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## The Constitution and Enforceable Natural Law

## *The Constitution and Enforceable Natural Law*

Karl Z. Deuble

In light of the untimely passing of Justice Antonin Scalia, once again the debate over how to best interpret and give meaning to the Constitution has entered the political discourse. Contemporarily presented this debate is often seen as a choice between a narrow and static interpretation as illustrated by the late Scalia's originalism or an open ended living Constitution that appears to have no defining parameters. However, missing from this debate is a third alternative which links the Constitution to the Declaration of Independence. By doing so, it creates what Scott Gerber calls "liberal originalism" which is a method of interpretation that better allows for the securing of liberty as understood by the authors of both documents. In the cases, *Lawrence v. Texas* and *Obergefell, et al. v. Hodges, Director, Ohio Department of Health, et al.* Justice Kennedy's majority opinions accurately use this third alternative to interpret the Constitution.

### I.

To first understand liberal originalism, one must understand the political philosophy of John Locke. Locke's classical liberal principles helped mold American government. These principles are laid out in his essay *The Second Treatise of Government*. This treatise is Locke's philosophy on the role of man in society and his relation to government. For Locke, the only goal of government is to protect three things; these are life, liberty, and property. Locke believed these three rights were naturally instilled in men. Furthermore, the only reason man would give up power to a government is to make sure these rights are

protected absolutely. An important piece to this assumption of the role of government is that these three things are inherently natural to man. Locke claims that the state of nature is "a state of perfect freedom [that allows men] to order their actions and dispose of their possessions and persons as they think fit" (Locke, 1788, 2). In this passage are two of Locke's natural rights. When Locke says men have the freedom to "order their actions" this is essential his view of liberty. It is a very negative view of liberty. Negative in the sense that to have liberty means there is an absence of restrictions on actions.

When Locke says "possessions and persons" he is really talking about property. His view of property is very expansive. He is not talking about solely private possessions. Locke states:

The labour of his body and the work of his hands we may say are properly his. Whatsoever, then, he removes [something] out the state that nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property. (Locke, 1788, 12-13)

To Locke, not only your labor but the product of your labor is also considered your property. Whether it is wages or products that you actually create, Locke believes this is your property because you have invested your time and labor in it. If man has removed something from its natural state it therefore belongs to him. This is crucially important to understand this expansive notation of property because it makes it

easier to see what the role of government should be. Government should protect the rights to property including the right to use your labor however you see fit. Naturally, this means that the government has to protect your liberty. In effect, the right to use your property how you see fit is an extension of your liberty. The role of government is then to protect these rights because in a state of nature these rights are not protected. Man only creates a government so that he may gain protection of his natural rights. This limited view of government is very important because evidence of this natural theory of law is a huge part of our Constitution that is often misunderstood or ignored.

There are many places, not only just in the Constitution, that Locke's theory of government is rooted. The Declaration of Independence, the Preamble to the Constitution, Article 1, Article 4, the 9<sup>th</sup> amendment, and the 13<sup>th</sup> amendment are just a few places where Lockean philosophy of government is rooted. Scholars have debated the importance of Lockean natural law but there is overwhelming evidence to support that the framers were heavily influenced by his work.

The Declaration of Independence is often one of the most over looked documents in constitutional law. For most people, the Declaration is not a legal document. It is simply just a piece of paper that lists our grievances with the King of England and declares our right to be free. However, overlooking the Declaration is a fatal mistake when looking to find the correct meaning of the Constitution. Understanding the presumptions of the Declaration creates the lens through which we can interpret the Constitution. The Declaration of Independence is adherently a natural law document. Its main components are pulled straight from Locke. Thomas Jefferson did

this on purpose. When Jefferson said "Life, liberty, and the pursuit of happiness, he was paraphrasing Locke's three natural rights which were life, liberty, and property. If one understands the expansive notion of property discussed earlier, property and the pursuit of happiness are essentially the same thing to Locke.

Timothy Sandefur explains in his book *The Conscience of the Constitution* how the Declaration is a legal document and how it is crucial to understanding the Constitution. The Declaration played a prominent role in the early legal system of the country. Jefferson called the Declaration "the fundamental act of union of these states" (Sandefur, 2014, 15). According to Sandefur, the American legal system started on July 4<sup>th</sup> 1776 with the Declaration not in 1789. Every state that was admitted to the Union after Nevada in 1864 had to write "a constitution consistent not only with the federal Constitution but also with the Declaration of Independence" (Sandefur, 2014, 15.) This is further proof that the Declaration has legal relevance and in some sense pre-exists the Constitution. If one wants to interpret the Constitution through the intent of the framers one cannot ignore how vital the Declaration's presumptions of life, liberty, and the pursuit of happiness are.

