SLAVERY, "INALIENABLE RIGHTS," AND ABORTION IN STATE CONSTITUTIONS

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INTRODUCTION

In 2019, the Kansas Supreme Court surprised many court watchers by holding that Section I of the Kansas Constitution's Bill of Rights protects a "natural right" to make decisions about parenting and procreation, including abortion.[1] The case was brought by two

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1. *See* Hodes & Nauser v. Schmidt, 440 P.3d 461, 502 (Kan. 2019). More astute observers were less surprised, given the state's history of providing abortion access. *See*, *e.g.*, Dann Margolies & Celia Llopes-Jepsen, *Kansas State Court Rules State*

Kansas-based abortion providers, Dr. Herbert Hodes and Dr. Traci Nauser, to challenge a Kansas state law that banned, with limited exceptions, the most common abortion procedure used for second-trimester abortions, Dilation and Evacuation (D&E).[2] Initiated prior to the U.S. Supreme Court's ruling in *Dobbs v. Jackson Women's Health*[3] which largely eliminated federal constitutional protection for abortion, the complaint rested on the Kansas Constitution.[4] The Kansas Supreme Court focused its analysis on the relevant state constitutional law.

The Kansas Constitution's Bill of Rights states "that all men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness."[5] Finding that these rights are "distinct from and broader" than those protected under the federal Constitution, the state Supreme Court opined that the state constitution's framers "intended these rights to be judicially protected against governmental action that does not meet constitutional standards."[6] To interpret the Kansas Bill of Rights' meaning, the court delved into the historical record of the Kansas Constitution. Sometimes called the "Wyandotte Constitution" (the constitutional convention was held Wyandotte, Kansas, now part of Kansas City), the draft constitution was adopted in 1859 during a period of political violence between three warring factions with opposing views on slavery: pro-slavery, Free Staters, and abolitionists.[7] It was this period that gave rise to the

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Constitution Protects Right to Abortion, NPR (Apr. 26, 2019), https://www.npr.org/2019/04/26/717449336/kansas-supreme-court-rules-state-constitution-protects-right-to-abortion (noting that "[b]efore the mid-1990s, Kansas was one of the least abortion-restrictive states in the country.").

2. *See* Klaira Lerma & Paul Blumenthal, *Current and Potential Methods for Second Trimester Abortion*, 63 BEST PRAC. & RSCH. CLINICAL OBSTETRICS & GYNECOLOGY 24, 29 (2020) (noting that "D&E is a safe procedure, and complications are rare").

3. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

4. *See* Hodes & Nauser v. Schmidt, No. 2015CV000490, 2015 WL 13065200, at *2 (Kan. Dist. Ct. June 30, 2015) (stating that the plaintiff's claims are brought under the Kansas Bill of Rights).

5. KAN. CONST. Bill of Rights, § 1.

6. *Hodes & Nauser*, 440 P.3d at 471.

7. *See generally Bleeding Kansas*, NAT'L PARK SERV., https://www.nps.gov/articles/bleeding-kansas.htm (last visited Jan. 1, 2025). For more information on this period, see generally *Bleeding Kansas: Topics in Chronicling America*, LIBR. OF CONG., https://guides.loc.gov/chronicling-america-bleeding-kansas (last visited May 31, 2025). On the Wyandotte Constitution, see generally Tony O'Bryan, *Wyandotte Constitution*, KAN. CITY LIBR., https://civilwaronthewesternborder.org/encyclopedia/wyandotte-constitution (last visited May 31, 2025).

state's nickname "Bleeding Kansas."[8] The violence continued for several years even after Kansas entered the Union as a free state in 1861, but the constitution drafted during the Wyandotte Convention in 1859 survived.[9] It is Kansas's current constitution.[10]

The "equal and inalienable natural rights" language in the Kansas Bill of Rights finds parallels in the Declaration of Independence.[11] In adopting this phrasing, along with a specific prohibition on slavery laid out in Article 6 of the state's bill of rights, the state's constitutional framers firmly rejected slavery in the state.[12] The Kansas Supreme Court recognized in this text the framers' strong commitment to individual liberties, including "life, liberty, and the pursuit of happiness."[13] Drawing extensively on the philosophical underpinnings of the Declaration of Independence, the Kansas court concluded that this language necessarily included "personal autonomy," and that the freedoms protected by the state's Bill of Rights encompass personal decisions concerning procreation and abortion.[14]

Kansas is not the only state that includes expansive language about inalienable rights in its constitution. In fact, the majority of states recognize 'inalienable" or "natural" rights, in state constitutional provisions known as "Lockean guarantees."[15] The label acknowledges the influence of English philosopher John Locke on America's founding generation. Locke argued that people possess inherent, natural rights, and that it is the role of legitimate government to maintain conditions under which people can exercise those rights.[16] Locke posited that this agreement incorporates an obligation of the

8. *See* NAT'L PARK SERV., *supra* note 7.

9. *See* O'Bryan, *supra* note 7.

10. *See id.*

11. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("[A]ll men are . . . endowed by their Creator with certain unalienable Rights" including "Life, Liberty and the pursuit of Happiness").

12. *See Hodes & Nauser*, 440 P.3d at 474–76.

13. *Id.* at 482.

14. *Id.* at 486. The Kansas court reaffirmed this conclusion in *Hodes & Nauser v. Stanek*, 551 P.3d 62, 71-72 (Kan. 2024).

15. Anthony B. Sanders, *Social Contracts: The State Convention Drafting History of the Lockean Natural Rights Guarantees* 1 (Aug. 2, 2024) (unpublished article), https://ssrn.com/abstract=4913917 (finding that two-thirds of state constitutions include Lockean guarantees).

16. *See generally* Alex Tuckness, *Locke's Political Philosophy*, STANFORD ENCYCLOPEDIA OF PHIL. (Oct. 6, 2020), https://plato.stanford.edu/archives/sum2024/entries/locke-political/.

government to protect the natural rights of its constituents.[17] In recent years, several state courts have found that these Lockean provisions are enforceable and protect procreative rights.[18] Yet to date, the Kansas Supreme Court's decision in *Hodes & Nauser* is unique in the depth of its analysis of the philosophical origins of these provisions and the recognition of their relationship to the anti-slavery movement in the United States.

Building on the Kansas Supreme Court's 2019 ruling, this article examines whether similar evidence regarding state constitutional history and framers' intentions might be available in other states, using a case study of Indiana. Thirty-nine states have inalienable rights provisions, while twenty-four have anti-slavery provisions, and seventeen have both.[19] As the locus of abortion protection shifts to the states, and historical and textual analysis continues to be an important touchstone in state constitutional interpretation, this article aims to demonstrate the importance of a thorough exploration of the specific history and meaning of state constitutional provisions, and the interconnections between the provisions that protect inalienable rights and those that bar slavery more directly.

Following the Introduction, this article proceeds in four parts. Part I provides more detailed context for this exploration of state constitutions by summarizing research on the federal Thirteenth Amendment and reproductive rights, then looking across a number of state constitutions to provide additional background on the evolution of state Lockean guarantees and state-level anti-slavery provisions. Part

17. *See* Tuckness, *supra* note 16; *see also* John Locke, *The Second Treatise: An Essay Concerning the True Original, Extent, and End of Civil Government*, *in* TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 100, 158–59 (Ian Shapiro et al. eds., 2003).

18. *See, e.g.*, Okla. Call for Reprod. Just. v. Drummond, 526 P.3d 1123, 1130 (Okla. 2023); Access Indep. Health Servs. v. Wrigley, No. 08-2022-CV-01608, at 12 (S. Jud. Dist. Sept. 12, 2024) (enjoining implementation of abortion restrictions based on state constitution's Lockean provisions), https://reproductiverights.org/wp-content/uploads/2024/09/ND-RRWC-v-Wrigley-SJ.pdf.

19. These figures are derived by cross-referencing the lists provided in the following articles: Stephen Gow Calabresi et al., *Individual Rights Under State Constitutions in 2018: What Rights are Deeply Rooted in a Consensus of the States?*, 94 NOTRE DAME L. REV. 49, 125 (2018); Michael L. Smith, *State Constitutional Prohibitions of Slavery and Involuntary Servitude*, 99 WASH. L. REV. 523, 535 (2024). The states with both provisions in their state constitutions are: Alabama, Arkansas, California, Colorado, Indiana, Iowa, Kansas, Kentucky, Louisiana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oregon, Vermont, and Wisconsin.

II focuses on the specifics of the Indiana state constitution to explore the proposition that the state's Lockean guarantee and constitution's anti-slavery provision should be viewed together, and should be understood to protection the personal autonomy of state residents.[20] In Part III, the article draws on this evidence to critique the opinion of Indiana's Supreme Court in *Members of Medical Licensing Board of Indiana v. Planned Parenthood Great Northwest*, a case challenging the state's restrictive post-*Dobbs* abortion law.[21] In that case, the court's majority found that the state's Lockean guarantee provided only minimal protections for abortion rights.[22] Finally, a short Conclusion summarizes this analytical approach, explores its broader implications, and identifies priorities for future research.

