

# ARTICLE

## Rediscovering the State Constitutional Right to Happiness and Safety

By JOSEPH R. GRODIN\*

Most people, at least most lawyers, are aware that of the trilogy of rights made famous by the Declaration of Independence—life, liberty, and the pursuit of happiness—only the first two made it into the Federal Constitution, felicity giving way, in the Fifth Amendment's due process clause, to a more sober concern for the rights of property.<sup>1</sup> What most people, even most lawyers, are less likely to know is that fully two thirds of the state constitutions contain provisions which either declare the right of persons to pursue happiness or (along with safety) to actually "obtain" it.

Scholars, as well as lawyers, have tended to ignore these state constitutional provisions, apparently regarding them as little more than pious echoes of the Declaration. These provisions had their origin in constitutional documents which preceded the Declaration and deserve consideration as independent sources of constitutional rights. This article explores the background and potential contemporary meaning of this long neglected constitutional language. First, I provide a typology of the various constitutional provisions as they currently exist. Second, I examine their history, to show their derivation and changes over time. Third, I inquire into the philosophical heritage of the relevant language. Fourth, I explore the manner in which courts have treated that language over time. And finally, I

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1. It is not only happiness which failed to make it into the Constitution, but, more broadly, the concept of inalienable rights and the social compact. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); U.S. CONST. amend. V; Dan Himmelfarb, *The Constitutional Relevance of the Second Sentence of the Declaration of Independence*, 100 YALE L.J. 169, 184-85 (1990).

consider what relevance the language might have for modern state constitutional jurisprudence.

## I. Constitutional Typology

References to happiness, sometimes in conjunction with safety, are found in two principal types of state constitutional language, though within each type variations appear. First, there are what I will call "governmental purpose" provisions, sometimes contained in a preamble to the constitution but often in the body of the constitutional Declaration of Rights (or Bill of Rights) which declare that happiness, or happiness and safety, is a goal of government.<sup>2</sup> Typical is the Vermont Declaration of Rights, 1777, which states:

Whereas, all government ought to be instituted and supported, for the security and protection of the community, as such, and to enable the individuals who compose it, to enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man; and whenever those great ends of government are not obtained, the people have a right, by common consent, to change it, and take such measures as to them may appear necessary to promote their safety and happiness.<sup>3</sup>

Similarly, the Rhode Island Constitution includes: "All free governments are instituted for the protection, safety, and happiness of the people. All laws, therefore, should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens."<sup>4</sup>

The second type of constitutional language, which I will call "rights language," is found in the declaration of rights provisions of state constitu-

2. The Declaration of Independence itself contains such language, asserting that governments are instituted among men "to secure these rights . . ." (i.e., inalienable rights including life, liberty and the pursuit of happiness) and 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.

THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

3. 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 319 (1971).

4. R.I. CONST. art. I, § 2 (amended 1986). In 1986, section 2 was amended to add:

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. No otherwise qualified person shall, solely by reason of race, gender or handicap be subject to discrimination by the state, its agents or any person or entity doing business with the state. Nothing in this section shall be construed to grant or secure any right relating to abortion or the funding thereof.

R.I. CONST. art. I, § 2.

The Oregon Constitution similarly declares that "all free governments are founded on [the people's] authority and instituted for their peace, safety, and happiness." OR. CONST. art. I, § 1.

tions, and is part of a statement of rights characterized as “inalienable,” “inherent,” or “natural.” These provisions typically make reference to life, liberty and property, but approximately thirty of them make reference also to happiness, or to happiness and safety. Of these, approximately one half refer to the right to pursue and obtain happiness and safety, or some variation thereof; and the other half refer to pursuit of happiness without mention of obtaining it, and without mentioning safety.

A typical example of the “happiness and safety” formulation is contained in the Iowa Constitution: “All men are, by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.”<sup>5</sup> The Iowa language (sometimes with a more extensive statement of rights) appears in the constitutions of California, Colorado, Nevada, New Jersey, New Mexico, North Dakota, Ohio, and Vermont.<sup>6</sup> There are, in addition, six states whose constitutions contain some variation of that form. In Virginia and West Virginia persons are said to have the rights to “the enjoyment of life and liberty, with the *means* of acquiring and possessing property, and of pursuing and obtaining happiness and safety.”<sup>7</sup> In Massachusetts people have the right of “seeking and obtaining *their* safety and happiness,”<sup>8</sup> and in Florida, the right “to pursue happiness, to be rewarded for industry, and to acquire, possess, and protect property.”<sup>9</sup> The New Hampshire Constitution lists “the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, *in a word*, of seeking and obtaining happiness.”<sup>10</sup> In Idaho, persons have the right of “pursuing” happiness and “securing” safety.<sup>11</sup>

Typical of the “pursuit of happiness” formulation is the language from the Illinois Constitution of 1970: “All men are by nature free and independent and have certain inherent and inalienable rights among which are life, liberty and the pursuit of happiness. To secure these rights and the protection of property, governments are instituted among men, deriving their just powers from the consent of the governed.”<sup>12</sup> Again, variations

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5. IOWA CONST. art. I, § 1.

6. See CAL. CONST. art. I, § 1; COLO. CONST. art. II, § 3; NEV. CONST. art. I, § 1; N.J. CONST. art. I, § 1; N.M. CONST. art. II, § 4; N.D. CONST. art. I, § 1; OHIO CONST. art. I, § 1; VT. CONST. ch. I, art. 1.

7. VA. CONST. art. I, § 1 (emphasis added); W. VA. CONST. art. III, § 1.

8. MASS. CONST. pt. I, art. 1 (emphasis added).

9. FLA. CONST. art. I, § 2.

10. N.H. CONST. pt. I, art. 2 (emphasis added). This provision is unchanged since 1784.

11. IDAHO CONST. art. I, § 1.

12. ILL. CONST., art. I, § 1. The Arkansas, South Dakota, and Wisconsin constitutions contain similar language. ARK. CONST. art. II, § 2; S.D. CONST. art. I, § 1; WIS. CONST. art. I, § 1.

appear. Citizens of Pennsylvania and Arkansas, for example, are said to have the right of "pursuing their own happiness,"<sup>13</sup> Kentuckians the right of "seeking and pursuing their safety and happiness,"<sup>14</sup> and Montanans the right of "seeking their safety, health and happiness in all lawful ways."<sup>15</sup> The Wyoming Constitution refers to the "pursuit of happiness" in a statement about equality: "In their inherent right to life, liberty and the pursuit of happiness, all members of the human race are equal."<sup>16</sup> And the two most recent state constitutions—those of Alaska and Hawaii—combine a statement of rights, including the pursuit of happiness, with a reference to corresponding obligations and responsibilities of citizens.<sup>17</sup> Finally, there are a number of instances in which "governmental purpose" language appears together, in the same constitution, with "rights" language. This is true, for example, of the Virginia Declaration of Rights.<sup>18</sup>

What, if anything, is to be made of all this language in the modern constitutional context? Should it be regarded (a) as an interesting relic of a natural rights/social contract philosophy which has no contemporary relevance; (b) as a statement about the objectives of government which may be viewed as a directive to the legislative and administrative branches of government, but not susceptible of application by the judicial branch; and/or (c) as a statement of rights capable of being enforced, in some situations, by the courts? If the latter, should courts view the language as describing rights *against* government, rights to *affirmative* governmental action, rights which trigger heightened "equal protection" scrutiny,<sup>19</sup> or even rights ca-

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The Alabama Constitution is identical except that it omits the final sentence. ALA. CONST. art. I, § 1. Examples of constitutions with minor variations include those of Missouri and Oklahoma, both of which add "and the enjoyment of the gains of their own industry," and Nebraska, which adds the "right to keep and bear arms." MO. CONST. art. I, § 2; OKLA. CONST. art. I, § 2; NEB. CONST. art. I, § 2. The Alaska Constitution declares: "This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry . . ." ALASKA CONST. art. I, § 1.

13. ARK. CONST. art. I, § 1; PA. CONST. art. I, § 1. The Pennsylvania Constitution, as amended in 1790, reads: "[A]ll men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." PA. CONST. art. I, § 1. The Arkansas Constitution has contained nearly identical language since 1874. ARK. CONST. art. II, § 2.

14. KY. CONST. § I.

15. MONT. CONST. art. II, § 3.

16. WYO. CONST. art. I, § 2.

17. ALASKA CONST. art. I, § 1; HAW. CONST. art. I, § 2.

18. See VIRGINIA DECLARATION OF RIGHTS (1776), reprinted in 1 SCHWARTZ, *supra* note 3, at 234-36.

19. The term "equal protection" is in quotes because some state constitutions state their equality principle in different terms. See e.g., *McKenney v. Byrne*, 412 A.2d 1041, 1047 (N.J. 1980) (holding that the New Jersey Constitution implicitly includes a "concept of equal protection").

pable of being asserted against non-governmental actors? Viewed either negatively or affirmatively as a statement of judicially enforceable rights, how should the rights be defined? And, in regard to all of these questions, what weight, if any, should be given to the differences that appear in language? Examining the origins of the relevant language in constitutional history and political thought is a first step towards addressing these questions.<sup>20</sup>

## II. Origins: Constitutional History

On May 10, 1776, the Second Continental Congress adopted a resolution recommending to the respective assemblies and conventions of the colonies that they "adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general."<sup>21</sup>

Five days later, on May 15, 1776, the Colonial Convention in Virginia adopted two resolutions.<sup>22</sup> One instructed Virginia delegates in the Continental Congress to propose a Declaration of Independence.<sup>23</sup> The other called for the appointment of a committee to prepare a Declaration of Rights and a constitution for the State of Virginia.<sup>24</sup> The committee's draft was presented to the convention on May 27, discussed from June 3 to 5, and adopted (with amendments unrelated to the key language) on June 12, all of this occurring, it should be noted, well before Jefferson's draft of the Declaration of Independence.<sup>25</sup>

The Virginia Declaration of Rights was "the first true Bill of Rights in the modern American sense, since it is the first protection for the rights of the individual to be contained in a constitution adopted by the people acting through an elected convention."<sup>26</sup> Its opening lines and first three paragraphs read as follows:

A Declaration of Rights made by the Representatives of the good people of Virginia, assembled in full and free Convention; which rights do pertain to them and their posterity, as the basis and foundation of Government.

1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of

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20. I am indebted in this effort to the stimulating work of Howard Mumford Jones. *See generally* HOWARD MUMFORD JONES, *THE PURSUIT OF HAPPINESS* (1953).

21. 1 SCHWARTZ, *supra* note 3, at 229.

22. *See id.* at 231.

23. *See id.*

24. *See id.*

25. *See id.* The body of the new state constitution was adopted on June 29, 1776. *See id.*

26. *Id.* at 231-34.

society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing [sic] and obtaining happiness and safety.

