"Purpose of Government" Clauses in State Constitutions

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INTRODUCTION

The bills of rights of state constitutions, especially their broadly worded guarantees of "life, liberty, and the pursuit of happiness," have recently attracted renewed interest from judges and legal scholars.[1] These clauses—sometimes called "Lockean Natural Rights Guarantees"—are critical protections for individual freedom.[2] But their companion provisions remain comparatively neglected: namely, constitutional language that explains why government exists in the first place.[3] I call these "Purpose of Government Clauses," and they help complete the classical liberal picture of government sketched out in the Lockean natural rights provisions. Whereas the latter introduce the basic rights of individuals, the former explain why government is created and implicitly suggest the limits of its legitimacy.

This article examines the origin, significance, and evolution of Purpose of Government Clauses, which range from the seemingly communitarian phraseology typified by the provisions of the 1776 constitutions of Maryland and Delaware (providing that government is "instituted solely for the good

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♦Vice President for Legal Affairs, Goldwater Institute. This article cites many superseded constitutions. To avoid confusion, therefore, these are cited with the year included (for example, "Va. Const. of 1776 art. I"). The year is omitted only when speaking of constitutional language still in effect at the time of this writing. My thanks to David Roland and Sam MacRoberts for helpful suggestions on this article.

[1] See, e.g., Anthony B. Sanders, Social Contracts: The State Convention Drafting History of the Lockean Natural Rights Guarantees, 93 UMKC L. Rev. 641 (2025); Daniel B. Rodriguez, State Constitutional Rights, Naturally, 93 UMKC L. Rev. 619 (2025); Nathaniel M. Fouch, "A Document of Independent Force": Towards A Robust Ohio Constitutionalism, 49 U. Dayton L. Rev. 1 (2023); Steven G. Calabresi & Sofía M. Vickery, On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees, 93 Tex. L. Rev. 1299 (2015).

[2] See Calabresi & Vickery, supra note 1.

[3] One of the few scholars to examine these clauses is Joseph R. Grodin, whose article, Rediscovering the State Constitutional Right to Happiness and Safety, 25 Hastings Const. L.Q. 1 (1997), argued that Purpose of Government Clauses impose on government "an affirmative obligation to provide at least the minimum conditions necessary for human happiness and safety," including "food, shelter, and medical care, and so far as possible, a nondangerous environment." Id. at 29. From either an originalist or textualist standpoint, however, such an interpretation is implausible. When these clauses were drafted, virtually nobody believed that government had an obligation to provide such goods to the people. Nor does the language of these clauses warrant such an interpretation. To cite one example on which Grodin relied (see id. at 3), the Virginia Declaration of Rights does not say government exists to provide happiness or safety; it says that the right to pursue happiness and safety is a *natural* right—i.e., a right held in the state of nature—and that people do not surrender that right when they join society. See Va. Const. of 1776, Declaration of Rights, ¶ 1. This only means government has a duty not to interfere in such pursuits, not that government must satisfy those needs.

of the whole"[4]) to the more libertarian language employed in the constitutions of Washington and Arizona, written in 1889 and 1910, respectively (providing that governments "are established to protect and maintain individual rights"[5]). Between these poles lies a tale of history and political philosophy that is both intriguing in its own right and helpful to courts addressing constitutional questions such as the scope of constitutionally protected liberty and the limits of government authority. The article concludes with observations on the relevance of these clauses in today's world, particularly with respect to "rational basis" scrutiny and the presumption of constitutionality.

I. THE AMERICAN REVOLUTIONARY BACKGROUND

A. Why Specify Government's Purposes at All?

Constitution-making is an unusual form of legislating because it involves a direct interaction with matters of political philosophy. Constitution-makers, more than any other lawmakers, must take abstract principles—such as the nature of individual rights or the limits of government legitimacy—and implement them in the form of rules that guide the actual operations of government and the expectations of citizens. To appreciate the Purpose of Government Clauses, therefore, it is best to begin with the philosophical groundwork.

Philosophers have long been preoccupied with the question of why government exists. From Plato and Aristotle to Augustine and Aquinas, ancient thinkers focused much attention on this issue. But the most important influences on American state constitutions were the philosophers associated with the social contract theory of seventeenth-century classical liberalism, particularly John Locke.[6]

Locke (following Thomas Hobbes and others) sought to explain why government exists by imagining a world without government. In such a "state of nature," individuals would possess rights to life, liberty, and property in principle, but would face serious threats of violence from others. They therefore agree—through a "social compact"—to establish government as an institution charged with protecting them against aggression. Their agreement gives government its legitimacy—that is, it

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[4] Del. Const. of 1776, Declaration of Rights, ¶ 1; Md. Const. of 1776, Declaration of Rights, ¶ 1.

[5] Wash. Const. art. I, § 1; Ariz. Const. art. II, § 2.

[6] See generally Michael Zuckert, Natural Rights and the New Republicanism (2011); C. Bradley Thompson, America's Revolutionary Mind (2019) (detailing ubiquity of Locke in American colonial thought).

justifies the government's use of coercion.[7] As Locke explained, because people are "by nature, all free, equal, and independent," no one may rightly be "subjected to the political power of another, without his own consent."[8] As there are no *natural* rulers, those who seek to govern others must instead ask permission. And the reason the people give that permission—i.e., their consent—is security. "The only way whereby any one divests himself of his natural liberty, and puts on the bonds of civil society," wrote Locke, "is by agreeing with other men to join and unite into a community, *for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security* against any, that are not of it."[9] It is because government is effectively hired to do this job that the people may reform or overthrow it if it does its job badly or perverts its powers in ways that are inimical to its mission.[10]

While there was a broad consensus in favor of Lockean social compact theory in the colonies at the time of the Revolution, the Patriots initially hesitated over whether to invoke its principles as the basis of their opposition to Parliament's actions. In fact, this was a matter of considerable debate at the First Continental Congress, where radical members such as John and Samuel Adams insisted that Parliament's treatment of the colonies—particularly its claim of authority to legislate for the Americans "in all cases whatsoever"[11]—violated principles of natural law and undermined the social compact. Their opponents feared that premising the case for American liberty on these philosophical arguments risked a dangerous transformation of society. Delegate Joseph Galloway, for example, warned his fellow Pennsylvanians that natural law arguments were "maizy [sic] labyrinths of perplexity" that, if pursued, would elevate "anarchy above order."[12] In short,

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[7] To be precise, consent is necessary but not sufficient to justify the use of coercion; their consent must be consistent with natural moral law.

[8] John Locke, Second Treatise of Civil Government § 95 (1689), *in* John Locke: Two Treatises of Civil Government 374 (Peter Laslett rev. ed., 1963) (spelling and orthography modernized).

[9] Id. (emphasis added).

[10] This contractarianism is the crux of classical liberal thinking about government, and distinguishes it from theories such as Hegelian historicism, which views government not as the creation of a deliberate choice but as a superhuman force, or the patriarchal model offered by Robert Filmer in his 1680 book *Patriarcha*, which holds that government is more akin to a family—based on natural rule and unchosen obligation—than a contract. By the time of the American Revolution, classical liberal contractarianism was virtually ubiquitous in the colonies, but there were some holdouts. In 1775, for example, Anglican preacher Jonathan Boucher publicly declared his support for Filmer's theory, with the consequence that he was hounded out of the colonies, and spent the rest of his life in England. See Peter Laslett, Sir Robert Filmer: The Man Versus the Whig Myth, 5 Wm. & Mary Q. 523 (1948). See Anne Young Zimmer, Jonathan Boucher: Moderate Loyalist and Public Man (1966) (Ph.D. dissertation, Wayne State University).

