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I. INTRODUCTION

Our written constitutions, elusive and abstract, evoke grandiose ideas about our history, about our government and our relationship with it, and about our self-perception as a civilized society. As we read them and grapple with the scholarly judicial opinions that seek to interpret their texts, we sometimes forget that these constitutions also serve as theatres where dramas and tragedies are played out. The words become ammunition in true struggles. In the case of article II, section 4, of the New Mexico Constitution, which deals with the most fundamental of our ideals—life, liberty, property, safety, and happiness—the struggle becomes epic, with the personal stakes in the outcome at their highest. So it was for Timothy Reed, a man who, in what he saw as a fight for his own life, used this obscure state constitutional provision to test the American constitutional order.

Timothy Reed (or, Little Rock Reed, as he came to be known) entered prison in Ohio for the ordinary, non-illustrious convictions of theft of drugs and assault and battery.[1] He turned out, however, to be an extraordinary convict. At the Southern Ohio Correctional Facility (Lucasville), Reed became a jailhouse lawyer, helping to prepare writs of habeas corpus for his fellow inmates. More than that, he had become acquainted with his Lakota Sioux heritage, and he became a very vocal activist against what he saw as abusive conditions for Native Americans at Lucasville, and in the Ohio system generally. As part of his advocacy for improved prison conditions for Native Americans, he regularly leveled heavy criticisms against Ohio prison officials. He also wrote scholarly articles and provided materials for various conferences, all of which brought him increasing notoriety.[2]

Reed's work as "writ writer" and activist aggravated prison officials and led to his mistreatment, and to denial of parole on at least one occasion. Eventually, however, Reed was paroled and continued his advocacy work on behalf of Native Americans in the Ohio prison system from outside of its walls. He continued his work in this capacity until he had an altercation with the husband of one of his co-volunteers in the Native American Prisoners' Rehabilitation Project. The husband pressed criminal charges for making an alleged death threat. Although Reed contended that his accuser subsequently agreed to recant the charges and affirm that they were fabricated, Reed's parole supervisor insisted that Reed report to be returned to Lucasville.[3]

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1. Reed v. State *ex rel.* Ortiz, 1997-NMSC-055, 947 P.2d 86, *rev'd per curiam*, 524 U.S. 151 (1998). I will be drawing from the New Mexico Supreme Court opinion for most of this narrative, unless otherwise indicated.

2. *See, e.g.*, Little Rock Reed, *The American Indian in the White Man's Prisons: A Story of Genocide*, J. OF PRISONERS ON PRISONS, Fall 1989, at 41; Little Rock Reed, *Today's Prison Administrators Were Trained by Fascists: And What About Tomorrow?*, IRON HOUSE DRUM (Native American Prisoners' Rehabilitation Research Project, Villa Hills, Ky.), 2d ed. 1992, at 7.

3. There is no indication in the factual record in *Reed v. State ex rel. Ortiz* that Reed's accuser ever dropped the charges.

Reed suspected that he was being set up. He had corresponded with other inmates at Lucasville who informed him that prison officials intended to harm or kill him when he returned. Based on information he was receiving from inside Lucasville, Reed suspected that policies that prison officials had adopted were fomenting an inevitable riot. In his testimony, Reed said, "I knew then that I was in serious danger, and particularly because I also had knowledge about the riot that was about to take place in Lucasville."[4] Reed also obtained affidavits from Lucasville inmates swearing that they had knowledge of prison officials' plans to harm him.

Fearing for his life, Reed fled to Taos, New Mexico, to continue his activism and advocacy work. He was convicted in absentia for his alleged threat against his co-volunteer's husband.[5] With Reed officially a parole violator at-large, Ohio initiated extradition proceedings and Reed was arrested as a fugitive from justice. In response, Reed filed a writ of habeas corpus. The district court in the Eighth Judicial District granted the writ, and the Supreme Court of New Mexico affirmed.

As a legal matter, Reed's case implicated two major constitutional conflicts: a clash between the Extradition[6] and the Suspension[7] clauses in the U.S. Constitution on the one hand, and a clash between the Extradition Clause in the U.S. Constitution and the natural rights clause of the New Mexico Constitution[8] on the other. The New Mexico judiciary seemed determined to grant Reed relief in the form of a writ of habeas corpus. They believed his story, and in the written opinions of the district court and the New Mexico Supreme Court, the judges and justices wrestled mightily to save Reed from impending doom in the face of contrary case law. Nonetheless, the U.S. Supreme Court eventually laid the controversy to rest in a per curiam reversal that seemed to express not a small amount of impatience. The Court stated:

> In *case after case* we have held that claims relating to what happened in the demanding State, the law of the demanding State, and what may be expected to happen in the demanding State when the fugitive returns are issues that must be tried in the courts of that State, and not in those of the asylum State.[9]

Even though the New Mexico Supreme Court invited the reprimand of the U.S. Supreme Court, it may have succeeded in saving Reed's life. After all, if he had been returned to Lucasville, he might have become involved in the violence that beset the prison during the riot. In the process it gave, in its majority opinion, one

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4. Whatever may be said about his multifaceted conspiracy theories, Reed proved to be correct concerning the pending riot at Lucasville. A few weeks after he was supposed to report to be returned there, a large riot broke out in which eight people were killed.

5. Despite Reed's insistence that the charge would be dropped, his accuser chose to pursue them.

6. Article IV, Section 2, of the U.S. Constitution provides:

> A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

7. Article I, Section 9, of the U.S. Constitution states that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

8. N.M. CONST. art. II, § 4.

9. New Mexico *ex rel.* Ortiz v. Reed, 524 U.S. 151, 153 (1998) (emphasis added). The legal principles will be examined more fully below.

of the only substantial analyses of article II, section 4, of the New Mexico Constitution, the so-called inherent or natural rights provision.[10]

In this Article, I will explore that enigmatic provision. Little Rock Reed's story may represent the highlight of New Mexico judicial opinions dealing with the clause—both because of its dramatic facts and because of its matter-of-fact reading of the clause as a font of substantive rights. Even so, many others have attempted to invoke it in litigation, both before and after Little Rock Reed. As of the writing of this paper, one member of the American Civil Liberties Union (ACLU) in New Mexico informed the author that the ACLU makes it a routine matter to add a claim based on this clause in claims that it brings under the state constitution. No clear vision of its meaning or use in the state's jurisprudence has emerged, and the court has never returned to the broad, substantive-rights-based analysis that shaped the New Mexico Supreme Court's ambitious majority opinion in *Reed*. The clause, therefore, deserves attention, and it begs to be better understood. To that end, Part II of this Article will set forth the New Mexico judiciary's current understanding of the clause. Then, in Part III, the Article will engage in a historical and textual examination, paying special attention to two critical time periods in the clause's development: the 1910 New Mexico Constitutional Convention and ratification, whereby it officially became a part of the constitution; and the much earlier era of the Virginia Declaration of Rights, where the language was initially drafted. Finally, Part IV will apply the understanding gained from the clause's history, in addition to insights gained from modern constitutional practice, to discuss its usefulness as an adjudicative tool (or, more precisely, a source of substantive constitutional rights).

II. NEW MEXICO'S ATTEMPTS TO GRAPPLE WITH THE NATURAL RIGHTS CLAUSE

Attempts by litigants in New Mexico to invoke the natural rights clause have arisen in widely varying circumstances, and those attempts have been relatively clumsy. Generally, the arguments that have been made fall into five categories. First are those instances where plaintiffs have sought to invoke inherent property rights as a means of overcoming state sovereign immunity or other aspects of the Tort Claims Act.[11] Second are cases involving challenges to economic regulations.[12] Third are those that involve arguments that the natural rights clause expands state constitutional protections of individual rights beyond those provided by the U.S. Constitution.[13] Fourth involve those cases where litigants raised the natural rights clause in conjunction with the due process clause, usually conflating the two, or at

10. Throughout this paper, I will refer to the clause as the natural rights clause.

11. *See* Blea v. City of Espanola, 117 N.M. 217, 221, 870 P.2d 755, 759 (Ct. App. 1994); Lucero v. Salazar, 117 N.M. 803, 803, 877 P.2d 1106, 1106 (Ct. App. 1994); Caillouette v. Hercules, Inc., 113 N.M. 492, 496, 827 P.2d 1306, 1310 (Ct. App. 1992).

12. *See* Rocky Mountain Wholesale Co. v. Ponca Wholesale Mercantile Co., 68 N.M. 228, 360 P.2d 643 (1961); Skaggs Drug Ctr. v. Gen. Elec. Co., 63 N.M. 215, 315 P.2d 967 (1957).

13. *See* Tafoya v. Bobroff, 865 F. Supp. 742, 747 (D.N.M. 1994); Trujillo v. City of Albuquerque, 110 N.M. 621, 628, 798 P.2d 571, 578 (1990); Futrell v. Ahrens, 88 N.M. 284, 288, 240 P.2d 214, 218 (1975); State v. Sutton, 112 N.M. 449, 816 P.2d 518 (Ct. App. 1991).

least assuming that they serve similar functions.[14] Fifth are cases in which individuals sought to challenge seemingly broad restrictions on property or individual liberty.[15] This Part examines the most important of cases dealing with these categories and in doing so demonstrates that New Mexico courts have never taken an opportunity to rigorously analyze the natural rights clause. This Part concludes by revisiting the case of Little Rock Reed[16] to discuss its endorsement of the natural rights clause as a source of substantive constitutional rights.

A. Using the Natural Rights Clause to State a Claim Under the Tort Claims Act

In 1994, the New Mexico Court of Appeals heard two cases in which plaintiffs raised similar arguments: *Blea v. City of Espanola*[17] and *Lucero v. Salazar*.[18] *Blea* involved a tragic series of events: Two officers from the Española Police Department stopped a minor who had consumed large amounts of alcohol and marijuana.[19] Despite several indicators that the minor was severely impaired, the officers allowed him to continue driving, and he was subsequently involved in a car accident, killing the plaintiffs' daughter.[20] The plaintiffs argued that the officers from the Española Police Department violated their decedent daughter's right "to live and be safe and happy"—a right that is expressed in article II, section 4, of the New Mexico Constitution.[21]

The practical purpose of the plaintiffs' argument was to state a claim under a section of the New Mexico Tort Claims Act that provides:

> The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.[22]

In other words, the plaintiffs hoped that if the court read the natural rights clause expansively, it would use it as a basis for taking advantage of the statutory waiver of sovereign immunity for constitutional deprivations caused by law enforcement officers. With respect to such an argument, the court observed that "[w]aiver of immunity based on such constitutional grounds would emasculate the immunity preserved in the Tort Claims Act."[23] According to the court, "vague references to

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14. *See Trujillo*, 110 N.M. at 628, 798 P.2d at 578; Otero v. Zouhar, 102 N.M. 493, 504, 697 P.2d 493, 504 (1984); *Skaggs Drug Ctr.*, 63 N.M. 215, 315 P.2d 967; Green v. Town of Gallup, 46 N.M. 71,72, 120 P.2d 619, 620 (1941).

15. *See Green*, 46 N.M. at 72, 120 P.2d at 620.

16. Reed v. State *ex rel.* Ortiz, 1997-NMSC-055, 947 P.2d 86, *rev'd per curiam*, 524 U.S. 151 (1998).

17. 117 N.M. 217, 870 P.2d 755 (Ct. App. 1994).

18. 117 N.M. 803, 877 P.2d 1106 (Ct. App. 1994).