2. That all power is vested in, and consequently derived from, the People; that magistrates are their trustees and servants, and at all times amenable to them.

3. 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, and is most effectually secured against the danger of maladministration; and that, whenever any Government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and inalienable right, to reform, alter, or abolish it, in such manner as shall be judged most conducive to the publick [sic] weal.<sup>27</sup>

Meanwhile, the May 27 draft of the Virginia Declaration found its way to Philadelphia, where a similar convention was in progress.<sup>28</sup> The Pennsylvania Declaration of Rights, adopted shortly thereafter, contained as article I the following language: "That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety."<sup>29</sup>

Vermont, in article 1, section 1 of its 1777 constitution, followed the Pennsylvania language closely.<sup>30</sup> Massachusetts, in 1780, modified the last phrase to read "in fine, that of seeking and obtaining their safety and happiness."<sup>31</sup> And in 1783, New Hampshire, in its second constitution (the first did not contain what the second called, for the first time in American constitutional history, a "Bill of Rights"), changed the language to read "and in a word, of seeking and obtaining happiness."<sup>32</sup>

During the pre-federal era, this "happiness and safety" form which existed in these five states was the only form of "rights" language to ap-

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27. *Id.* at 234 (quoting the VIRGINIA DECLARATION OF RIGHTS, 1776). Subsequent provisions of the Declaration pertain either to general principles of governance (such as the separation of powers) or to specific rights, such as the right to jury trial, bail, freedom of the press, and the free exercise of religion. *See id.* at 234-36.

28. *See* ROBERT ALLEN RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS 1776-1791* 43-44 (1955) ("[T]he Virginia Declaration of Rights was broadcast throughout the colonies in private letters and public print.").

29. *See* 1 SCHWARTZ, *supra* note 3, at 264.

30. *See id.* at 322.

31. *See id.* at 340.

32. *See id.* at 374-75.

pear in state constitutions. Other states which adopted constitutions before 1790 either contained no declaration or "bill of rights,"<sup>33</sup> or included one that contained no reference to either happiness or safety.<sup>34</sup>

The "pursuit of happiness" form made its first appearance in Pennsylvania, which had been a pioneer in the "pursuing and obtaining happiness and safety" language. In 1790, that state, as a result of a constitutional convention, adopted a new constitution and changed article I, section 1 to declare that persons have the right of "pursuing their own happiness."<sup>35</sup>

Thereafter, during the nineteenth century, the "happiness and safety" and "pursuit of happiness" forms competed with one another, sometimes within the same state. In 1802, Ohio adopted its first constitution, using the original Pennsylvania language ("pursuing and obtaining happiness and safety"), as did Indiana in 1816, and Maine in 1819.<sup>36</sup> The Illinois Constitution of 1818, however, followed the language of the second Pennsylvania Constitution ("pursuing their own happiness"), as did the Arkansas Constitution of 1836 and the Florida Constitution of 1838.<sup>37</sup>

The original Pennsylvania language reemerged in the next decade, with Iowa's Constitution of 1846 and California's Constitution of 1849.<sup>38</sup> Californians acquired the right to pursue and obtain both happiness and safety. Wisconsin opted for the simple "pursuit of happiness," as did Indiana (by amendment) in 1851, Missouri in 1865, and Kansas in 1861.<sup>39</sup>

All of these variations appear to be quite deliberate. And read literally, they appear to be meaningful as well. The Virginia formulation, if read literally, guarantees the "means" of pursuing and obtaining happiness and safety.<sup>40</sup> The right to pursue and "obtain" happiness appears to be something more than the right simply to pursue it, and the right to pursue and obtain safety implies something more than individual autonomy. Happiness conjoined with safety appears to be something more than happiness alone, and the right to pursue and obtain safety (viewed separately from happiness) suggests something more positive than freedom from govern-

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33. In addition to New Hampshire's first constitution, this was also true in South Carolina, New Jersey, Georgia, and New York. *See id.* at 325, 374.

34. *See id.* at 276-90.

35. PA. CONST. art. I, § 1.

36. IND. CONST. of 1816 art. I, § 1 (1851); ME. CONST. art. I, § 1 (amended 1993); OHIO CONST. of 1802 art. VIII, § 1 (1851).

37. ARK. CONST. of 1836 art. II, § 1 (1874); FLA. CONST. of 1838 art. I, § 1 (1968); ILL. CONST. of 1818 art. VIII, § 1 (1970).

38. CAL. CONST. of 1849 art. I, § 1 (1879); IOWA CONST. of 1846 art. I, § 1 (1857).

39. IND. CONST. art. I, § 1 (amended 1984); KAN. CONST. bill of rights, § 1; MO. CONST. of 1865 art. I, § 1 (1945); WIS. CONST. art. I, § 1 (amended 1986).

40. A more plausible reading is that the word "means" refers to the right of acquiring and possessing property, and its apparent application to happiness and safety represents a syntactical error.

ment regulation. Similarly, the right of persons to pursue “their own” happiness, absent reference to the right to “obtain” it, or to safety, suggests a more individualistic perspective, arguably, than other forms. Finally, the introductory phrase “in fine”<sup>41</sup> or “in a word”<sup>42</sup> suggests that the right to seek and obtain safety and happiness may have been viewed as derivative from the rights to life, liberty and property, rather than as an independent right.

Whether it is appropriate to rely upon these semantic differences, given what we know about their provenance, is a legitimate question. Knud Haakonssen makes the point that while “many people certainly talked” of the rights of man in the eighteenth century, “few people understood exactly what they were talking about.”<sup>43</sup> It is possible that these differences reflect aesthetic tastes more than variations in understandings about the substance of rights. In any event, the question calls for an examination of the intellectual milieu.

### III. Origins: History and Political Theory

It is useful at the outset to disentangle our inquiry into the roots of the happiness and safety language from the more traditional inquiry into the origins of Jefferson’s language for the Declaration of Independence. Scholars engaged in the latter enterprise have almost invariably bypassed the Virginia Declaration of Rights in their search for the philosophical roots of that felicitous phrase.<sup>44</sup> But, as we have seen, it is the Virginia Declaration, not the Declaration of Independence, that formed the model for state constitutions in the pre-federal era and, so far as we know, Thomas Jefferson played no role in the drafting of that document.

Credit for the authorship of the Virginia Declaration of Rights, at least the portion that contains the happiness and safety language, goes by all

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41. MASS. CONST. pt. I, art. 1.

42. N.H. CONST. pt. I, art. 2.

43. Knud Haakonssen, *From Natural Law to the Rights of Man: a European Perspective on American Debates*, in A CULTURE OF RIGHTS 19, 61 (Michael J. Lacey et al. eds., 1991). A similar point is expressed in JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 292 (1996).

44. The extent to which Jefferson’s draft of the Declaration of Independence was influenced by George Mason’s language is a matter of dispute among historians. Compare JULIAN P. BOYD, DECLARATION OF INDEPENDENCE 16 (1943) (insisting that Jefferson’s debt to Mason was “not yet proved”) with PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 133 (1997) (observing that an examination of the various drafts of the Declaration reveals that they “were based upon the . . . Mason / committee draft of Virginia’s Declaration of Rights.”). In Maier’s view, Jefferson’s “rewriting of Mason produced a more memorable state of the same content. Less was more.” MAIER at 134.



historical accounts to George Mason,<sup>45</sup> and so the inquiry must be where Mason got that language. Unfortunately, we know far less about Mason than we do about Jefferson, and what we do know casts little light on that inquiry.<sup>46</sup>

We know that the George Mason was born in 1725, the fourth in a line of George Masons that began when his great-grandfather came to Virginia from England in the middle of the seventeenth century, obtained a land patent, and became a successful tobacco farmer. His grandfather and father were both prominent Virginia citizens, active in society and in the political affairs of the colony. His father died when he was ten years old, leaving him to be raised by his mother and an uncle by marriage named John Mercer.

Unlike Jefferson, Mason had no formal education. Most likely he was tutored at home, as was the practice within the Virginia landed aristocracy, under the guidance of his guardian. John Mercer was a prominent lawyer and patriot, a well-read man who maintained an extensive library, but as the library burned without a surviving catalogue, we have no record of its contents. Mason was an active correspondent, and a number of his letters have survived, but these are mainly personal or practical, containing (unlike Jefferson's correspondence) little in the way of philosophical reflection. The only direct evidence we have of his reading consists of a volume of Cicero's Orations bearing his name and the date of acquisition.<sup>47</sup>

Mason was politically active, apparently out of a sense of obligation. George Washington was a close neighbor, and it is likely that the two were friends at an early age.<sup>48</sup> In 1748, at the age of 23, Mason lost a bid for election to the House of Burgesses in Fairfax County. By the late 1750s, however, Mason succeeded in winning that post. From time to time Mason held other public positions, including membership on the Board of Trustees of the town of Alexandria. At age 25, he married a wealthy heiress, and became active as a member of the Ohio Company in the colonization of Virginia's western territory. He was later to serve, along with Jefferson,

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45. See 1 SCHWARTZ, *supra* note 3, at 232 ("[T]he Declaration was virtually all of Mason's work"); see also RUTLAND, *supra* note 28, at 33-34.

46. The summary of Mason's life which follows is based upon PAPERS OF GEORGE MASON (Rutland ed., Univ. of North Carolina Press 1970) (1787) and upon the following biographies: HELEN HILL, GEORGE MASON, CONSTITUTIONALIST (1938); HELEN HILL MILLER, GEORGE MASON, GENTLEMAN REVOLUTIONARY (1975); KATE MASON ROWLAND, GEORGE MASON, RELUCTANT STATESMAN (1961); ROBERT A. RUTLAND, THE LIFE OF GEORGE MASON 1725-1792 (1892).

47. The volume is contained in the small museum at Gunston Hall Plantation, Mason's home in northern Virginia.

48. See 1 ROWLAND, *supra* note 46, at 54.

as a moderate bridge between the conservative politics of Virginia and the more radical politics of what became West Virginia.<sup>49</sup>

The Virginia Declaration of Rights was not Mason's first effort at drafting political documents. He had a reputation as a patriot-spokesman, and prior to the Revolution authored a number of pieces criticizing English rule. The most important of these were the Fairfax Resolves, a set of resolutions drafted by Mason and adopted in July 1774 by the citizens of that county in protest of treatment by England. Those resolutions made reference to the "safety and happiness of the community" as consisting in that part of the English Constitution which provided for lawmaking through elected representatives, "for if this part of the Constitution was taken away, or materially altered, the government must degenerate either into an absolute and despotic monarchy, or a tyrannical aristocracy, and the freedoms of the people be annihilated."<sup>50</sup> This ode to process appears to be the only reference to happiness or safety in Mason's writings prior to the Revolution.