[11] Declaratory Act 1766, 6 Geo. 3 c. 12 (Gr. Brit.).

[12] 1 American Archives (Fourth Series) 608 (Peter Force ed., 1837).

arguing that Parliament's mistreatment of the colonists violated the English common law or the written terms of colonial charters kept the dispute between America and Britain confined to an internal disagreement about the relative powers of agreed-upon institutions. To argue instead that Parliament's actions violated natural law would call into question the legitimacy of the entire political system of British America.

Of course, Adams and his fellow radicals won that debate. As London ignored American petitions for redress, it became ever more clear that Britain regarded the colonies not as equal members of the empire, but as subsidiaries—effectively, corporations established to enrich the mother country. Patriots, viewing this as a violation of natural law and a betrayal of the social compact, eventually ceased to argue about the protections of colonial charters and the common law and rested their case on "the laws of nature and of nature's God."[13]

The question of whether to rely exclusively on positive law or to invoke the abstract principles of political philosophy was not just a momentary preoccupation during a particular political episode. On the contrary, it reflected a tension in Enlightenment-era political thinking which burst to the surface during the French Revolution in the 1780s and is most vividly symbolized by the famous debate between Thomas Paine and Edmund Burke. The focus of this dispute was on the degree to which abstract principles should guide the formation and reformation of government *at all*. On one side, Burke thought they should play little or no role. Rejecting the analogy between the political state and a contract, he argued that politics was not a matter of doctrines, principles, or rational deliberation, but rather one of habit and sentiment. In his view, politics was about fostering "pleasing illusions" and "decent drapery" which are necessary to "cover the defects of our . . . nature" and render us willing to accept "loyalty to rank . . . submission . . . obedience . . . [and] servitude"[14]—which, he conceded, cannot be justified on the basis of reason, but only habit and dogmatic tradition. Thus, he excoriated the "sophisters, []economists, and calculators" who—like a person who tells an audience how a magician performs his tricks—were peeking behind the "pleasing illusions" thus ruining the effect by explaining the purposes and limits of government in rational terms.[15]

One of those "sophisters" was, of course, Thomas Paine, who sought to explain the creation and function of the state as a man-made institution

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[13] Declaration of Independence, 1 Stat. 1 (1776).

[14] Edmund Burke, Reflections on the Revolution in France 170–71 (Connor Cruise O'Brien ed., 1984) (1790).

[15] Id.

explicable by reason: "Government in a well-constituted republic[] requires no belief from man beyond what his reason can give," he wrote.[16] The American Revolution set the precedent of basing government on "principles as universal as truth and the existence of man" rather than on mere habit.[17] Others included John Adams—who, despite his many differences with Paine, agreed that "government [is] a plain, simple, intelligible thing founded in nature and reason and quite comprehensible by common sense"[18]—and Thomas Jefferson, who thought human beings "enlisted by all their interests on the side of law and order, habituated to think for themselves, and to follow their reason as their guide, would be more easily and safely governed than with their minds nourished in error, and vitiated and debased . . . by ignorance, indigence, and oppression."[19]

Of course, the Paine-Burke debate lay in the future when America's first state constitutions were written, but it helps highlight the significance of the fact that Americans so often chose to state expressly in those constitutions *why* government exists in the first place. Between Burkean sentimentalism and Painite contractarianism, they emphatically chose the latter. Rather than viewing government as a kind of inevitability—as a matter of habit, tradition, or "decent drapery"[20]—they believed that it is rationally designed to accomplish specific purposes and is, consequently, subject to alteration or overthrow if it fails in those purposes. *Common Sense*, the most famous American Revolutionary pamphlet, thus expressed the almost universal view that government is a man-made institution designed to protect the citizenry. "[S]ecurity [is] the true design and end of government," wrote Paine. When the people "surrender up a part of [their] property to furnish means for the protection of the rest," they do so as an act of "prudence," proving "that whatever form thereof appears most likely to ensure [safety]

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[16] Thomas Paine, Rights of Man, Part One (1791), *reprinted in* Thomas Paine: Collected Writings 534 (Eric Foner ed., 1995).

[17] Id. at 537.

[18] John Adams: American Revolutionary Writings 1775-1783, at 120 (Gordon Wood ed., 2011).

[19] 10 Writings of Thomas Jefferson 227 (Paul Leicster Ford, ed., 1899).

[20] Burke, supra note 14, at 171. James Madison boasted that it was "the glory of the people of America, that whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience[.]" The Federalist No. 14 at 88 (James Madison) (J. Cooke ed., 1961). He thought this "manly spirit" was responsible for the laudable "innovations displayed on the American theatre, in favor of private rights and public happiness." Id.

to us, with the least expense and greatest benefit, is preferable to all others."[21]

Five months after *Common Sense* appeared, the Second Continental Congress urged Americans to repudiate their colonial charters and formulate new governments. All except Connecticut and Rhode Island did so, and most of them naturally prefaced their new constitutions with explanations of why they were taking this step. Thus, the preambles and bills of rights they adopted sought to articulate principles of legitimacy. The language they used was that of Lockean liberalism, typically beginning with assertions of rights, followed by Purpose of Government Clauses.[22] The Virginia Constitution of 1776, the Pennsylvania Constitution of 1776, and the Massachusetts Constitution of 1780, to cite just a few, began with the proposition that all individuals are inherently entitled to liberty—that is, naturally endowed with rights—and proceeded to say that their equal possession of such rights entitles them to form governments to protect those rights; these governments being managed by people of their own choosing.[23]

Some state constitutions went further, including clauses that admonished future generations to remember the basic principles of government legitimacy. The reason for this was that the classically educated American founders knew that societies tend to lose track of such principles, particularly when distracted by material wealth, and that this can weaken their commitment to liberty and destroy a free society,[24] as had happened in

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[21] This is not to say that the principle that government exists to protect the people was an innovation of seventeenth century classical liberalism. The social-compact theory can be traced back at least to the Roman poet Lucretius (see Lucretius, On the Nature of Things bk. V (A.E. Stallings, trans., 2007)) or even Aristotle (see Harry V. Jaffa, A New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War 414 (2000)). The Mayflower Compact declared that government's purpose is to see to the "better ordering and preservation" of the people. Colonial Origins of the American Constitution: A Documentary History 32 (Donald S. Lutz ed., 1998).

[22] Thomas Paine, Common Sense 7 (Philadelphia, R. Bell 1776). Of the eleven constitutions adopted in 1776, eight contained a Purpose of Government Clause. See Del. Const. of 1776, Bill of Rights § 1 ("good of the whole"); Ga. Const. of 1776 pmbl. ("benefit"); Md. Const. of 1776, Declaration of Rights, art. I ("good of the whole"); N.J. Const. of 1776 pmbl. ("for the common interest of the whole [s]ociety"); Pa. Const. of 1776, Declaration of Rights, art. V ("common benefit, protection and security of the people"); S.C. Const. of 1776 pmbl. ("good of the people"); Va. Const. of 1776 Declaration of Rights, § 3 ("common benefit, protection, and security"); Vt. Const. of 1776 ch. 1, § 6 ("common benefit, protection, and security"). New Hampshire's, North Carolina's, and New York's lacked such clauses, but the latter repeated the Declaration of Independence verbatim, and therefore arguably contained one.