19. *Blea*, 117 N.M. at 218–19, 870 P.2d at 756–57.

20. *Id.* at 218–19, 870 P.2d at 757–58.

21. *Id.* at 221, 870 P.2d at 760.

22. NMSA 1978, § 41-4-12 (1977).

23. *Blea*, 117 N.M. at 221, 870 P.2d at 759 (citing Caillouette v. Hercules, Inc., 113 N.M. 492, 497, 827

safety and happiness in article II, section 4 of the state Constitution are not sufficient to state a claim under Section 41-4-12."[24] This analysis suggests that the court was concerned that it would not be possible to craft a clear theory of waiver from the vague references to safety and happiness.

In *Lucero v. Salazar*, the Court of Appeals heard the identical argument.[25] In that case, the plaintiff sued under article II, section 4, alleging that one of the defendants, a police officer, shot and killed his natural father without justification.[26] The plaintiff contended that the defendant intentionally deprived him of his relationship with his natural father.[27] As a result, the plaintiff claimed that he suffered a deprivation of his right to "enjoy life and seek and obtain happiness," and that the constitutional deprivation gave rise to a claim under the Tort Claims Act.[28] The court cited *Blea*, reiterating the proposition that such a reading of the natural rights clause would "emasculate" state sovereign immunity.[29]

Thus, the New Mexico courts have not been open to a broad reading of the natural rights clause that would give rise to waivers of state sovereign immunity. The specific violations asserted in *Blea* and *Lucero*, based on failure to prevent a foreseeable fatal car accident in one case, and on deprivation of a relationship in the other, were not enough. As discussed below, the only reasoning offered—that such a reading would virtually eliminate sovereign immunity—leaves much to be desired. The courts made no attempt to delve into the meaning of the clause (and they probably did not need to do so). They did not decide whether a more concrete violation of the clause would result in a waiver of sovereign immunity under the statute in question. The most the courts would say about the clause in these Tort Claims Act cases is that "[t]he scope of the right to enjoy life and pursue happiness stated in Article II, Section 4 of the New Mexico Constitution, and whether violation of that section's provisions gives rise to a cause of action under the Tort Claims Act, has not been determined."[30]

B. Cases Concerning Arguments that the Natural Rights Clause Establishes a Ground for Finding Expanded Protections of Individual Rights Under the State Constitution

Litigants (and in one case, the New Mexico Court of Appeals) have oftentimes suggested that the natural rights clause might be grounds for finding added protections for certain individual liberties. This Part introduces the main exemplar cases following this argument and discusses the courts' rulings and reasoning with respect to it.

One of the leading examples of this line of reasoning comes from *State v. Sutton*, a criminal appeal involving an alleged illegal search and seizure.[31] In *Sutton*, police

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P.2d 1306, 1311 (Ct. App. 1992)).

24. *Id.* at 221, 870 P.2d at 759.
25. 117 N.M. 803, 803–04, 877 P.2d 1106, 1106–07 (Ct. App. 1994).
26. *Id.* at 803, 877 P.2d at 1106.
27. *Id.* at 803–04, 877 P.2d at 1106–07.
28. *Id.* (citing N.M. CONST. art. II, § 2) (internal quotation marks omitted).
29. *Id.* at 804, 877 P.2d at 1107.
30. *Id.*
31. 112 N.M. 449, 816 P.2d 518 (Ct. App. 1991).

officers responding to a tip entered onto property occupied by the defendant and discovered marijuana plots in the area surrounding a cabin.[32] Subsequently, the officers initiated surveillance on the defendant, eventually arresting him.[33] As part of his appeal, the defendant argued that this was a violation of the Fourth Amendment of the U.S. Constitution,[34] and of article II, section 10, of the New Mexico Constitution.[35]

Although it was unclear whether the argument had even been preserved for appeal, the New Mexico Court of Appeals decided that it was important to discuss the differences between search and seizure law under the U.S. and New Mexico Constitutions. The court noted that the wording of article II, section 10, of the New Mexico Constitution left open the possibility that it afforded more protection of individuals against police activity than its federal counterpart.[36] Moreover, the court cited article II, section 4, noting that it

> contains very general language protecting a variety of rights. We are not prepared in this case to make a definitive statement as to the scope of the protection it provides. The *right to protect property*, however, is a specific right. Its presence in this clause might provide the basis for additional protection against unreasonable searches and seizures.[37]

This is the most the court would say about how the natural rights clause might function in the context of search and seizure.

A subsequent search and seizure case cast some doubt on the court's declaration in *Sutton*. In *State v. Madalena*, an individual convicted of driving while intoxicated (DWI) appealed on the grounds that the roadblock in which the initial stop occurred was unconstitutional.[38] The defendant based the constitutional attack in an argument that article II, sections 4 and 10, provided greater protections than the Fourth Amendment of the U.S. Constitution "when DWI roadblocks are used to stop motorists with no reasonable suspicion that a crime has been committed."[39] With regard to article II, section 4, the New Mexico Court of Appeals stated that "we…fail to see how the language of Article II, Section 4 affords more protection against unreasonable searches and seizures than does Article II, Section 10 of [sic]

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32. *Id.* at 450–51, 816 P.2d at 519–20.

33. *Id.* at 451, 816 P.2d at 520.

34. The Fourth Amendment guarantees that the people's right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

35. This provision, which is the counterpart to the Fourth Amendment of the U.S. Constitution states:

> The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause, supported by oath or affirmation.

36. *Sutton*, 112 N.M. at 455, 816 P.2d at 524 ("The difference in wording between the federal and state constitutions is some evidence that the state constitutional provision may be interpreted to provide broader protection than the federal.").

37. *Id.* (emphasis added).

38. 121 N.M. 63, 65, 908 P.2d 756, 758 (Ct. App. 1995).

39. *Id.* at 66, 908 P.2d at 759.

the Fourth Amendment."[40] This seems to close the door on the possibility suggested in *Sutton* that the natural rights clause might afford greater protections than the Fourth Amendment. Moreover, New Mexico courts have not suggested that the natural rights clause is a vehicle for expanding rights that other clauses in the state or federal constitutions protect. Even though *Madalena* involved legal principles specific to roadblocks, the passage cited above is framed in terms broad enough to be considered a generalization.

C. Cases Conflating the Inherent Rights and Due Process Clauses

In other cases, plaintiffs simply tacked references to the natural rights clause onto their due process or equal protection arguments. Although it is unstated in most of these cases, the theory of such an approach appears to be that the natural rights clause gives guidance as to the substantive meaning of the due process and equal protection clauses, and that a higher level of judicial scrutiny should be triggered any time some deprivation (or classification in the context of equal protection) occurs that implicates a right mentioned in the clause. Another possibility, as expressed by one member of the ACLU, is that the claim is routinely added as the basis of a state constitutional claim in the hopes that eventually the court will decide to use it as a source of substantive protection of individual rights.[41]

It appears, for example, that a reference to the natural rights clause was tacked onto the the equal protection claims without an articulated theory in *Futrell v. Ahrens*,[42] where the plaintiffs contended that a regulation preventing most visits in the rooms of members of the opposite sex in university housing violated their rights to safety and happiness and to equal protection.[43] The court in *Futrell* rejected the notion that the Regents, who had the power and the responsibility to pass "reasonable rules and regulations for the conduct of the University," infringed students' constitutional rights by regulating against the intervisitation between men and women in the dormitory rooms.[44] The court held "that the regulation [wa]s reasonable, serve[d] legitimate educational purposes, and promote[d] the welfare of the students."[45] Similarly, in *Trujillo v. City of Albuquerque*, a plaintiff challenged damage caps under the New Mexico Tort Claims Act by arguing that they violated the New Mexico Constitution under article II, sections 4 and 18.[46] The court in both cases rejected the arguments, and explained in *Trujillo* that it did not "believe this provision provides additional support to Trujillo. We find somewhat nebulous any connection that may exist between [the natural rights clause] and the damage cap.…"[47] The court elaborated: "Even were we to assume that the damage

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40. *Id.* at 67, 908 P.2d at 760. There seems to be a confusing typographical error in this sentence. The Fourth Amendment obviously does not have articles or sections. The "of" is probably meant to be "or."

41. See discussion *supra* Part I.

42. 88 N.M. 284, 288, 540 P.2d 214, 218 (1975).

43. *Id.* at 285–86, 540 P.2d at 215–16. In fact, the plaintiffs in *Futrell* went further, searching for an unstated right of association as being implicated by article II, section 4. *See id.* at 286, 540 P.2d at 216.

44. *Id.* at 288, 540 P.2d at 218.

45. *Id.*

46. *See* 110 N.M. 621, 622, 628, 798 P.2d 571, 572, 578 (1990), *overruled by* Trujillo v. City of Albuquerque, 1998-NMSC-031, 965 P.2d 305.

47. *Id.* at 628, 798 P.2d at 578.

cap implicates the constitutional provisions of Article II, Section 4, here we do not believe these provisions afford more protection to victims of governmental torts than do the provisions of Article II, Section 18."[48]

To summarize, the courts have been reluctant to view the natural rights clause as a basis for raising the level of scrutiny with which they examine laws that supposedly violate due process or equal protection. *Trujillo* at least gives a basic presumption that article II, section 18, provides all of the substance necessary to decide at least some cases. How far that extends, however, is unknown. Besides that, the court has said of the inherent rights in article II, section 4, that "[t]h[o]se rights are not absolute, but subject to reasonable regulation."[49] This language suggests a balancing analysis, in which laws that effect deprivations trigger a weighing of state interest against that of individuals. Moreover, the reference to "reasonable regulation" evokes images not only of a balance between state and individual interests, but of the fit between the state's interest and its proposed action. It is unclear whether the court intended to frame its reference to the "inherent" rights in such a way. Nevertheless, it appears that the due process and equal protection clauses are sufficient to handle most situations, but to the extent those clauses are not, the courts will apply the same analysis to rights protected under the natural rights clause as they do to rights under the equal protection and due process clauses.

D. Broad Statements of Police Power

Some instances in which the natural rights clause has arisen seem to suggest that the police power receives favorable treatment when balanced against it. It is useful to examine these cases because they offer clues about possible limitations to using the clause. For example, the earliest written opinions discussing article II, section 4, simply say as a truism that despite the language of the clause, the state police power can be reasonably used to impose limits on individuals to further the public good. *State v. Brooken*, which is the first published opinion to discuss the clause, exemplifies this approach.[50] Facing a constitutional challenge to a statute that prohibited confinement of young cattle and horses apart from their mothers except under narrow circumstances,[51] the court discussed the police power in broad terms.[52] Thus, under the police power envisioned by the New Mexico Supreme Court in 1914, an ordinance that substantially restricted property use stood undisturbed because it reasonably furthered its stated goals of guarding against cattle theft.[53]

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48. *Id.*

49. Otero v. Zouhar, 102 N.M. 493, 504, 697 P.2d 493, 504 (1984), *aff'd in part, rev'd in part by* Otero v. Zouhar, 102 N.M. 482, 697 P.2d 482 (1985).

50. *See* 19 N.M. 404, 143 P. 479 (1914).

51. *See id.* at 406–07, 143 P. at 479.

52. *See id.* at 412, 143 P. at 481.

53. The statute was passed because, at the time, many ranchers left their cattle, horses, and other animals unattended on the open range at certain times. Newly born animals could be reared on the range by their mothers until they reached a certain age, when they would be rounded up and branded. Cattle thieves would sometimes take advantage of this practice by rounding up large numbers of calves that had not been branded. The owners would face great difficulty proving their property interest in the unaccompanied, unbranded animals. *See id.* at 409, 143 P. at 480.