Mason played a leading role in the Revolution, and became a delegate to the Federal Constitutional Convention in Philadelphia, where he established a reputation as a leading anti-federalist. The proposed Constitution, he believed, was flawed both in giving the federal government too much power and in failing to include a statement of rights. He refused to sign the document for these reasons, and during the battle over ratification, became one of the Constitution's most articulate opponents. Recognizing that ratification was inevitable, however, Mason served on the drafting committee appointed by the Virginia Ratifying Convention to make recommendations for amendments.<sup>51</sup>

Predictably, the Virginia Ratifying Convention recommended that the Federal Constitution be amended to include the language of the Virginia Declaration: a statement of the "essential and unalienable rights of the people," including "the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety."<sup>52</sup> And surprisingly, James Madison—formerly an opponent of a Bill of Rights, but by 1789 a pragmatic Virginia representative to the first Congress of the United States—proposed that language as part of an amended preamble to the Federal Constitution.<sup>53</sup> It was when Congress decided to adopt a separate Bill of Rights in lieu of Madison's

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49. *See id.* at 419.

50. *Id.* at 419.

51. *See supra* text accompanying note 46.

52. *See* 1 SCHWARTZ, *supra* note 3, at 762-65, 840.

53. *See id.* at 983-84.

list of constitutional amendments that the language George Mason drafted fell by the boards.<sup>54</sup>

What can be said, then, about the sources of Mason's inspiration? It would be a mistake to try to pin its derivation upon any particular individual or philosophical tradition. The eighteenth century was enormously rich in ideas.<sup>55</sup> The leaders of the American Revolution were remarkably well-read and thoughtful people, and their rhetoric regarding rights was often more enthusiastic than precise.<sup>56</sup> References to happiness as a political goal "are everywhere in American political writings . . . as anyone can see who bothers to look."<sup>57</sup> There are, however, several strands of classical and enlightenment thought which carry particular resonance with the language in question.

For Aristotle, "eudaimonia"—"happiness" or "flourishing"—was a core concept in defining both human perfection and the goal of community.<sup>58</sup> Just as human perfection consists in the attainment of one's natural ends, i.e. the full realization of one's nature, so the perfect society is one in which is conducive to that attainment.<sup>59</sup> "[W]hat we count as self-sufficient is not what suffices for a solitary person by himself, living an isolated life, but what suffices also for parents, children, wife and in general for friends and fellow citizens, since a human being is a naturally political [animal]."<sup>60</sup> By extension, social justice is identified with "the things that tend to produce and safeguard happiness or parts of happiness for the political community."<sup>61</sup> The end (goal) of the best constitution is happiness, defined as "the perfect [or complete] activity and employment of virtue."<sup>62</sup> It has been suggested that Aristotle's theory of justice "does require that the happiness and virtue of each and every member of the polis be protected by the constitution, and in this sense entails a respect for indi-

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54. *See id.*

55. For an extensive compendium of eighteenth century sources, see generally Herbert L. Ganter, *Jefferson's "Pursuit of Happiness" and Some Forgotten Men*, 16 WM. & MARY C. Q. HIST. MAG. 558 (1938).

56. *See* Harry N. Scheiber, *Economic Liberty and the Constitution*, in *ESSAYS IN THE HISTORY OF LIBERTY* 75, 82 (1988) ("The rhetoric of rights, equality, opportunity, happiness, and liberty is necessarily ambiguous; and so to draw inferences and connect ideas with great confidence is a misguided quest.").

57. MAIER, *supra* note 44, at 170. For a collection of references, see generally Ganter, *supra* note 55.

58. *See* FRED D. MILLER, JR., *NATURE, JUSTICE, AND RIGHTS IN ARISTOTLE'S POLITICS* 18-19 (1995).

59. *See id.* at 19.

60. ARISTOTLE, *ETHICA NICOMACHEA*, quoted in MILLER, *supra* note 58, at 50.

61. *Id.* at 68.

62. ARISTOTLE, *POLITICS*, quoted in MILLER, *supra* note 58, at 157.

vidual rights.”<sup>63</sup> But Aristotle’s theory of government also entails the concept of *mutual*, rather than solely individual, advantage.<sup>64</sup>

The Roman classical tradition, with which educated 18th century Americans were quite familiar, contained the concept *salus populi*.<sup>65</sup> The Latin “salus” embraced physical safety, but also more; its root, “sar,” connotes being “safe and sound,” a “sound or whole condition,” including health, welfare, and property preservation as well.<sup>66</sup> The term “welfare of the people” perhaps best captures the concept.<sup>67</sup>

In the eighteenth century, the *salus populi* was incorporated into the social contract, or natural rights, philosophy of the period.<sup>68</sup> Both the “governmental purpose” language and the “rights” language of the relevant portions of state constitutions appear in contexts which imply or articulate some version of that philosophy: that men in a state of nature have certain rights which “inhere” in them because they are human beings, and which are “inalienable” in the sense that men continue to possess those rights even after they have subjected themselves to common governance.

John Locke was certainly among the most influential of the social contract theorists in revolutionary America, and the language of the Virginia Declaration identifying natural rights as including “enjoyment of life and liberty, with the means of acquiring and possessing property” bears close resemblance to Locke’s famous trilogy.<sup>69</sup> But it is difficult to find in Locke any strong support for the “persuing [sic] and obtaining happiness and safety” language which follows. It is true that at times, in his *Second Treatise on Government*, Locke uses the term “property” to convey rights in one’s person as well as in tangible goods;<sup>70</sup> and that he makes reference to the “Peace, Safety, and publick [sic] good of the People” as being the “end” of Society.<sup>71</sup> For references to “happiness,” however, one must go to his *Essay Concerning Human Understanding*, where he declares at one point that “Man in his original Structure and Constitutions, was de-

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63. See MILLER, *supra* note 58, at 138.

64. See *id.* at 211.

65. See WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 52 (1996).

66. SWEIS & SHORT’S *LATIN DICTIONARY* (Oxford 1869).

67. See NOVAK, *supra* note 65, at 52-53.

68. See *id.*

69. See JOHN LOCKE, *THE SECOND TREATISE ON CIVIL GOVERNMENT* 9 (1690).

70. *Id.* at 296 (“By property, I must be understood here as in other places to mean that property which men have in their persons as well as their goods.”). At other times, however, Locke appears to use the term in a narrower sense, as in the proposition that men “unite for the mutual preservation of their lives, liberties and estates, which I call by the general name—property.” *Id.* at 70. See generally JEROME HUYLER, *LOCKE IN AMERICA: THE MORAL PHILOSOPHY OF THE FOUNDING ERA* (1995).

71. *Id.* at 72.

signed . . . and created solely for the enjoyment of his own Happiness."<sup>72</sup> The *Essay* is more epistemological than political, however, and while its language certainly establishes Locke as a contributor to the stream of thought culminating in the Virginia Declaration, it hardly supports the suggestion of some "Lockeophiles" that the quest for roots need go no further.<sup>73</sup>

The writings of Francis Hutcheson, a key figure in the Scottish Enlightenment, were also widely read in the American colonies, and the parallels between his language and the aspirational language found in the early state constitutions is, in some respects, striking.<sup>74</sup> In his 1747 essay *A Short Introduction to Moral Philosophy*, Hutcheson wrote that "the end of all civil power is acknowledged by all to be the safety and happiness of the whole body; [and] any power not naturally conducive to this end is unjust; which the people, how rashly granted it under an error may, justly abolish again, when they find it necessary to their safety to do so."<sup>75</sup> This proposition about the ends of government is in turn premised upon Hutcheson's view of the nature of men—that they are "necessarily determined to pursue their own happiness."<sup>76</sup>

When Hutcheson wrote that the end of civil power is the "safety and happiness of the whole body,"<sup>77</sup> he was asserting more than a libertarian principle that government should let people alone. "Locke's system of government began with the individual's autonomy. Hutcheson's begins

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72. JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING*, Bk. II, para. 243 (Fraser ed., Dover 1959) (1690). See also *id.* at para. 52 (referring to "happiness" and the "pursuit of happiness").

73. See HUYLER, *supra* note 70, at 247 ("Not very much need be made of Jefferson's decision to substitute 'the pursuit of happiness' for Locke's own formulation . . . . It was, as John Dickinson explained, all of a piece."). See also Edmond N. Cahn, *Madison and the Pursuit of Happiness*, 27 N.Y.U. L. REV. 265, 271-72 (1952) (arguing that Locke was the source of the phrase for both Jefferson and Madison).

74. See GARY WILLS, *INVENTING AMERICA 175-78* (1978) (focusing on the Declaration of Independence, with scant reference to George Mason, and arguing that the Scottish Enlightenment, and particularly Hutcheson, may have been Jefferson's chief source of inspiration). Cf. Ronald Hamowy, *Jefferson and the Scottish Enlightenment: A Critique of Gary Wills's "Inventing America: Jefferson's Declaration of Independence,"* 36 WM. & MARY C.Q. HIST. MAG. 503, 510 (1979) (book review) ("In writing the Declaration, Jefferson had either Locke or Hutcheson in mind, but certainly not the other Scottish writers."). According to Hamowy, "[a] far more likely source of the sentiments expressed in the preamble . . . was George Mason's draft of the first three articles of the Virginia Bill of Rights." *Id.* at 518.

75. Francis Hutcheson, *A Short Introduction to Moral Philosophy* (1747), reprinted in 4 COLLECTED WORKS OF FRANCIS HUTCHESON 302 (Georg Olms Verlagsbuchhandlungbuch ed. 1969).

76. Francis Hutcheson, *Nature and Conduct of the Passions* (1728), reprinted in 4 COLLECTED WORKS OF FRANCIS HUTCHESON 33 (Georg Olms Verlagsbuchhandlungbuch ed. 1969).

