested in the people; and all free governments are founded on their authority, and are instituted for their peace, safety, and happiness.</p> <p>(1778): No Lockean Natural Rights Guarantee</p> <p>(1776): No Lockean Natural Rights Guarantee</p>
South Carolina		
Texas	<p>ART. I, PREAMBLE (1866): That the general, great, and essential principles of Liberty and Free Government may be recognized and established we declare that . . .</p> <p>ART. I, § 2 (1866): All freemen, when they form a social compact, have equal rights; and no man, or act of men, is entitled to exclusive separate public emoluments or privileges, but in consideration of public services.</p>	<p>ART. I, PREAMBLE (1861): That the general, great and essential principles of Liberty and Free Government may be recognized and established, we declare, that . . .</p> <p>ART. I, § 2 (1861): All freemen, when they form a social compact, have equal rights; and no man, or set of men, is entitled to exclusive separate public emoluments or privileges, but in consideration of public services.</p> <p>ART. I, PREAMBLE (1845): That the general, great, and essential principles of liberty and free government may be recognized and established, we declare that . . .</p> <p>ART. I, § 2 (1845): All freemen, when they form a social compact, have equal rights; and no man or set of men is entitled to exclusive, separate public emoluments or privileges, but in consideration of public service.</p>

State	1868 Version [Placement (Year adopted): Text]	Prior Versions [Placement (Year adopted): Text]
Vermont	CH. 1, ART. 1 (1793): That all men are born equally free and independent, and have certain natural, inherent, and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining happiness, and safety;—therefore, no male person born in this country, or brought from over sea, ought to be holden by law to serve any person as a servant, slave, or apprentice, after he arrives to the age of twenty-one years, nor female in like manner after she arrives to the age of eighteen years, unless they are bound by their own consent after they arrive to such age, or bound by law for the payment of debts, damages, fines, costs, or the like.	CH. 1, ART. 1 (1777): That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty; acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety. Therefore, no male person, born in this country, or brought from over sea, ought to be holden by law, to serve any person, as a servant, slave, or apprentice, after he arrives to the age of twenty-one years; nor female, in like manner, after she arrives to the age of eighteen years, unless they are bound by their own consent, after they arrive to such age, or bound by law for the payment of debts, damages, fines, costs, or the like.
Virginia	BILL OF RIGHTS, § 1 (1864): That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.	BILL OF RIGHTS, § 1 (1851): That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety. BILL OF RIGHTS, § 1 (1830): That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety. BILL OF RIGHTS, § 1 (1776): That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Wisconsin	ART. I, § 1 (1848): All men are born equally free and independent, and have certain inherent rights, among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.	No prior constitution
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