Similarly, in *Green v. Town of Gallup*, a salesman who was convicted under an anti-solicitation ordinance challenged its constitutionality.[54] Aside from his due process and equal protection arguments, which he seemed to keep separate, he contended that the statute "deprive[d him] of his right to acquire and enjoy property as a gain of his industry contrary to the provisions of Sec. 4 of Art. 2 of the State Constitution."[55] He did not articulate a theory for this claim, and the court drew on a previous nuisance case for its reasoning "that all property and property rights are held subject to the fair exercise of police power of a municipality,"[56] and that "a vested interest in property cannot be asserted against reasonable regulation enacted for the benefit of public health, convenience or general welfare on the theory that business was established before enactment of the ordinance making the regulation."[57] In the balance between the police power and the property interests arguably protected by the natural rights clause, the police power carried the day.

E. Challenges to Economic Regulations

The two most important New Mexico cases involving challenges to economic regulation based on article II, section 4, of the constitution are *Skaggs Drug Center v. General Electric Co.*[58] and *Rocky Mountain Wholesale Co. v. Ponca Wholesale Mercantile Co.*[59] Both turned on arguably similar statutes. *Skaggs Drug Center* dealt with a so-called Fair Trade Act.[60] The New Mexico version stated that

> [w]ilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1…of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.[61]

Similarly, the relevant statute in *Rocky Mountain Wholesale Co.* involved the New Mexico Cigarette Fair Trade Act, which made it illegal for any retailer or wholesaler to advertise, offer for sale, or sell at retail or wholesale any cigarettes at less than cost to such retailer or wholesaler.[62]

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54. 46 N.M. 71, 72, 120 P.2d 619, 620 (1941). The statute stated:

> The practice of going in and upon private residences in the Town of Gallup, New Mexico, by solicitors, peddlers, hawkers, itinerant merchants, and transient vendors of merchandise, not having been requested or invited so to do by the owner or owners, occupant or occupants of said private residence, for the purpose of soliciting orders for the sale of goods, wares, and merchandise, or for the purpose of disposing of or peddling or hawking the same, is hereby declared to be a nuisance, and punishable as such nuisance as a misdemeanor.

Id. at 72, 120 P.2d at 619.

55. *Id.* at 73, 120 P.2d at 620.

56. *Id.* at 75, 120 P.2d at 621.

57. *Id.* at 75, 120 P.2d at 621.

58. 63 N.M. 215, 315 P.2d 967 (1957).

59. 68 N.M. 228, 360 P.2d 643 (1961).

60. *Skaggs Drug Ctr.*, 63 N.M. at 216, 315 P.2d at 967.

61. NMSA 1953, § 49-2-2 (1937) (as cited in *Skaggs Drug Ctr.*, 63 N.M. at 218–19, 315 P.2d at 969) (subsequently repealed).

62. NMSA 1953, §§ 49-3-1 to 49-3-14 (1949) (as cited in *Rocky Mountain Wholesale Co.*, 68 N.M. at 230–31, 360 P.2d at 644).

In both cases, parties antagonistic to the statutes asserted that the natural rights clause was violated. In neither case, however, did the party asserting the constitutional violation articulate a clear theory of how the clause applied. In *Skaggs Drug Center*, a drugstore facing actions under the statute for selling below prices that had been fixed by General Electric (and one other company) confusingly argued that the statute "deprive[d it] of property without due process of law, in violation of Article II, §§ 4 and 18 of the Constitution of the State of New Mexico."[63] In *Rocky Mountain Wholesale Co.*, the argument amounted to a due process claim—"that [the law] violate[d] Article II, §§ 4 and 18 of the New Mexico Constitution and the 14th Amendment of the Constitution of the United States."[64] Specifically, the contention was that the law was "an unreasonable and arbitrary interference with private property rights; that it ha[d] no reasonable or substantial relation to the public morals, safety or general welfare; and that it [was] not within the proper exercise of the police power of the state."[65]

The courts' answers to the two challenges did nothing to advance an understanding of how the natural rights clause should inform constitutional rights jurisprudence, but they shed light on a related issue. How much deference a court gives to economic regulation has been a very controversial question, and these cases show that New Mexico, despite its constitution's supposed libertarian, laissez-faire roots,[66] while showing signs in *Skaggs Drug Center* that it might scrutinize economic regulations, apparently abandoned any effort to strictly scrutinize the legislature's chosen economic policies by the time of *Rocky Mountain Wholesale Co.*

In *Skaggs Drug Center*, the earlier of the two cases, the court struck down the Fair Trade Act in question.[67] In support of its holding, the court surveyed case law from various jurisdictions and an article in a law review to determine that, "it is obvious that the whole scheme of the Fair Trade Acts is one for private, rather than public, gain, a scheme fathered by highly organized groups of distributors and retailers interested not in the public weal, but only in their own selfish ends."[68] Thus, the court found the Act's anti-competitive nature to be repugnant to the constitution, stating that "[the Act] is unconstitutional and void as an arbitrary and unreasonable exercise of the police power without any substantial relation to [it]."[69]

Note the low level of deference that the court paid to the legislation: The law needed a "substantial relation" to a valid exercise of the police power. This looks a lot like the language of substantive due process jurisprudence, where a court would weigh individual, fundamental rights against the state's police powers with a presumption in favor of those fundamental liberties. The court in this case seems

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63. *Skaggs Drug Ctr.*, 63 N.M. at 220, 315 P.2d at 970. In the framework that I have presented, this case obviously falls under the section discussing instances where parties have conflated the natural rights clause with the due process clause. Even so, I include it here to further the discussion of economic regulations.

64. *Rocky Mountain Wholesale Co.*, 68 N.M. at 231, 360 P.2d at 645.

65. *Id.* The last two arguments, by the way, are redundant.

66. *See* DOROTHY I. CLINE, NEW MEXICO'S 1910 CONSTITUTION: A 19TH CENTURY PRODUCT 21 (The Lightning Tree 1985).

67. 63 N.M. at 226–27, 315 P.2d at 974.

68. *Id.* at 224–25, 315 P.2d at 973 (citations omitted).

69. *Id.* at 226–27, 315 P.2d at 974.

to have applied a higher level of scrutiny (though not by any means a strict one) than what might be seen today. The court did not, however, make reference to the natural rights clause in its holding, so its impact is unknown.

In *Rocky Mountain Wholesale Co.*, which came just four years later, the Supreme Court of New Mexico upheld a statute that was, as mentioned earlier, very similar to the one in *Skaggs Drug Center*. Again, the natural rights clause seems to have played no role in the outcome. Instead, the court did a due process analysis.[70] This time, however, the tenor was markedly different. The court stated that, "it has been firmly established that a state is free to adopt an economic policy that may reasonably be deemed to promote the public welfare and may enforce that policy by appropriate legislation…so long as such legislation has a reasonable relation to a proper legislative purpose and is neither arbitrary nor discriminatory."[71] The fact that the court cited to *Nebbia v. New York*[72] demonstrates that if New Mexico ever had an era of high scrutiny of economic legislation, that era was over.

F. Reed v. State *ex rel.* Ortiz *Seems to Breathe Substantive Life into the Natural Rights Clause*

As a final discussion of New Mexico precedent, it is appropriate to discuss the New Mexico Supreme Court's opinion in *Reed v. State ex rel. Ortiz*.[73] In *Reed*, the majority of the court found the natural rights clause to be a source of substantive protection and afforded relief based upon it. The per curiam reversal at the hands of the U.S. Supreme Court subsequently cast doubt on the clause's use in the specific circumstances of the case. The opinion still stands, however, as recognition of the clause as a judicial tool for protecting individual rights. It is therefore necessary to probe its analysis.

As stated in Part I, Reed had filed for a writ of habeas corpus to challenge his detention and extradition to Ohio. The standard governing such challenges was given in *Michigan v. Doran*.[74] Under *Doran*, a state court's ability to review an extradition order was supposedly very narrow.[75] This would make sense, considering the valid concern that a state (like New Mexico) would create ways to challenge the merits of other states' convictions and become a haven for fugitives. Against this better judgment, the New Mexico Supreme Court affirmed the writ granted in the lower court.[76] The following language from the case suggests the posture that the court was taking: "[D]espite proclamations that 'the commands of the Extradition Clause are mandatory, and afford no discretion to the executive officers or courts of the asylum state,' the U.S. Supreme Court must have intended

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70. *Rocky Mountain Wholesale Co.*, 68 N.M. at 231, 360 P.2d at 645.

71. *Id.*

72. 291 U.S. 502 (1934). In *Nebbia*, the U.S. Supreme Court upheld a law governing milk prices. The case is often suggested to be the harbinger of the end for the *Lochner* era. As one commentator has said, "in *Nebbia*, the Court appeared to question the premises of the *Lochner* era that government only could regulate to achieve a police purpose and that the Court needed to review laws aggressively to ensure that they truly served a police purpose." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 8.2.3, at 622 (3d ed. 2006).

73. 1997-NMSC-055, 947 P.2d 86, *rev'd per curiam*, 524 U.S. 151 (1998).

74. 439 U.S. 282 (1978).

75. *See id.* at 288–89.

76. *Reed*, 1997-NMSC-055, ¶ 126, 947 P.2d at 112.

some sort of inquiry.…"[77] Accordingly, the New Mexico Supreme Court stated, "We hold that the extradition process was not meant to abrogate the New Mexico Constitution which regards 'seeking and obtaining safety' as a 'natural, inherent and inalienable' right. Reed came to New Mexico explicitly for the purpose of 'seeking and obtaining safety.'"[78]

The court summed up its reason for affirming the writ by stating that "Reed, in seeking refuge from injustice, is not a fugitive from justice."[79] The court explained its authority for making such a finding in the following terms: "The New Mexico Constitution guarantees rights that no law can abrogate. In addition to our own Bill of Rights, the New Mexico Constitution offers unique protections that are not duplicated by its federal counterpart."[80] The court's analysis of these "unique protections" went the full distance to declare that the natural rights clause provides substance to the due process clause beyond life, liberty, and property, to "the more expansive guarantee of obtaining safety."[81] Although the court did not define safety, it suggested that it was within a state's ability to make such a guarantee, given "the more intimate relationship existing between a state government and its people, as well as the more expansive role states traditionally have played in keeping and maintaining the peace within their borders."[82]

In sum, the New Mexico courts do not have a clear jurisprudence on the natural rights clause of the constitution. In fact, none of the cases invoke traditional natural rights theory, which I discuss in the next Part. Instead, the above cases suggest that the courts either ignore or side-step the text and do a due process analysis, or they read the text literally as either offering or not offering extra rights beyond those listed in the due process clause. Such shallow analysis, however, has not helped New Mexico's courts reach a more complete understanding of the natural rights clause. If a court is going to find that the natural rights clause provides substantive rights, the court should be able to convincingly articulate why it is doing so and what principle guides the determination. On the other hand, if the court finds that the clause is not an enforceable source of rights, the court should be able to intelligently explain its basis for finding that a clause that appears to explicitly provide strong protections for individuals rights is not judicially enforceable.