[23] Va. Const. of 1776, Declaration of Rights, ¶¶ 1–2; Pa. Const. of 1776, Declaration of Rights, ¶¶ 1–3; Mass. Const. of 1780 pmbl.

[24] Jefferson, for example, observed that "the time for fixing every essential right on a legal basis is while our rulers are honest, and ourselves united. From the conclusion of this war we shall be going down hill. It will not then be necessary to resort every moment to the people for support. They will be forgotten, therefore, and their rights disregarded. They will forget themselves, but in the sole faculty of making

ancient Rome.[25] The only way to prevent this was for the people to be reminded occasionally of the basic principles that justify their (or any) government.

For the Revolutionaries to adopt such clauses was a sensible step, considering that democratic republics are premised on public opinion, and, therefore, prevailing attitudes toward justice, authority, and individual rights are the indispensable basis for all social and political institutions. In short, a "creedal nation" could survive only if that creed was understood, revered, and taught to future generations.[26] Consequently, these early constitutions warned (in Virginia's wording) "[t]hat no free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue and by frequent recurrence to fundamental principles,"[27] or (in Pennsylvania's phrasing) that "a frequent recurrence to fundamental principles, and a firm adherence to justice, moderation, temperance, industry, and frugality are absolutely necessary to preserve the blessings of liberty, and keep a government free[.] The people ought therefore to pay particular attention to these points . . . ."[28]

B. What Government "Ought to Be"

Many of these early constitutional admonitions and explanations used a phrase that rarely occurs in today's law: "ought to be." To the modern lawyer's ear, this phrase sounds optional, precatory, or non-mandatory, as opposed to more compulsory words such as "must" or "shall."[29] The Virginia Declaration of Rights, in fact, used the word "ought" eight times, and the

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money, and will never think of uniting to effect a due respect for their rights. The shackles, therefore, which shall not be knocked off at the conclusion of this war, will remain on us long, will be made heavier and heavier, till our rights shall revive or expire in a convulsion." Thomas Jefferson: Writings 287 (Merrill Peterson ed., 1984).

[25] The Roman example was much on the minds of Englishmen in 1776. That year, Edward Gibbon ascribed the collapse of Rome to its forgetting its ancient virtues. See J.G.A. Pocock, Between Machiavelli and Hume: Gibbon as Civic Humanist and Philosophical Historian, 105 Dedalus 153 (1976).

[26] See Gordon S. Wood, "Why America is a 'Creedal Nation,'" Wall St. J. (Nov. 21, 2025), https://www.wsj.com/opinion/why-america-is-a-creedal-nation-75676aa8.

[27] Va. Const. of 1776, Declaration of Rights, ¶ 15. Remarkably enough, these admonitions trace their origin to Machiavelli. See Herbert Lawrence Ganter, The Machiavellianism of George Mason, 17 Wm. & Mary Coll. Q. Hist. Mag. 239, 257 (1937).

[28] Pa. Const. of 1776, Declaration of Rights, ¶ 14.

[29] Leonard Levy went so far as to call these clauses "flabby" and "namby-pamby," because "'[o]ught' . . . reflected an ideal, not a prescription or a command." Leonard W. Levy, The Emergence of a Free Press 184 (1985). This ignores the fact that "ought" was essentially a term of art in that era, signifying the dividing line between actual law and usurpations. Incidentally, courts have often held that even the term "ought" can be mandatory, depending on context. See, e.g., Opinion of the Justs., 150 A.2d 816, 819–20 (N.H. 1959); State v. Blaine, 124 P. 516, 517 (Mont. 1912); Life Ass'n of Am. v. St. Louis Cnty. Bd. of Assessors, 49 Mo. 512, 518–19 (1872).

Pennsylvania Declaration ten.[30] In the eighteenth century, however, "ought" was not viewed as a contrast to "shall." Samuel Johnson's *Dictionary*, for example, defined "ought" as "[t]o be obliged by duty," which is closer to today's "shall" than "may."[31] Moreover, in eighteenth century constitutional parlance, the phrase "ought to be" was a well-recognized formula—or, rather, half of a two-part formula for government legitimacy. According to the prevailing natural law theory, the distinction between *law* and mere *force* is that law combines force with rightfulness—it is not coercion alone, but *justified* coercion. Legislatures therefore often employed the phrase "ought to be" in statutes that purported to articulate the legitimate reach of government power or that acknowledged the rights of individuals or groups. As early as 1547, Parliament declared it treason to deny that Edward VI and his heirs "of right ought to be Kings" of England.[32] It later declared it treason to assert that Queen Mary "is not or of right ought not to be [] Que[en]."[33] More familiar to the American Revolutionaries, Parliament declared in 1719 that the government of Ireland was and "ought to be" subordinate to Parliament,[34] and in 1766, it adopted the Declaratory Act, which pronounced that the colonies "are, and of right ought to be, subordinate unto, and dependent upon the imperial crown and parliament of Great Britain."[35] It was in response to this that the authors of the Declaration of Independence twice employed the same formula in 1776, declaring that the bond between Britain and the colonies "is, and ought to be, totally dissolved," and that the colonies "are, and of right ought to be, free and independent states."[36]

In such documents, the term "ought" operates as a reminder of the normative ingredients necessary to make a government act into *law*. As Lon Fuller observed, the lawfulness of a statute is a matter of degree—a function of multiple factors—and the more imperfectly those factors are realized in the statute, the less *lawful* that statute will be.[37] At the far end of the

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[30] Va. Declaration of Rights, ¶¶ 3, 4, 6, 7, 9, 10, 11, 14 (1776); Pa. Declaration of Rights, ¶¶ 2, 5, 7, 10–14 (1776).

[31] Ought, A Dictionary of the English Language (Samuel Johnson ed., 1768). Noah Webster's 1828 dictionary likewise defined the term as "to be held or bound in duty or moral obligation." Ought, American Dictionary of the English Language (Noah Webster ed., 1828). More strikingly, Johnson defined "shall" as a "sign of the future tense," and Webster as "express[ing] a determination," but made no mention of the mandatory/advisory distinction moderns use. In short, as Thomas Y. Davies has written, "framing-era usages do not bear out the notion that 'shall' was more imperative than 'ought.'" Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547, 675 n.350 (1999).

[32] 1 Edw. 6 c. 12 (1547).

[33] 1 & 2 Ph. & M. c. 10 (1554).

[34] Declaratory Act 1719, 6 Geo. 1 c. 5 (Gr. Brit.).

[35] Declaratory Act 1766, 6 Geo. 3 c. 12 (Gr. Brit.) (emphasis added).

[36] 1 Stat. 1 (1776).

[37] Lon L. Fuller, The Morality of Law ch. 2 (rev. ed. 1969).

spectrum, a statute can be so lacking in these normative ingredients that it cannot be called *law* at all.[38] Thus, when the Virginia Declaration of Rights, for example, asserts "[t]hat all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights and *ought not* to be exercised,"[39] or when the Pennsylvania Declaration states that "all elections ought to be free,"[40] they mean that, for government actions to qualify as legitimate and thus be binding in conscience, they must fall within the specified boundaries. One would not hesitate to say, for example, that a suspension of the laws without legislative consent, or an unfree election, would fail to achieve constitutionality according to these provisions, notwithstanding the language of "ought not" instead of "shall not."[41]

Thus, we can see that Robert Palmer erred in arguing that the use of "ought" indicates that Revolutionary era bills of rights were "not guarantees at all," but only "principles . . . by which government was expected to abide."[42] Lawyers of the era did not distinguish between these two categories as strictly as moderns do. They surely did not regard the Declaration of Independence as a mere "principle" just because it repeatedly uses the word "ought." While not denying that government *can* act outside its legitimate scope (after all, they were witnessing the British government doing just that), the American Revolutionaries were asserting standards of *legitimacy*, offering a framework for understanding government's *entitlement* to exercise power. They understood that it is always *physically* possible for the government to act unjustly or to engage in an act of mere force, but it is not *legally* possible for the government to do such things and remain within the boundaries of its authority. At that point, it crosses into illegitimacy and becomes an institution of force and usurpation instead of law.[43]

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[38] It might, for example, require and forbid the same act at the same time, or be simply gibberish. See id. at 36.