More evidence to show that the Constitution creates a natural law presumption of liberty is in the most often overlooked part of the document. Everyone reads the preamble and many even have memorized the words, however, many do not understand their true meaning. The preamble reads "WE THE PEOPLE of the United States, in Order to form a more perfect Union...secure the Blessings of Liberty to ourselves and our Posterity." The most important part of the Constitution is right there in the very first paragraph. The whole reason the framers are forming this government is to secure liberty

for all citizens. This presumption of liberty in the preamble connects the Constitution to the Declaration and to a natural law approach. Many do not understand that the Constitution is merely an ends to a mean. The Declaration of Independence is the reason why our country was founded. The Constitution was how the framers best saw to achieve the goals of the Declaration. To interpret the true meaning of the Constitution, one has to understand the reason why it was written in the way that it was. The framers intent was that we look at the Constitution with the view that the right to liberty pre-exists all government and the goal of government is that liberty not be taken away without reason.

Another example of the idea of liberty being ingrained in the Constitution is the privileges and immunities clause. This clause appears in slightly different forms in both Article 4 Section 2 and the 14<sup>th</sup> Amendment. The clause in the 14<sup>th</sup> amendment was stripped of all its teeth, wrongly according to a large majority of modern legal thinkers, by the U.S Supreme Court in the late 19<sup>th</sup> century. However, the clause in Article 4 Section 2 states “the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.” This clause still holds legal weight and its premise is very Lockean. The goal of this clause was to promote the general liberty of each citizen. In a law review article discussing the important of this clause, Emily Jennings noted through historical research that “Such clauses... were largely intended to ensure that a citizen traveling to another jurisdiction would be afforded the same local rights as the citizens of that jurisdiction” (Jennings, 2013, 1807). This clause is essentially Lockean because it assumes that one person from one state has the same liberty as one person from another state. Each person, no matter where they are from, is equal in regards to their right to

liberty and property. This clause protects a state from abridging these natural rights regardless of where the individual is from.

Also found in Article 4 of the U.S Constitution is the full faith and credit clause. The assumptions behind this clause are also heavily rooted in Locke and natural law. Article 4 Section 1 states “full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State.” Practically, this provision forces each state to recognize the actions and laws of other States. As discussed by Jeffrey Schmitt, “The Court has held that the first portion of the Clause is a substantive command requiring a state to give conclusive effect to the judgments of other states” (Schmitt, 1, 2014). According to the Supreme Court and the Constitution, a contract in one state is to be recognized by all the states. On its face, this is very easier to understand and non-controversial. However, at its heart it really is a provision protecting property. It protects property in the expansive notion understood by Locke. If a person has contracted to use his property in a specific way in New York and he chooses to move to Pennsylvania, that State cannot deny him the liberty he enjoyed in New York. Again, this was added to the Constitution by the framers to protect individual liberty and property from infringement by the government.

Up until this point the only parts of the Constitution that have been discussed at length have been the articles. Natural law is not only ingrained in the articles but also in the Amendments. The writers of the 9<sup>th</sup> and 13<sup>th</sup> amendments were also greatly influenced by Locke. The 13<sup>th</sup> amendment in effect eliminates slavery and involuntary servitude unless as a punishment for a convicted crime. John Locke was a strong opponent of slavery because it completely takes away a person’s liberty. One of the big

problems with the original Constitution was that it did not outlaw slavery. Joseph Mark eloquently states how the ideas of Locke and the Declaration are connected to the 13<sup>th</sup> Amendment:

...some Americans considered that the Constitution's protection of liberty embodied protections sufficient to rid the nation of slavery. However, it is well-understood that the original Constitution failed to live up to the Declaration's promise of liberty and equality in one major way—its treatment of slavery. It was not until adoption of the Thirteenth Amendment that the Constitution came more closely in line with the Declaration. (Mark, 4, 2014)

The writers of the 13<sup>th</sup> amendment, like Mark, realized the importance of Lockean liberty and created an amendment that brought the Constitution closer to its original intent.

Finally, the 9<sup>th</sup> amendment, and the history behind its existence, continues to prove that the protection of liberty is the main goal of the U.S Constitution. The 9<sup>th</sup> amendment reads "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage other retained by the people." This amendment was very important to Madison because he wanted to stick to a government that adhered to Lockean natural law. He was afraid of a Bill of Rights because he thought if the framers listed specific rights, future people would assume that those are the only rights they are given. If understood correctly, citizens are not *given* rights under natural law; they are inherent to all citizens. Those rights not listed in the first ten amendments are "retained by the people." The use of the word *retained* is very important. If rights are retained that means they are held onto which assumes citizens already have them. They

are not given to them and cannot be taken away from them. Madison shares his views on a Bill of Rights in a letter to Thomas Jefferson. Part of it reads "I have not viewed it in an important light because I conceive that in a certain degree ... the rights in question are reserved by the manner in which the federal powers are granted" (Madison, 1788). Madison believed that the rest of the Constitution already protected the rights for which Jefferson wanted to write down. Madison viewed the role of government through a natural law lens and by doing so he deeply ingrained Lockean principles in the Constitution.