77. Hutcheson, *A Short Introduction to Moral Philosophy*, *supra* note 75, at 302.

with social drives and interdependence.”<sup>78</sup> Hutcheson disagreed with the then popular rights-based theories of Grotius and Pufendorf; his moral theories embraced duties as well.<sup>79</sup> His focus was upon public rather than purely private happiness, as reflected in his adoption of “the greatest happiness of the greatest number” as the test of a just society.<sup>80</sup>

Writing about the same time as Hutcheson, and in the same vein, was the Swiss philosopher Jean Jacques Burlamaqui.<sup>81</sup> Like Locke, Burlamaqui was an advocate of the social contract, but, unlike Locke and other social contract theorists who viewed the state as an artificial institution superimposed upon man to restrain and curb his natural liberty, Burlamaqui saw man as an essentially social creature—in Aristotle’s language a “political animal”—for whom society and government are necessary to the development of his natural faculties.<sup>82</sup> Foremost among those faculties is the “desire for happiness,” which is “as essential to man and as inseparable from his nature as reason itself.”<sup>83</sup> Since man is “designed for happiness,” it is the function of society to assist him in attaining it.<sup>84</sup> When a person has a natural right, “other people ought not to employ their strength and liberty in resisting him in this point; but on the contrary, . . . they should respect his right, and assist him in the exercise of it.”<sup>85</sup> A “just society,” in Burlamaqui’s view, is

78. WILLS, *supra* note 74, at 236.

79. See THOMAS MAUTNER, FRANCIS HUTCHESON: TWO TEXTS ON MORAL NATURE 52 (1993).

80. WILLS, *supra* note 74, at 250. As Wills observes, “Happiness was not only a constant preoccupation of the eighteenth century; it was one inextricably linked with the effort to create a science of man based on numerical guages for all his activity.” *Id.* at 151. Indeed, Hutcheson developed an algebraic formula for the measurement of happiness which, though it became the butt of jokes, reflected an important concept: “the twofold measurability of happiness, in terms of *quantity* within the individual and of the *sum* of individuals.” *Id.* at 149-51. One may argue, as did Adam Smith, that “by acting according to the dictates of our moral faculties, we necessarily pursue the most effectual means for promoting the happiness of mankind,” ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 3, vi (1759), but Hutcheson’s view did not necessarily exclude an affirmative government role in the process.

81. For a thorough discussion of Burlamaqui’s views, and of their influence upon American thought, see generally RAY FORREST HARVEY, JEAN JACQUES BURLAMAQUI: A LIBERAL TRADITION IN AMERICAN CONSTITUTIONALISM (1937). Francis Hutcheson’s *Essay on the Nature and Conduct of the Passions and Affections* (1728) and *A Short Introduction to Moral Philosophy* (1747) were both published before Burlamaqui’s principal works. Hutcheson’s *A System of Moral Philosophy* and Burlamaqui’s *Principles of Natural Law* were published in the same year (1747). Wills asserts that Burlamaqui was a “disciple of Hutcheson’s philosophy of moral sense.” WILLS, *supra* note 74, at 250. Perhaps in some sense he was, but that ought not deprive Burlamaqui of credit for his own contribution.

82. See HARVEY, *supra* note 81, at 11-16.

83. *Id.* at 18 (quoting Burlamaqui).

84. *Id.* at 17.

85. 1 JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW 50 (1972).

[N]o more than natural society itself modified in such a manner, as to have a sovereign, that commands, and on whose will whatever concerns the happiness of society ultimately depends; to the end that, under his protection and through his care, mankind may surely attain the felicity, to which they naturally aspire.<sup>86</sup>

Between Locke and Burlamaqui there is a subtle but important difference in emphasis. Locke's general view of rights is a negative one—that they are rights which people have individually *against* the government, as a basis for objecting to governmental interference with life, liberty, or property. Burlamaqui, on the other hand, appears to be talking about *affirmative* obligations imposed upon government by the nature of human beings, including an obligation to increase the happiness of its citizens. For Burlamaqui, man has a *duty* to pursue happiness,<sup>87</sup> and he posits an extension of that duty upon the state. Burlamaqui, more than Locke, reaches back to the earlier classical tradition of *salus populi*. In modern terms, Locke's perspective is more libertarian, Burlamaqui's more communitarian.

Burlamaqui was widely read and discussed in America,<sup>88</sup> and his ideas and language are traceable in the writings of many American patriots.<sup>89</sup> Among the most influential of these was James Wilson, an avid federalist who in due course would become an Associate Justice on the first United States Supreme Court. In 1774, Wilson, then a lecturer at the University of Pennsylvania, wrote an essay called *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament* in which he declared that

[T]he happiness of the society is the *first* law of every government.

This rule is founded on the law of nature: it must control every political maxim: *it must regulate the legislature itself*. The people have a right to insist that this rule be observed; and are entitled to demand a moral security that the legislature will observe it.<sup>90</sup>

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86. *Id.* at 135. For a thorough discussion of Burlamaqui's impact upon American thought in the eighteenth century, see generally HARVEY, *supra* note 81.

87. See MORTON WHITE, *THE PHILOSOPHY OF THE AMERICAN REVOLUTION* 231 (1978) ("Burlamaqui's incorporation of the duty to pursue happiness into the body of natural law represented a significant change in the doctrine. He puts this duty on a par with the duty to preserve life and liberty, and by doing so he makes the principle that all human creatures should pursue happiness a rational principle of natural law.").

88. See HARVEY, *supra* note 81, at 105.

89. See *id.* at 108-30. Reverend Benjamin Stevens, preaching before the Great and General Court of the Province of Massachusetts in 1761, stated: "The supreme law of all governments is the safety and happiness of the people." *Id.* at 109. (emphasis in original). Reverend Samuel Lockwood, preaching to the General Assembly of Connecticut in 1774, stated that "the end of the state is "general security and public happiness." *Id.* at 111.

90. James Wilson, *Consideration on the Nature and Extent of the Legislative Authority of the British Parliament* (1774), in 2 *THE WORKS OF JAMES WILSON* 721, 723 (Robert Green

Wilson supported this pronouncement with a quotation from Burlamaqui.<sup>91</sup> It was also Wilson who asserted that in his “unrelated state,” i.e. in a state of nature, “man has a natural right to his property, to his character, to liberty, and to safety.”<sup>92</sup>

As for the true meaning of either “happiness” or “safety” for those who used the terms, indeed there is little that can be said with any assurance. At least for those in the Hutcheson-Burlamaqui tradition (which is also the tradition of the classical philosophers), the notion of happiness is not simply circular—that which is pursued—but a deeper notion of self-realization, the fulfillment of one’s essential being.<sup>93</sup> While the scientific atmosphere of the Enlightenment assumed that everything was quantifiable, including happiness,<sup>94</sup> there was hardly any agreement on the identification of what it was that was capable of such measurement.<sup>95</sup>

The term “safety” is similarly imprecise. Viewed independently of “happiness,” the term suggests physical safety, and may reflect the Hobbesian natural law tradition which teaches that people relinquish the liberty associated with the state of nature in order to gain collective protection against domestic and foreign threats to stability and security.<sup>96</sup> But it would be more in keeping with the classical tradition reflected in eight-

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McCloskey ed., 1967) (second emphasis added). This language echoes language in a letter from John Adams to George Wythe in early 1775: “[U]pon this point all speculative politicians will agree, that the happiness of society is the end of government, as all divines and moral philosophers will agree that the happiness of the individual is the end of man.” HARVEY, *supra* note 81, at 118. In 1790, Wilson published his *Lectures on Law*, in which he declared: “Government, in my humble opinion, should be formed to secure *and to enlarge* the exercise of the natural rights of its members.” James Wilson, *Of the Natural Rights of Individuals*, in 2 THE WORKS OF JAMES WILSON 585, 592 (Robert Green McCloskey ed., 1967) (emphasis added).

91. Wilson, *Consideration on the Nature and Extent of the Legislative Authority of the British Parliament*, *supra* note 90, at 723. “The right of sovereignty is that of commanding finally—but in order to procure real felicity; for if this end is not obtained, sovereignty ceases to be a legitimate authority.” *Id.* at 723 n.c. (citation omitted).

92. *Id.* at 592.

93. See BURLAMAQUI, *supra* note 85, at 10 (“By happiness we are to understand the internal satisfaction of the mind, arising from the possession of good. . .”). As Morton White points out:

[T]he reason why the American revolutionaries were not utilitarians is that they thought that man had certain duties and rights by nature in the sense of ‘essence,’ whereas the utilitarian did not think he was extracting something from man’s essence in asserting that man *by nature* becomes happy by acting on certain principles.

WHITE, *supra* note 87, at 238-39.

94. See, e.g., JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT 93 (1891) (using in 1776 for the first time the formula, “*it is the greatest happiness for the greatest number that is the measure of right and wrong.*”) (emphasis in original).

95. See WILLS, *supra* note 74, at 248-55.

96. See generally THOMAS HOBBS, LEVIATHAN (1651). I would acknowledge that the right to pursue and obtain safety could be viewed as a private right of self-defense, perhaps including the right to bear and use arms, but there is little in the background of eighteenth century America that would support such a reading.



eenth century thought to view safety and happiness as related terms, together expressing the concept of *salus populi*, or the welfare of the people. On that view, safety connotes not merely physical safety, but a state of wholeness, or well-being.<sup>97</sup>

Whether the early state constitutions drew upon the communitarian/republican tradition of Burlamaqui and Hutcheson more than the liberal/pluralistic tradition of Locke, I find it impossible to say.<sup>98</sup> What appears to be emerging from the debate among historians as to the relative influence of these two traditions in early American thought is a consensus that both played important roles and that attempting to separate and evaluate their respective contributions may not be a fruitful enterprise. While that consensus has developed from a focus upon the Federal Constitution and its background, it applies with equal force to the early state constitutions and their background as well.

What is to be said of those state constitutions which refer only to the "pursuit of happiness," or to the right of persons to "pursue their own happiness," and omit reference to safety? To the modern ear, at least, the difference sounds significant. Thus, when Pennsylvania, in 1790, adopted the "pursue their own happiness" language in lieu of its original "Virginia-like" language, one is tempted to say this is because Pennsylvanians wanted to eliminate any suggestion that the state had an obligation, or at least a judicially enforceable obligation, to provide either happiness or safety. Such an interpretation of the change would find support in our knowledge that the political forces that underlay the 1790 Pennsylvania Constitution were demonstrably more conservative than those responsible

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97. It seems to be in this sense that the term was used in the English Petition of Rights of 1626, *see* V STATUTES OF THE REALM 23 (addressing the King by reference to the "comfort and safety of your people") and in the English Bill of Rights of 1689, *see* VI STATUTES OF THE REALM 142 (referring to the "safety and welfare of this Protestant kingdom"). The "Committees of Safety" that were formed in the various colonies in preparation for independence were directed, not only at physical safety, but at general governance as well. *See* MAIER, *supra* note 44, at 134 ("For Jefferson and his contemporaries, happiness no doubt included safety or security, which would have been in keeping with the biblical phrase one colonist after another used to describe the good life—to be at peace under their vine and fig tree with none to make thee afraid.") (citation omitted).

98. According to Morton White,

[T]he ultimate ambiguity of the American revolutionary mind is its failure to come to a single conclusion on the role of government with regard to man's natural rights. Was it merely to guard them, to see to it that they were not invaded? Or was it to abet and favor the people in attaining certain God-proposed ends?

WHITE, *supra* note 87, at 256.