III. SEARCHING THE TEXT AND HISTORY OF THE NATURAL RIGHTS CLAUSE TO DISCOVER ITS MEANING

The verbal formula of article II, section 4, of the New Mexico Constitution is simple on its face: "All persons are born equally free, and have certain natural, inherent, and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of

77. *Id.* ¶ 17, 947 P.2d at 100.
78. *Id.* ¶105, 947 P.2d at 107 (citing N.M. CONST. art. II, § 4).
79. *Id.* ¶ 94, 947 P.2d at 105.
80. *Id.* ¶ 93, 947 P.2d at 104–05.
81. *Id.* ¶ 105, 947 P.2d at 108 (internal quotation marks omitted). The court did not discuss the guarantee of happiness as a substantive right, but they must have believed it to be on the same footing as safety, given the reasoning of this case.
82. *Id.* ¶ 105, 948 P.2d at 107–08 (internal quotation marks omitted).

seeking and obtaining safety and happiness." These words, however, have an ancient pedigree. This Part will provide a historical understanding that is necessary to interpreting the words. Section A will explore the New Mexico Constitutional Convention of 1910 and show how little that event contributes to an understanding of the natural rights clause. Section B will examine the way in which other states with similar provisions were interpreting them at the time of New Mexico's adoption of the language. Section C will probe the deeper history of the natural rights clause, tracing its origins and explaining how those origins inform its meaning.

A. The Framing and Ratification of the 1910 Constitution

The New Mexico Constitutional Convention, which convened on October 3, 1910, and adjourned on November 21 in the same year,[83] does not enjoy the romantic idealization with which we often conceptualize the framing of the U.S. Constitution. The New Mexico framers had a different task before them. The framers of the U.S. Constitution were working to devise an innovative structural document that would solidify a struggling union without unduly jeopardizing the sovereignty of states or the individual freedoms of their respective citizens. They were also working in the wake of a revolution. The New Mexico framers, on the other hand, seem to have had two primary goals: achieving acceptance into the Union as a state[84] and protecting partisan interests.[85]

At the convention, Republicans dominated. They controlled seventy-one of the 100 delegate seats.[86] Consequently, the Democrats, holding only twenty-eight seats,[87] had little ability to stop the Republicans from shaping a generally conservative document.[88] According to one commentator, the constitution they drafted was a "model of fiscal and political conservatism [that] protected and nurtured laissez-faire, individualism, and capitalism, and it minimized the role of government in initiating, directing, conducting programs and allocating resources."[89]

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83. Thomas J. Mabrey, *New Mexico's Constitution in the Making: Reminiscences of 1910*, 19 N.M. HIST. REV., 168, 170 (1944). This essay was based on an address that Justice Mabrey gave at the annual meeting of the State Bar in 1943. At the time, he was one of only seventeen delegates from the 1910 convention still living. *Id.* at 168 n.1, 182.

84. CLINE, *supra* note 66, at 19 ("The purpose of New Mexico's Constitutional Convention of 1910, the seventh in 52 years, was to gain admission to the Union. The prerequisite for admission was a constitution.…" (citation omitted)).

85. *Id.* at 26–40.

86. Mabrey, *supra* note 83, at 170.

87. The remaining seat was occupied by a Socialist. *Id.*

88. CLINE, *supra* note 66, at 21 ("[W]hen the time finally came to write the constitution for the new state, the territorial leaders [generally Republican] were determined not to let victory slip through their hands by drafting a document that appeared to be controversial, radical or experimental.…The most dangerous and radical proposals, in their view, were those espoused by Teddy Roosevelt Progressives and civic reformers.…"); *see also* Mabrey, *supra* note 83, at 172 ("The document, as finally written, was largely the handiwork of such able delegates of the majority party.…I omit mention of the many able democrats, since these, after all, were in a hopeless minority, and, as I have often said, were there to get into the document what they could…, *but whose principle function seemed to be to vote 'no*.'" (emphasis added)).

89. CLINE, *supra* note 66, at 49. Cline does not explain her contention that the constitution was libertarian, or that it embodied laissez-faire economic theories. One is left to speculate, since the constitution itself does not seem to adopt a specific economic approach. It is possible that she means that the constitution did not contain any

Although the convention was a "rough and tumble political fight,"[90] the natural rights clause was not considered controversial. Instead, the biggest fights revolved around

> direct legislation (the initiative and referendum), term of office for county and state officials; succession to office; power to be given to the state corporation commission; specific manner and method of our selection and retention of public lands granted by congress; authorizing payment of the bonded indebtedness of Santa Fé and Grant counties, legalized by congress; the price or term at which public lands might be sold or leased; the protection of established water rights; methods of amending the constitution; the matter of the creation of legislative and judicial districts; and the method of selecting the judiciary.[91]

It is notable that Justice Mabrey remembered such an extensive list of provisions that were controversial, in addition to a great many that were easily agreed upon.[92] Nonetheless, he made no mention of the natural rights clause. Although we cannot know for sure, since the delegate did not keep a detailed record, it appears that the New Mexico framers viewed it as boilerplate. Even if this view is unwarranted, the least that can be said is that the New Mexico framers did not devote a great deal of discussion to the provision. Clearly, their attention was on other matters.

Although no signs of debate on the meaning and propriety of the natural rights clause can be found in the sparse records of the 1910 constitutional convention, it is tempting to cast an eye toward the voters who eventually approved the document for guidance. The principle has been elegantly articulated that "[t]he meaning of a constitutional provision depends, of course, on the common understanding of the citizens who, by ratifying the Constitution, gave it life." [93]

This is a powerful idea, but a difficult one to implement as a practical matter. To the extent that one believes original intent should be considered (and I believe it should), any attempts to discover the intent of ratifying voters, either as a body or as individuals, must rely heavily on inferences. Those inferences might be based on external indicators of public mood at the time, such as newspapers, political speeches, debates, and state and local politics.[94] The alternative to such an approach is to either delve into the metaphysical, or to assume that the framers' intent reflects

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language to counteract the jurisprudential spirit of the time. After all, in 1910, the U.S. Supreme Court in fact functioned to protect just such economic interests. It was the *Lochner* era, and the modern presumption of constitutionality that economic regulation enjoys today did not exist. Another possibility is that the natural rights clause was meant to enshrine the principles of the *Lochner* era into New Mexico's constitutional order by including language broad enough to encompass property and contract rights, which necessarily underlie such principles. This theory is explored below in Part IV.

To be fair to the Republicans, they had a sincere fear that the conservative Congress would not approve of a progressive constitution. They felt a great deal of urgency in the bid for statehood, and they did not wish to see its prospects sidetracked. *See id.* at 49. ("The Republicans accomplished two essential goals by writing a constitution that was sufficiently conservative to satisfy a president and Congress.…").

90. Mabrey, *supra* note 83, at 172.

91. *Id.* at 172–73.

92. *Id.*

93. Kalodimos v. Village of Morton Grove, 470 N.E.2d 266 (Ill. 1984).

94. *See* L. Harold Levinson, *Interpreting State Constitutions by Resort to the Record*, 6 FLA. ST. U. L. REV. 567, 568–69 (1978).

the intent of the voters.[95] According to Professor Levinson, certain theories support this type of approach. One theory is that the delegates who framed the document acted as agents to the people who voted them into the position.[96] Another is that after completing the drafting process, the framers "reported back to the people, explaining the meaning of the provisions by informal methods of communication."[97]

It is possible that the best way of ascertaining the intent of the voters in the case of the New Mexico Constitution is to adopt an approach that considers both of the theories discussed by Professor Levinson: The delegates were selected through a political process, and they went to the convention presumably representing the interests of their constituencies. This squares with the theory of framers as agents of the voters. In addition, after the drafting, the same framers and their respective parties campaigned either for or against the document based on representations of its meaning.

Thus, the external indicators discussed above (newspapers, debates, political speeches, campaigning) serve the function of gauging the people's mood at the time. But more than that, they reinforce the notion that the politicians who drafted the constitution acted as agents, and also as educators to the people on what they, the public, were voting on. If that is the case, then the evidence again suggests that the voters, like the delegates at the convention, were focused on matters other than the natural rights clause. For the majority's part, "the leading Republican spokesmen…hammered on the statehood issue, contending that further delay would be calamitous for New Mexico's future development."[98] They "lauded the soundness and fine quality of the document and *forcefully defended the provisions assaulted by the Democrats*."[99] What were these provisions that the Democrats assaulted? They "denounced the amending provisions, the absence of direct legislation, partisan judicial elections, the method of selecting public lands, the referendum, water rights, the corporation commission, apportionment, and other provisions."[100]

Considering all of the fierce campaigning about such a variety of issues, and the absence of any debate about the natural rights clause, it is difficult to escape the conclusion that it was simply uncontroversial. Nothing of its meaning can be gained by examining the 1910 convention or the subsequent ratification process. One must instead reach deep into the nation's history.

B. Interpretations of Natural Rights Clauses from the Era of the New Mexico Constitutional Convention of 1910

It is useful to examine how other states viewed their natural rights clauses shortly before and up to the time when New Mexico adopted its own version.[101] This rests

95. *See id.* at 569–71.
96. *Id.* at 569.
97. *Id.*
98. CLINE, *supra* note 66, at 51.
99. *Id.* (emphasis added).
100. *Id.* Although the author mentions "other provisions," I cannot find any references to the natural rights provision.
101. One commentator has referred to a similar methodology called a constitutional wormhole. *See* James A. Gardner, *Whose Constitution Is It? Why Federalism and Constitutional Positivism Don't Mix*, 46 WM. & MARY

partially upon the assumption that at least some of the framers knew what other states thought, and possibly gave some weight to those states' interpretations. Even if this assumption is not warranted, something might be gained from delving into the understanding of individual rights that contemporaries of the 1910 framers displayed. As Chief Justice Ransom has stated, it is relevant to examine the milieu from which the New Mexico Constitution emerged.[102] For those reasons, this Section will examine some of the more illuminating decisions from that time period.

Up until the New Mexico Constitution was drafted and ratified, many judicial opinions existed that discussed clauses similar to New Mexico's natural rights clause. Similarly, many opinions existed in which courts at least attempted to distinguish between natural, inherent, or inalienable rights, and positive rights, even where no specific constitutional provision gave rise to such terms. Presumably, if a right were found to be natural, the state would require a greater justification in overcoming it. Although no easily discernible categories can be found in these cases, some themes emerge.

Certain asserted rights, the status of which was less clear than others, gave rise to various discussions about how to classify rights as either natural and inherent, or as positive rights. The right to devise property by will was controversial in this respect, for example. One case, *State v. Phelps*, summarized this debate to provide a framework for analyzing another controversial right at the time: suffrage.[103] The basic question was whether the right to vote was natural and inherent, or whether it was born of law and thus subject to the will of law for its existence. The analysis began with the reference in the Declaration of Independence to unalienable rights.[104] According to the court, the term "inalienable" was not exactly accurate, and presented itself as a source of confusion.[105] The phrase in the Declaration was meant to embody natural or inherent rights, and the state constitutions accordingly used the terms "natural" and "inherent" rather than the Declaration's formula to preserve clarity.[106] In the court's words:

> The word "inalienable" was, doubtless, not used in the strict sense, because some rights referred to were commonly parted with or modified by consent. Appreciating that, doubtless, in most constitutions…the term "inherent" was substituted for inalienable, to denote, more accurately, the functional character of rights of members of a community in an unorganized state.[107]

Therefore, natural rights theory was considered the proper framework under which to analyze rights.