## II.

Viewing the Constitution through a natural law prospective has increasingly become unpopular. Many Supreme Court justices have failed to recognize the connection between the intent of the framers and Locke. Understanding Locke is very important because it makes it much easier to determine if a law is unconstitutional. Scott Gerber has developed a comprehensive natural law theory of interpretation that is line with Locke. If a law or government action violates the spirit of the Constitution by unnecessarily taking away personal liberty, life, or property then it is contrary to Locke and the intent of the framers. However, many justices have not taken this view. They have taken a more positivist position when interpreting the Constitution. This has caused many problems and has created case law that in many instances is contrary to the preservation of liberty. Justice Kennedy has been the justice who, more than any other, has written opinions in the spirit of natural law. His majority opinions in *Lawrence v. Texas* and *Obergefell, et al. v. Hodges, Director, Ohio Department of Health, et al* are most closely in line with that of liberal originalism.

Gerber's use of the phrase liberal originalism to describe his view of constitutional interpretation can be a little confusing. This phrase is slightly puzzling in a contemporary setting because when the word liberal is used it creates a connection to the modern day liberal ideology most often adopted by Democrats. This is a problem because Gerber's philosophy of interpreting the Constitution is far from the philosophy modern liberals adhere to. To get a better understanding of what liberal originalism really means, Gerber would have been better off calling it classical liberal originalism. Classical liberalism as an ideology has a strong belief in natural law. Specifically, it is based in the natural law understood by John Locke. This is an important distinction because classical liberalism is the philosophy that was adopted by many, if not all, of the Founding Fathers when they wrote the Constitution. According to Gerber, "To secure natural rights is, therefore, why the Constitution was enacted, and to secure natural rights is how the Constitution should be interpreted. That is the 'original intent' of the Founders" (Gerber, 1995, 6). This is the role Jefferson, Madison, and many others thought to be the correct role of government. Liberal originalism is a method of interpretation whose primary purpose is to protect the natural rights of the people. The question then becomes how one interprets the Constitution by using liberal originalism. To interpret the Constitution through liberal originalism, it is crucial to have not only an understanding of the role of government (to secure natural rights) but also what those natural rights are. According to Lockean natural law, those rights are life, liberty, and property. Another important concept in Lockean natural law is equality. Now, Lockean equality is equality of opportunity not equality of outcome. Everyone in our society is equal in the fact that their natural

rights have to be protected. No one person's rights can trump another's. Adhering to these principles laid out by Locke is how to correctly interpret the Constitution using liberal originalism.

*Lawrence v. Texas* specifically deals with a homosexual couple who were caught, in a legal execution of a search warrant, having sex. Under Texas Penal Code 21.06(a), it is illegal for two individuals of the same sex to engage in "deviate sexual intercourse." There is no denying, by either party, that *Lawrence* committed this act. However, *Lawrence* is arguing against the right of the State of Texas to pass such a law banning private behavior.

The first sentence in Kennedy's opinion in *Lawrence* is the presumption he works off of in the rest of the opinion. It reads, "Liberty protects the person from unwarranted government intrusions..." (*Lawrence v. Texas*, 2003, 562). This presumption seems so simple and so in line with the aims of the Constitution it is frightening that many of the justices do not agree with it. To positivists, liberty is not inherent in citizens. Certain liberties are given to them by the government while others are not. Justice Kennedy rejects this notion in the very first sentence of his opinion. He recognizes correctly the links between Locke and the Constitution. Justice Kennedy believes it is the Court's role to guard the all liberties of the people against "unwarranted government intrusions." Therefore, Kennedy is defending Lawrence's liberty to do what he wishes in a private setting.

Secondly, Justice Kennedy looks at the goals of the statute in question. It is reasonable to assume that the aim of the statute is to discourage homosexual behavior and to try to "correctly" define the relationships between citizens. However, Justice Kennedy does not believe this is

within the role of the government to do. He states “The statutes do seek to control a personal relationship that...is within the liberty of persons to choose without being punished...” (Lawrence v. Texas, 2003, 567). Nowhere in the Constitution does it specifically protect private homosexual behavior. However, Kennedy takes a Lockean notion of liberty and protects this act as an expression of liberty that cannot be taken away by the State. This becomes clearer when he states later “The liberty protected by the Constitution allows homosexual persons the right to make this choice” (Lawrence v. Texas, 2003, 567).