[39] Va. Const. of 1776, Declaration of Rights, ¶ 7 (1776) (emphasis added).

[40] Pa. Const. of 1776, Declaration of Rights, ¶ 7 (1776) (emphasis added).

[41] Even more clearly, the Vermont Constitution declared that "no man ought, or of right can be compelled, to attend any religious worship." Vt. Const. of 1777 ch. 1, § 3. "Ought" and "of right can be" are plainly synonymous.

[42] Robert C. Palmer, Liberties as Constitutional Provisions, 1776-1791, *in* Liberty and Community: Constitution and Rights in the Early American Republic 55, 65–66 (William E. Nelson & Robert C. Palmer eds., 1987).

[43] Cf. The Federalist No. 16, supra note 20, at 103–04 (Alexander Hamilton) (noting the "distin[ction] between a legal exercise and an illegal usurpation of authority"); id. No. 33, at 207 (Alexander Hamilton) ("[A]cts of the larger society which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies . . . will be merely acts of usurpation, and will deserve to be treated as such.").

C. How Preambulatory (and Postambulatory) Language Works

Lawyers are often uncomfortable with preambles. According to an old maxim, a preamble is "no part of the law,"[44] and in *Jacobson v. Massachusetts*, the U.S. Supreme Court rejected an argument based on the federal Constitution's Preamble with the observation that it "has never been regarded as the source of any substantive power conferred on the government . . . ."[45] But ignoring preambles would violate a cardinal rule of construction which holds that no constitutional provision should be rendered ineffective by interpretation.[46] And nineteenth century treatise writers were clear that while preambles may not themselves be operative law, they should guide the *interpretation* of laws.[47]

Furthermore, although modern lawyers might be skeptical toward prefatory provisions,[48] there are instances where the dividing line between "prefatory" and "operative" is unclear. This is particularly true of the kind of instructive or aspirational language that early constitution writers employed, such as Purpose of Government Clauses. In fact, some early constitutions, including Virginia's, Pennsylvania's, Delaware's, and Maryland's, separated bills of rights from the rest of the constitution, and presented them at the beginning. We might therefore view them *in their entirety* as preambles, particularly given their use of the word "ought." Yet it would be absurd to view a state's whole bill of rights as merely advisory or precatory. In short, the modern lawyer's prejudice against preambles collides with early constitutional practice. Today's preconceptions must therefore make way for yesterday's richer understanding of the importance of constitutional clauses that articulate the basis of government legitimacy

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[44] See, e.g., State v. Superior Ct. in & for Thurston Cnty., 159 P. 92, 96 (Wash. 1916).

[45] 197 U.S. 11, 22 (1905).

[46] See, e.g., Moore v. Valley Garden Ctr., 185 P.2d 998, 999 (Ariz. 1947). A number of scholars have tried to revive focus on preambles. See, e.g., Eliot T. Tracz, Towards a Preamble-Based Theory of Constitutional Interpretation, 56 Gonz. L. Rev. 95 (2021); John W. Welch & James A. Heilpern, Recovering Our Forgotten Preamble, 91 S. Cal. L. Rev. 1021 (2018).

[47] As Joseph Story observed, a preamble "is a key to open the mind of the [law]makers, as to the mischiefs which are to be remedied and the objects which are to be accomplished by the . . . statute." 1 Joseph Story, Commentaries on the Constitution § 459, at 338 (5th ed. 1891). Theodore Sedgwick agreed: a preamble is "without force in a legislative sense" but is "a guide to the intentions of the framers." Theodore Sedgwick, A Treatise on the Interpretation and Construction of Statutory and Constitutional Law 43 (2d ed. 1874). More recently, in *District of Columbia v. Heller*, 554 U.S. 570, 577 (2008), the Supreme Court observed that a prefatory clause can "resolve an ambiguity" in the "operative" portion of a statute.

[48] See, e.g., Rick Applegate, Montana Constitutional Convention Studies No. 10: Bill of Rights 69–70 (1972) (arguing that some claim that such "hortatory" clauses regarding "political theory" should be "exclu[ded]" from the state constitution).

and that were written in hopes of shaping the understandings of future generations and limiting the operation of government.

Nevertheless, the thoroughly modern lawyer might ask how, exactly, broad expressions regarding legitimacy can play out in constitutional practice. Even assuming that an utterance such as "no free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue and by frequent recurrence to fundamental principles"[49] is legally significant; how is it supposed to work in the concrete world of daily experience?[50] The answer is that just as a compass is not a part of a boat's engine but is nevertheless essential to reaching one's destination, constitutional guidances are critical to the proper functioning of government. Admonitions and preambles guide interpretation of contested terms such as "liberty" or "privacy," thereby shaping broader jurisprudential considerations or models of application.

Take, for example, the principle of the "presumption of constitutionality." This is not referenced in the text of any constitution, state or federal. It is a judicial construct, typically held to be based on the value of democracy and the separation of powers.[51] In other words, the presumption of constitutionality represents a normative premise that judges have adopted—namely, that majoritarian outcomes are typically preferable (because these outcomes are likely to be better informed than the decisions of a single judge, or because there is something legitimizing about the process of democratic consensus-building, or because errors by the majoritarian process are more likely to be self-correcting).[52] Whatever the merits of these rationales, the

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[49] Va. Const. of 1776, Declaration of Rights, § 15.

[50] That very question was raised at the Utah Constitutional Convention of 1895. When it was proposed that the constitution include the phrase "[f]requent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government," delegate Charles Varian asked what the purpose of this language could possibly be. "Are the individual members of the commonwealth frequently to recur to fundamental principles, and how? . . . And if they do not, how will we compel them to do it . . . ?" 1 Official Report of the Proceedings and Debates of the Convention Assembled at Salt Lake City on the Fourth Day of March 1895 to Adopt a Constitution for the State of Utah 361–62 (1898). Delegate Heber Wells replied that the language was "a patriotic utterance that did no harm." Id. at 362. But delegates Orson Whitney and Franklin Richards had a better answer. "This is not the first section in this document which declares a fundamental principle without guaranteeing it," said Whitney. "We declare that all men have the inalienable right to enjoy and defend their lives and liberty." Id. Richards agreed. It was "an admonition from the great sovereign power of this State to every officer and every citizen and every person within the State." Id. A constitution, after all, is supposed to instruct executive and legislative officials, too, not just judges.

[51] See F. Andrew Hessick, Rethinking the Presumption of Constitutionality, 85 Notre Dame L. Rev. 1447, 1449–1450 (2010).