I. SLAVERY, PERSONAL AUTONOMY, AND ABORTION IN FEDERAL AND STATE CONSTITUTIONAL LAW

A. The Thirteenth Amendment: Slavery and Abortion in the Federal Constitution

Both scholars and judges have advanced the idea that the Thirteenth Amendment to the U.S. Constitution protects individual decision-making about procreation, including the right to abortion.[23] These

20. For a preliminary analysis and examples of interpreting two state constitutional provisions together, see generally Robert F. Williams, *Enhanced State Constitutional Rights: Interpreting Two or More Provisions Together*, 2021 WISC. L. REV. 1001 (2021). *See also* Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1897 (2023) (noting that "[w]ithin state declarations of rights, abundant provisions, added over time by amendments, may work together to enhance a right").

21. *See generally* Members of Med. Licensing Bd. of Ind. v. Planned Parenthood Great Nw., 211 N.E.3d 957 (Ind. 2023) (upholding statute barring abortion except when necessary to save a woman's life, when there is a lethal fetal abnormality, or within first ten weeks of pregnancy in cases of rape or incest).

22. *See id.* at 985. At least one commentator viewed this as an important recognition that the Lockean guarantees in the Indiana Constitution provided some enforceable protections, however meager. *See* Anthony Sanders, *Indiana Supreme Court Gives Natural Rights a Boost*, STATE CT. REP. (Sept. 12, 2023), https://statecourtreport.org/our-work/analysis-opinion/indiana-supreme-court-gives-natural-rights-boost.

23. Examples of scholarship include Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 480 (1990); Michele Goodwin, *Involuntary Reproductive Servitude: Forced Pregnancy, Abortion, and the Thirteenth Amendment*, 2022 U. CHI. L.F. 191, 191 (2022); Rebecca Zietlow, *Reproductive Justice and the Thirteen Amendment*, 104 BU L. REV. ONLINE 143, 143 (2024). For examples of judicial decisions, see Jane L. v. Bangerter, 61 F.3d 1505, 1514–15 (10th Cir. 1995); United States v. Handy, No. 22-096 (CKK),

arguments have drawn from various sources. First, some commentators have relied on case law, text, and analogy to assert that being forced to carry a pregnancy against one's will constitutes involuntary servitude and is explicitly banned under the text of the Thirteenth Amendment.[24] Second, the rising interest in originalist approaches to constitutional interpretation has encouraged scholars to look more closely at historical sources demonstrating that the loss of personal autonomy inherent in slavery was not limited to forced manual labor, but included practices of sexual abuse, rape, and forced pregnancy.[25] These scholars argue that the Thirteenth Amendment's prohibitions on slavery and involuntary servitude encompass slavery's full breadth, and should be understood to bar practices, whether by the government or individuals, that would violate personal bodily autonomy, including in the area of reproduction.[26]

Despite the seriousness of the scholars who have advanced these Thirteenth Amendment interpretations, the approaches have been seldom pressed into service in legal advocacy or litigation.[27] Rather, for the past five decades, the primary focus of federal abortion advocacy and adjudication remained on the scope of the Fourteenth Amendment, which was the basis on which the majority in *Roe v. Wade* found a fundamental constitutional right to abortion.[28] Following the path set by *Roe*, the Fourteenth Amendment's protection of abortion was

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2023 WL 4744057, at *5 (D.D.C. Feb. 25, 2023); Allegheny Reprod. Health Ctr. v. Pa. Dep't of Health Serv., 309 A.3d 808, 967–68 (Pa. 2024) (Wecht, J., concurring). *But see* Kurt Lash, Roe *and the Original Meaning of the Thirteenth Amendment*, 21 GEO. J.L. & PUB. POL'y 131, 144 (2023) (disputing claim that the Thirteenth Amendment extended beyond "private economic relationship" between master and servant).

24. *See* Koppelman, *supra* note 23, at 486–93; *see also* Donald H. Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569, 1619–20 (1979) (suggesting that the constitutional argument against abortion statutes could be based on nonsubordination and physical integrity values of the Thirteenth Amendment).

25. *See* Goodwin, *supra* note 23, at 202–19; *see also* Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917, 1935–43 (2012) (extending his earlier work beyond case law and textual analysis, Koppelman looks at original sources to argue that they support broader understanding of the scope of slavery and, thus, the Thirteenth Amendment).

26. *See* Goodwin, *supra* note 23, at 202–19.

27. *See* Alexandria Gutierrez, *Sufferings Peculiarly Their Own*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 117, 168 (2013) ("[T]he Thirteenth Amendment defense of abortion remains on the legal fringe"); *see also Allegheny Reprod. Health Ctr.*, 309 A.3d at 967 (Wecht, J., concurring) (characterizing this argument as building on "creative invocations" of academia).

28. *See* Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Casey, 505 U.S. 833 (1992).

repeatedly affirmed, establishing a federal baseline that prevented states from denying the right.[29] There was little opportunity or impetus to fully develop alternative federal or state constitutional grounds for protecting procreative rights.[30]

The Supreme Court's 2022 decision in *Dobbs v. Jackson Women's Health* dramatically changed the landscape.[31] The Court reversed the longstanding precedent of *Roe v. Wade* and determined that the Fourteenth Amendment no longer provides protection for abortion as a fundamental constitutional right. This development directed new attention to the possibility of finding federal abortion protections in the Thirteenth Amendment. The argument has been advanced in public fora, including congressional hearings, as well as new scholarly contributions.[32] Yet the apparent hostility of the current Supreme Court majority to a broad understanding of the Reconstruction Amendments and federal abortion rights may discourage advocates from more directly raising Thirteenth Amendment claims until the composition of the Court changes. For advocates seeking to secure a federal abortion right, the risk of a negative Supreme Court ruling that forecloses such a claim for the long term may simply be too great. Meanwhile, the demise of *Roe* shifted much of the litigation aimed at

29. *See, e.g.*, *Casey*, 505 U.S. at 870.

30. An exception is litigation at the state level to establish access to government-funded abortion. *Compare* N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841, 845 (N.M. 1998) (disallowing restrictions on state Medicaid funding of medically necessary abortions) *with* Harris v. McRae, 448 U.S. 297, 311 (1980) (upholding restrictions on federal abortion funding). Likewise, state courts continued to address the scope of permissible restrictions on minors' abortion rights under state constitutions. *See, e.g.*, Planned Parenthood of Cent. N.J. v. Farmer, 762 A.2d 620, 622 (N.J. 2000) (striking down state law mandating parental notification as a condition of abortion for a minor, absent a judicial waiver).

31. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

32. See, e.g., The Impact of the Supreme Court's Dobbs Decision on Abortion Rights and Access Across the United States: Hearing Before the H. Comm. on Oversight & Reform, 117th Cong. 4, 12–13 (2022) (statement of Michele Bratcher Goodwin, Professor of Law, University of California, Irvine), https://docs.house.gov/meetings/GO/GO00/20220713/114986/HHRG-117-GO00-Wstate-GoodwinM-20220713.pdf [hereinafter Statement of Michele Bratcher Goodwin]; Rebecca Zietlow, Abortion, Citizenship, and the Right to Travel, 27 EMP. RTS. & EMP. POL'Y J. 335, 335 (2024) ("States banning travel to obtain abortions also arguably impose involuntary servitudes on those travelers, violating the Thirteenth Amendment.").

protecting abortion access to state courts, with litigants raising abortion rights claims under state constitutions.[33]

State constitutions are not simply miniature versions of the federal document, but differ from the federal Constitution in many respects, particularly in the arena of fundamental rights.[34] These differences may be clearly reflected through variations in text. For example, textual differences are a key factor when a state court upholds abortion access under a state constitution's equal rights amendment, a provision that is absent from the federal Constitution.[35] Likewise, the Kansas supreme court's decision in *Hodes & Nauser v. Schmidt I*, discussed above, rests on an interpretation of language in the Kansas Constitution's Bill of Rights that is absent from the federal Constitution.[36] Alternatively, sometimes state courts are charged with interpretating state constitutional language that is similar, or identical, to federal constitutional text. In that instance, states may proceed in "lockstep" with federal interpretations or may find a basis in state constitutional history and context to depart from the federal approach.[37]

As noted above, a significant textual *difference* between the federal Constitution and the majority of state constitutions is the states' inclusion of explicit protections for "inalienable" or "inherent" rights, i.e., Lockean guarantees.[38] At the same time, a textual *similarity* (of varying degrees) appears in the twenty-four state constitutions that include prohibitions on slavery (usually including involuntary servitude)

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33. *See* Kate Zernike, *A Volatile Tool Emerges in the Abortion Battle: State Constitutions*, N.Y. TIMES (Jan. 29, 2023), https://www.nytimes.com/2023/01/29/us/abortion-rights-state-constitutions.html.

