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See Also

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Response

Understanding State Constitutions: Locke and Key

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Steve Calabresi and Sofia Vickery have done a great service by uncovering the pre-Fourteenth Amendment case law in state courts interpreting and applying state constitutional provisions which contain “Lockean” language guaranteeing rights to life, liberty, property, safety, happiness, or some combination of those rights.¹ These cases are manifestly one of the keys to understanding the legal world in which the Fourteenth Amendment was crafted and ratified. It is instructive and fascinating to see the development and application of these Lockean provisions, whose influence seems to have spread beyond this country.² It is a pleasure and honor to be asked to comment on this article.³

This study fits in elegantly with Professor Calabresi’s ongoing project of describing the state law background of the pre-Fourteenth Amendment era,⁴

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1. Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEXAS L. REV. 1299 (2015). For examples of such clauses, see *infra* note 15. I use the term “Lockean” here very loosely and metaphorically, as both I and others have done elsewhere. *E.g.*, Gary Lawson, *The Ethics of Insider Trading*, 11 HARV. J.L. & PUB. POL’Y 727, 763 n.149 (1988). Professor Calabresi and Ms. Vickery may have in mind something more precise and historically concrete. *See* Calabresi & Vickery, *supra*, at 1314–15 (suggesting Locke’s influence on George Mason, whose drafting was the basis and model for the earliest Lockean provisions in state constitutions). Their usage may be entirely accurate; I am simply not well enough versed in eighteenth-century intellectual history to make strong claims about the influence of Locke on the founding generation.

2. *Id.* at 1320–22.

3. Honesty compels the disclosure that I am rather far from an impartial reviewer. Professor Calabresi has been a colleague, a housemate, and (aside from my wife) my best friend for more than thirty years. Nonetheless, I believe that everything in this comment is intellectually “clean,” and I do not think that I have pulled any punches.

4. *See generally* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State*

and it provides information that will prove invaluable to anyone trying to come up with a theory of the Fourteenth Amendment or the federal case law construing it. That some state courts, but not others, engaged in broad, purposive reasoning about preambular or Declaration-like constitutional provisions is a datum of which all scholars in this area need to take note.

Present company is not included in that last remark because I am not in fact a scholar in this area. I have long shied away from theorizing about the Fourteenth Amendment,⁵ and I do not plan to enter that thicket today. Instead, I want to offer some cautionary remarks about potential uses (or misuses) of this excellent project—remarks that I suspect the authors will consider at worst a friendly amendment, which is certainly how they are intended. Those cautions are of two types. The first type concerns the parameters of the study itself, and the second concerns the implications of that study for interpretation of the Fourteenth Amendment.

The authors themselves note some of the limitations of their study: It does not cover cases construing Ninth Amendment-like provisions,⁶ which arguably raise issues of legal interpretation similar to those addressed by the study, and some of the cases discussed by the authors weave together discussions of broad Lockean constitutional provisions with invocation of more specific constitutional language.⁷ The latter limitation is particularly noteworthy; the entire class of cases involving litigation procedures,⁸ for example, could easily be characterized as cases about due process of law. But some other limitations should be noted as well.

First, the dataset itself is actually quite small. More than 100 cases⁹ sounds like a substantial number, but those cases are spread over decades; many of them, as noted above, are ambiguous or equivocal about the actual role played by the Lockean constitutional provisions in the decisions; and the numerous cases failing to apply the Lockean provisions, in particular, are often very terse or silent about the reasons for rejecting those claims, so it is difficult to say much about what those courts thought. It would therefore be difficult at best to generalize from this dataset. Certainly, it seems harder to draw conclusions in this context than from a study of explicit state constitutional provisions circa 1868.¹⁰

Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?, 87 TEXAS L. REV. 7 (2008) [hereinafter Calabresi & Agudo, *Individual Rights Under State Constitutions*]; Steven G. Calabresi, Sarah E. Agudo & Kathryn L. Dore, *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451 (2012).

5. E.g., Gary Lawson, *The Bill of Rights as an Exclamation Point*, 33 U. RICH. L. REV. 511, 512 n.7 (1999).

6. Calabresi & Vickery, *supra* note 1, at 1310–11.

7. *Id.*

8. *Id.* at 1389–93.

9. *Id.* at 1441.