There appears to be an emerging consensus among historians that the thought of the "framers" was affected by both republican and liberal ideology. *See* JOYCE OLDHAM APPLEBY, *CAPITALISM AND A NEW SOCIAL ORDER* (1984); Daniel T. Rogers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11, 30 (1992).

for the Constitution of 1776, which is considered the most “radical” among the early state constitutions.<sup>99</sup>

Arthur Schlesinger, however, has argued that in the context of eighteenth century usage the term “pursuit” should be read as meaning something more than running after—that it connotes a practice, or activity, as when we speak of the “pursuits” of life.<sup>100</sup> Gary Wills makes a similar argument—that since the seeking after happiness was considered part of man’s nature, the term “pursuit” meant something more than mere aspiration: “Only when one recognizes the law of man’s nature as his *right* does one remove the obstacles and let him move free, knowing this is consonant with the order of nature.”<sup>101</sup> On this basis, Wills seeks to minimize the difference in language between the Virginia Declaration and the Declaration of Independence, and questioningly suggests that the word “obtain” is surplusage.<sup>102</sup> I’m not sure.<sup>103</sup>

The difficulty of reliance upon eighteenth century meanings increases when it comes to the constitutions of the nineteenth century. Even if there was a common understanding in the eighteenth century of what it meant to say that people have a right to pursue and obtain happiness and safety, which is doubtful, it does not follow that the framers of the nineteenth century constitutions that adopted that language had the same meaning “in mind.”<sup>104</sup> Moreover, while the variations in language among the various state constitutions adopted in the eighteenth century appear on their face to be significant and deliberate, one searches in vain among the records of constitutional proceedings for any evidence that this is so.

99. See Robert Levere Brunhouse, *The Counter-Revolution in Pennsylvania 1776-1790* 227 (1942) (unpublished Ph.D. Thesis, University of Pennsylvania) (“[By 1790, the] Counter-Revolution was accomplished. It took fourteen years to complete the curve from the days in 1776 when the conservatives lost their control until 1790 when they returned to complete leadership in the State. . . . But in the Constitution of 1790 they secured a form of government under which they could feel safe from the excesses which characterized the State under the Radical regime.”).

100. Arthur M. Schlesinger, *The Lost Meaning of ‘The Pursuit of Happiness,’* 21 WM. & MARY C.Q. HIST. MAG. 325, 325-26 (1964). Schlesinger concedes that Locke uses the expression “the pursuit of happiness” in the sense of “pursuing,” and suggests that Mason’s phrasing of the Virginia Declaration “may have seemed the more necessary” in view of Locke’s use. *Id.* at 326 n.8; see also Ganter, *supra* note 55, at 564.

101. WILLS, *supra* note 74, at 247.

102. *Id.* at 245-46.

103. The difference can also be reconciled with Adam Smith’s view that the untrammelled pursuit of private gain tends to promote public happiness. See generally ADAM SMITH, *THE WEALTH OF NATIONS* (1776).

104. William Novak has persuasively demonstrated, however, that the *ethos* of nineteenth century America, at least until the Reconstruction period, was consistent with the republican tradition. NOVAK, *supra* note 65, at 42-47. Novack’s thesis, well supported by references to laws and cases, is that American policy-making from 1787 to 1877 was dominated, not by a *laissez-faire* philosophy, but by the vision of a “well-regulated society.” *Id.* at 1.

The most that can be said consistent with intellectual honesty is this: 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. While there may be tension between these two propositions in some contexts, it is possible for both of them to coexist as principles of governance. The argument for the second proposition is a bit weaker in the case of those constitutions which follow the "pursuit of happiness" format, though the Schlesinger/Wills analysis provides some support for that argument, as does the governmental purpose language where it appears. Whether either or both of these principles are properly the subject of judicial cognizance is a different question, which I reserve for later consideration.

#### IV. Judicial Gloss and Contemporary Meanings

When we move beyond attempting to discern the meanings that the happiness and safety language had for the generations that introduced it into the various state constitutions and confront the question of what meaning ought to be attributed to that language today, our difficulty is compounded. The words speak to us from a set of assumptions and concepts about law and society that we find difficult to comprehend or, at least, to translate into modern experience. And, as we shall see, those courts which have addressed that language so far have failed to develop around it any coherent body of jurisprudence. The opinions are typically shallow in analysis and tend, as has so often been the case with state constitutional jurisprudence, to defer to the Federal Constitution and its interpretation despite the obvious differences in language.

##### A. Hortatory or Subject to Judicial Application?

Courts in a few states have taken the position that the early provisions referring to inalienable rights were advisory or hortatory only,<sup>105</sup> and not

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105. See, e.g., *Sepe v. Daneker*, 68 A.2d 101, 105 (R.I. 1949). There, the provision of the Rhode Island Constitution read as follows:

All free governments are instituted for the protection, safety and happiness of the people. All laws, therefore, should be made for the good of the whole, and the burdens of the state ought to be fairly distributed among its citizens. No persons shall be deprived of life, liberty or property without due process of law, nor shall any person be denied

susceptible to judicial enforcement. The Rhode Island Supreme Court, for example, declared in 1949 that article 1, section 2 of that state's constitution was addressed to the General Assembly as advice and direction, rather than to the court as a restraint on legislative power.<sup>106</sup> The Vermont Supreme Court has asserted a similar view of that state's article 1, section 1.<sup>107</sup>

Even on the basis of such reading, it should be emphasized, the language is far from meaningless. As the Rhode Island court suggested, constitutions are addressed to the legislative and administrative branches as well as to the judicial branch, and those other branches have a political obligation to take into account constitutional commands whether or not they are susceptible of judicial application.<sup>108</sup> This obligation is particularly relevant to the affirmative connotations of the language, insofar as it points toward a duty on the part of government to act positively in the face of human suffering.

Those who would deny any judicially enforceable content to the language can find some historical support for their position in the strong reliance which the framers of the early state constitutions placed in legislative bodies and in the framers' concomitant ambivalence toward the entire idea of judicial review. I find that line of argument unpersuasive. Attitudes toward legislative sovereignty and the role of the courts changed rather quickly. By the 1780s, popular confidence in legislatures was on the wane, and the idea of judicial review came gradually into acceptance.<sup>109</sup> The early history has not hindered reliance upon other provisions of state constitutions as a basis for the exercise of judicial review.

Moreover, some state constitutions which contain happiness and safety language also declare that "[t]he provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be

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equal protection of the laws. Nothing in this section shall be construed to grant or secure any right relating to abortion or the funding thereof.

R.I. CONST. art. I, § 2 (amended 1986). The Committee on Citizens' Rights responsible for drafting the new provision stated its intent was to create an independent state foundation for individual rights.

106. See *Sepe*, 68 A.2d at 105.

107. VT. CONST. art. I, § 1.

108. See *Sepe*, 68 A.2d at 105; see also WILLIAM E. NELSON & ROBERT E. PALMER, LIBERTY AND COMMUNITY: CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC 82-83 (Oceana Publications 1987) ("When principled liberties were declared in state constitutions, those declarations were not directed primarily at the courts as standards for judicial review. . . . The declarations were directed at the legislative assemblies, stating fundamental principles by which the assembly should have felt bound."); see also GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 462 (1972).

109. See Wood, *supra* note 108, at 453-63.

otherwise."<sup>110</sup> And such a declaration would appear to preclude adoption of the "hortatory" approach.<sup>111</sup> Also, in a number of state constitutions, the original language of the statement of inalienable or inherent rights has been amended to add other rights which quite clearly were intended to be, and in most cases have been, the subject of judicial cognizance. California, for example, amended article 1, section 1 of its constitution in 1972 to provide for the right to pursue and obtain "happiness, safety, and privacy,"<sup>112</sup> and the privacy clause has been the frequent subject of litigation.<sup>113</sup> In 1974, New Hampshire amended part 1, article 2 of its constitution, which refers to "seeking and obtaining happiness," by adding: "Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex, or national origin."<sup>114</sup> Missouri, in 1945, added similar language asserting the equality principle,<sup>115</sup> as did Florida in 1974.<sup>116</sup> The Alaska Constitution of 1959 embraces the equality principle as well.<sup>117</sup> Nebraska, in 1988, amended its comparable provision to include a right to keep and bear arms,<sup>118</sup> as did North Dakota.<sup>119</sup> Montana, in 1972, added a "right to a clean and healthful environment,"<sup>120</sup> and the right to seek "health" as well as safety and happiness.<sup>121</sup> For a court to single out the "happiness and safety" language as being incapable of judicial enforcement would be, in these states, somewhat anomalous.

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110. See, e.g., CAL. CONST. art. I, § 26.

111. The "mandatory and prohibitory" clause of the California Constitution was adopted in 1870 in response to decisions of the California Supreme Court which had characterized certain provisions bearing upon the title of legislative enactments as merely "directory" rather than "mandatory" in nature and, therefore, not subject to judicial enforcement.

112. CAL. CONST. art. I, § 1 (emphasis added).

113. See JOSEPH GRODIN ET AL., THE CALIFORNIA STATE CONSTITUTION 39 (1993).

114. N.H. CONST. pt. I, art. 2.

115. The 1945 amendment inserted "that all persons are created equal and are entitled to equal rights and opportunity under the law." MO. CONST. art. I, § 2.

116. The 1974 amendment added: "No person shall be deprived of any right because of race, religion or physical handicap." FLA. CONST. art. I, § 2.

117. ALASKA CONST. art. I, § 1.

118. The amendment added: "and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof." NEB. CONST. art. I, § 1.

119. N.D. CONST. art. I, § 1.

120. MONT. CONST. art. II, § 3.

121. Article II, section 3, of the Montana Constitution now reads:

Inalienable rights. All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.

MONT. CONST. art. I, §3.

In fact, most courts have assumed that the inalienable rights clauses have some judicially enforceable content. One of the earliest decisions is that of the California Supreme Court in *Billings v. Hall*,<sup>122</sup> which held the Settler's Act of 1856 invalid under article I, section 1 of the state constitution because it deprived owners of settled property expectations. The case produced three opinions, with Justice Terry arguing that the section represented a mere "truism," and could not be viewed as a limitation upon the power of government.<sup>123</sup> The other two justices, writing separately, disagreed.<sup>124</sup> Chief Justice Murray declared that the section

[W]as not lightly incorporated into the Constitution of this state as one of those political dogmas designed to tickle the popular ear, and conveying no substantive meaning or idea; but as one of those fundamental principles of enlightened government, without a rigorous observance of which there could be neither liberty nor safety to the citizen.<sup>125</sup>

And Justice Burnett, concurring, reasoned that

[F]or the Constitution to declare a right inalienable, and at the same time leave the Legislature unlimited power over it, would be a contradiction in terms, an idle provision, proving that a Constitution was a mere parchment barrier, insufficient to protect the citizen, delusive and visionary, and the practical result of which would be to destroy, not conserve, the rights it vainly presumed to protect.<sup>126</sup>

## B. Happiness and Safety as Negative Rights: The Content the Courts Have Given the Language

One of the earliest cases to rely upon happiness and safety language as grounds for decision was *Beebe v. State*,<sup>127</sup> in which the Supreme Court of Indiana overturned that state's prohibition law on the ground that it interfered with the right to "liberty and the pursuit of happiness."<sup>128</sup> That right, declared Judge Perkins in the companion case of *Herman v. State*,<sup>129</sup> "embraces the right, in each *compos mentis* individual, of selecting what he will eat and drink. . . ."<sup>130</sup> If that were not so, the legislature could control

122. 7 Cal. 1 (1857)

123. *See id.* at 19 (Terry, J., dissenting).