34. *See* Bulman-Pozen & Seifter, *supra* note 20, at 1862–78 (providing a catalogue of the rights found in state constitutions).

35. *See, e.g.*, Allegheny Reprod. Health Ctr. v. Pa. Dep't of Hum. Servs., 309 A.3d 808, 867 (Pa. 2024) (holding that because pregnancy discrimination (including abortion) is sex discrimination, the state's Medicaid funding ban presumptively violated the state Equal Rights Amendment).

36. *See* discussion *supra* notes 1–7 and accompanying text.

37. For several examples of lockstepping, and an argument against it, see Kevin Frazier, *A Rallying Cry Against Lockstepping*, STATE CT. REP. (Oct. 22, 2024), https://statecourtreport.org/our-work/analysis-opinion/rallying-cry-against-lockstepping. The Hawaii Supreme Court is among those that has rejected a lockstep approach, even when the state and federal constitutional texts are the same. *See* State v. Wilson, 543 P.3d 440, 445 (Haw. 2024) (when the federal and state constitution "contain look-alike provisions, Hawaii has chosen not to lockstep with the Supreme Court's interpretation of the federal constitution."). *See also* Planned Parenthood Ass'n of Utah v. State, 554 P.3d 998, 1033 (Utah 2024) (the historical account offered in the *Dobbs* case "does not end the inquiry" when construing the Utah Constitution).

38. *See* discussion *supra* notes 16–20 and accompanying text.

similar in form to the Thirteenth Amendment.[39] However, while scholars have explored the relevance of the Thirteenth Amendment for abortion protections, little analysis has focused on the implications of the state constitutional bars on slavery for state-level abortion rights. Nor have scholars examined the ways in which state constitutions' unique Lockean guarantees might interact with, or complement, state-level anti-slavery provisions to protect rights of personal autonomy.

This is not surprising. As noted above, until 2022, state constitutional protections were largely eclipsed by the federal protection of the fundamental right to abortion. Further, researching the varying textual nuances and meanings of fifty state constitutions is daunting. To top it off, states' historical records—particularly the earliest ones—are often incomplete, with scant information about constitutional drafting debates or the intentions of the state constitutional framers.[40]

Despite these hurdles, the historic records that do exist may yield valuable insights into the unique meanings of a state constitution's protections. Just as with the scholarship under the Thirteenth Amendment, there may be under-explored support for the proposition that state constitutions' Lockean provisions and anti-slavery clauses provide robust protections for personal autonomy that include decisions about procreation, including abortion.[41]

B. Lockean Guarantees in State Constitutions

In May 1776, the Second Continental Congress asked each colonial legislature to draw up a governance structure that would "best conduce to the happiness and safety of their constituents."[42] Virginia's was drafted first, written in June 1776 by George Mason, a wealthy planter and opponent of slavery.[43] His draft reflected the influence of

39. *See supra* note 20.

40. *See, e.g.*, Anthony Sanders, *Social Contracts: The State Convention Drafting History of the Lockean Natural Rights Guarantees*, 93 UMKC L. Rev. 641, 643 (2025) (finding that for states, the constitutional drafting history "did not amount to much . . . , perhaps, a sparse journal of the convention's proceedings") [hereinafter, Sanders, *Social Contracts* (2025)].

41. One scholar has suggested that viewing enslaved persons themselves as the authors of the Thirteenth Amendment would strengthen applications of the provision to reproductive rights and private violence. Guyora Binder, Note, *Did the Slaves Author the Thirteenth Amendment? An Essay in Redemptive History*, 5 YALE J.L. & HUM. 471, 479 (1993).

42. BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 229 (1971).

43. *See id.* at 32–33.

English philosopher John Locke and Swiss political theorist Jean-Jacque Burlamaqui, among others.[44] Virginia's draft was circulated throughout the colonies. It was highly influential as each colony prepared its own declaration, and as members of the Continental Congress debated the Declaration of Independence.[45] Pennsylvania's Declaration of Rights, completed in September 1776, drew directly from the Virginia declaration.[46] Massachusetts' declaration, drafted by John Adams in 1780, has been characterized as a "compendium of the earlier state Declarations of Rights."[47] Over time, Virginia's declaration (and thus, indirectly, Pennsylvania's) influenced the framers in Ohio.[48] Indiana and Kansas borrowed from Ohio.[49] And so it went, as the language of Lockean guarantees spread to state constitutions across the country.[50]

From earliest stages of this process, the inalienable rights clauses in these initial declarations—later, incorporated into state constitutions—were identified as challenging the institution of slavery.[51] For example, as originally drafted by George Mason, the first clause of Virginia's Declaration of Rights provided that "all men are by nature equally free and independent and have certain inherent rights . . . ."[52] When Virginia's constitutional convention began debating the declaration, a vocal faction objected, asserting that the clause was inconsistent with slavery.[53] These objections brought the drafting process to a standstill. As described by Thomas Ludwell Lee, one of the editors

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44. *See id.*; *see also* Joseph R. Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, 25 HASTINGS CONST. L.Q. 1, 8–9 (1997).

45. *See* SCHWARTZ, *supra* note 42, at 262.

46. *See* Grodin, *supra* note 44, at 5–6.

47. *See* SCHWARTZ, *supra* note 42, at 338.

48. *See* G. Alan Tarr, *The Ohio Constitution of 1802: An Introduction* 6 (2000) (unpublished manuscript), https://sites.camden.rutgers.edu/wp-content/uploads/sites/19/2022/10/The_ohio_constitution.pdf (last visited Apr. 17, 2025).

49. On Indiana, see 1 CHARLES KETTLEBOROUGH, CONSTITUTION MAKING IN INDIANA 20 (1916) (describing borrowing from Ohio Constitution). On Kansas, see Hodes & Nauser v. Schmidt, 440 P.3d 461, 474 (Kan. 2019) (describing influence of Ohio Constitution on Kansas drafters).

50. One study found that "[o]n average, 20 percent of a state's constitutional language was borrowed directly from another state constitution." Erik Engstrom et al., *Constitutional Innovation and Imitation in the American States*, 75 POL. RSCH. Q. 244, 244 (2022).

51. *See* Stephen Calabresi & Sofia Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEX. L. REV. 1299, 1325–28 (2015).

52. SCHWARTZ, *supra* note 42, at 248.

53. *See id.*

of Virginia's declaration, "[t]he words as they stand are approved by a very great majority, yet by a thousand masterly fetches and strategems the business has been so delayed that the first clause stands yet unassented to by the Convention."[54] To address the impasse and appease the slaveholders, the Virginia Convention added the caveat that inherent rights attached only when men "enter into a state of Society," thus excluding men who were enslaved.[55]

The debates in Virginia were not unique. A recently published review of the constitutional debates in all fifty states confirms that these clauses were central to state constitutional debates regarding slavery and race.[56] Supporters of slavery recognized that Lockean guarantees were inconsistent with the perpetuation of slavery and raised objections during the constitutional drafting processes. In states where slavery was disfavored by the majority of representatives at the constitutional convention—for example, New Jersey, Pennsylvania, Iowa, Kansas, and elsewhere—supporters of slavery, albeit outnumbered, tried to water down the inalienable rights clauses with amendments that would explicitly exempt slavery; these proposals were ultimately rejected by most state constitutional framers in favor of broader provisions that, on their face, extended to all men and, over time, to women as well.[57]

Early case law also confirms that state constitutions' "inalienable rights" clauses were deemed to be inconsistent with the perpetuation of slavery. In particular, the *Quock Walker* cases—a series of three related cases decided between 1781 and 1783—ended legal slavery in Massachusetts by applying the state constitution's inalienable rights clause.[58] While several other states in the early days of the nation gradually curtailed legalized slavery without litigation, the Massachusetts cases established a precedent as to the meaning of the Lockean

54. 1 THE PAPERS OF GEORGE MASON, 1725–1792, at 275 (Robert A. Rutland ed., 1970) (quoting 1 KATE MASON ROWLAND, THE LIFE OF GEORGE MASON, 1725–1792, at 240 (1892)).

55. *See id.* at 274–89.

56. *See* Sanders, *Social Contracts* (2025), *supra* note 40, at 643, 674-79.

57. *See id.* at 674-79.

58. These unreported cases are described on the Massachusetts Court System website. *See Massachusetts Constitution and the Abolition of Slavery*, MASS. CT. SYS., https://www.mass.gov/guides/massachusetts-constitution-and-the-abolition-of-slavery [https://perma.cc/74QQ-FB2X] (last visited Apr. 17, 2025); *see also* Paul Finkelman, *The First Federal Human Rights Legislation: Suppressing the African Slave Trade*, 3 CRITICAL STUD. J. 20, 24 (2010).