Now, Justice Kennedy recognized the need for laws similar to this Texas statute. Many states have sodomy laws similar to Texas but they are valid because of one key distinction. There is a limit to liberty and it is noted by Kennedy in this passage. “A substantial number of sodomy...convictions for which there are surviving records were for predatory acts against those who could not or did not consent” (Lawrence v. Texas, 2003, 569). These sodomy laws referenced by Kennedy are not under questioned for one reason. To Locke and Gerber, this is known as the harm principle. Liberty can be limited by the state if the use of one’s liberty harms another person. Kennedy draws this distinction because in the case in question the harm principle does not apply and the government should have no right to infringe on this liberty.

Finally, Kennedy cites a previous case where the court used the 14<sup>th</sup> amendment, and its due process clause, to uphold this notion of liberty. The court ruled in *Planned Parenthood of Southeastern Pa. v. Casey* that “intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment” (Lawrence v. Texas, 2003,

574). The right to liberty and control of one’s life is a central tenant of natural law. The goals of the 14<sup>th</sup> Amendment are to insure this liberty is not taken away. Without this natural law lens through which to view the Constitution finding this right would be very hard. But, when one takes a liberal originalist approach and has the goals of the framers in mind, it is clear to see how the liberty inherent in *Lawrence* is violated by the State of Texas through Penal Code 21.06(a).

The Supreme Court case *Obergefell v. Hodges* is similar to that of *Lawrence*. Justice Kennedy again writes the majority opinion and uses liberal originalism to interpret the Constitution. *Obergefell* is a case dealing with the legality of same-sex couples and their right to be legally married. The States from which the petitioners are from each define marriage as the union between one man and one woman. Justice Kennedy is writing for the majority when he declares that these laws are unconstitutional and the petitioners have the right to marry. Just like in *Lawrence*, the first sentence of Justice Kennedy’s opinion sets the tone. It reads “The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity” (*Obergefell v. Hodges*, 2015, 2). In the previous case, Kennedy’s view of natural law was only focused on liberty. In *Obergefell*, he extends this view to include not only liberty but Locke’s notion of property too. The right to express personal identity can be viewed as a right to property because expressing one’s identity is essentially the same thing as one’s property. This broad Lockean notion of the right to property is founded in the Declaration and it the driving force behind the rest of Kennedy’s opinion.

Kennedy sided in favor of same-sex marriage because he believed the petitioners in *Obergefell* have the liberty to express their identity how they see fit. However, this specific liberty is not listed anywhere in the Constitution. The dissenters in *Obergefell* use this as their argument. Justice John Roberts states in his dissenting opinion that “This [decision] is an act of will, not legal judgment.” Justice Kennedy strongly resists this accusation because the Court does have the legal authority to make this judgment. Not simply because they are Justices of the Supreme Court and they have the final say but because the protection of liberty is rooted deep in the Constitution. The 14<sup>th</sup> amendment reads, no State shall “deprive any person of life, liberty, or property, without due process of law.” The liberty for same-sex couples to marry had not previously been considered to be protected by this clause. This is why Justice Roberts and his fellow dissenters are so angry. However, Justice Kennedy believes “the identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution.” (*Obergefell v. Hodges*, 2015, 10). Kennedy believes it is the role of the Justices’ to continually define liberty in a changing society. The framers could not see the issue of same-sex marriage in the 18<sup>th</sup> century. They accepted that as time went on different issues would

challenge future generations. But, their key foundation to solving problems of government power would never change. Defending liberty against government action must fall on the Supreme Court. Kennedy recognizes this in *Obergefell* and he does so correctly by sticking to using Gerber’s liberal originalism to interpret the Constitution.

Constitutional jurisprudence is a very hotly debated issue among legal scholars and it seems that this debate will creep into the political arena because of the recent vacancy in the Court. Many say it is impossible to know what the true intent of the framers was. However, it is very clear to see the connection between Locke, the Declaration, and then finally the Constitution. The framers did this on purpose because they believed Locke’s notion of liberty and how it is inherent in every man. They formed a government system around the goal of creating a civil society where it was not possible for the State to intrude on this liberty. Many modern thinkers do not subscribe to the notion of Lockean natural law but it is still strongly supported by some. Gerber is one of those scholars who has developed a convincing argument for this type of interpretation. Justice Kennedy is a great example of how a justice can use liberal originalism to decide cases.

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