124. *See id.* at 3-18.

125. *Id.* at 6.

126. *Id.* at 17 (Burnett, J., concurring).

127. 6 Ind. 501 (1855).

128. *See Beebe*, 6 Ind. at 510. Indiana's early Constitution of 1816 contained "pursuing and obtaining happiness and safety" language. *See* IND. CONST. of 1816, art. I, § 1 (1851). The revised Constitution of 1851 settled for "life, liberty and the pursuit of happiness." IND. CONST. art. I, § 1.

129. *Herman* was decided on a petition for habeas corpus before Judge Perkins of the Indiana Supreme Court, and appears in the appendix to the reports at 8 Ind. (Tanner) 545 (1855).

130. *Id.* at 558.

individuals "as to their articles of dress and their hours of sleeping and waking."<sup>131</sup> If people were not competent to decide such matters they "should be placed at once in a state of pupilage to a set of government sumptuary officers; eulogies upon the dignity of human nature should cease; and the doctrine of the competency of the people for self-government be declared a deluding rhetorical flourish."<sup>132</sup> Stimulating beverages, the court opined, "were created by the Almighty expressly to promote his social hilarity and enjoyment," and the potential for abuse must be left to personal responsibility, for if God had wished to control man's choice "He could have easily enacted a physical prohibitory law by declaring the fatal apple a nuisance and removing it. He did not."<sup>133</sup>

The embrace of pure libertarian principles reflected in the Indiana court's opinion did not survive the Victorian era. The Washington Supreme Court in *Territory v. Ah Lim*,<sup>134</sup> in rejecting the defendant's argument that his right to the pursuit of happiness included the right to smoke opium in the privacy of his home, declared that "the state has an interest in the intellectual condition of each of its citizens, recognizing that the fact that society is but an aggregation of individuals, and that the moral or intellectual plane of society is elevated or degraded in proportion to the plane occupied by its individual members."<sup>135</sup> It was a "matter of general information," in the court's view,

[T]hat [opium smoking] is a loathsome, disgusting, and degrading habit, that it is becoming dangerously common with the youth of the country, and that its usual concomitants are imbecility, pauperism, and crime . . . . If the state concludes that a given habit is detrimental to either the moral, mental or physical well-being of one of its citizens, to such an extent that it is liable to become a burden upon society, it has an undoubted right to restrain the citizen from the commission of that act.<sup>136</sup>

On the basis of similar reasoning, a sober Alabama Supreme Court upheld that state's limitations upon the sale of liquor.<sup>137</sup> "A man's chief joy," the court declared:

[M]ay be in the death of his enemy, yet the law does not allow him to pursue happiness in that direction. So his individual sense of bliss attained may result from carrying on the liquor traffic, but the law

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131. *Id.*

132. *Id.* at 558-59.

133. *Id.* at 561, 563.

134. 24 P. 588 (Wash. 1890).

135. *Id.* at 589.

136. *Id.* at 590.

137. *See Sheppard v. Dowling*, 28 So. 791, 795 (Ala. 1899).

does not esteem that particular avocation, involving, as it does, in the eye of the law, baneful consequences to society . . . .<sup>138</sup>

Judicial reluctance to read the happiness and safety clauses as embodying a general libertarian principle continues. Modern attacks on marijuana laws in the name of happiness and safety, for example, have fared no better than Ah Lim's claim with respect to opium.<sup>139</sup> And the same is true of claims that the happiness and safety clauses require the destruction of an arrested person's fingerprints and photo,<sup>140</sup> and the invalidation of a state income tax.<sup>141</sup> An exception is the decision of the Ohio Court of Common Pleas, holding that school officials violated a student's rights under article 1, section 1 of the Ohio Constitution when they removed him as student body president, barred him from extra-curricular activities, and penalized his grade point average because he insisted on violating the School Board's regulation of hair length and style.<sup>142</sup> The court stated:

It seems to us strikingly important that our founding fathers placed this section first in the Bill of Rights. . . . In non-legal terms Section 1 establishes the principle that every American has the right to be let alone and to be regulated by the government only so far as such regulation is shown to be necessary to protect others or to advance legitimate government purposes. This constitutional provision places a heavy responsibility on any governmental body to justify its interference with a citizen's freedom, his right to enjoy liberty of decision and to seek happiness in his own way.<sup>143</sup>

At the same time that courts were rejecting happiness and safety language as a shield against state interference with personal conduct, some state courts came to accept that language, in conjunction with "liberty" and "property" as a shield against state interference with economic activity. Impetus for this development came from Justice Field's dissenting opinion

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138. *Id.* at 795. See also *Benning v. State*, 641 A.2d 757-58 (Vt. 1994) (upholding law requiring motorcyclists to wear helmets). On the basis of similar reasoning, the California Supreme Court has upheld Sunday closing laws, see *Ex Parte Andrews*, 18 Cal. 678 (1861), and laws which prohibited slaughterhouses from operating within city limits, see *Ex parte Shrader*, 33 Cal. 279 (1867).

139. See, e.g., *National Org. for Reform of Marijuana Laws v. Gain*, 161 Cal. Rptr. 181, 187 (1979) ("The guarantees [of article 1, section 1] . . . do not operate as a curtailment on the basic power of the Legislature to enact reasonable police regulations. Here appellants have not shown irrational conduct by our lawmakers." (citations omitted)). To the same effect, but considering only the Federal Constitution, is *State v. Leins*, 234 N.W.2d 645 (Iowa 1975). Cf. *Ravin v. State*, 537 P.2d 494, 511 (Alaska 1975) (finding a right to smoke marijuana in the privacy of one's home protected by the privacy clause of the Alaska Constitution).

140. See, e.g., *Mavity v. Tyndall*, 74 N.E.2d 914 (Ind. 1947).

141. See, e.g., *Cogan v. State*, 657 P.2d 396 (Alaska 1983).

142. See *Jacobs v. Benedict*, 301 N.E.2d 723 (Ohio Misc. 1973).

143. *Id.* at 725.



in the *Slaughterhouse Cases*,<sup>144</sup> in which he argued that the “privileges and immunities” protected by the Fourteenth Amendment should be deemed to embrace “the right to pursue a lawful calling in a lawful manner, without other restraint than such as equally affects all persons,” and in which he quoted from Blackstone to the effect that civil liberty “is that state in which each individual has the power to pursue his own happiness according to his own views of his interest, and the dictates of his conscience, unrestrained except by equal, just, and impartial laws.”<sup>145</sup> Impetus came also, but later, from *Allgeyer v. Louisiana*,<sup>146</sup> in which a majority of the Court embraced the view that the “liberty” protected by the Due Process Clause of the Fourteenth Amendment includes:

[T]he right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.<sup>147</sup>

Labor legislation came under particular attack in the state courts. Courts in several states concurred in relying upon the inalienable rights clauses to strike down statutes which required employers to pay their workers at least twice a month.<sup>148</sup> The Colorado Supreme Court found a statute regulating the hours of employment in underground mines to be constitutionally infirm on similar grounds.<sup>149</sup>

Licensing laws also suffered. In 1901, the Supreme Court of Illinois found its sense of constitutional propriety, as informed by article 1, section 1 of that state’s constitution, to be offended by a law requiring persons engaged in the horseshoeing business to procure a license from a board of examiners.<sup>150</sup> “It is impossible to conceive,” the court declared, “how the health, comfort, safety, or welfare of society is to be promoted by requiring a horseshoer to practice the business of horseshoeing for four years, and submit to an examination by a board of examiners, and pay a license fee for the privilege of exercising his calling.”<sup>151</sup>

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144. 83 U.S. (16 Wall.) 36 (1872).

145. *Id.* at 111 n.40 (citation omitted).

146. 165 U.S. 578 (1897).

147. *Id.* at 589.

148. *See* *Commonwealth v. Isenberg*, 4 Pa. Dist. R. 579 (Pa. 1895); *Ohio v. Lake Erie Iron Co.*, 33 Weekly Law Bull. 6 (Ohio 1894); *see also* *State v. Goodwill*, 33 W. Va. 179 (1889); *State v. Scougal*, 51 N.W. 858 (S.D. 1892).

149. *See In re Morgan*, 58 P. 1071 (Colo. 1899).

150. *See Bessette v. People*, 62 N.E. 215, 219 (Ill. 1901).

151. *Id.*

These decisions, which foreshadowed the U.S. Supreme Court's decision in *Lochner v. New York*,<sup>152</sup> were not based upon any separate analysis of the happiness and safety language, but upon the implicit proposition that the right to pursue happiness, or to pursue and obtain happiness and safety, is an aspect of economic liberty.<sup>153</sup> And they assumed, in contrast to the deference displayed in earlier cases, that courts should play an active role in determining whether those rights were violated by particular statutes.

When the U.S. Supreme Court abandoned its *Allgeyer-Lochner* philosophy in the 1930s, some state courts followed suit, but not all. As late as the 1940s, the Indiana Supreme Court relied upon that state's constitutional protection of "life, liberty and the pursuit of happiness" to strike down one statute which restricted the manner in which fire and casualty insurance could be sold,<sup>154</sup> and another which prohibited the "scalping" of theater tickets below established prices.<sup>155</sup> And the Supreme Court of Oklahoma held a statute which required a license for the professional practice of photography invalid on the ground that the asserted justifications for the statute were "fanciful."<sup>156</sup> The court quoted an 1895 treatise on constitutional law by Henry Campell Black, the author of Black's Law Dictionary.<sup>157</sup> Without benefit of citation to authority, Mr. Black proclaimed:

[Pursuit of happiness] is really the aggregate of many particular rights, some of which are enumerated in the constitutions, and others included in the general guaranty of "liberty." The happiness of men may consist in many things or depend on many circumstances. But in so far as it is likely to be acted upon by the operations of government, it is clear that it must comprise personal freedom, exemption from oppression or individual discrimination, the right to follow one's individual preference in the choice of an occupation and the application of his energies, liberty of conscience, and the right to

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152. 198 U.S. 45 (1905) (invalidating a New York statute that regulated work hours for bakers on the basis of substantive due process).