L. REV. 1245, 1266 (2005). According to the wormhole approach, where a state's constitution contains a provision that is borrowed from another jurisdiction—which appears to be the case with the natural rights clause of the New Mexico Constitution—a court will find that "the borrowed provision must be given the same meaning as it had under the constitution from which it was borrowed at the time of borrowing." *Id.* at 1266–67.

102. State v. Gutierrez, 116 N.M. 431, 441, 863 P.2d 1052, 1062 (1993).

103. 128 N.W. 1041, 1045–46 (Wis. 1910).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 1045.

Under that framework, the court in *Phelps* proceeded to find that suffrage was properly considered to be as fundamental as the rights to self-defense and property. It was "conventional in the sense other rights are[,] which are in their nature absolute till surrendered or limited by consent, express or implied."[108] Although the court's reasoning is informative, it does leave something to be desired in its final step of deeming the vote to be a natural rather than positive right. That step goes unexplained as it relates to the state's Declaration of Rights.[109]

The main reason the court discussed natural rights theory was probably to point out that even rights expressed in the most absolute of terms (inalienable, inherent, natural) could be impinged upon by appropriate or properly justified regulation.[110] This theoretical basis for balancing inalienable, inherent, natural rights against state police power conformed to what most other jurisdictions did when analyzing natural rights clauses or general appeals to natural rights.[111]

Aside from generic balancing of individual rights against police power, various other cases discuss natural rights in terms of the common law maxim *Sic utere tuo ut alienum non laedas* (Use your own property in such a manner that you do not injure another). It has been suggested that at least one state had the principle underlying this expression in mind when it adopted its natural rights clause. According to one author, "the tenor of the 1857 constitutional debates in Iowa City tends to suggest that the natural rights clause would invalidate legislation adversely

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108. *Id.* at 1046.

109. The court found other constitutional provisions that supported its position besides the Declaration of Rights. These bases were more concrete in nature. The right to vote was, "guaranteed both by the Bill of Rights, and the exclusive instrument of voting power contained in section 1, art. 3, of the Constitution, and by the fundamentally declared purpose of government; and the express and implied inhibitions of class legislation, as well." *Id.*

110. *Id.*

111. *See Ex parte* Quarg, 84 P. 766, 766 (Cal. 1906) ("Any statute which interferes with this right [to acquire, possess, and protect property], except in cases where the public health, morals, or safety, or the general welfare authorizes such restriction as an exercise of the police power is to the extent of such interference unconstitutional and void."); Curran Bill Posting & Distrib. Co. v. City of Denver, 107 P. 261, 263 (Colo. 1910) ("The natural right one may have to use his own property as he wills is subject always to the limitation that in its use others shall not be injured."); State v. Phillips, 78 A. 283, 286 (Me. 1910) (holding that an ordinance banning automobiles in town was not a violation of the natural and inherent rights of man because the right to use public streets is not absolute, but is instead subject to "limitation and control by the Legislature"); State v. Snowman, 46 A. 815, 817–18 (Me. 1900) ("So when a vocation, naturally lawful, or the mode of exercising it…is inconsistent with the public welfare, it may be regulated and restrained by the state by the exercise of its police power, by which persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state."); State v. First Judicial Dist. Ct. of Mont., 66 P. 754, 755 (Mont. 1901) ("It may be stated, as a general proposition, that every person has a natural right to pursue any lawful business or profession. This general statement is subject, however, to the limitation that the person asserting such a right must, before attempting to exercise it, comply with all reasonable police regulations made by the state touching the qualifications declared necessary for the particular calling."); Commonwealth v. Vrooman, 30 A. 217, 218–19 (Pa. 1894) ("Th[e Constitution] affirms that 'all men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of acquiring, possessing and protecting property and reputation.' The methods by which this right to acquire property is asserted and exercised are, however, and have been since organized government began among men, subject to regulation by law. The power of government thus brought into service is known as the 'police power.'"); Caven v. Coleman, 96 S.W. 774, 778 (Tex. Civ. App. 1906) ("[W]hile the right of the individual to labor and enjoy the fruits thereof is recognized as a natural right…, yet whenever the pursuit concerns the public health and is of such a character as to require special training or experience to qualify one to pursue such occupation with safety to the public interest, the Legislature may enact reasonable regulations to protect the public against the evils which may result from incapacity and ignorance." (internal quotation marks omitted)).

affecting personal liberty and happiness unless their exercise in some way harms or presents an actual and substantial risk of harm to another person."[112]

In fact, other jurisdictions besides Iowa viewed natural rights in these very terms.[113] The vast majority of the cases produced involved nuisance or other private disputes, or challenges to zoning laws.[114] There were occasions, however, as discussed below, where courts characterized the old common law maxim as a general libertarian principle that protected natural or inherent rights.

Unlike those cases that merely repeat the *sic utere* maxim as a justification for ordinances that allegedly impinged upon a claimed natural or inherent right,[115] the so-called libertarian cases give more detail as to how the maxim acts as a protection of natural rights (rather than as a justification for state encroachment upon those rights). For example, in *Commonwealth v. Campbell*, the Kentucky Court of Appeals found that "[t]he right to use liquor for one's own comfort, if the use is without direct injury to the public, is one of the citizen's natural and inalienable rights, guaranteed to him by the Constitution."[116] The court further announced that the right in question "cannot be abridged as long as the absolute power of a majority is limited by [the] present Constitution."[117]

The specific question that the court was dealing with was whether an ordinance forbidding possession of "spirituous, vinous, or malt liquors," for personal use except in quantities not in excess of one quart was an unconstitutional encroachment on individual rights.[118] In finding that the application in question of the ordinance was unconstitutional, the court cited John Stuart Mill,[119] then, in its

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112. Bruce Kempkes, *The Natural Rights Clause of the Iowa Constitution: When the Law Sits Too Tight*, 42 DRAKE L. REV. 593, 636–37 (1993). This was apparently rooted in John Stuart Mill's explanation of Lockean theory in *On Liberty*. *Id.* at 617–19 (citing JOHN STUART MILL, ON LIBERTY, *reprinted in* ON LIBERTY AND OTHER WRITINGS (Stefan Collini ed., 1989) (1859)).

113. A search in Westlaw in the All-States database for all cases before 1911, using the terms "*Sic utere tuo ut alienum non laedas*" (with the quotations included) yielded 503 hits.

114. *E.g.*, Lake Shore & M.S. Ry. Co. v. Chicago, L.S. & S.B. Ry. Co., 92 N.E. 989, 990 (Ind. App. 1910); Densmore v. Evergreen Camp No. 147, Woodmen of the World, 112 P. 255, 256 (Wash. 1910); Everett v. Paschall, 111 P. 879, 882 (Wash. 1910).

115. *See, e.g.*, Horan v. Byrnes, 54 A. 945, 946, 948 (N.H. 1903) (holding that the "'natural, essential, and inherent' right of 'acquiring, possessing, and protecting property'" is "subject all the time, of course, to a proper application of the doctrine contained in the maxim, 'Sic utere tuo ut alienum non laedas'").

116. 117 S.W. 383, 387 (Ky. App. 1909).

117. *Id.*

118. *Id.* at 383.

119. *Id.* at 386 (quoting JOHN STUART MILL, ON LIBERTY 22–23, 28 (n.p., 1859)). The court quoted two key passages from *On Liberty*:

> The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their numbers is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil, in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to some one else. The only part of

own words, made the point that, "the theory of our government is to allow the largest liberty to the individual commensurate with the public safety, or, as it has been otherwise expressed, that government is best which governs least."[120] Not wanting to leave any doubt, the court proceeded to hold that "the police power—vague and wide and undefined as it is—has limits, and in matters such as that we have in hand its utmost frontier is marked by the maxim: 'Sic utere tuo ut alienum non laedas.'"[121] Thus, the Kentucky Court established a principle that the *sic utere* doctrine, more than being a justification for nuisance recovery, zoning ordinances, or police power generally, also established a zone of individual liberty. Moreover, the court found that that principle founds its protection in the natural rights clause of its constitution.

During this same time period, California seemed to adhere to a similar principle, even though it did not explicitly rely on the *sic utere* maxim or on Mill for doing so. In *Ex parte Quarg*, for example, the California Supreme Court invalidated a law prohibiting the "sell[ing] or offer[ing] for sale any ticket or tickets to any theater or other public place of amusement at a price in excess of that charged originally by the management of such theater or public place of amusement," using its natural rights clause.[122] The court noted that the rights to acquire, possess, and protect property, coupled with the right to liberty, "include[d] the right to dispose of such property in such innocent manner as [one] please[d], and to sell it for such price as he can obtain in fair barter."[123] Even though the court characterized the state's police power as broad, it took pains to refute various possible justifications for its use in effecting the impairment in question[124]—that is, an impairment of property rights and the freedom of contract. This suggests that, at least for certain rights, the natural rights clause contained—or more precisely—protected pre-existing rights,[125] the infringement of which would require a stronger justification in the context of the use of police power.[126]

That the right protected in *Ex Parte Quarg* implicated the liberty to contract raises the possibility that such cases are merely products of a time of intense judicial protection of economic rights. In other words, the case might be seen as a

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> the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

And:

> Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow; without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong.

Id.

120. *Id.* at 387.

121. *Id.*

122. *Ex parte* Quarg, 84 P. 766, 766 (Cal. 1906).

123. *Id.*

124. *See id.* at 767.

125. *See id.* at 766 ("These rights are in fact inherent in every natural person, and do not depend on constitutional grant or guaranty.").

126. This can be rephrased in terms of judicial scrutiny. In other words, the court would more closely scrutinize laws impairing certain rights. It is proper to speak in these terms, even though "[c]oncern with levels of judicial scrutiny received its elaboration only after the Progressive Era." RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION 11 (2006).

product of the so-called *Lochner*-era jurisprudence. Seeing it in such a light might clarify the meaning of many of the cases discussed in this Section. I have discussed a rough dichotomy of late nineteenth and early twentieth century cases where some used broad references to police power to uphold impairments of property use or liberties, while others spoke from the reference point of individual liberty to strike down invalid uses of police power.

This division of approaches corresponds in part to the scholarly and philosophical debate between those who view property rights in terms of "the public duties and obligations of property ownership, which give rise to the idea of economic liberty as a legal construct embracing the whole of the citizenry and…the prosperity of the larger society,"[127] and those whose view is based "on the traditional concept of economic liberty as an attribute of individual rights that is essential to personal and political liberty."[128] This essentially summarizes the progressive and conservative views, a debate over which was raging at the time these cases were decided. The nineteenth century saw "[s]tate governments regulat[ing] property and economic activity [in ways that were] narrowly conceived, did not aim at redistribution of wealth, and left owners and entrepreneurs substantially free to use their property in socially productive ways."[129] As the nineteenth century waned and expired, however, progressive calls for market regulation and redistributive measures gained force.[130]

In the end, then, the different judicial approaches to natural rights clauses, to natural rights in general, and to economic and property rights (as opposed to so-called civil rights[131]) up until the critical period of the New Mexico Constitutional Convention in 1910 provide no conclusive evidence about how the clause would be interpreted in our own governmental scheme. Even though one scholar argued that the type of constitutional order that was adopted (whether or not the natural rights clause embodied that type of order) represented the laissez-faire, economic liberties approach,[132] the natural rights clause was not invoked in New Mexico's earliest jurisprudence to support such a principle. With this in mind, Part III.C reaches further back into history, to the American Revolution. It is there that the original meaning of the natural rights clause most clearly reveals itself.