[52] See David M. Burke, The "Presumption of Constitutionality" Doctrine and the Rehnquist Court: A Lethal Combination for Individual Liberty, 18 Harv. J.L. & Pub. Pol'y 73, 80–81 (1994).

point here is that the presumption of constitutionality is built in part on a particular normative view about democracy—one that, at least in many cases, prioritizes the common good over individual freedom.[53] Preambulatory language is what shapes these kinds of normative views. It is what shapes—or is intended to shape—the "meta-norms of the constitution."[54]

There is nothing radical about this. The Tenth Amendment to the U.S. Constitution is an obvious example. Like its sibling, the Ninth Amendment, the Tenth is not an operative command, but an admonishment—a "postamble." Both amendments instruct readers on how to interpret the Constitution, rather than imposing any particular rule. In cases involving the proper spheres of the federal and state governments, courts properly consult the Tenth Amendment and seek to respect its instructions. When they do, they are using it to interpret operative constitutional rules in accordance with the meta-norm established in the Amendment. So, in *Printz v. United States*,[55] the Court did not (as is sometimes said[56]) "enforce" the Amendment. Instead, it interpreted the Commerce Clause by reference to the Amendment's admonition that states do (and of right ought to) retain primary responsibility for governing domestic matters. That decision applied the normative rule articulated in the Constitution's postamble, in just the way the authors of state constitutions expected officials to apply state preambulary language. In short, constitutional provisions that instruct judges and other officials to abide by or consider certain principles are not mere

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[53] See id. at 83–84.

[54] Frank I. Michelman, What Do Constitutions Do That Statutes Don't? *in* The Least Examined Branch: The role of Legislatures in the Constitutional State 274 (Richard W. Bauman & Tsvi Kahana eds., 2006). Michelman was quoting a paper by Matthew Palmer which defines this term as "constitutional conventions, in the sense of recogni[z]ed practices, usages and understandings"—practices that exist "'in the actions, understandings and inter-relationships of those who operate' the constitution." Id. (citation omitted). Palmer's paper was later published as *What is New Zealand's Constitution and Who Interprets It? Constitutional Realism and the Importance of Public Office-Holders*, 17 Pub. L. Rev. 133 (2006). Unfortunately, the published version omitted this useful term. Douglas Den Uyl and Douglas Rasmussen have also explored the concept of meta-norms helpfully in their book *Norms of Liberty* (2005).

[55] 521 U.S. 898 (1997).

[56] See, e.g., D. Cody Huffaker, A New Type of Commandeering: The Bypass Clause of the American Recovery and Reinvestment Act of 2009 (Stimulus Package), 42 Ariz. St. L.J. 1055, 1062 (2010); Harold J. Krent, Judging Judging: The Problem of Second-Guessing State Judges' Interpretation of State Law in Bush v. Gore, 29 Fla. St. U. L. Rev. 493, 533 n.221 (2001); Royal C. Gardner, Exporting American Values: Tenth Amendment Principles and International Environmental Assistance, 22 Harv. Env't. L. Rev. 1, 2 n.5 (1998).

rhetoric; they bind officials to employ specified norms as part of their actions and, in the case of courts, in their jurisprudence.[57]

This point takes on added significance given recent debates regarding the normative valence of the U.S. Constitution. Scholars concerned with so-called "common good constitutionalism" have expressed concern over what they see as the modern effort to establish a "values-neutral liberal proceduralism" that ignores the law's normative dimension.[58] One need not share the goals of the "common good" school to agree that value-neutrality leads to regrettable consequences or even logical incoherence in the law.[59] Fortunately, constitutions—both state and federal—are not only *not* value-neutral, but they say this themselves.[60] Their preambles and postambles instruct us about their implicit moral frameworks, if only we will notice.

II. THE DELAWARE/MARYLAND MODEL: "GOOD OF THE WHOLE"

A. The Origin of Purpose of Government Clauses

Openly specifying government's purposes was a critical part of the Revolutionary effort, and not just as a matter of philosophical doctrine. It helped the Patriots explain why they chose to resist British rule, both vindicating the cause in which they were engaged and helping to persuade and recruit the undecided. This was especially important given the diversity of the country's population. Americans differed not just in terms of ethnic ancestry (encompassing Englishmen, Frenchmen, Germans, Irish, and Italians, among many others), but also in terms of religion: they included Protestants, Catholics, Jews, Quakers, and deists.[61] Specifying the purposes of government clarified the terms on which this disparate population could join hands.

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[57] Statutes also do this, and quite often. Countless laws require officials to "consider" certain "factors" when making decisions about, say, licenses or permits. See, e.g., Cal. Food & Ag. Code § 42683 (specifying factors for regulating food containers); Wash. Rev. Code § 67.70.070 (specifying factors to be considered in granting permission to sell lottery tickets); S.D. Codified Laws § 34A-3A-6(1) (listing factors to be considered when regulating water facilities). Many statutes require consideration of normative factors, such as justice, see, e.g., Wa. Stat. § 36.26.080, or the "best interest of the child." See, e.g., Ohio Rev. Code § 3109.04. Hawaii has even statutorily instructed courts to consider the "aloha spirit" when interpreting statutes. Haw. Rev. Stat. § 5-7.5.

[58] Josh Hammer, Common Good Originalism: Our Tradition and Our Path Forward, 44 Harv. J.L. & Pub. Pol'y 917, 929, 952 (2021).

[59] I made this case in Timothy Sandefur, The Conscience of the Constitution (2014).

[60] For example, the U.S. Constitution declares in its preamble that liberty is a "blessing"—the only use of that word in the document, and a clear expression of approval that reflects the underlying classical liberal premises of the Constitution. U.S. Const. pmbl.

[61] See Vincent N. Parrillo, Diversity in America ch. 3 (2005).

Consider the Continental Congress's address to the people of Quebec in 1774, in a letter intended to persuade Catholic French Canadians to join a resistance that was led by Protestants of English descent. It began by quoting the Catholic liberal Cesare Beccaria to the effect that "[i]n every human society . . . there is an *effort*, *continually tending* to confer on one part the heighth [sic] of power and happiness, and to reduce the other to the extreme of weakness and misery. The intent of good laws is to *oppose this effort* and to diffuse their influence *universally* and *equally*."[62] Making clear what the government they hoped to establish would do—and what it would not do—in terms acceptable to a broad spectrum of religious believers, may have helped reassure potential allies that they were not being asked to sacrifice too much.

There was another reason the Patriots saw fit to declare the purposes of government. In the years leading up to independence, the British Parliament often appeared to regard the American economies as existing solely for the purpose of enriching the mother country. "Colonies we are apt to consider in the light of factories," wrote an anonymous English pamphleteer in 1769, "who are only to contribute to our wealth and aggrandizement, and are wholly to be regulated and controuled [sic] by ourselves, in such manner as we think will best answer our present designs and purposes."[63] London's policies, another author wrote, sacrificed the colonists' interests "purely to enrich some merchants or some brokers of the capital."[64] King George III thought the colonies ought to stand in a "subordinate relation to Great Britain."[65] Over time, Americans came to resent this, insisting that their ancestors had not gone to America to improve England's bottom line, but to escape European control and to set up autonomous societies for the benefit of themselves and their posterity. As their principal champion in Parliament, William Pitt, put it in a speech to the House of Commons: "You have prohibited [commerce] where you ought to have encouraged [it]; you have encouraged [it] where you ought to have prohibited [it] . . . . Much is wrong. Much may be amended for the general good of the whole."[66]

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[62] 1 Journals of the Continental Congress 105–06 (1904) (quoting Cesare Beccaria, An Essay on Crimes and Punishments 1 (4th ed. 1775)).