153. In his *Slaughterhouse* dissent, Justice Field quotes from Blackstone: "Civil liberty, the great end of all human society and government, is that state in which each individual has the power to pursue his own happiness according to his own views of his interest, and the dictates of his conscience, unrestrained, except by equal, just, and impartial laws." *Slaughterhouse Cases*, 83 U.S. (16 Wall.) at 111 n.40 (Field, J., dissenting) (citation omitted). This portion of Justice Field's opinion has been frequently quoted in state courts. See, e.g., *State v. Brown*, 79 P. 635, 636 (Wash. 1905); *People v. Tyrola*, 51 N.E. 1006, 1010 (N.Y. Ct. App. 1898).

154. See *Department of Ins. v. Schoonover*, 72 N.E.2d 747, 749 (Ind. 1947). The statute at issue restricted the selling of fire and casualty insurance to agents selling exclusively on a commission basis, a limitation which the court found had "nothing to do with the public welfare and . . . no substantial relation to the police power." *Id.*

155. See *Kirtley v. State*, 84 N.E.2d 712, 714 (Ind. 1949).

156. See *State v. Cromwell*, 9 N.W.2d 914, 921 (N.D. 1943).

157. See *id.* at 918-19.

enjoy the domestic relations and the privileges of the family and the home. The constitutional right to pursue happiness can mean no less than the right to devote the mental and physical powers to the attainment of this end, without restriction or obstruction, in respect to any of the particulars thus mentioned, except in so far as it may be necessary to secure the equal rights of others. Thus it appears that this guaranty, though one of the most indefinite, is also one of the most comprehensive to be found in the constitutions.<sup>158</sup>

Such unbounded definitions of the interests protected by the happiness/safety clauses are not likely to be of use in modern constitutional adjudication. Courts inclined to follow the *Lochner* tradition do not need happiness and safety to bolster their views; liberty and property will do quite well. And outside the economic arena, if the pursuit of happiness is taken to mean whatever an individual may seek for herself, "happiness" and "liberty" become equivalent terms.

If the happiness and safety clauses are to have any independent significance as restraints upon governmental action, we will need to view them as denoting a more limited area of human activity, interference with which will trigger a level of scrutiny more stringent than mere rationality review. Here, the classical view of human happiness, derived from Aristotle and reflected in the writings of philosophers like Burlamaqui, might prove a useful point of departure. The right to pursue happiness, or the right to pursue and obtain happiness and safety, might be viewed as protecting individuals, absent adequate justification, from interference with those decisions and activities that may be deemed basic, or essential, to their identity and well being.<sup>159</sup> Viewed in this way, such clauses could provide an appropriate state constitutional basis, independent of federal constitutional semantics (and surely more suitable than the term "privacy") for protecting such interests in personhood as the right to choose an abortion, or to pursue one's sexual orientation, or to end one's life at a time and in a manner that one might choose.<sup>160</sup> Whereas "privacy" connotes

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158. *Id.*

159. The plurality opinion by Justices Souter, O'Connor and Kennedy in *Casey v. Planned Parenthood*, 505 U.S. 833 (1992), seeks to identify a core of "liberty" interest in similar terms, referring to the constitutional protections afforded to "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education" as "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy." *Casey*, 505 U.S. at 851. My colleague Mark Aaronson suggests that the intended meaning goes back to Aristotle and the ancient Greeks, where happiness meant "flourishment," in the sense of self-realization. See Mark Aaronson, *Scapegoating the Poor*, 7 *Hastings Women's L. J.* 213, 256 (1996).

160. Paradoxically, the New Jersey Supreme Court has read article 1, section 1 of that state's constitution (which incorporates the right to pursue and obtain happiness and safety) as implying a right of "privacy," and has accorded a broad interpretation to the privacy right so derived. See *State v. Sanders*, 381 A.2d 333, 339 (N.J. 1977).

bounded individual autonomy, "happiness," or "happiness and safety" points more in the direction of an individual's relationship to others. A negative right to pursue and obtain "safety," if the word is to have a meaning independent from "happiness," could of course be interpreted to mean physical safety, and point toward a right of self-defense, or to bear arms, but, as I have suggested, the idea of wholeness might provide a more appropriate guidepost.

It might be asked what advantage such a jurisprudence would have over the jurisprudence which has been constructed through the Due Process Clause of the Federal Constitution. And while the puristic answer would be that the question is irrelevant (since state constitutions are independent and primary), more pragmatic responses are available. The happiness and safety language would provide a textual basis for decision arguably more principled, or as I have argued at least more satisfying, than the implied right of privacy upon which federal jurisprudence has been constructed. It would allow for the development of a state law jurisprudence untethered from the constraints imposed by the sometimes wandering and sometimes not compelling reasoning of the United States Supreme Court. For state courts willing to assume responsibility for an independent state constitutional jurisprudence, these are formidable advantages.

### C. Rights Clauses as a Basis for Objecting to Private Conduct

There are several cases in which courts have relied upon happiness and safety language as grounds for sustaining a complaint against a private party, in the absence of any governmental action. An example is *Melvin v. Reid*,<sup>161</sup> in which the California Court of Appeal held that article 1, section 1 of the state constitution provided a basis for the plaintiff's complaint that defendant had, without justification, exposed her lurid past as a prostitute, and turned friends, who were unaware of that past, against her by making a movie of her life in which she could be identified.<sup>162</sup> The courts in such cases did not come to grips with the state action issue. The potential for application of the clauses to non-governmental action persists, but in light of other developments (including, for example, expansion of the tort of invasion of privacy) the significance of such a reading is probably not great.

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161. 297 P. 91, 93 (1931).

162. *See id.* at 91-94. *See also* Hagen v. Culinary Workers Alliance, 246 P.2d 778 (1952) (holding that picketing by union, allegedly to compel employer to "coerce" employees into union membership, violated the employer's right to "life, liberty and the pursuit of happiness" under the Wyoming Constitution).

#### D. Rights Clauses as a Basis for Affirmative Government Obligations

Either as an alternative or as an additional meaning, the happiness and safety clauses could be viewed as a declaration, and even a judicially enforceable one, that government has an affirmative obligation to provide at least the minimum conditions necessary for human happiness and safety. This would entail, arguably, the assurance of such things as minimal requirements for food, shelter, and medical care, and so far as possible, a nondangerous environment.

While such a construction runs counter to the accepted view of rights under the Federal Constitution, a number of arguments can be advanced in its favor.<sup>163</sup> First, state constitutions, unlike the Federal Constitution, often contain provisions which impose affirmative obligations.<sup>164</sup> The most common of these is a requirement for free public education, but also extant are numerous directives, variously phrased, that the legislature make provision for the poor, the aged, or the infirm.<sup>165</sup> Thus, a reading of the happi-

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163. See, e.g., Arthur S. Miller, *Toward a Concept of Constitutional Duty*, in 1968 THE SUPREME COURT REVIEW 199 (Philip B. Kikland ed. 1968) (discerning support in some U.S. Supreme Court decisions for an affirmative obligation to care for the poor); Frank Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) (arguing that certain decisions of the Court purportedly based upon the equal protection principle are best viewed as reflecting a principle of obligation).

164. See Burt Neuborne, *Evolution of Positive Rights*, 20 RUTGERS L. J. 881, 883 (1989).

165. See *id.* Such provisions include apparent requirements that the legislature provide for "aid, care and support of the needy," N.Y. CONST. art. XVII, § 1; provide "[b]eneficient provision for the poor," N.C. CONST. art. XI, § 4; provide "adequate provision for the maintenance of the poor," ALA. CONST. art. IV, § 88; provide "such economic assistance and social and rehabilitative services necessary for those who, by reason of age, infirmities, or misfortune are determined by the legislature to be in need," MONT. CONST. art. XII, § 3(3); establish and support such "charitable . . . institutions as the claims of humanity and the public good may require," WYO. CONST. art. VII, § 18; provide an old age pension to all residents 60 years of age and older, see COLO. CONST. art. XXIV, § 3; provide "medical assistance and social services for persons who are found to be in need," HAW. CONST. art. IX, § 3; "as the public good may require," IDAHO CONST. art. X, § 1; provide "asylum for those persons, who, by reason of age, infirmity, or other misfortune, have claims upon the sympathies and aid of society," IND. CONST. art. IX, § 3; "provide homes or farms as asylums for those persons who, by reason of age, infirmity, or misfortune, may have claims upon the sympathy and aid of society," MISS. CONST. art. XIV, § 262; and "support such benevolent institutions as the public good may require," NEV. CONST. art. 13, § 1(1). See also MASS. CONST. art. XLVII (provide "a sufficient supply of food and other common necessities of life and the providing of shelter"); UTAH CONST. art. XIX, § 2 (appoint "overseers for the poor").

Further, in some states, such language has been recognized in court decisions. The New York Court of Appeals, for example, has declared:

In New York State, the provision for assistance to the needy is not a matter of legislative grace; rather, it is specifically mandated by our Constitution. . . . Although our Constitution provides the Legislature with discretion in determining the means by which this objective is to be effectuated, in determining the amount of aid, and in classifying recipients and defining the term 'needy,' it unequivocally prevents the legislature from simply refusing to aid those whom it has classified as needy.

ness and safety clauses as imposing affirmative obligations along the lines I have suggested would not be at all anomalous. In fact, it would be in accord with the views of numerous scholars who have argued for a right of minimal subsistence.<sup>166</sup>

Second, such a construction fits comfortably with the language of the early constitutions that speak of both pursuing and obtaining happiness and safety,<sup>167</sup> and at least according to the views of people like George Wills and Arthur Schlesinger,<sup>168</sup> with the pursuit of happiness language as well.

Finally, such a construction is compatible with the postulate, generally accepted in the eighteenth century and often explicit in state constitutions of all periods, that government exists for the purpose of promoting happiness and safety. While one might argue that happiness and safety are best promoted by libertarian principles, such an argument is not one which courts in the twentieth or twenty-first centuries are bound to accept.

Some indirect support for such an affirmative obligation can be found in a decision of the Minnesota Supreme Court in *Thiede v. Scandia Valley*,<sup>169</sup> which relied upon an implied theory of natural rights (the state constitution lacks an explicit inalienable rights clause) to grant relief in a situation which it described as being "like a sequel to Steinbeck's 'The Grapes of Wrath.'"<sup>170</sup> Plaintiff Thiede, her husband, and their six minor children were living in the Town of Scandia Valley but receiving welfare from the Town of Fawn Lake where they had previously resided.<sup>171</sup> When the Town of Fawn Lake decided to withdraw welfare benefits from the Thiedes because they did not live in town, the Town of Scandia Valley attempted to evict them from their property and move them with their possessions to Fawn Lake.<sup>172</sup> "The entire social and political structure of America," the Minnesota court declared:

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Tucker v. Toia, 371 N.E.2d 449, 451 (N.Y. Ct. Apps. 1977).