Guarantees that contributed to the ongoing public debate over these provisions.[59]

C. Anti-Slavery Provisions in State Constitutions

Explicit state constitutional prohibitions on slavery, though not as prevalent as state constitutional Lockean guarantees, also reflect state-level campaigns to banish the practice in the decades before the federal Reconstruction framers adopted the Thirteenth Amendment in 1865, or after 1865, to reinforce the Thirteenth Amendment in state law.[60] In at least one state, Vermont, the slavery ban and Lockean guarantee were directly linked in state constitutional text; Vermont's slavery prohibition appears within a broader provision setting forth a list of inalienable rights. The version of the Vermont State Constitution, chapter 1, article 1, enacted in 1777, stated:

> That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty; acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety. Therefore, no male person, born in this country, or brought from over sea, ought to be holden by law, to serve any person, as a servant, slave, or apprentice, after he arrives to the age of twenty-one years; nor female, in like manner, after she arrives to the age of eighteen years, unless they are bound by their own consent, after they arrive to such age, or bound by law for the payment of debts, damages, fines, costs, or the like.[61]

Vermont's subsequent 1786 Constitution retained this same language, and in 1924, the provision—which continues in similar form today—was revised to be gender-neutral.[62]

More often, state constitutions addressed inalienable rights and slavery in separate constitutional provisions. The Northwest Ordinance, enacted by Congress in 1787, included a provision outlawing slavery in the territory, though the ordinance allowed slaveholders to

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59. *See* Finkelman, *supra* note 58, at 24.

60. *See, e.g.*, *Smith*, *supra* note 19, at 535–43 (describing slavery prohibitions in several state constitutions, including Rhode Island's constitutional provision, adopted in 1842, and Alabama's, added in 1901).

61. VT. CONST. of 1777, ch. I, art. 1.

62. *See Smith*, *supra* note 19, at 540–41 (describing evolution of Vermont's slavery prohibition).

recapture enslaved people alleged to have escaped.[63] The Ordinance did not include a Lockean guarantee.[64] When applying for statehood, all five of the states encompassed by the Northwest Territory—Ohio, Indiana, Illinois, Michigan, and Wisconsin—retained the anti-slavery provision in their new state constitutions.[65] Four of these former territories—Ohio, Indiana, Illinois, and Wisconsin—also added a separate Lockean guarantee to their state constitutions.[66]

Once the Thirteen Amendment was added to the federal constitution, these state constitutional provisions prohibiting slavery were less consequential, superseded by the federal pronouncement. Still, several state constitutions adopted after 1865 included both specific slavery bans and Lockean guarantees. For example, Colorado's state constitution, adopted in 1876, includes both provisions.[67] Utah's constitution, dating from 1896, also includes both a Lockean guarantee in Section 1 of its Declaration of Rights, and an anti-slavery provision in Section 21 of the Declaration.[68] Altogether, the constitutional Lockean

63. *See An Ordinance for the Government of the Territory of the United States North-West of the River Ohio* (July 13, 1787), *reprinted in* 32 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 340 (1937).

64. The Northwest Ordinance did articulate other rights, particularly religious freedom. *See generally* Matthew J. Hegreness, Note, *An Organic Law Theory of the Fourteenth Amendment: The Northwest Ordinance as the Source of Rights, Privileges, and Immunities*, 120 YALE L.J. 1820 (2011).

65. *See* David R. Upham, *The Understanding of 'Neither Slavery Nor Involuntary Servitude Shall Exist' Before the Thirteenth Amendment*, 15 GEO. J.L. & PUB. POL'Y 137, 139 (2017) (citing OHIO CONST. of 1802, art. VIII, § 2; OHIO CONST. of 1851, art. I, § 6; IND. CONST. of 1816, art. XI, § 7; IND. CONST. of 1851, art. I, § 37; ILL. CONST. of 1818, art. VI, § 1; ILL. CONST. of 1848, art. XIII, § 16; MICH. CONST. of 1835, art. XI, § 1; MICH. CONST. of 1850, art. XVIII, § 11; WIS. CONST. of 1848, art. I, § 2). Only a portion of Minnesota was part of the Northwest Territory. *See, e.g.*, *About Minnesota: Northwest Ordinance of 1787*, STATE OF MINN., https://www.sos.state.mn.us/about-minnesota/minnesota-government/northwest-ordinance-of-1787/ (last visited May 1, 2025).

66. *See* Calabresi & Vickery, *supra* note 51, at 1444 App. A (2015). Illinois included a slavery prohibition in its 1818 and 1848 constitutions. It eliminated the slavery ban in its 1870 constitution, while retaining a Lockean Guarantee that had been added at the time of Illinois statehood. *See* FRANK CICERO, CREATING THE LAND OF LINCOLN: THE HISTORY AND CONSTITUTIONS OF ILLINOIS, 1778-1870, at 189 (2018). Possibly the 1870 change reflected the preclusive impact of the federal Thirteen Amendment. *See generally* ANN LOUSIN, THE ILLINOIS STATE CONSTITUTION 6–7 (2011).

67. *See* COLO. CONST. art. 2, § 3 (inalienable rights), and § 26 (slavery prohibition). Section 26 was amended in 2018 to remove involuntary servitude exceptions. *See* Smith, *supra* note 19, at 536.

68. *See* UTAH CONST. art. 1, § 1 ("All persons have the inherent and inalienable right to enjoy and defend their lives and liberties"); and art. 1, § 21 (providing in

guarantees and the constitutional slavery prohibitions continue to coexist in seventeen states, reinforcing those states' basic commitments to fundamental freedoms. The case study of Indiana, set out below, provides some insight into the interrelationship of these two provisions.

II. CASE STUDY: INDIANA

A. The 1816 Constitution's Lockean Guarantee and Anti-Slavery Provision

Having initially joined the United States as part of the Northwest Territory, Indiana gained statehood in 1816. As discussed above, the Northwest Ordinance banned slavery in the Northwest Territory.[69] Indiana's first Constitution, approved in 1816, incorporated a slavery prohibition and also included a Lockean guarantee, the latter prominently placed as Section 1 of Article I, the Bill of Rights. The Lockean guarantee stated that:

> We declare, That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights; among which are the enjoying and defending life and liberty, and of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.[70]

What did this language mean in 1816, when Indiana's constitutional framers included it in the new constitution? Indiana's framers did not coin this language but copied it from other sources including the Ohio Constitution, where it appears in the state's Bill of Rights, and the Declaration of Independence.[71] Though inalienable rights language was not part of the federal Constitution, Indiana's was one of

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subsection (1) that "[n]either slavery nor involuntary servitude shall exist within this State").

69. *Supra* notes 63–66 and accompanying text.

70. IND. CONST. of 1816, art. 1, § 1.

71. *See* Patrick Baude, *Indiana's Constitution in a Nation of Constitutions*, *in* THE HISTORY OF INDIANA LAW 21, 24 (David J. Bodenhamer & Hon. Randall T. Shepard eds., 2006); OHIO CONST. art. 1, § 1; THE DECLARATION OF INDEPENDENCE (U.S. 1776).

several state constitutions in 1816 that included Lockean guarantees protecting inalienable or inherent rights.[72]

In adding this phrase to Indiana's constitution, the state's framers were following the lead of other states taking a stand against slavery. The numbers tell the story. Of the twenty free states admitted to the union through 1864, fourteen included a Lockean guarantee in an antebellum constitution.[73] In contrast, of the sixteen slave states of the Confederacy, thirteen had no Lockean guarantee in their antebellum constitutions.[74] Two more of these states had clauses that limited such rights to "free men," and a third, Virginia's clause, attached to men only "when they enter into a state of society."[75] These limiting provisions were added to appease the states' slaveholders.[76]

Indiana's inalienable rights clause reinforced the state's position against the institution of slavery. Indeed, the drafting committee for the Indiana Constitution consisted predominantly of men who opposed slavery.[77] They stood in staunch political opposition to the former

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72. Indiana was admitted as the 19th state in the union. Earlier constitutions with Lockean guarantees included Massachusetts, New Hampshire, New Jersey, Vermont, Virginia, Pennsylvania, and Ohio. *See generally* Calabresi & Vickery, *supra* note 51.

73. California, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Nevada, New Hampshire, New Jersey, Ohio, Pennsylvania, Vermont, Wisconsin.

74. Alabama, Delaware, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, South Carolina, Tennessee, Texas, West Virginia.

75. The two states which limited inalienable rights to "free men" were Arkansas and Florida.

76. *See* SCHWARTZ, *supra* note 42, at 338.