C. George Mason and the Virginia Declaration of Rights

In the time period immediately preceding the Declaration of Independence, the seeds of revolution had been germinating in Virginia. Revolutionaries had begun organizing and meeting in a series of "conventions." Patrick Henry gave his fabled speech at one of these conventions, supposedly exclaiming, "Give me liberty or give

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127. Herman Belz, *Property and Liberty Reconsidered*, 45 VAND. L. REV. 1015, 1015 (1992) (reviewing JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (1992)) (citation and internal quotation marks omitted).

128. *Id.* 1016.

129. *Id.* at 1018.

130. *Id.*

131. "New Deal liberals introduced into public policy a distinction between personal civil rights and liberties, which were accorded a preferred position in constitutional law, and property rights, which were relegated to an inferior status less worthy of judicial protection." *Id.* at 1019.

132. *See* CLINE, *supra* note 66, at 49.

me death," and talk had already begun of forming an armed militia. These events culminated in Virginia declaring independence from Britain on May 15, 1776—about a month and a half before the Second Continental Congress followed suit in declaring the thirteen colonies independent of British rule. In the wake of Virginia's declaration of independence, the fifth Virginia Convention of Delegates (the Convention) adopted the Virginia Declaration of Rights, the language for which George Mason receives much of the credit.

Article II, section 4, of the New Mexico Constitution can be traced directly to the first article of the Virginia Declaration of Rights, the verbal formula being attributable to George Mason.[133] George Mason himself observed that it was "the first thing of the kind upon the continent, and has been closely imitated by all the States."[134] In the original draft, the first article read:

> That all men are created equally free and independent and have certain inherent natural rights, of which they cannot, by any compact, deprive or divest their posterity; among which are the Enjoyment of Life and Liberty, with the means of acquiring & possessing Property, and pursuing and obtaining Happiness and Safety.[135]

This version differs in a few ways from the one finally adopted by the Convention. First, the word "natural" was removed, leaving the first sentence to read, "all men…have certain inherent rights."[136] The intent seems not to have been to erase references to natural rights, however. Instead, the Convention invoked the imagery of natural rights by inserting an additional clause: "when [men] enter into a state of society."[137] This change, then, seems to preserve the notion that the clause was meant to express Lockean principles of the purpose of government.[138] Thus, the

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133. KATE MASON ROWLAND, 1 THE LIFE OF GEORGE MASON, 1725–1792, at 235–37 (G.P. Putnam's Sons 1892) (discussing disputes of attribution and concluding that George Mason did pen the original draft of the Declaration of Rights). George Mason declared himself the author of the Declaration. In a letter addressed to his cousin, George Mercer, Mason said,

> To show you that I have not been an idle spectator of this great contest, and to amuse you with the sentiments of an old friend upon an important subject, I enclose you a copy of the first draught of the declaration of rights *just as it was drawn and presented by me*, to the Virginia Convention.

Id. at 237 (reproducing the Letter from George Mason to George Mercer dated October 2, 1778).

134. *Id.*

135. Copy of First Draft of the Declaration of Rights (1776), *reprinted in* ROWLAND, *supra* note 133, app., at 433 [hereinafter First Draft].

136. THE ARTICLES OF CONFEDERATION; THE DECLARATION OF RIGHTS; THE CONSTITUTION OF THIS COMMONWEALTH, AND THE ARTICLES OF DEFINITIVE TREATY BETWEEN GREAT-BRITAIN AND THE UNITED STATES OF AMERICA, PUBLISHED BY ORDER OF THE GENERAL ASSEMBLY (Dixon and Holt 1784).

137. *Id.*

138. There was, in fact, a more pernicious purpose behind the insertion of the words "enter into a state of society." Slavery, an issue that caught in the craw of the founding generation at so many junctures, loomed over the Virginia Convention as well. It seemed, after all, contradictory to establish a government that would protect the safety and happiness of all men (who were created equally free and independent), and then to allow slavery. The answer to this quandary was a bit of sophistry: the slaves had not entered into society, and therefore the government was not designed to protect their safety and happiness. At the same time, the notion of "entering into a state of society" was part of Lockean theory: namely, that man leaves the state of nature to form a social contract. So, the inserted language had no theoretical impact on the clause, except to muddle it. After all, Locke's natural rights were not gained by entering or forming society—such rights were inherent. Even so, it served to ease the minds of pro-slavery delegates. *See* Thomas B. McAffee, *Restoring the Lost World of Classical Legal Thought: The Presumption in Favor of Liberty over Law and the Court over the Constitution*, 75 U. CIN. L. REV. 1499, 1579–80

meaning and purposes of the clause did not suffer a change as a result of these minor alterations from draft to adoption.

What, then, was the purpose of the clause? First, as mentioned in the previous paragraph, it was meant to invoke philosophical theories of government propounded by the likes of John Locke. That will be discussed below. More immediately, the drafter, Mr. Mason, and those who eventually adopted the language, hung another important duty upon the clause: It was to summarize the moral and intellectual basis for revolution.[139]

The revolutionary character of the language becomes clear as the first article of the Declaration of Rights is studied in conjunction with one of its sister articles. Article III of the adopted Declaration states that "government is, or ought to be, instituted for the common benefit, protection and Security of the People, Nation, or Community. Of all the various modes and forms of Government that is best, which is capable of producing the greatest Degree of Happiness and Safety.…"[140] To that end, the language continues, "wherever any Government shall be found inadequate or contrary to these purposes, a majority of the Community hath an indubitable, unalienable, and indefeasible right, to reform, alter or abolish it, in such manner as shall be judged most conducive to the public Weal."[141] When articles I and III are read together, they lay a foundation for revolution: that the purpose of government is to strive for the greatest degree of safety and happiness. Safety and happiness are part of the package of inherent rights, and may be seen as the end result of protecting the other rights mentioned (life, liberty, and property). When government fails in its purpose of furthering this end, the people gain a right to throw it off and start anew.

It is for this reason that Jefferson conspicuously relied upon this very construct as the basis of the Declaration of Independence:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.[142]

(2007). When other states adopted the language of the Declaration of Rights into their Constitutions, they conscientiously excluded the "enter into a state of society" language. William M. Weicek, *The Emergence of Equality as a Constitutional Value: The First Century*, 82 CHI.-KENT L. REV. 233, 235 (2007).

139. This may be traced to Locke as well. "As suggested by the philosopher John Locke, the right of revolution arose only under the most dire circumstances. Americans considered that their plight met this test." CHRISTIAN G. FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR 13 (2008).

140. First Draft, *supra* note 135, at art. III.

141. *Id.*

142. THE DECLARATION OF INDEPENDENCE PARA. 3 (U.S. 1776). The original handwritten version uses the formula "life, liberty, and the pursuit of property." Subsequent versions substituted the phrase happiness.

Although it is not a verbatim reproduction, the U.S. Declaration of Independence bears the indelible imprint of the Virginia Declaration of Rights.[143]

Thus, article I was not viewed as a tool of adjudication, as a due process clause might be. It was not conceived that someone would walk into a courtroom, pointing to the clause and asking for its judicial enforcement. The drafters of the first article were more ambitious: They viewed the rights enshrined in the article as a basis for taking up arms and rejecting a failing government. Edmund Randolph recalled the discussions at the Virginia Convention about article I in these terms:

> [T]he declaration in the first article…was opposed by Robert Carter Nicholas, as being the forerunner or pretext of civil convulsion. It was answered…that with *arms in our hands*, asserting the general rights of man, we ought not to be too nice and too much restricted in the declaration of them.[144]

Further evidence that article I was not designed as a tool for adjudication can be found by exploring the Lockean philosophy underlying the article. Recall that, according to Locke, men unite into "Community" to improve their prospects of protecting rights that they already possess.[145] In his words, "Men [consent] to join and unite into a Community, for their comfortable, safe, and peaceable living…in a secure Enjoyment of their Properties, and a greater Security against any that are not of it."[146] Moreover, those who do not consent to join a political community retain their liberty in the natural state.[147] Consequently, things like liberty, property, safety, and happiness are not derivative of or granted by the political union or its talismans. They exist before governments, constitutions, or declarations.

Given the difficulties that man would face in securing his property and safety in the natural state, the task, then, would be to devise a government that best protects inherent rights for those who entered the Community. At a minimum, individuals entering into the enterprise should experience more life, liberty, property, safety, and happiness than they would in a state of nature. Locke seems to have envisioned this in terms of a net societal increase of these things, as opposed to an increase for every single individual as a component of the society. This is evidenced in his declaration that it is necessary that the

> Body should move that way whither the greater force carries it, which is the consent of the majority…[a]nd thus every Man by consenting with others to make one Body Politick, under one Government, puts himself under an

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143. Although it has never gained significant support, another theory exists that the self-evident truths, as expressed by Jefferson in the Bill of Rights, find their root more in Hobbes than in Locke. *See, e.g.,* GEORGE MACE, LOCKE, HOBBES, AND THE FEDERALIST PAPERS: AN ESSAY ON THE GENESIS OF AMERICAN POLITICAL HERITAGE 33–44 (1979). Without denying that Hobbes may have had some influence (though his obvious monarchical leanings militate against such a view), it is generally accepted that Locke was a primary source of inspiration for the text of the Declaration of Independence. *See, e.g.,* CARL BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS 16 (1922).

144. ROWLAND, *supra* note 133, at 240 (citation omitted) (emphasis added).

145. JOHN LOCKE, TWO TREATISES OF GOVERNMENT, ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT, AND END OF CIVIL GOVERNMENT § 95, at 316 (Amen-Corner 1690).

146. *Id.*

147. *Id.*

> obligation to every one of that Society, to submit to the determination of the majority.[148]

Locke did recognize the need for some check against the majority,[149] and the American systems would come to contain anti-majoritarian safeguards, such as the guarantees in the federal and state bills of rights. Nevertheless, the declaration of inherent rights in article I of the Virginia Declaration of Rights, and as copied into numerous state constitutions, was not designed to stake out the details of what authority a government would have, or what form it would take. Instead, to the extent that article I of the Virginia Convention and its derivatives[150] represented Locke's basic understanding of the ends of government, they cannot be said to have granted rights. They instead memorialized, in hortatory terms, the purpose of a good government.

At least one other commentator has corroborated this view of the state constitutions' references to "inherent" or "natural" rights: The declarations were "taken as widely accepted statements of political principle, but not as enforceable limits to government power."[151] The question, therefore, becomes: How does the demonstrated original meaning and intent of an "inherent rights" clause inform constitutional decision-making in a modern setting, especially since these clauses were not understood to be part of the "process" of adjudication? In fact, the clauses do not define the metes and bounds of the government's relationship with its citizens. Part IV of this Article explores the possibilities.

In a thoughtful treatment of the "safety and happiness" language existent in various state constitutions, former California Supreme Court Justice Joseph R. Grodin classifies the various permutations of "safety and happiness" language that have appeared.[152] After surveying the possible philosophical influences that contributed to the Virginia Declaration of Rights, Justice Grodin states:

> Both the language and the intellectual background of the Virginia Declaration of Rights and of those state constitutions that followed the Virginia model are consistent with two propositions: (1) that people are entitled to pursue and obtain both happiness and safety (leaving aside how those terms are to be defined) without undue government interference; and (2) that government has an affirmative obligation of some sort (leaving aside the definition of its scope) to further the happiness and safety of the people.[153]

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148. *Id.* §§ 96–97, at 317.