[63] Anonymous, An Inquiry into the Nature and Causes of the Present Disputes between the British Colonies in America and Their Mother Country 5–6 (1769).

[64] Abbé Raynal, The Sentiments of a Foreigner on the Disputes of Great-Britain with America 7–8 (1775).

[65] George III, Speech to Parliament, Oct. 26, 1775, *in* The Declaration of Independence in Historical Context 383 (Barry Alan Shain ed., 2014).

[66] 2 Correspondence of William Pitt, Earl of Chatham 371 (William Stanhope Taylor & John Henry Pringle eds., 1838).

Note the final phrase. When Benjamin Franklin wrote in 1754 that Parliament should legislate "for the interest of the whole [empire]," he imagined Americans and Britons sharing power and opportunity equally. However, it gradually became clear that Parliament saw the colonies as ventures for enriching Britons.[67] As Jefferson wrote twenty years later, Parliament restricted colonial trade "for the purpose of supporting not men, but machines, in the island of Great Britain."[68]

The impression that London treated colonists like servants—and that London was legislating for the interests of a few rather than the empire as a whole—was particularly acute in "proprietary" colonies, which were controlled by private owners under royal charters.[69] This proprietor was effectively a king, but perhaps worse, because while the king was at least subordinate to Parliament, the proprietor's authority was practically limitless. Two such proprietary colonies were Pennsylvania and Maryland, ruled by the Penn and Baltimore families, respectively. Both colonies had tense relationships with their proprietors. Pennsylvania's government was often forced into difficult negotiations with the proprietors over political controversies and Maryland was wracked by conflicts over proprietary authority and complaints about exploitation of the residents, until the Baltimore family's charter was revoked (after which it was ruled as a royal colony).[70] Therefore, by the time of the Revolution, Pennsylvanians and Marylanders had particular reason to emphasize that proper government exists to serve the broad public interest, not the aggrandizement of a single ruler or group of grandees. In such an atmosphere, a statement that government is established to serve the public interest marked a turning point in popular opinion.

When the Continental Congress called upon the colonies to draft new constitutions in May 1776, it specified that these new governments should be created for "the preservation of internal peace, virtue, and good order, as well as for the defense of their lives, liberties, and properties, against the hostile invasions and cruel depredations of their enemies."[71] The first colony

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[67] Letter to William Shirley, Dec. 22, 1754, *in* 5 Papers of Benjamin Franklin 449 (Leonard W. Labaree ed., 1962). See also Norbert Kilian, New Wine in Old Skins? American Definitions of Empire and the Emergence of a New Concept, *in* Theories of Empire 1450-1800 at 308–09 (David Armitage ed., 1998) (discussing Americans' realization that "good of the whole" meant something different in London).

[68] A Summary View of the Rights of British America (1774), *reprinted in* Jefferson: Writings, supra note 24, at 110.

[69] As opposed to royal colonies which were governed by the king directly and charter colonies, which were governed by a company or corporation.

[70] 2 The American Colonies and the British Empire 1–2 (Steven Sarson ed., Routledge 2016) (2010).

[71] 4 Journals of the Continental Congress, supra note 62, at 357–58.

to act on this recommendation was Virginia, which adopted its constitution and Declaration of Rights a month later. That declaration began with the Lockean premises of equality and liberty, before observing that "government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community."[72] Two months later, Delaware proclaimed its new constitution, using different language: "All government of right," it said, "[is] instituted solely for the good of the whole."[73] Maryland copied this wording a few months afterwards.[74]

This use of the era's "ought to be" terminology reminds the reader that this clause articulates a standard of legitimacy. And its statement that government exists "for the good of the whole" rejects the proposition that the colonists' role is to labor for the enrichment of a king, a proprietor, or a group of British bigwigs. As one Marylander observed at a later constitutional convention, the "good of the whole" terminology "was a declaration made by our ancestors of 1776 as against monarchical forms of government."[75]

B. "Classical Republicanism" and the Dorr Rebellion

It would be easy to regard the "good of the whole" terminology as a statement of "classical republicanism"—a political philosophy concerned primarily with the stability of the political community and emphasizing the need of individuals to sacrifice for its benefit—as opposed to the more individualistic "classical liberal" perspective associated with John Locke. For several decades now, historians have debated whether the American Revolution is best classified as "classical liberal" or "classical republican" in orientation.[76] But as Willi Paul Adams—one of the few scholars to focus on Purpose of Government Clauses—observes, imposing this dichotomous reading on these clauses is anachronistic.[77] The American Revolutionaries did not tend to view the individual's pursuit of happiness as inimical to the overall public interest, but, on the contrary, generally held that the highest

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[72] Va. Const. of 1776, Declaration of Rights, § 3.

[73] Del. Const. of 1776, Declaration of Rights, § 1.

[74] Md. Const. of 1776, Declaration of Rights, ¶ 1.

[75] 1 Debates of the Constitutional Convention of the State of Maryland 145 (1865) (Remarks of Mr. Miller).

[76] See Gordon S. Wood, Classical Republicanism and the American Revolution, 66 Chi.-Kent L. Rev. 13 (1990). Champions of the "classical republican" theory tend to downplay the importance of individual rights and the influence of John Locke on the Revolution, see, e.g., Bernard Bailyn, The Ideological Origins of the American Revolution (1967), whereas defenders of the "classical liberal" underscore the importance of both. See, e.g., Michael Zuckert, Natural Rights and the New Republicanism (1994); C. Bradley Thompson, America's Revolutionary Mind (2019).

[77] Willi Paul Adams, The First American Constitutions 218 (Rita & Robert Kimber trans., 1980).

political good is the protection of individual freedom.[78] Thus, Adams writes, the authors of the "good of the whole" clauses did not try to "resolve[] the ambiguities inherent in the concept"; they instead "belittled" the "possibility of conflict between them."[79]

It is hardly surprising that in the midst of a war during which Patriots were rallying around a common effort, they would not pause to resolve such complex questions in detail.[80] Also, the specter of a domestic political state intruding on individual rights probably seemed distant at a time when the primary threat to freedom came from abroad. But it is clear, as Adams puts it, that "[d]espite their penchant for the image of the state as a body," the framers of America's first constitutions "did not go so far as to invest this body with a life and with interests of its own that would justify the ruthless subordination of the individual's interests."[81] On the contrary, those who did consider the question appear to have detected early on the danger of excessive emphasis on communitarianism.[82] Yet the phrase "good of the whole" was indeed broad enough that it might be interpreted in ways inimical to the rights the Revolution was fought to secure. And in the decades after independence, that threat became increasingly pressing, as democratic pressures turned sharply toward the "tyranny of the majority." What ensued was a process of constitutional evolution, as state constitution-makers began to seek ways to resolve the dangerous ambiguities of the seemingly communitarian "good of the whole" concept.

It became clear in the early nineteenth century that when a majority in a community took actions that violated the rights of a minority or individual, those responsible would often invoke the "good of the whole" principle to rationalize their actions. Thus, for example, when schoolteacher Prudence Crandall was put on trial in Connecticut in 1833 for teaching a racially

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[78] See, e.g., The Federalist No. 10 (James Madison), supra note 20, at 58 ("[T]he first object of Government" is "the protection of different and unequal faculties of acquiring property . . . .").

[79] Adams, supra note 77, at 221. But see Applegate, supra note 48, at 76 (arguing that early Purpose of Government Clauses were intended to "point the society to an exclusive 'public good' at the expense of private, essentially personal, interests.")