77. *See* D.W. Varble, Legislation and Its Effects on Race Relations in Southeastern Indiana, 1785-1860, at 15–18 (Apr. 2, 2014) (B.A. thesis, University of Louisville) (ThinkIR) (explaining that despite the strong anti-slavery constitutional text, the practice of slavery and its impacts on black citizens persisted in the state for many years); *see* WILLIAM MONROE COCKRUM, PIONEER HISTORY OF INDIANA INCLUDING STORIES, INCIDENTS AND CUSTOMS OF THE EARLY SETTLERS 142 (1907) (reporting that slavery did not disappear from the state's census report until 1850); *see generally* Paul Finkelman, *Almost a Free State: The Indiana Constitution of 1816 and the Problem of Slavery*, 111 IND. MAG. HIST. 64 (March 2015); *Laying the Foundation*, IND. HIST. BUREAU, https://www.in.gov/history/for-educators/all-resources-for-educators/resources/underground-railroad/gwen-crenshaw/laying-the-foundation/. The 1851 Constitution even included a provision (replaced in 1881) barring any additional black people from entering the state. IND. CONST. of 1851, art. XIII, § 1; *see* David G. Vanderstel, *The 1851 Indiana Constitution*, IND. HIST. BUREAU, https://www.in.gov/history/about-indiana-history-and-trivia/explore-indiana-history-by-topic/state-constitutions/the-1851-indiana-constitution-by-david-g-vanderstel/ (last visited Apr. 17, 2025); *see* WILLIAM P. MCLAUCHLAN, THE INDIANA STATE CONSTITUTION 161 (2011) (describing repeal of earlier Art. XIII and replacement with a provision on municipal debt).

Governor of the Indiana territory, William Henry Harrison, who still wielded considerable political influence; Harrison was a slave owner and slavery defender, recently elected to the U.S. House of Representatives (from Ohio) and soon to be elected as the ninth U.S. President.[78]

Yet the state constitution produced by Indiana's drafting committee included two provisions relating to slavery. First, it set out an explicit prohibition on slavery, extending the ban originally imposed in the Northwest Territory. The slavery prohibition was drafted by Dennis Pennington, the Speaker of the Indiana House.[79] A longstanding opponent of slavery, he spent 1815 as the state's "census enumerator," and in that capacity, "carried the anti-slavery propaganda into every household."[80] Pennington himself wrote a "clean-cut anti-slavery clause" for the State Constitution.[81] Appearing outside of the Bill of Rights, in Article VIII of the 1816 Constitution, that provision stated:

> as the holding any part of the human Creation in slavery, or involuntary servitude, can only originate in usurpation and tyranny, no alteration of this constitution shall ever take place so as to introduce slavery or involuntary servitude in this State, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted.[82]

When the state constitution was revised in 1851, this provision was moved to a more prominent position as part of the Bill of Rights.[83]

Second, the new constitution introduced a Lockean guarantee, drafted by a separate committee appointed to prepare the state constitution's Bill of Rights. The Lockean provision, positioned prominently in Article 1, Section 1 of the 1816 constitution and reaffirmed with minor changes in the 1851 constitution, articulated a series of inalienable rights possessed by "all men" and deemed in Indiana and most

78. *See* Varble, *supra* note 77, at 8, 17; Finkelman, *supra* note 77, at 75; JACOB PIATT DUNN, JR., INDIANA: A REDEMPTION FROM SLAVERY 289–90 (1888) (reporting that as early as 1799, most members of the Indiana legislature were "Eastern men, and both they and their constituents were heartily opposed to having slavery fastened on the government of their new homes").

79. For more on background on Dennis Pennington, see John W. Ray, *A Recollection of Dennis Pennington*, 3 IND. Q. MAG. HIST. 26, 26–28 (1907).

80. MATILDA GRESHAM, THE LIFE OF WALTER QUINN GRESHAM 1832-1895, at 24 (1919).

81. *See id.* at 24.

82. IND. CONST. of 1816 art. 8.

83. *See* IND. CONST. art. 1, § 37.

other states to be fundamentally inconsistent with slavery.[84] This provision does not specifically end slavery, since that is addressed elsewhere in the state constitution. It is also not limited to articulating the rights of formerly enslaved people (though it ensures that the rights denied through slavery are now recognized as inalienable). Rather, this is a pronouncement regarding the individual rights of the people of Indiana (life, liberty, property, happiness, safety) and the state government's obligations vis-à-vis those rights. The 1851 revisions to this provision, which appear in the current Indiana constitution, added that the "Creator" is the ultimate source of the rights specified in the provision.[85] The 1851 drafters also eliminated "safety" and "property" from the list of inalienable rights. However, the nature of the rights to "life, liberty, and the pursuit of happiness" was not changed, and these rights remained "inalienable" under the revised provision.[86]

B. The Framers of Indiana's Bill of Rights

In 1816, six men formed the committee to prepare the Bill of Rights and the preamble to Indiana's first state constitution: John Badollet of Knox County; Solomon Manwaring of Dearborn County; John K. Graham of Clark County; Daniel C. Lane of Harrison County; James Smith of Gibson County; and the aforementioned Dennis Pennington of Harrison County.[87] As Speaker of the Indiana House of Representatives in 1815, Pennington monitored the selection of these delegates. In fact, shortly before the Indiana constitutional convention, on November 3, 1815, Pennington wrote to a political ally, "let us be on our gard [sic] when our convention men is Chosen [sic] that they may be men opposed to slavery."[88]

It was no coincidence, then, that the six men on Indiana's Bill of Rights drafting committee were all disposed to support an anti-slavery constitution. The committee was chaired by John Badollet. Born in Switzerland in 1757, Badollet migrated to the United States in 1780,

84. *See* Sanders, *Social Contracts* (2025), *supra* note 40, at 674–77. The provision was amended in 1984 to include "all people."

85. *See* IND. CONST. art. 1, § 1. The "Creator" is similarly referenced in the U.S. Declaration of Independence.

86. In *Members of the Medical Licensing Board*, the Indiana Supreme Court adopted a narrow view of the rights encompassed by this provision, but nevertheless determined that they are judicially enforceable. Members of Med. Licensing Bd. of Ind. v. Planned Parenthood Great Nw., 211 N.E.3d 957, 961 (Ind. 2023).

87. *See generally* Robert Twomley, *The Indiana Bill of Rights*, 20 IND. L.J. 211 (1945).

88. Dennis Pennington, *A Letter*, 3 IND. Q. MAG. HIST. 28, 30 (1907).

following the path of his childhood friend, Albert Gallatin.[89] After establishing a farm and starting a family in Pennsylvania, Badollet moved to Indiana in 1804.[90] Badollet was adamantly opposed to slavery, and resolved that it should be banned in the new state of Indiana.[91]

While Badollet became a leader in Indiana's state and local politics, his friend Gallatin moved up in national politics and, by 1801, was serving as the U.S. Secretary of the Treasury under President Thomas Jefferson.[92] The two friends maintained a regular correspondence, with Badollet frequently sharing his efforts to quell the pro-slavery factions in Indiana.[93] For example, describing members of the Indiana legislature who in 1805 sought to modify the Northwest Ordinance to permit slavery, Badollet wrote, "[s]hallow politicians, who to obtain a transitory good are willing to entail on their Country a permanent evil."[94] A few years later, in 1809, Badollet wrote to Gallatin about his own petition opposing slavery in the territory, which at put him at odds with then-Governor William Henry Harrison.[95]

Badollet's correspondence during this period also demonstrates his understanding that the evils of slavery included sexual abuses as well as forced labor and loss of autonomy. For example, in a letter to the *Western Sun* newspaper in 1809, Badollet asked rhetorically, "[i]s a practice [such as slavery] which sears the heart and renders it callous to other's woes, no moral evil?" He continued, using the language

89. *See 1816 Constitutional Convention: Meet the Delegates*, IND. ARCHIVES & RECS. ADMIN., https://www.in.gov/iara/services-for-public/search-archives-holdings/constitution-and-legislation/1816-constitutional-convention-exhibit/ (last visited Jan. 5, 2025); *see also* William A. Hunter, *John Badollet's 'Journal of the Time I Spent in Stony Creeck Glades' 1793-1794*, 104 PENN. MAG. 162, 162 (1980).

90. *See* Hunter, *supra* note 89, at 162–63.

91. *See* Letter from John Badollet to Albert Gallatin (Jan. 1, 1806), *in* THE CORRESPONDENCE OF JOHN BADOLLET AND ALBERT GALLATIN, 1804-1836, at 64–65 (Gayle Thornbrough, ed., 1963) ("I will I suppose end my days here, provided the inhabitants, when arrived at the third grade of government do not admit the odious system of slavery . . . . ").

92. U.S. DEP'T OF THE TREASURY, *Prior Secretaries, Albert Gallatin*, https://home.treasury.gov/about/history/prior-secretaries/albert-gallatin-1801-1814 (last visited Jan. 5, 2025).

93. *See* THE CORRESPONDENCE OF JOHN BADOLLET AND ALBERT GALLATIN, 1804–1836 (Gayle Thornbrough, ed., 1963).

94. *See* Letter from John Badollet to Albert Gallatin (Aug. 31, 1805), *in* THE CORRESPONDENCE OF JOHN BADOLLET AND ALBERT GALLATIN, 1804–1836, at 49 (Gayle Thornbrough, ed., 1963).