149. *Id.* § 160, at 383–84 (discussing the Executive's prerogative power to act, at times, in proscription of or even against the law).

150. These derivatives include the state constitutions that eventually copied it, and the very Declaration of Independence.

151. McAffee, *supra* note 138, at 1505 (citations omitted). The articles of the Declaration of Rights contained other aspirational or hortatory provisions that can best be viewed as providing more principle than substance. For example, article I, section 5, stated vaguely that the legislative, executive, and judicial branches should be kept separate. It left the substantive details, however, for a later day.

152. Joseph R. Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, 25 HASTINGS CONST. L.Q. 1 (1997).

153. *Id.* at 19.

Justice Grodin concedes, however, that "[w]hether either or both of these principles are properly the subject of judicial cognizance is a different question.…"[154] The following Part explores whether New Mexico's natural rights clause, which contains a reference to safety and happiness, is a useful tool in adjudication.

IV. USING THE NATURAL RIGHTS CLAUSE IN JUDICIAL CONSTITUTIONAL DECISION MAKING

Under the modern New Mexico Constitution, the natural rights clause can either be used as a source of substantive rights, or it cannot. If it can be used as a source of substantive rights, the question still remains: What rights will it contain? In other words, what specific activities or zones of interest will be protected under the broad terms of the clause? Section A of this Part will present the argument against using the clause as a source of substantive rights. Section B will discuss the arguments in favor, in addition to the approaches that might guide analysis under it.

A. The Natural Rights Clause Does Not Create Judicially Enforceable Substantive Rights

The argument that article II, section 4, of the New Mexico Constitution is not a useful tool for judicial decision-making rests on two grounds. First, the clause's text and history indicate that it was never meant to serve in such a capacity, but was instead meant to express a basic political principle. Second, even if one read constitutional text under a presumption that it establishes substantive rights, this clause adds nothing to existing jurisprudence under due process and equal protection clauses.

The text itself refers to natural, inherent rights: "All persons are born equally free, and have certain natural, inherent, and inalienable rights."[155] Rights that are natural, inherent, and inalienable do not exist because they are enumerated in a constitution. They precede constitutions and governments. The fact that the constitution mentions them at all functions almost as a mere reminder that the government exists to further them.

Invocation of natural rights, then, does not create any constitutional rights. Instead, it expresses the fact that the people have adopted a natural rights theory of government. Thus, the government, if legitimate under this clause, should be shaped in such a way that New Mexico citizens receive the maximum benefit of the traditional natural rights to life, liberty, and property.[156] That would be

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154. *Id.* Ultimately, Justice Grodin surveys various arguments and concludes that, in the appropriate situation, either principle might support judicial action. Under the first principle, he argues that, if we accept the notion of a living constitution that adapts to its environment, it is not ridiculous to imagine references to safety and happiness providing sources of judicially enforceable protections against government encroachment. *See id.* at 34. Moreover, Justice Grodin contends that circumstances might arise where a court could rely on such language to impose affirmative duties on a government to assure certain entitlements. *See id.* at 29–33.

155. N.M. CONST. art. II, § 4.

156. Life, liberty, and property have been characterized as "perhaps, the most elementary and important rights conceivable, and are the ones with the development of which English constitutional history is chiefly concerned." Charles E. Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property,"* 4 HARV. L. REV. 365, 374 (1890). Shattuck traced the formulations concerning life, liberty, and property to the Magna Carta, and to some other statutes, which shortly

accomplished by giving the government the proper shape through the structural provisions of the state's constitution and by demanding and defining proper procedures for redress where either public or private activity leads to deprivations.

Understanding natural rights in this way helps clear up some confusion that the plain language creates. In fact, it may be argued that article II, section 4 (or any of its sisters), is incomprehensible on its face. Without the established philosophical framework of natural rights, a casual reading of words such as "inherent" and "inalienable" would be cause for alarm, considering the reality that governments organized in the United States have always had the ability to take life, liberty, and property from citizens. In other words, if rights to life, liberty, and property are described in a constitution as inherent and inalienable, one might be tempted to say that they should be unreachable by government action; since in reality, government has always had ample ability to reach them, the words "inherent" and "inalienable" that accompany the rights are in fact empty and meaningless. Reading the clause for what it purports to be (an invocation of natural rights theory) solves this problem.

As discussed above, the rights are inherent and natural in the sense that each person is naturally free with respect to them without answering to someone else.[157] Because of many factors, however, including human nature, man can never fully enjoy these rights to the fullest extent possible outside of government.[158] This is because in a state of nature, all men equally have an "executive power" whereby they can punish others who violate the laws of nature as to them. In this situation, men come into conflict, and each one faces the temptation to decide any dispute in his own favor; not out of reason, but out of bias. Men thus give up their executive power, and vest certain authorities in a government to rule over them.[159] Such governments rightfully have the ability to distribute benefits and burdens, and to place limits on natural rights so that the net public benefit is maximized.

For example, public deprivations of natural rights occur frequently, in the form of criminal sanctions (which deprive persons of liberty), takings (deprivations of property), and other exercises of police power. This is all part of the give and take that is necessary under Lockean theory, as expressed in the New Mexico Constitution. The protection or assurance of natural rights under the constitution therefore comes primarily in two forms: structural checks on the authority of government entities, and due process for state action that effects deprivations of life, liberty, and property. For cases of public deprivation of rights, the New Mexico Constitution in fact does provide for due process and equal protection.[160] In that

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followed, and which refined the terms of the original charter. These declarations, in turn, represented rights that always existed in the theory of the Common Law, if not in practice. *Id.* at 372–74. John Locke imported these elementary rights into his theory: "Man…hath by nature a power, not only to preserve his Property, that is, his Life, Liberty, and Estate, against the injuries and attempts of other men…." LOCKE, *supra* note 145, § 87, at 305. Thus, when Locke says that "no political Society can be, nor subsist without having in it self the power to preserve the property," he is referring to the English Common Law notions of life, liberty, and property. *Id.*

157. All men are in a "State of perfect freedom to order their Actions and dispose of their Possessions, and Person as they see fit, within the bounds of the Law of Nature, without asking Leave, or depending on the Will of any other Man." LOCKE, *supra* note 145 § 4, at 220.

158. *Id.* § 89, at 306–07.

159. *Id.*

160. "No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws." N.M. CONST. art. II, § 18.

way, state action must be justified in some way, either by demonstrating that someone has forfeited some right (such as in the criminal context), or by justifying its own actions when it takes something away from people.

Private deprivation is also provided for under Lockean theory, and should thus be provided for in a government that claims to espouse it. In New Mexico, that is probably manifest, at least in part, in the tort system. This fits properly with natural law, since one of the fundamental purposes of society is to provide neutral judges who can decide disputes between individuals.[161] To the extent that these regimes exist to maximize the basic natural rights to life, liberty, and property, and to protect them from public and private diminution, the New Mexico government remains true to the spirit of article II, section 4. Therefore, further substance need not be (nor can it be) provided by the clause. So goes the argument.

One obvious counterargument to this view is that the text of article II, section 4, contains references to rights beyond the life, liberty, and property expressed in the due process clause of article II, section 18. This is exactly what the New Mexico Supreme Court argued in *Reed v. State ex rel. Ortiz*.[162] The clause specifically mentions rights to defend life and liberty, to protect property, and to seek and obtain safety and happiness—all rights that facially expand upon the rights enumerated in the due process clause. Professor Eugene Volokh has pointed out that the state constitutional rights to defend life and liberty and to protect property, though generally neglected, might be relevant to judgments about, among other things: (1) the scope of self-defense or defense of property, "such as proposed self-defense exceptions to felon-in-possession statutes"; (2) acts of self-defense that lead to tort liability; (3) limits on employers' ability to fire employees for violent, self-defense motivated acts in the workplace; (4) "attempts to defend life against nonhuman threats"; and (5) bans on non-lethal weapons.[163]

Although Professor Volokh does not offer a framework for dealing with these rights, he provides a valuable survey of case law in which state courts have interpreted provisions that refer to the rights to defend life and liberty and to protect property.[164] Professor Volokh also notes that there is a substantial tradition of courts finding these provisions to represent judicially enforceable rights.[165] The longest line of cases finding such substantive rights originates in Pennsylvania, "where cases from 1917 to 2000 hold that the constitutional right to protect property entitles landowners and their agents to kill wild animals that are threatening the

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161. In Locke's words:

> To this strange Doctrine, *viz.*, that in the state of Nature every one has the Executive Power of the Law of Nature, I doubt not but it will be objected; that it is unreasonable for Men to be Judges in their own Cases, that self love will make Men partial to themselves and their Friends. And on the other side ill Nature, Passion and Revenge will carry them too far in punishing others. And hence nothing but confusion and disorder will follow, and that therefore God hath certainly appointed Government to refrain the partiality and violence of Men.

LOCKE, *supra* note 145, § 13, at 230–31.

162. *See* 1997-NMSC-055, ¶ 105, 947 P.2d 86, 107–08, *rev'd per curiam*, 524 U.S. 151 (1998).

163. Eugene Volokh, *State Constitutional Rights of Self-Defense and Defense of Property*, 11 TEX. REV. L. & POL. 399, 400–01 (2007).

164. *See id.* at 407–14.

165. *Id.* at 401.

landowner's crops."[166] This precedent, which dates back to 1917 using language that often appears in natural rights clauses, is strong evidence that the natural rights clauses can be used to protect individual rights.

Under a framers' intent understanding, however, even such case law does not overcome the fact that the original drafters of the language from which these clauses are drawn did not understand the verbal formulas to provide substantive, judicially enforceable rights. It is less than self-evident, for example, that the guarantees found in the natural rights clause actually add anything to the classic formulation of life, liberty, and property. During the time period when the New Mexico Constitution (and thus the natural rights clause) was adopted, at least some courts understood "the right of 'acquiring, possessing and protecting property'" as a basic "right to acquire and possess the absolute and unqualified title to every species of property recognized by law, with all the rights incidental thereto."[167] In other words, the phrase found in the natural rights clause simply summarized the property right; it did not in any way expand it beyond traditional understanding.

The same might be said of the right to pursue happiness. It has been analyzed as a reference to property rights. One court explained:

> Unquestionably [the pursuit of happiness] covers the idea of the acquisition of private property; not that the possession of property is the supreme good, but that there is planted in the breast of every person the desire to possess something useful or something pleasing which will serve to render life enjoyable, which shall be his very own, and which he may dispose of as he chooses, or leave to his children or his dependents at his decease. To deny that there is such universal desire, or to deny that the fulfillment of this desire contributes in a large degree to the attainment of human happiness is to deny a fact as patent as the shining of the sun at noonday. And so we find that, however far we penetrate into the history of the remote past, this idea of the acquisition and undisturbed possession of private property has been the controlling idea of the race, the supposed goal of earthly happiness. From this idea has sprung every industry, to preserve it governments have been formed, and its development has been coincident with the development of civilization.[168]

Under this view, then, references to happiness do not add to the rights already included under the term property. Moreover, if the Declaration of Independence can be rightly viewed as a source of national principles, then a state constitution's references to pursuing happiness cannot even be said to add any new principle that is not a part of the federal constitutional order, even where the U.S. Constitution does not contain the specific phrase.