The Kansas Supreme Court has followed New York's lead in declaring the Kansas provision mandatory but subject to legislative discretion. See *Bullock v. Whiteman*, 865 P.2d 197, 206 (Kan. 1993).

166. See, e.g., Akhil Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL'Y 37, 41 (1990); see also Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103 (1986); Peter Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987).

167. Arguably, the Virginia and West Virginia Constitutions, which appear to include a right to the "means" of pursuing and obtaining happiness and safety, are even more explicitly affirmative in connotation.

168. See generally Schlesinger, *supra* note 100; WILLS, *supra* note 74.

169. 14 N.W.2d 400 (Minn. 1944).

170. *Id.* at 402.

171. See *id.* at 402-03.

172. See *id.*

[R]ests upon the cornerstone that all men have certain rights which are inherent and inalienable. Among these are the right to be protected in life, liberty, and the pursuit of happiness; the right to acquire, possess, and enjoy property; and the right to establish a home and family . . . Today the care of the less fortunate members of our society is universally regarded as a proper governmental function or duty to be assumed in the interest of general welfare. . . . The protection afforded by our form of government is not merely fair weather shelter. It may not be minified by reasons of temporary economic expediency.<sup>173</sup>

On the basis of such reasoning, the court held that the Thiedes were entitled to proceed with their complaint for damages against the Town of Scandia Valley.<sup>174</sup>

If the reasoning of the Minnesota court in the *Thiede* case is not entirely satisfying, neither is the reasoning of the Ohio Court of Appeals in the only case expressly to consider an argument for affirmative governmental obligation based upon a "happiness and safety" clause. In *Daugherty v. Wallace*,<sup>175</sup> the court rejected an argument by recipients of general assistance benefits that a statute limiting benefits to a period of six months, regardless of continuing need or the unavailability of work, violated their state constitutional right to seek and obtain safety.<sup>176</sup> The court commiserated with the plaintiffs' plight, which it characterized as "disheartening and poignant," and recognized that as a result of the new legislation many of them would face "life-threatening circumstances . . . be forced into homelessness . . . [and] lose needed health benefits."<sup>177</sup> But the court was unable to read the safety clause of the state constitution as creating an affirmative obligation on the part of the state to provide subsistence welfare benefits to its citizens.<sup>178</sup> Rather, in the court's view, "the framers meant to give no other substance to the word than that of an aspirational statement of natural law rights upon which the state may not place unreasonable restrictions."<sup>179</sup>

In reaching this conclusion, the *Daugherty* court took no account of the historical roots of the relevant language, characterizing it (erroneously, as we have seen) as merely a "paraphrase[]" of the Declaration of Independence.<sup>180</sup> The court reasoned that if the right to safety had an affirma-

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173. *Id.* at 405.

174. *See id.* at 409-10.

175. 621 N.E.2d 1374 (Ohio Ct. App. 1993).

176. *See id.* at 1377. An *amicus* brief, which the court ignored, argued a violation of happiness as well. *See id.*

177. *Id.* at 1376.

178. *See id.* at 1378.

179. *Id.*

180. *See id.* at 1378.

tive component, then the other rights referred to in that section—the “enjoyment” of life, the “acquisition” of property, and the “obtainment” of happiness—would also have to be similarly viewed.<sup>181</sup> That, said the court, would be “untenable.”<sup>182</sup>

The Ohio court’s reasoning is flawed. To begin with, it is of course not impossible that some rights should bear an affirmative component but not others, even others mentioned in the same section. The word “obtain” is mentioned only in connection with safety and happiness. But even on the court’s assumption, it would be perfectly tenable to read the inalienable rights provision of the Ohio Constitution (and of other similar state constitutions) as imposing upon government an affirmative obligation to assure the minimum means for the enjoyment of life and a legal system which makes it possible to acquire and possess property.

The New Jersey courts have so far been similarly unreceptive to arguments that the state constitutional “happiness and safety” clause imposes an affirmative obligation. In *Franklin v. New Jersey Department of Human Services*,<sup>183</sup> for example, the New Jersey superior court rebuffed reliance upon article 1, section 1 of that state’s constitution as a basis for challenging a five-month limitation on emergency shelter assistance for the homeless, asserting that such language was intended to express general principles of democratic governance “fundamentally different from any concept of a governmental obligation to provide social services.”<sup>184</sup> In a more recent case, however, the New Jersey Supreme Court, finding a statutory basis for invalidating an administrative regulation that terminated rental assistance benefits after one year, appeared deliberately to leave the constitutional question open.<sup>185</sup>

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181. *See id.* at 1379.

182. *See id.*

183. 543 A.2d 56 (N. J. Super. 1988).

184. *Id.* at 67-68.

185. *See* L.T. v. New Jersey Dep’t of Human Servs., 133 A.2d 964, 974 (N.J. 1993). “The question before us is not whether the homeless have a constitutional right to shelter . . . Rather, it is, for now, what the Legislature intends.” *Id.*

The Supreme Court of Connecticut has also held that its state constitution does not impose an affirmative duty to provide minimum subsistence to indigent citizens. *See Moore v. Ganim*, 660 A.2d 742 (Conn. 1995). The Connecticut Constitution, however, does not contain an explicit inalienable rights provision. Plaintiffs argued for an implied right to minimum subsistence based upon the preamble to the constitution (which refers to the perpetuation of “the liberties, rights and privileges which [people] have derived from their ancestors”), and upon a reference to “social compact” in article 1, section 1. *See id.* at 750 n.28-29. Even in this sparse setting, three of the seven justices declared the existence of an affirmative obligation to provide minimum subsistence. *See id.* at 751-810. Chief Justice Peters, one of the three, wrote a particularly scholarly opinion relying upon early understandings of the government’s obligation to help the poor; contemporary economic, sociological, legal and moral considerations; and the international law of human rights. *See id.* at 771-83.



Arguments based on history and language aside, one can sympathize with a court's reluctance to embark upon a course of imposing affirmative obligations upon a recalcitrant legislature, especially in the absence of clear constitutional guidance. There may be situations so egregious, however, as to call for some form of creative judicial intervention that would respect both the principle of separation of powers and the principle that government has certain minimal obligations toward those in need. A court need not undertake supervision of welfare in order to decide that a particular legislative scheme falls so far short of constitutional obligation as to trigger the need for a judicial remedy. As Chief Justice Peters stated in her concurrence in *Moore v. Ganim*,<sup>186</sup> responding to certain scholarly objections that recognition of an affirmative obligation would be judicially unmanageable and counterproductive:

Judicial intervention will not be warranted to enforce the constitutional obligation except in the most extreme cases—where individuals demonstrate that: (1) without government support, they actually will be unable to secure the necessities of life such that they will face a grave threat to their health or welfare; and (2) for reasons beyond their control, they could not comply with the conditions the statute imposes. Judicial intervention to enforce a constitutional obligation only in such narrowly defined circumstances of severe deprivation meets all legitimate jurisprudential objections.<sup>187</sup>

#### **E. Rights Clauses as a Basis for Heightened Scrutiny Under the Equality Principle**

For a while it appeared that the United States Supreme Court was on the verge of finding poverty to be a "suspect class" for purposes of equal protection analysis, so as to trigger heightened scrutiny of classifications that adversely impacted the poor,<sup>188</sup> but the Court withdrew from that enterprise.<sup>189</sup> For those states whose state constitutional equality principle depends, for its applicable level of judicial scrutiny, upon a characterization of a statutory classification as implicating something like "fundamental rights" or "suspect classes," the happiness and safety clauses might yield such a characterization, and thus provide a basis for something more than deferential "rational basis" review in those situations—such as wel-

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There are also cases in other states also in which courts have denied the existence of an affirmative obligation to assist the poor, but these cases are either from states which have no constitutional "happiness and safety" provision, or cases where such provisions were not invoked. See, e.g., *Tilden v. Hayward*, 1990 WL 131162, 1990 LEXIS 140 (Del. Ch. 1990) (no provision); *People ex. rel. Heydenreich v. Lyons*, 30 N.E.2d 46 (Ill. 1940) (provision not invoked).

186. 660 A.2d 742 (Conn. 1995).

187. *Id.* at 782.

188. See LAURENCE TRIBE, *AMERICAN CONSTITUTION LAW* 1626 (2d ed. 1988).

189. See *id.* at 1649-59.

fare legislation—where the government has taken some action with particular impact upon the poor.<sup>190</sup>

### Conclusion

The initial reaction of people to the idea of a constitutional right to happiness (or safety) is, typically, laughter,<sup>191</sup> followed (if at all) by dismissal of the constitutional language as the relic of an age of flowery rhetoric, unsupported by precedent except along lines now rejected by most courts and scholars. Fair enough. If the test of viability of a constitutional theory is the response it would have invoked from those responsible for the relevant constitutional language, plus the response it has in the past received from the courts, then we can probably write off any arguments based upon the happiness/safety language as both likely and deserving of failure.

If, however, we start with the premise that constitutions are living documents properly subject to change and growth in response to their environment, and if we add to that the proposition that all language contained in constitutions deserves to be taken seriously, then the matter appears in a different light. To the extent that the language reflects religiously based views of natural rights which are no longer widely held, we may find it uncomfortable. But to the extent that it reflects a view of the relationship between citizen and community that rests upon mutual respect and a view of government as an extension of man's nature, with an obligation (as individuals have) to serve the needs of the community, it speaks to us in terms exceedingly relevant to the problems of today. It does in any event present a challenge to courts, lawyers, and legal scholars which they cannot with reason lightly dismiss.

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190. Article XII, section 3(3), of the Montana Constitution formerly stated: "The legislature shall provide such economic assistance and social and rehabilitative services as may be necessary for those inhabitants who, by reason of age, infirmities, or misfortune may have the need for the aid of society." MONT. CONST. art. XII, § 3(3) (amended 1988). In *Butte Community Union v. Lewis*, 712 P.2d 1309 (Mont. 1986), an organization representing welfare recipients relied upon this provision to challenge legislative action eliminating General Assistance payments to able-bodied individuals under thirty-five who have no minor dependent children. *Lewis*, 712 P.2d at 1309. The Montana Supreme Court held that while this constitutional provision "does not establish a fundamental right to welfare for the aged, infirm, or misfortunate," so that strict scrutiny did not apply, it did express "an interest whose abridgment requires something more than a rational relationship to a governmental objective." *Id.* at 1311-13. Applying a "middle-tier analysis," the court found the classification created by the challenged legislation to violate the state equal protection principle and enjoined implementation of the offending provision. *See id.*

191. See, for example, my own snide suggestion that the happiness clause of the California Constitution could be the basis for the largest class action in the state's history. *See GRODIN ET AL.*, *supra* note 113, at 40.