[80] As Jefferson noted a few years later, Virginia's 1776 Constitution "was formed when we were new and unexperienced [sic] in the science of government. . . . No wonder then that time and trial have discovered very capital defects in it." Notes on the State of Virginia (1787), *reprinted in* Jefferson: Writings, supra note 24, at 243.

[81] Adams, supra note 77, at 221.

[82] Thus, Jefferson complained that being required to devote too much time to public affairs was akin to slavery. See Letter to James Monroe, May 20, 1782, *in* Jefferson: Writings, supra note 24, at 779. He was not alone. A frequent complaint about the Patriot movement was that in its reliance on mass protests, boycotts, etc., it tended toward the tyranny of the majority. See Paul A. Gilje, The Road to Mobocracy: Popular Disorder in New York City, 1763-1834 (1987); Dick Hoerder, Crowd Action in Revolutionary Massachusetts 1765-1780 (1977).

integrated class in violation of the state's segregation law, her counsel argued the law violated the "privileges and immunities" that belong to the citizens of all free governments and that Justice Washington had roughly identified in the legendary case of *Corfield v. Coryell*.[83] But Justice Washington also wrote that these rights were "subject . . . to such restraints as the government may justly prescribe for the general good of the whole,"[84] and prosecutors seized upon this phrase. "[T]he 'privileges and immunities' of education shall be subject to such restraints as the government may justly prescribe, for the general good of the whole," said one. "And who will not say it is for the general good of the whole . . . [to] exclude from our state a bad population [i.e., Black Americans]?"[85]

By the mid-nineteenth century, the risk of majority tyranny was a subject of growing concern. Such fears were provoked in part by the rise of collectivistic political theories,[86] some of which held that democratic sovereignty includes the right to forcibly redistribute wealth or opportunities to serve whatever the majority considers legitimate. These fears were also partly inspired by the rise of abolitionism, which slaveowners often viewed as an effort by a radical, urban minority of ideological crusaders to deprive the conservative, rural populace of their vested property rights.[87]

Americans were highly sensitive to the problem of majority tyranny because European intellectuals had predicted since before the Revolution that American democracy would degenerate into cycles of uprisings and retaliation like the bloody and farcical rebellions of Masaniello or Jack Cade, or the "*stasis*" familiar to ancient Greek democracies.[88] James Madison had

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[83] 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

[84] Id. at 552.

[85] Report of the Arguments of Counsel in the Case of Prudence Crandall v. State of Connecticut 22 (1834) (argument of Mr. Judson).

[86] These included everything from the theories of Robert Owen, who in 1816 dedicated his socialist utopia New Lanark by expressing the hope that "the whole human race may . . . be trained in one mind; all their efforts . . . united to act for the good of the whole . . . [so that] all our evil passions will disappear: no ground of anger or displeasure from one human being towards another will remain; the period of the supposed millennium will commence, and universal love prevail," Robert Owen, An Address Delivered to the Inhabitants of New Lanark 24 (1817)—to the Shaker movement, which pledged that it was "the duty of all the members[] to support and maintain the joint-interest of the Church, according to their several abilities . . . for the good of the whole." The Constitution of the United Societies, of Believers (Called Shakers) 83 (1833).

[87] See Herbert Aptheker, Abolitionism: A Revolutionary Movement (1989).

[88] Masaniello, whose real name was Tomaso Aniello, led a rebellion against Spanish authorities in Naples in 1647. In the space of less than two months, he took control of the city, overthrowing and brutalizing its former leaders, and then turned against former supporters, and was eventually assassinated. Cade led a revolt in England in 1450 which devolved into looting and violence before he was captured by government officials. He died in captivity, but his corpse was nevertheless beheaded. He is

warned that a "pure democracy" offered insufficient protections against the temptation of the majority "to sacrifice the weaker party or an obnoxious individual."[89] He hoped institutional checks and balances would prevent this, but privately expressed concern that "[i]n our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended . . . but from acts in which the Government is the mere instrument of the major number of the constituents."[90] Certainly, incidents such as the Shays and Whiskey Rebellions were worrisome omens, as was Rhode Island's Dorr Rebellion of 1841–42, which devolved into shambles before being put down, and became for many a symbol of the dangers of ultrademocratic politics.[91] In seeking to address this problem, authors of state constitutions would frequently wrestle over the notion of the "good of the whole."

C. The "Good of the Whole" and the Limits of Constitutional Reform

The Dorr Rebellion was a pivotal moment in state constitutional development because it represented a clash over how states could reform their fundamental laws. Unlike other states, Rhode Island had not adopted a new constitution upon independence and operated under its original colonial charter for more than half a century. Reformers saw that charter as inadequate for many reasons, particularly because it gave unequal political weight to entrenched interests over those of average citizens, by (among other things) imposing severe property-ownership requirements for voting.

Options for reform were limited, however, because the charter made no provision for holding a constitutional convention. Thus, in 1841, the state's Suffrage Party simply held a convention of its own, not sanctioned by official authorities. Its members justified this by pointing to the principle, articulated in the Declaration of Independence and many state bills of rights,

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immortalized in Shakespeare's *Henry VI Part 2*, where he speaks the immortal line "first thing we do, let's kill all the lawyers." *Stasis* (which means civil war) was frequent enough in the democratic *poleis* of ancient Greece that it preoccupied many writers on politics over the centuries. See also Will Durant, The Life of Greece 554, 564–65 (1939).

[89] The Federalist No. 10 (James Madison), supra note 20, at 61.

[90] Letter to Thomas Jefferson, Oct. 17, 1788, *in* James Madison: Writings 421 (Jack Rakove ed., 1999).

[91] As historian William M. Wiecek notes, the lesson many drew from the Dorr Rebellion was that "[o]nly by exalting law as a stabilizing influence of social organization, and order as the *summum bonum* of the state, could men fend off a Hobbesian world in which life was supposedly short, nasty, and brutish." "A Peculiar Conservatism" and the Dorr Rebellion: Constitutional Clash in Jacksonian America, 22 Am. J. Legal Hist. 237, 253 (1978). It is worth noting, however, that only a year after the Door Revolution failed, Rhode Island officially adopted a new constitution—which included the "good of the whole" language. R.I. Const. of 1842 art. I, § 2.

that the people have the right to alter or abolish governments. The proposal the convention produced, called "The People's Constitution," was approved by a majority vote. But the existing authorities continued to deny its legitimacy and ultimately succeeded in quashing the People's Constitution movement through military intervention and the support of the federal government. The movement ended without fully deciding the ultimate question of whether the people at large could alter their constitution outside the forms of existing law.[92]

This was a recent memory when Marylanders held their second constitutional convention in 1850, and it contributed to a significant debate over the meaning of the "good of the whole" language. When delegate Benjamin C. Presstman of Baltimore City proposed to change the Purpose of Government Clause by adding a statement (borrowed from Texas's 1845 Constitution[93]) that the people "have at all times the unalienable right to alter, reform, or abolish their form of government in such manner as they may think expedient," delegate Daniel Jenifer of Charles County objected.[94] He agreed with the principle, but argued that it had often been misunderstood or misrepresented by those who thought that "a bare majority . . . from caprice, or inflamed by popular excitement, have a right to overthrow the Constitution without the forms of law."[95] Indeed, some seemed to think "that the people, the immortal, the eternal people, could do what they pleased."[96] If that sort of limitless majoritarianism were enshrined in the constitution, "what becomes of the rights of the minority . . . ?"[97]

A long debate ensued, regarding whether the people's right to change the constitution could be confined *by* the constitution.[98] This seemed self-contradictory to some, but delegate William Spencer cited a wide range of

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[92] See Christian G. Fritz, American Sovereigns: The People and America's Constitutional Tradition Before the Civil War 274–75 (2008).