Then again, the Declaration of Independence can just as readily be invoked for an argument that the "pursuit of happiness" contains something beyond a property right. A court might hesitate to artificially narrow the scope of a word such as happiness. After all, the original handwritten declaration spoke to "life, liberty and property," and yet the drafters subsequently decided to replace the term "property"

166. *Id.* at 408.
167. *Ex parte* Quarg, 84 P. 766, 766 (Cal. 1906).
168. Nunnemacher v. State, 108 N.W. 627, 629 (Wis. 1906).

with "the pursuit of happiness." They must have thought that the phrase added something.

As a final counterpoint, all of the discussions about the phrases concerning property and happiness as merely summarizing property rights still fail to explain the right to safety. Justice Grodin, as discussed earlier, suggests that, if one accepts the proposition of a living constitution, a right to safety might be the source of substantive rights.[169] Grodin's reliance on the premise of a living constitution is germane to my contention that, in the end, whether a court interpreting the natural rights clause chooses to use the clause as a source of substantive rights will depend on whether the court feels bound by history and the framers' intent (which both suggest a non-substantive view) or whether the court believes it has license, under the theory of a living constitution, to adapt the clause to a modern interpretation.

B. The Natural Rights Clause Is a Source of Substantive Rights

Because of the natural rights clause's murky history, or even a philosophy that disfavors historical analysis—such as a living constitution theory—a court might be more inclined to un-tether the clause from natural rights theory and simply view it as a textual enumeration of certain substantive rights.[170] If the natural rights clause is to be viewed as a source of substantive rights, a two-step analysis might be appropriate. Under such an analysis, a court would first decide what specific activities or zones of interest the clause protects. Second, the court would decide how it will balance those rights against the justifications states may provide for encroaching upon them. Thus, the analysis becomes similar to that of substantive due process. That being the case, the natural rights clause, if viewed as a substantive provision, could be read as putting the substance in substantive due process. By that classification, rights found protected under the natural rights clause would be considered (in due process language) fundamental. If that is to be true, and if the natural rights clause is to serve a substantive purpose, it will be necessary to show what fundamental rights it protects, that the due process clause—either of the federal or state constitution—does not.

In fact, the answer to the question of what the natural rights clause adds to the protections of the due process clause logically begins with a determination of what the Due Process Clause substantively protects as it is found in the U.S. Constitution. The reason for this is that New Mexico follows the interstitial approach for deciding whether and when to find state constitutional protections beyond those in the U.S. Constitution. The mode with which New Mexico courts perform this analysis was described in *State v. Gomez*.[171] Under the interstitial approach, the court first

169. *See* Grodin, *supra* note 152, at 34.

170. California seems to have implicitly done just this. Its natural rights clause, substantially similar to New Mexico's, originally referred to the rights to defend life and liberty, to obtain, possess, and protect property, and to pursue and obtain safety and happiness. CAL. CONST. art. I, § 1 (amended 1972). In 1972, the constitution was amended by initiative to include a specific grant of privacy. This act of amending the natural rights clause forecloses both of the originalist arguments discussed in Part IV.A. First, the people clearly understand the clause to protect substantive rights; otherwise they would not have seen the value in adding to its wording. Second, the Lockean linguistic formula was broken with the addition of a right that, as understood today, arguably had nothing to do with original Lockean notions.

171. 1997-NMSC-006, ¶¶ 19–23, 932 P.2d 1, 7–8.

determines whether an asserted right is protected under the U.S. Constitution. If it is, then the state constitutional question is not reached.[172] If it is not, a second step is performed in which the court asks whether "flawed federal [constitutional] analysis, structural differences between state and federal government, or distinctive state characteristics" call for protections beyond those in the U.S. Constitution.[173]

Therefore, the syllogism for finding that the natural rights clause adds extra protection in the state constitution would be as follows: The due process clause of the New Mexico Constitution, based on an interstitial analysis, gives more protection than the federal. This may be because of differences in governmental structure,[174] or perhaps because of some distinctive state characteristic. One such distinctive characteristic would be the existence of the natural rights clause in the New Mexico Constitution. That clause would be said to promote a baseline set of constitutional rights that the state has assumed the responsibility of protecting. The interstitial analysis, then, would provide a judicial framework for a court to announce that the natural rights clause gives rise to greater substantive due process protection than the U.S. Constitution. It would first have to be determined, however, whether federal substantive due process already covers what New Mexico's natural rights clause would, based on modern judicial interpretation.

New Mexico courts have explained federal substantive due process analysis as follows: The concept of substantive due process exists to protect against government action "that shocks the conscience or interferes with rights implicit in the concept of ordered liberty,"[175] or fundamental rights.[176] In accord with this, the New Mexico courts consider rights fundamental, and thus evocative of stricter scrutiny of state action that impinges upon them, when the U.S. Supreme Court does.[177] There are no occasions where a New Mexico court has expressed a view that substantive due process under the state constitution is more expansive than substantive due process under the U.S. Constitution. However, it would not be entirely unprincipled in doing so. As discussed above, the interstitial approach provides a framework with which a court could say that the natural rights clause bolsters or supports the due process clause. Perhaps it would do this by requiring less deference when natural rights are implicated—in other words, when substantive due process interests, as protected by the due process and natural rights clauses are involved.

Considering the New Mexico courts' adherence to federal precedent on this matter, this approach raises one distinct problem. That is, that according to New Mexico courts, the substantive zone covered by the liberty aspect of due process protects "[f]undamental rights [that] essentially have emanated from *natural law*

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172. *Id.* ¶ 19, 932 P.2d at 7.

173. *Id.*

174. Recall that the New Mexico Supreme Court made exactly such a determination when it referred to the more intimate relationship between state governments and people. See *supra* Part II.F, discussing the case of *Reed v. State ex rel. Ortiz*.

175. State v. Rotherham, 1996-NMSC-048, ¶ 40, 923 P.2d 1131, 1144 (citation and internal quotation marks omitted).

176. *Id.* (citation omitted).

177. *See* State v. Druktenis, 2004-NMCA-032, ¶¶ 89–96, 86 P.3d 1050, 1076–79 (surveying U.S. Supreme Court opinions on liberty interests protected by the Due Process Clause).

concepts or very basic liberal (in the nineteenth century sense of the term) democratic concepts clearly essential to individual liberty in this Country in the view of a majority of Justices of the United States Supreme Court."[178] The natural rights clause, being concerned with natural law, becomes merely duplicative of what liberty under due process provides. Even if this view is qualified by the reference to "the view of a majority of Justices of the United States Supreme Court," this can hardly be viewed as espousing a principle that our court merely waits to see how the votes will come down at the federal level. Rather, it is more probable that the New Mexico courts find the principles used by the Supreme Court—the analysis of history to discover natural rights, or rights necessary to individual liberty—as being the proper ones upon which to rest an inquiry into implied rights. This brings us full circle back to natural rights.

One other possibility by which the natural rights clause might bolster the due process clause in a meaningful way is to view it as protecting substantive due process rights as they were understood at the time of the drafting of the New Mexico Constitution.[179] This, of course, inevitably references *Lochner*, since that case in many ways defines the doctrine of substantive due process as it existed when New Mexico gained statehood. Natural law and the U.S. Supreme Court's view of natural law at the time provided robust protections for liberty of contract, and skepticism toward economic regulation. One commentator has referred to the entire approach of protecting economic liberty as part of a classical liberal tradition that saw the constitutional order as being designed to protect individual freedom and Adam Smith-style laissez-faire free market economics.[180] If that was in fact the milieu out of which the New Mexico Constitution emerged—and it has already been argued that it was[181]—then some attention should be paid to that understanding of due process.

One critique of this approach is that *Lochner*-era jurisprudence was unprincipled,[182] and that a foray into that arena would return us to a worse, less enlightened time. This, however, need not be the case. Even if the heavy handed scrutiny with which the U.S. Supreme Court struck down laws interfering with economic or contractual liberty is considered overly active and unprincipled,[183] a modern court could adopt a moderated approach to protect a liberty interest that, although not recognized as part of modern federal substantive due process

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178. *Id.* ¶ 91, 86 P.3d at 1077 (citation omitted) (emphasis added).

179. *Cf.* State v. Gutierrez, 116 N.M. 431, 441, 863 P.2d 1052, 1062 (1993) ("[R]elevant to our interpretation of Article II, Section 10 is the milieu from which the New Mexico search and seizure provision emerged."). If such inquiry into the milieu is warranted in search and seizure law, it would arguably be with respect to due process and natural rights as well.

180. *See generally* EPSTEIN, *supra* note 126.

181. *See* CLINE, supra note 66, at 49 ("The Constitution, a model of fiscal and political conservatism, protected and nurtured laissez-faire, individualism, and capitalism, and it minimized the role of government.…").

182. *Cf.* Pub. Serv. Co. of N.M. v. N.M. Pub. Serv. Comm'n, 112 N.M. 379, 386, 815 P.2d 1169, 1176 (1991).

183. The accusation that it was unprincipled is unfair, anyway. The jurisprudence of the time arguably followed the principles of classical liberalism, which militated against market regulation, except where necessary to protect competition or to regulate industries affected with a public interest, and stood for minimal governmental intrusion. *See generally* EPSTEIN, *supra* note 126. Just because ideologies shifted in favor of another competing philosophy of the time (progressivism) does not mean that the previous approach was "unprincipled."

jurisprudence, was most likely a part of the understanding of natural rights and liberty at the time of the drafting of the New Mexico Constitution. Those understandings of natural rights and liberty would accordingly be represented in our notion of substantive due process.

Implementation of a moderated approach might involve merely raising the level of scrutiny where contractual or economic freedoms are impinged. Instead of viewing infringing state action in the most deferential, rationally based way, the court might ask for a stronger justification or better fit, even if not a compelling justification that is narrowly tailored. Such an approach would give some meaning to the natural rights clause and arguably bolster individual protections.

Again, it can be argued that in our changing times, the notions underlying strong protections of economic and contractual liberty have become less relevant. With the modern problems associated with juggernaut corporations and increased state assumption of the task of regulating ever more aspects of our lives, it might simply be impossible to start subjecting such regulation to the chopping block of higher scrutiny in the name of economic freedom. And even if it were possible, it might lead to the alleged problems of the Gilded Age,[184] where our nation struggled to learn how to deal with mass industrialization.

V. CONCLUSION

The ambition of this article was to elicit a critical evaluation of a neglected part of the New Mexico Constitution. In-depth study of the relevant time periods in the history of the natural rights clause does not reveal clear answers as to the clause's meaning. It does, however, give clues that could lead either to a conclusion that the natural rights clause does not provide substance, or alternatively, that the clause might serve to bolster the rights protected in the due process clause.

Ultimately, the text, stripped of an underlying theory, is enigmatic. Moreover, the New Mexico framers' original understanding of the natural rights clause is unclear. If the natural rights clause, however, is viewed in light of its Virginia Declaration of Rights parentage, an argument rooted in original intent should lead to a conclusion that the clause is not meant to be a source of substantive rights.

On the other hand, if an interpreter is willing to minimize or abandon appeals to the original intent, in favor of a more flexible theory, such as one rooted in the notion of a living constitution, there are opportunities to view the clause as protecting individual rights. For those uncomfortable with wholesale abandonment of framers' intent, but who believe the natural rights clause should be interpreted as a source of individual rights, another possible route exists. Namely, New Mexico voters could follow California's example and amend the natural rights clause in a way that manifests the voters' intent to transform the clause into a source of rights. Such an event would solve the concerns about framers' intent because voters amending the clause would become the framers, and their understanding of the clause as a source of substantive rights would be on the record. Such an amendment, of course, has not occurred.

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184. *See* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 82 (2d ed. 1998).