95. *See* Letter from Albert Gallatin to John Badollet (May 12, 1809), *in* THE CORRESPONDENCE OF JOHN BADOLLET AND ALBERT GALLATIN, 1804–1836, at 104, 107 (Gayle Thornbrough, ed., 1963).

of the time, "[t]he existence of so many thousand mulattoes evinces a general dissoluteness of manners where slavery obtains, and the practice of selling and dooming to eternal slavery those unfortunate fruits of unbridled and savage lust followed by their parents themselves, has no parallel, except amongst the most savage nations of the earth . . . ."[96]

Badollet's correspondence also reveals his appreciation for women's rights. Little more than a decade after his time with the drafting committee, in 1828, Badollet wrote to Gallatin describing an excursion he took to New Harmony, Indiana, to hear suffragist and social reformer Fanny Wright speak. Wright was an advocate of both sexual and racial emancipation who had established a multi-racial utopian community in Nashoba, Tennessee to put into practice the principles that she espoused.[97] While Badollet did not wholeheartedly endorse all of her views, and particularly dissented from her opposition to marriage, he wrote that she was a "remarkable woman" and a "deep and fearless thinker."[98]

Badollet brought his unshakeable anti-slavery views and his concern about the sexual exploitation inherent in U.S. slavery to his work as chair of the committee drafting Indiana's Bill of Rights. Dennis Pennington, also a leading anti-slavery figure in Indiana, likewise contributed to the Bill of Rights committee.[99] While there is less information about other members of the Committee, all were active in opposing slavery in Indiana. Solomon Manwaring was a lawyer, judge and surveyor from Delaware, who was on the record as an opponent of slavery during debates of the Fugitive Slave Law.[100] John K.

96. *See* Letter from John Badollet to the Editor of the *Western Sun* (April 15, 1809), *in* THE CORRESPONDENCE OF JOHN BADOLLET AND ALBERT GALLATIN, 1804-1836, at 342–43 (Gayle Thornbrough, ed., 1963).

97. The Nashoba community disbanded in 1830, and Wright arranged for the remaining residents to be relocated to Haiti, where they would be free from enslavement. For more information on Fanny Wright's remarkable life, see CELIA MORRIS ECKHARDT, FANNY WRIGHT: REBEL IN AMERICA (1984).

98. *See* Letter from John Badollet to Albert Gallatin (Jan. 10, 1829), *in* THE CORRESPONDENCE OF JOHN BADOLLET AND ALBERT GALLATIN, 1804-1836, at 282 (Gayle Thornbrough, ed., 1963).

99. *See 1816 Constitutional Convention: Meet the Delegates, Dennis Pennington*, IND. ARCHIVES & RECS. ADMIN., https://www.in.gov/iara/divisions/state-archives/collections/1816-constitutional-convention-exhibit/#Dennis%20Pennington (last visited Jan. 6, 2025).

100. *See* Christopher David Walker, The Fugitive Slave Law, Antislavery and the Emergence of the Republican Party in Indiana 38–39 (Dec. 2, 2013) (Ph.D. dissertation, Purdue University). *See also* DUNN, *supra* note 78, at 404 (confirming that Manwaring opposed slavery).

Graham, a surveyor, civil engineer, teacher, poet, and farmer, was born in Pennsylvania and came to Indiana by way of Kentucky.[101] Representing Clark County in the Indiana House of Representatives, Graham was a friend and ally of Jonathan Jennings, a leader of the antislavery movement in Indiana who was elected president of the constitutional convention.[102] Daniel C. Lane, born in Virginia, was a surveyor, banker, and politician.[103] Two years after his stint on the drafting committee, when he was serving as the first State Treasurer of Indiana, he was found to be harboring a fugitive slave in flight from Kentucky.[104] James Smith, born in Virginia, was a Baptist minister. Though he served on the staff of pro-slavery William Henry Harrison, Smith joined others on the committee in supporting the inclusion of a Lockean guarantee in the state's bill of rights.[105]

Just four years after Indiana's constitutional convention, the two constitutional clauses discussed here—the Lockean guarantee and the prohibition on slavery—were put to the test in *State v. Lasselle*.[106] The plaintiff there claimed that he lived in a part of the state ceded by Virginia and had a vested right to own slaves that could not be divested by the Indiana state constitution.[107] He sued to assert his right to

101. *See 1816 Constitutional Convention: Meet the Delegates*, *John Graham*, IND. ARCHIVES & RECS. ADMIN., https://www.in.gov/iara/divisions/state-archives/collections/1816-constitutional-convention-exhibit/#John%20K.%20Graham (last visited Jan. 6, 2025).

102. *See Documents: Some Additional Jennings Letters*, 39 IND. MAG. HIST. 279 (reproducing seventeen letters from Jennings to John Graham).

103. *See 1816 Constitutional Convention: Meet the Delegates*, *Daniel C. Lane*, IND. ARCHIVES & RECS. ADMIN, https://www.in.gov/iara/divisions/state-archives/collections/1816-constitutional-convention-exhibit/#Daniel%20C.%20Lane (last visited Jan. 6, 2025).

104. *Walker*, *supra* note 100, at 66.

105. *See 1816 Constitutional Convention: Meet the Delegates*, *James Smith*, IND. ARCHIVES & RECS. ADMIN., https://www.in.gov/iara/divisions/state-archives/collections/1816-constitutional-convention-exhibit/#James%20Smith (last visited Jan. 6, 2025.) The Journal of the Convention indicates that the Preamble and Bill of Rights were drafted expeditiously between June 12 and June 14, 1816, and that no amendments were offered to Section 1, which included the inalienable rights provision. *See Journal of the Convention of the Indiana Territory* 13, 24 (1816), *available at* https://indianamemory.contentdm.oclc.org/digital/collection/p15078coll21/id/80672 (last visited Jan. 6, 2025). *See also* DUNN, *supra* note 78, at 430 (noting that the inalienable rights clause was added to the bill of rights with no opposition).

106. *See* State v. Lasselle, 1 Blackf. 60 (Ind. 1820).

107. *See id*. at 61.

continue to hold a woman named Polly "as his slave."[108] After quoting both the inalienable rights clause and the anti-slavery clause, the state supreme court concluded:

> It is evident that, by these provisions, the framers of our constitution intended a total and entire prohibition of slavery in this state; and we can conceive of no form of words in which that intention could have been more clearly expressed.[109]

The *Lasselle* case concerned the specific issue of ownership. However, it is also evident that in 1816, and certainly by 1851 when Indiana's second and current constitution was adopted, the full scope of slavery's evils were widely known and condemned.

C. The Social Context in Indiana: Rising Public Concern About All Aspects of Slavery, including Exploitation and Abuse of Female Slaves

There is no doubt that by the late 1850s, the American public was well aware that slavery was not limited to forced manual labor, but also encompassed sexual exploitation and abuse of enslaved women. Indeed, in 1856, this issue was discussed with evocative language by Massachusetts Senator Charles Sumner on the floor of the U.S. Senate during the debates ultimately leading to the passage of the Thirteenth Amendment.[110] Sumner's speech, which provoked an assault by another senator, was widely reported in local and regional newspapers across the country, including in Indiana.[111] But while that may have been a culminating event in the recognizing and publicizing the full scope of slavery, awareness of the dynamics of slavery was spread widely throughout the country, including in Indiana, much earlier.

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108. *Id*.

109. *Id.* at 62.

110. SPEECH OF HON. CHARLES SUMNER IN THE SENATE OF THE UNITED STATES, 19TH AND 20TH MAY, 1856, at 3–6, 9–14 (John P. Jewett & Co., 1856).

111. *See*, *e.g*., Jesse Conrade, *Congressional*, THE WABASH COURIER, June 7, 1856 (reporting on the "brutal assault" of Sumner); *Personal Attack on Mr. Summer*, THE WEEKLY REVEILLE, May 28, 1856 (describing Massachusetts officials' reaction to the assault); *Summers Inflammatory Speech*, THE INDIANA AMERICAN, May 30, 1856 (urging readers to obtain a copy of the speech from their elected representatives, as "[i]t is too long to be published in our paper and it is too valuable to be as ephemeral as a newspaper.").

As mentioned previously, John Badollet expressed this understanding as early as 1809 in his letter published in the *Western Sun*.[112] In the decades that followed, and certainly well before Indiana's 1851 constitution reaffirmed the two relevant provisions here, accounts of the more intimate and abusive conditions of slavery were in increasing circulation, often written by freed slaves. For example, published accounts of slave breeding, such as that put forward by the abolitionist and formerly enslaved man Moses Roper in 1838, were well known.[113] Roper—who was himself the offspring of an enslaver—wrote:

> The [slave] traders' will often sleep with the best looking female slaves among them, and they will often have many children in the year, which are said to be slaveholder's children, by which means, through his villany, he will make an immense profit in this intercourse, by selling the babe with its mother. They often keep an immense stock of slaves on hand [for this purpose].[114]

The plight of enslaved women was of particular interest to the growing number of women's anti-slavery societies. Active nationwide, these arose in Indiana beginning in the 1830s, spurred to a considerable degree by the migration of Quaker abolitionists to the state.[115] The Henry County Female Anti-Slavery Society was one such group, active in Indiana. The minutes of their meetings provide a further indication of the awareness and concern regarding the situation of enslaved women, and the resolve that ending slavery would also support women's personal bodily autonomy. For example, in 1838, the society recorded the following address by a speaker at one of their meetings:

> Mothers when you watch with fond delight your little prattling offspring playing in all the sportiveness of infantile carelessness around you . . . Oh! Then

112. *See* Letter from John Badollet to the Editor of the *Western Sun*, *supra* note 96.