10. See Calabresi & Agudo, *Individual Rights Under State Constitutions*, *supra* note 4, at 12.

Second, the very small number of cases that strongly applied Lockean provisions seems to be concentrated in specific courts—primarily, at various times, in California,¹¹ Indiana,¹² and Maine.¹³ It may be that those decisions are less a product of general background understandings that were widely shared in the national legal community than of specific judges who happened to be in the right place at the right time. I do not claim to know which, if either, of these hypotheses is the most supportable. A useful sequel to this study might be an examination of the general jurisprudential outlook of those courts that seemed most inclined to take a broad view of Lockean constitutional provisions. If those courts were somehow jurisprudentially distinct from “mainstream” thinking, that might be important information to know when assessing the potential consequences of their decisions. At the very least, the concentration of certain kinds of decisions in a limited number of courts suggests that one ought to be hesitant before drawing general conclusions about pre-Fourteenth Amendment legal thought.

Even with these limitations, the implications of this article are far from trivial. It is significant that some courts—even a relatively small number—were willing to give strong application, or even serious consideration, to broadly worded constitutional language that many modern observers might be inclined to dismiss as hortatory, aspirational, or nonjusticiable. At a minimum, that means that one cannot dismiss this kind of broad, rights-oriented reasoning about the Fourteenth Amendment out of hand without more careful analysis.

That leads to my second set of cautions, which pertains to the interpretative enterprise. This article is written against the backdrop, and with an eye toward, actual and prospective interpretations of the Fourteenth Amendment. At numerous places, the authors point out past and present applications of the Fourteenth Amendment that are potentially analogous to the kinds of issues faced by pre-1868 state courts construing Lockean provisions.¹⁴ But relating this dataset to the interpretation of the Fourteenth Amendment is a very tricky endeavor.

The most obvious difficulty is that the Fourteenth Amendment contains no Lockean provision. It contains a Due Process Clause, an Equal Protection Clause, and a Privileges or Immunities Clause, but no clause whose wording even approximates the kind of language about the purposes and ends of government that characterizes the Lockean provisions about which Professor Calabresi and Ms. Vickery write.¹⁵ Even if one thinks that the purposive

11. *See, e.g.*, Calabresi & Vickery, *supra* note 1, at 1375–76, 1377–79, 1409–12.

12. *See, e.g., id.* at 1337–39, 1384–86.

13. *See, e.g., id.* at 1358–63.

14. *See, e.g., id.* at 1304–06, 1393–94, 1407.

15. *Compare, e.g.*, 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.”), and VA. BILL OF

reasoning that infuses some of the state court decisions construing Lockean provisions is in some respect generalizable to interpretation of at least some clauses of the federal Constitution, it is not at all obvious that it is generalizable to interpretation of the Fourteenth Amendment in particular. Indeed, the absence of Lockean language in the Fourteenth Amendment may counsel *against* use of the kinds of interpretative methods identified by Professor Calabresi and Ms. Vickery. If the drafters, ratifiers, or readers of the Fourteenth Amendment really wanted or expected a Lockean constitutional provision, they knew what one looked like—and the Fourteenth Amendment isn't it.

Second, there is a fundamental difference between state constitutional interpretation and interpretation of the Fourteenth Amendment. As far as the federal Constitution is concerned, state governments are generally unlimited except to the extent that the Constitution specifically constrains them.¹⁶ This means, among other things, that the burden of proof on issues of constitutional meaning most naturally falls on those who are challenging the permissibility of state action by invoking the Fourteenth Amendment because they are asserting an affirmative limitation.¹⁷ But when state courts are construing their own state constitutions, they might approach that enterprise from a very different perspective. It would certainly be possible (though not mandatory) for a state court to see its state constitution as a document that creates and empowers state institutions, much as the federal Constitution creates and empowers federal institutions. A constitutional provision that sets out the purposes and ends of a government that is being created by that constitution might therefore call for a different interpretative methodology than does a provision limiting otherwise unlimited state governments. It might suggest, for example, that the burden of proof for claims of constitutional meaning should rest with the person arguing *in favor* of rather than against state action, as I think the burden does rest with anyone arguing in favor of federal action. For all of these reasons, any move from state

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.”), with U.S. CONST. amend. XIV, § 1, which states:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

16. The one exception is state power over federal elections and constitutional amendments, which stems from specific enumerated grants of power in the federal Constitution. See Gary Lawson, Guy I. Seidman & Robert G. Natelson, *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U. L. REV. 415, 429 n.76 (2014).

17. Or so I think. Gary Lawson, *Dead Document Walking*, 92 B.U. L. REV. 1225, 1235 (2012).

constitutional interpretation to federal constitutional interpretation requires several discrete steps beyond what is set forth in this article.

Third, the federal constitutional provision most analogous to the Lockean provisions in state constitutions is the Preamble. Just as the Lockean provisions set forth the purposes and ends of government, and thus of the constitutions of which they are a part, the federal Preamble sets forth the purposes and ends for which the federal Constitution is ordained and established.¹⁸ The most powerful application of Professor Calabresi and Ms. Vickery's research may thus be to provide some measure of support for those who urge a broadly purposive interpretation of the federal Constitution in light of the ends described in the Preamble. The leading representatives of this school of thought, and hence the most likely beneficiaries of any such argument, would be Sotirios Barber¹⁹ and James Fleming.²⁰

For those who are unfamiliar with this form of reasoning, it begins by noting that the Preamble "lists substantive goods—good things, like 'the common defense,' 'the general Welfare,' and 'the Blessings of Liberty.'"²¹ The Constitution was created in order to achieve these ends. The ends, and the governmental powers that are conferred in order to achieve them (not limitations on governmental power), must therefore be the central themes of constitutionalism: "[N]o rational actor would establish a government solely or even chiefly for the sake of restraining it."²² The Constitution should, so goes the argument, be interpreted so that it can achieve the ends for which it was ordained and established.

While this kind of argument deserves more currency than it often gets, I have never found it persuasive as an interpretative tool.²³ The Constitution, of course, does not *merely* prescribe ends and goals in the Preamble. It goes on to specify, often in quite gruesome detail, the precise *means* by which it expects those ends and goals to be pursued. Technically, the Constitution does not authorize institutions of the national government to pursue specified ends at all. Rather, it authorizes institutions of the national government to

18. See U.S. CONST. pmbl., which states:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S. CONST. pmbl.

19. See generally SOTIRIOS A. BARBER, *WELFARE AND THE CONSTITUTION* (2003).

20. See generally SOTIRIOS A. BARBER & JAMES E. FLEMING, *CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS* (2007) [hereinafter BARBER & FLEMING, *CONSTITUTIONAL INTERPRETATION*]; JAMES E. FLEMING, *FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS* (forthcoming 2015).

21. SOTIRIOS A. BARBER, *THE FALLACIES OF STATES' RIGHTS* 3 (2013).

22. *Id.* at 177.

23. That may not be either surprising or unwelcome to advocates of this form of constitutional argument, both because I suspect that it is meant to be normative political theory more than positive interpretative theory and because I am unlikely to be the argument's target audience.

pursue certain tasks through certain forms. There is, for example, no “promote national security” clause in the Constitution; there is simply a set of clauses that authorizes various actors to engage in tasks that, so the document contemplates, will promote national security if done well. Nor is there a “general welfare” clause, in the sense of a clause authorizing some institution of the national government to pursue the general welfare. (Those who think that they have found one in Article I, Section Eight, Clause One have not read that clause carefully enough: The “general welfare” language in that clause identifies proper purposes of taxation but does not grant Congress any power.²⁴) One might well draft a constitution hoping or expecting it to achieve certain ends, but that does not mean that the Constitution is itself a direct authorization to pursue those ends rather than a specification of means that might or might not, as things play out, accomplish those ends with any particular degree of efficacy. From an interpretative standpoint, it is far from obvious that the ends and goals should be privileged over the specified means—and perhaps closer to obvious that the reverse is true.

In response to my doubts, an advocate of purposive, or teleological, reasoning about the federal Constitution could point to the practices of state courts construing provisions analogous to the Preamble as evidence that such reasoning was an accepted, if not standard, tool of interpretation of such provisions. Can one draw any insight into this dispute about the character of constitutional interpretation from Professor Calabresi and Ms. Vickery’s article?

I would have been interested to hear the authors’ view on that question (they do not address it), but I personally doubt whether much can be gleaned one way or the other. The purposive interpretative approach applied by some state courts has some similarity to the “moral reading” of the Constitution advocated by Professors Barber and Fleming²⁵ and therefore might be thought to support such a reading of the 1788 Constitution. But the failure of many other courts to apply such reasoning to their Lockean constitutional provisions could just as easily be thought to tug in the other direction. More concretely, the case law identified by Professor Calabresi and Ms. Vickery lends its strongest analogical support to the idea of unenumerated rights against the federal government, but that particular idea is already quite firmly

24. GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 24–25 (2004); U.S. CONST. art. I, § 8, cl. 1; *see also* Jeffrey T. Renz, *What Spending Clause? (Or the President’s Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution*, 33 J. MARSHALL L. REV. 81, 142–44 (1999).