113. *See* MOSES ROPER, NARRATIVE OF THE ADVENTURES AND ESCAPE OF MOSES ROPER FROM AMERICAN SLAVERY (2011). First published in the U.S. in 1838, the "Summary" by Harry Thomas appearing in this modern edition notes that the book was "extremely popular with abolitionist audiences," and "was published in 10 different editions between 1837 and 1856." *Id*. at 5.

114. ROPER, *supra* note 113, at 15.

115. *See* Kendra Clauser-Roemer, "'Tho' We are Deprived of the Privilege of Suffrage": The Henry County Female Anti-Slavery Society Records, 1841-1849, 22–24 (Feb. 2009) (M.A. thesis, Indiana University–Purdue University Indianapolis) (ScholarWorks).

> remember the slave, the wretched and bereaved slave mother and her children torn from her by the unrelenting and unfeeling master.[116]

The Society's minutes identify "[h]orrors uniquely experienced by enslaved women," include "insults of the tyrannical master."[117] And in a public statement published in 1848, the Society asserted that the system of slavery

> degrades woman to the level of a brute, while at its bidding she is bartered as an article of merchandize, doomed to drag out her life in a state of heathenish darkness, deprived of the privilege of learning to read the Bible—[and] robbed of every night—robbed as much as possible of the knowledge of her own degradation.[118]

By the late 1840s, the North Star, Frederick Douglass's newspaper, in wide circulation nationwide among abolitionists, was publishing regular acknowledgments of slave breeding and sexual abuse.[119] Similarly, in the 1840s, the *Indiana Free Labor Advocate*, an abolitionist newspaper, reprinted a pamphlet titled *Immediate, Not Gradual Abolition*, written by Elizabeth Heyrick in 1824. In it, Heyrick described the plight of an enslaved woman, taken from her husband and "forced to become the mistress to an overseer."[120]

Certainly by 1851, the year that Indiana's inalienable rights and anti-slavery clauses were reaffirmed in a constitutional re-drafting process, such accounts were well-known in the state. In fact, anti-

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116. *Id.* at 81.

117. *Id.* at 86. Note that the term "insult" includes offenses to one's honor, including assault.

118. *Id*. at 84–85. This correspondence also explicitly invokes "inalienable rights," stating that these protections should extend to "fugitives from slavery" who are seeking liberty and pursuing happiness. *Id*. at 84.

119. *See*, *e.g*., *The Anti-Slavery Bazaar at Minerva Hall*, N. STAR, Jan. 8, 1848 ("This is, indeed, an appropriate sphere for women; for their sisters in the South are the greatest sufferers by the infernal system of slavery. The very fact that they are under the control of licentious and profligate owners, furnishes a key by which to unlock those recesses of darkness and vice, to which the Spanish inquisition bore no parallel."); *Correspondence of the N.Y. Tribune: Southern Slavery, By An Eyewitness*, N. STAR, July 4, 1850 ("I have learned that there are numerous slaves in this city as white as their masters.").

120. Elizabeth Heyrick, Immediate, Not Gradual Abolition, or, an Inquiry into the Shortest, Safest, and Most Effectual Means of Getting Rid of West Indian Slavery 31–32 (1824). The pamphlet was reprinted in *The Free Labor Advocate* on August 19, 1847. *See* Clauser-Roemer, *supra* note 115, at 23.

slavery activists had asserted that this system violated the government's guarantees of inalienable rights.[121]

Unlike the 1816 Constitution, which did not go through a public referendum process, the 1851 Constitution was approved by a vote of the "people," i.e., white men who met a one-year residency requirement.[122] Women and Black Hoosiers were not eligible to participate in the 1851 vote.[123] The question of who qualified for inalienable rights was not so limited, however. As for whether women were protected by these constitutional clauses, in reaffirming these provisions in 1851, the head of the constitutional drafting committee stated that "when we employ in a Constitution the word 'all men' we use the word 'men' in a general sense. We include both sexes."[124] In any event, the question of women's inclusion in these provisions was resolved in 1984 when the state constitution's Lockean guarantee was amended to apply to "all people" rather than "all men."[125]

III. INDIANA ABORTION LITIGATION POST-*DOBBS*

Following the U.S. Supreme Court's 2022 ruling in *Dobbs*, the Indiana legislature acted quickly to adopt a state abortion law, Senate Bill 1 (SB 1), that was far more restrictive than had been previously allowed under federal law.[126] The new state law generally prohibited abortion but made exceptions in three narrow circumstances: "(1) when an abortion is necessary to save a woman's life or to prevent a serious health risk; (2) when there is a lethal fetal anomaly; or (3) when pregnancy results from rape or incest."[127] In adopting these restrictions, the state legislature retreated significantly from the accepted practice when the 1816 constitution was finalized, which criminalized abortion only after "quickening," usually between the 16th and 18th week of pregnancy.[128] It was in the decades after 1816 when successive Indiana legislatures enacted more restrictive laws cutting off

121. *See* Clauser-Roemer, *supra* note 115, at 84.

122. Vanderstel, *supra* note 77.

123. *See* Vanderstel, *supra* note 77 and accompanying text; *see also* KETTLEBOROUGH, *supra* note 49, at 304–09.

124. REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 958 (H. Fowler & A.H. Brown, eds., 1850).

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

126. Members of Med. Licensing Bd. of Ind. v. Planned Parenthood Great Nw., 211 N.E.3d 957, 961 (Ind. 2023).

127. *Id.*

128. *Id.* at 962.

access to abortions until, with the 1972 ruling in *Roe v. Wade*, the federal fundamental right precluded any further efforts to pursue criminal sanctions against pregnant women or providers for seeking or obtaining an abortion.[129]

Before SB 1 went into effect, it was challenged by a group of abortion providers led by Planned Parenthood Great Northwest.[130] The plaintiffs sought declaratory and injunctive relief, arguing *inter alia* that the new law violated the Lockean guarantee in the state constitution.[131] The case made its way to the Indiana Supreme Court, where the justices ruled that the plaintiffs had standing to sue, and that the state's inalienable rights clause created enforceable rights.[132] However, the court concluded that the plaintiffs did not have a reasonable likelihood of success on the merits of their claim that the new abortion restrictions violated rights protected by the state's Lockean guarantee.[133]

In reaching this conclusion, the Indiana court walked through the philosophical background of Lockean guarantees and prior Indiana case law under the provision.[134] The court noted the links between the inalienable rights clause and slavery in the *Lasselle* case, and acknowledged that the rights protected by the Lockean guarantee were not limited to slavery-related infringements.[135] The court concluded, however, that the application of the Lockean provisions to procreative decisions were extremely limited. According to the court, a bar on abortion with only limited exceptions to save the life of the mother or to avoid severe health effects was consistent with the inalienable rights clause.[136] On that basis, the court allowed the restrictive law banning most abortions in the state to go into effect.

In a partial concurrent, Justice Goff opined that the Lockean guarantee had been hollowed out by the majority, and that it should be read to "protect[] a woman's qualified right to bodily autonomy."[137] Justice Goff further argued that the 1984 amendment substituting the words "all people" for "all men" in the inalienable rights clause should be the

129. *See id.* at 963.
130. *See id.* at 964.
131. *See Members of Med. Licensing Bd. of Ind.*, 211 N.E.3d at 961, 964.
132. *See id.* at 965.
133. *See id.* at 976–77.
134. *See id.* at 967–70.
135. *See id.* at 973–75.
136. *See Members of Med. Licensing Bd. of Ind.*, 211 N.E.3d at 975–77.
137. *Id.* at 993.

"starting point" for the analysis, rather than the 1851 framing.[138] As she noted, women were completely excluded from the 1851 constitutional process.[139]

Strikingly absent from the justices' opinions is any mention of the 1816 constitution which introduced the Lockean guarantee. The court makes no note of the 1816 constitution's affirmative departure from the text of the Northwest Ordinance, nor does it explore the relationship between the state constitution's prohibition on slavery and the protection of inalienable rights.

In their survey of early Lockean guarantees, Calabresi and Vickery offer only speculation as to the reason why the Indiana Constitution (and others) contains both a Lockean Clause and a slavery prohibition.[140] They write, "it seems likely that the framers of the Indiana, Illinois, and Ohio state constitutions simply decided to write two different bans into their constitutions out of an abundance of caution to ensure that their constitutions did in fact abolish slavery."[141] Alternatively, they suggest, "[p]erhaps the framers of these state constitutions anticipated the need for more general language in their constitutions to provide a textual basis for broader antislavery decisions" addressing issues like comity or retroactivity.[142]

These speculations, offered without the support of any historical documentation, ignore the plain state constitutional text and the way in which these two provisions interact to build out the rights of Indiana residents. In fact, the drafting history and surrounding evidence set out above indicate that the Indiana court could have taken a different approach, tracing the steps of the Kansas Supreme Court and construing Indiana's Lockean guarantee, in light of the constitution's anti-slavery prohibition, to more broadly protect personal autonomy.

An alternative opinion in the Indiana case might have made the following points. The court might have drawn on the philosophical underpinnings of Indiana's Lockean guarantee to recognize the framers' underlying intention of limiting government intrusion into individuals' pursuits of life, liberty and happiness.[143] Knowing the 1816 framers' staunch opposition to slavery (a perspective that was reiterated in 1851), the court might have recognized that the drafters of the

138. *Id.*
139. *See id.* at 993.
140. *See* Calabresi & Vickery, *supra* note 51, at 1336–37.
141. *See id.* at 1336.
142. *See id.* at 1336–38.
143. *See, e.g.*, IND. CONST. art. 1, § 1.

1816 constitution took a twofold approach to the issue. First, they intended to prohibit all aspects of slavery and, second, with the inclusion of a Lockean guarantee, they intended to further recognize the inalienable rights of all members of the community, including the formerly enslaved.[144]

Reading the constitution as a whole, the court might have noted that the Lockean guarantee does not merely replicate the slavery prohibition, but it affirmatively recognizes and guarantees the very rights that had been violated by the institution of slavery, i.e., rights to personal autonomy, which would necessarily include procreative decisions.[145] These violations were well-known in Indiana in the 1800s. Notably, both the inalienable rights provisions and the slavery prohibition were included in the 1816 constitution, then reaffirmed in 1851, and again in 1984, with the amendment to clarify that the rights were available to "all people."

Failing to adopt this "whole document" approach, the Indiana court's decision upholding the state's abortion ban cited post-1816 legislation criminalizing abortion at various stages of pregnancy as evidence that the constitution did not protect procreative rights as an aspect of personal autonomy. But as the Kansas Supreme Court concluded when it considered similar evidence, legislation does not modify the meaning of the state constitution.[146] The Indiana legislature's repeated failures to honor the constitutional provisions protecting the personal autonomy encompassed in natural rights is not conclusive, particularly given that abortion was available well into a

144. *See id.*; *see also id.* at § 37.

145. The "whole document" approach is accepted in all fifty states as a basic method of constitutional construction. *See* Bulman-Pozen & Seifter, *supra* note 20, at 1891 (citing cases to demonstrate that "all fifty state high courts purport to interpret their state constitutions as a whole, rather than clause by clause"). The assumption that the Lockean guarantee and the slavery prohibition are merely duplicative violates that accepted approach, and ignores the way in which the conjunction of these provisions actually defines and deepens the protected rights. *See* Bulman-Pozen & Seifter, *supra* note 20, at 1897–98.

146. *See* Hodes & Nauser v. Schmidt, 440 P.3d 461, 490 (Kan. 2019) (noting that "the fact that an unconstitutional statute has been enacted and has remained in the statute books for a long period of time in no sense imparts legality. . . . Age does not invest a statute with constitutional validity, neither does it rob it of such validity.") (quoting State v. Hill, 369 P.2d 365, 370 (Kan. 1962)); *see also* Kligler v. Attorney General, 198 N.E.3d 1229, 1255 (Mass. 2022) ("[T]hat something may have been unprotected, or even prohibited, throughout history is not determinative, as our Constitution evolves alongside newly discovered insights about the nature of liberty.").

pregnancy at the time the 1816 constitution adopted the Lockean guarantee.[147]

In any event, historical evidence is just one part of a constitutional analysis. And a state court need not be bound to repeat history if that history reflects deep and offensive prejudices. The Massachusetts Supreme Judicial Court has articulated an alternative approach. In a veiled reference to *Dobbs*, the Massachusetts court opined in *Kligler v. Attorney General* that it would depart from a rigid history-bound interpretation of state constitutional language when that approach had the effect of limiting liberty rights.[148] The Massachusetts court wrote in dicta that when equality interests are involved, "the right at issue may be stated at a higher level of generalization," thus opening the court's analysis to include more modern understandings of rights.[149] In the Indiana abortion case, for example, instead of focusing on whether abortion has been explicitly recognized as a longstanding right, the proper question would be whether personal autonomy is a value enshrined in the constitution.[150]

In Indiana, these components cut against the constitutionality of the state's extreme abortion ban. The whole text of the constitution, its structure, its drafting history and historical context, the impact of a narrow ruling that ignores contemporary understandings of political and social equality, and the value and prominence accorded inalienable rights in the state constitution, might all be taken to suggest that the state's constitution was intended to protect personal autonomy, including decisions regarding procreation.

The Indiana Supreme Court took a different approach, however, and denied the request to enjoin the operation of the state's abortion ban. The restrictive law went into effect. Challenges might go forward on an "as applied" basis, but those will necessarily raise individual circumstances under the restrictive law rather than challenge its broader impact.[151]

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147. *See* Members of Med. Licensing Bd. of Ind. v. Planned Parenthood Great Nw., 211 N.E.3d 957, 962 (Ind. 2023).

148. *See Kligler*, 198 N.E.3d at 1252 ("By phrasing the right more broadly, and considering modern precedent alongside history, we are able to cleanse our substantive due process analysis of the bigotry that too often haunts our history, and to ensure that those who were denied rights in the past due to outmoded prejudices are not denied those rights in the future.").

149. *Id*. at 1250.

150. *See, e.g., Hodes & Nauser*, 440 P.3d at 486 (concluding that Kansas's Bill of Rights protects personal autonomy, including decisions concerning reproduction).

151. *See Members of Med. Licensing Bd. of Ind.*, 211 N.E.3d at 965.

CONCLUSION

This article argues that a close examination of drafting context, constitutional structure, and constitutional text is critical to state courts' consideration of legal challenges to restrictive abortion policies post-*Dobbs*. In particular, this article draws on historical context to focus on the interrelationship between the Indiana state constitution's slavery prohibitions and its Lockean guarantee, an important key to ascertaining the principles that are enshrined in the state constitution.[152]

Seventeen state constitutions include both slavery prohibitions and Lockean guarantees. The shared history of these provisions suggests that they should be considered and construed in tandem. Slavery prohibitions put an end to the legal practice of slavery, an institution which was well-understood by legislators and the public to include sexual abuse as well as other forms of exploitation. The Lockean guarantees then ensured that the rights that had been violated by slavery—including the rights to be free of sexual abuse and exploitation, and to make one's own procreative decisions—were extended to all and recognized as inalienable.

Some courts have found that Lockean guarantees alone are sufficient to protect procreative rights.[153] Certainly, the history and wording of these provisions provide ample support for this conclusion. No more is needed to justify that outcome. Likewise, some scholars forcefully argue that a prohibition on slavery, as in the federal Thirteenth Amendment, is alone sufficient to establish a right to abortion.[154] There is also support for this assertion.[155] But the presence of both provisions in seventeen state constitutions provides particularly strong support for the protection of procreative rights in those states. A thorough exploration of the historical context of those provisions, necessarily on a state-by-state basis but also with an appreciation of the

152. On the important distinction between constitutional principles and application, see Planned Parenthood Ass'n of Utah v. State, 554 P.3d 998, 1028–29 (Utah 2024). According to that court, in construing Utah's 1895 constitution, "[o]ur interpretive task is to determine what principles the people of Utah enshrined in the constitution. And once we determine those principles, it is our duty to apply them to the cases before us. This is more than an academic exercise. Failure to distinguish between principles and application of those principles would hold constitutional protections hostage to the prejudices of the 1890s." *Id.* at 1028–29.

153. See, e.g., Hodes & Nauser, 440 P.3d.at 502.

154. See discussion *supra* at note 24 and accompanying text.

155. See discussion *supra* at note 25–27 and accompanying text.

shared history that transcends state borders, is likely to reinforce those conclusions.

States where this research approach might be fruitfully pursued in the near term include North Dakota, Wisconsin, and Iowa. The constitutions of these states include both slavery prohibitions and Lockean guarantees.[156] In addition, access to abortion has been vigorously contested in each of these states post-*Dobbs*.

This article models such an investigation, drawing on the contrasting examples of litigation in Kansas and in Indiana to demonstrate in detail how such an analysis might be conducted and the ways in which it would effectuate the principles enshrined by state constitutional framers. This deeper examination of these related state constitutional provisions—provisions that are present together in seventeen state constitutions —illuminates their meaning and appropriate application in today's world.

156. *See* N.D. CONST. art. 1, §§ 1, 6; *see also* WIS. CONST. art. 1, §§ 1, 2; IOWA CONST. art. 1, §§ 1, 23.