25. BARBER & FLEMING, *CONSTITUTIONAL INTERPRETATION*, *supra* note 20, at xiii; *see also* James E. Fleming, *Living Originalism and Living Constitutionalism as Moral Readings of the American Constitution*, 92 B.U. L. REV. 1171, 1173 (2012) (“By a ‘moral reading,’ I refer to a conception of the Constitution as embodying abstract moral and political principles, not codifying concrete historical rules or practices.”).

embedded in the federal Constitution through the general principle of enumerated powers, the Necessary and Proper Clause,²⁶ the Ninth Amendment,²⁷ and the fiduciary character of the Constitution.²⁸ It does not need a lot of extra support from state law analogies. Extending that idea to unenumerated federal rights against state governments under the Fourteenth Amendment, however, is another matter altogether. Perhaps it can be done—I have no general theory of the Fourteenth Amendment that I am prepared to defend with academic rigor and therefore have no official opinion on that question—but for reasons given above, the Fourteenth Amendment is among the least promising federal constitutional candidates for a Lockean-style reading. It does not contain the kind of language typical of Lockean provisions; its interpretation is properly subject to a burden of proof rule that amounts to a presumption *against* the invalidity of state action; and its connection to the Preamble is more remote, both temporally and conceptually, than is the connection of the text of the 1788 Constitution. In sum, I see relatively little interpretative traction, in any particular direction, for understanding the Fourteenth Amendment to be drawn from Professor Calabresi and Ms. Vickery’s article.

But all of the foregoing is somewhat beside the point—or at least somewhat beside the point that I think Professor Calabresi and Ms. Vickery are trying to make. I do not see them as really arguing that the case law that they present has strong textual and structural implications for interpretation of the Fourteenth Amendment (or of the federal Constitution more broadly). Rather, the trigger for much of their analysis is the idea of rights that are “deeply rooted in this Nation’s history and tradition.”²⁹ Professor Calabresi and Ms. Vickery correctly note that this phrase has become something of a rallying cry for those Justices who are willing to read some relatively narrow and cabined set of rights into the Fourteenth Amendment (and the Fifth Amendment’s Due Process Clause) without engaging in seemingly open-ended philosophizing or judicial creativity.³⁰ This idea of “deeply rooted” rights is, I believe, a jurisprudential creation of the interaction between precedent, the perceived need for social acceptance of court decisions, and a strong conception of a limited judicial role. It is *not* the product of anything that I can recognize as a form of interpretation of the text of the Fourteenth Amendment. As I have said, I do not have a theory of the Fourteenth Amendment that I am prepared to set forth and defend. There are a great many such theories that are, at a minimum, intellectually defensible.

26. U.S. CONST. art. I, § 8, cl. 18; *see generally* Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993).

27. U.S. CONST. amend. IX; *see* Lawson & Granger, *supra* note 26, at 326–30.

28. *See generally* Lawson, et. al., *supra* note 16.

29. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977)).

30. Calabresi & Vickery, *supra* note 1, at 1302.

Nonetheless, a theory that would read the text of the Fourteenth Amendment to protect those rights, but only those rights, deeply rooted in history and tradition does not strike me as one of those intellectually defensible theories. It might very well be a normatively attractive political conception, and one that will secure a good deal of popular support, but I have a hard time seeing how one could reasonably claim that it is the best reading of the words of the Fourteenth Amendment.

If one is not really interpreting the Fourteenth Amendment but is instead trying to understand, apply, and refine certain ideas generated by a body of case law that is mostly untethered to the actual Constitution, then the textual and structural cautions that I have raised above are not really relevant. If one is looking for what is deeply rooted in history and tradition, one needs to look carefully at history and tradition, not at the text and structure of the Constitution. For that purpose, the study conducted by Professor Calabresi and Ms. Vickery is obviously quite pertinent. The cautions concerning the limitations of the study itself—both those declared by the authors and (so I think) the others that I have outlined here—remain important, but arguments about how to connect the study's findings to the constitutional text may be about as significant as arguments about the consistency of the administrative state with the Constitution. In other words: Of almost no significance whatsoever.