[93] See Tex. Const. of 1845 art. I, § 1.

[94] 2 Proc. & Debs. of the 1850 [Maryland] Const. Conv. 153 (1851). Presstman (1812–1883) was a member of the state legislature, and later a superior court judge. Dan Friedman, The History of the Baltimore City Solicitors 3 (2003), https://msa.maryland.gov/msa/speccol/sc2600/sc2685/text/solicitors.pdf. Jenifer (1791–1855) was nephew of Daniel of St. Thomas Jenifer, delegate to the Constitutional Convention of 1787. He served as a member of Congress and as minister to Austria. Jenifer, Daniel, History, Art & Archives: US House of Representatives, Jenifer, https://history.house.gov/People/Listing/J/JENIFER,-Daniel-(J000078)/ (last visited Sept. 8, 2026).

[95] Id. Jenifer went on to explain that he was particularly concerned with the risk that residents of urban centers such as Baltimore might adopt a law to abolish slavery in rural areas of the state—a threat so dire, Jenifer said, that it would warrant disunion or secession, words that once "fell upon my ear as the words of a traitor," but which he now feared "may become the language of patriotism." Id.

[96] Id.

[97] Id.

[98] See, e.g., id. at 177 (remarks of Delegate Chambers).

authorities, from Joseph Story to James Madison, to prove that the people's right to alter the constitution must always be exercised "in the manner prescribed in it, or otherwise prescribed by the majority."[99] After extensive discussion, the convention chose to adopt Presstman's amendment to the "good of the whole" clause, but added a new phrase:

> That all government of right originates from the people, is found in compact only, and instituted solely for the good of the whole; and they have at all times, *according to the mode prescribed in this Constitution*, the unalienable right to alter, reform, or abolish their form of government, in such manner as they may deem expedient.[100]

The italicized phrase was then supported by a new article (Article XI), which required the legislature to ask the voters every ten years whether they wanted to hold a constitutional convention.[101] Together, these two provisions tried to confine the people's constitution-making power within the boundaries of the constitution.[102] This effort reflected a basic problem with the "good of the whole" clause: Its ambiguous, seemingly collectivist terminology lent itself too readily to the kind of factionalism or majoritarianism that constitutions are intended to prevent. Yet trying to impose checks and balances on the very process of constitution-making seemed like a kind of category error.

The real scope of that error became clear in 1864, when Marylanders convened another constitutional convention, only to have the convention's legitimacy immediately disputed. Pursuant to Article XI, the legislature had asked voters in 1860 if they wanted to hold a convention, and they said no by a convincing margin.[103] Naturally, they would not be asked again until 1870. But, just four years later, as the state was occupied by the Union Army in the midst of the Civil War, the legislature called for a new convention

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[99] Id. at 181 (emphasis removed). Spencer (1802–1863) served as clerk of the Maryland Court of Appeals and a member of the state legislature. William A. Spencer, Maryland State Archives, https://msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/013800/013841/html/13841bio.html (last visited Sept. 8, 2026).

[100] Md. Const. of 1851, Declaration of Rights, art. I (emphasis added).

[101] See Md. Const. of 1851, art. XI.

[102] See John Alexander Jameson, A Treatise on Constitutional Conventions 242–43 (4th ed. 1887) (describing Maryland's effort to channel constitutional change within the constitution).

[103] See William Starr Myers, The Maryland Constitution of 1864, at 13–35 (1901). Specifically, although voters initially rejected the idea of a constitutional convention, the Union Army effectively took control of Maryland and ensured that a legislative majority was elected that was committed to calling a convention. Delegates at the convention were subject to a stringent oath of loyalty. See id. at 32.

anyway. Many objected, claiming that conventions could only be held on the decennial schedule, while others believed that the article did not forbid the holding of additional conventions in between the decades.[104]

Almost immediately after the convention opened, this debate was reignited when the Bill of Rights Committee proposed to revise the "good of the whole" clause by moving the words "in the mode prescribed in this Constitution."[105] Delegate James Briscoe—a member of the legislature who thought the 1864 convention was unlawful[106]—objected, arguing that the phrase "in the mode prescribed in this constitution" should be retained "[i]n order to avoid misconception" in the future.[107] Delegate George Sands disagreed. He thought it was self-contradictory to claim that the people's right to alter the government is "unalienable" while at the same time attempting to limit that right.[108] Another member, Frederick Schley, seconded Sands's argument. It was "inconsistent," he said, to try to "limit[] the democratic principle," given that the convention itself was meeting in a manner inconsistent with Article XI.[109]

There were larger concerns, however. It was important to limit how constitutional change could come about, one delegate argued, to prevent the tyranny of the majority:

> [W]hile it is undeniably true that [the people] have the right to alter or reform or abolish their form of government, does it necessarily follow that the good of the community, the good of the whole, will be promoted by this wild hurricane rage to which all communities are liable? . . . Because the majority outnumbers the minority, it may be by one only, should that majority do what it pleases, when it pleases, and where it pleases? I acknowledge no such doctrine.[110]

A few puzzled delegates pointed out that the Committee had not proposed to eliminate the "according to the mode prescribed in this Constitution"

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[104] See, e.g., Message of Gov. Bradford of Maryland, Baltimore Sun, Jan. 8, 1864, at 4 (describing debate over propriety of a convention).

[105] See 1 The Debates of the Constitutional Convention of the State of Maryland 134 (1864).

[106] Briscoe (1828–1903) served as Maryland secretary of state and state attorney for Calvert County. James T. Briscoe, Maryland State Archives, https://msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/012900/012949/html/12949bio.html (last visited Sept. 8, 2026).

[107] Myers, supra note 103, at 134.

[108] See id. at 136.

[109] Id.

[110] Id. at 144 (remarks of Mr. Dennis).

provision, but only to reword it and move it to another section. "[T]he Legislature," read the new provision, "shall pass no law providing for an alteration, change or abolishment of this Constitution, except in the manner therein prescribed and directed."[111] That satisfied some, but one delegate persisted, arguing that absent a restriction on the power to remake the constitution, democracy would devolve into a tyranny of the majority. "I am merely calling the attention of members to this matter—those who are announcing their wild theories here, which will catch the ear of the populace who like something radical, such as this 'power of the people'—in order that they may stop and reflect . . . ."[112]

The debate continued at length, with the delegates reading through the Purpose of Government Clauses of many other states,[113] before finally deciding to replace the phrase "according to the mode prescribed in this Constitution," with the assertion that the people have the right to change the constitution "at all times."[114] The convention otherwise retained the "good of the whole" language. Both of these remain in place today.[115]

The evolution of Maryland's Purpose of Government Clause—from the bare assertion in 1776 that government exists for "the good of the whole,"[116] to the more elaborate 1851 clause seeking to constrain the people's right to alter the constitution,[117] to the 1864 revisions loosening some of those constraints[118]—shows how Americans struggled with the meaning and limits of the "good of the whole" concept. While believing in a broad sense that government exists to serve "the whole" people rather than to enrich or empower a narrow group, they feared that excessive deference to the majority risked the rights of the minority and might pervert the "good of the whole" into a form of tyranny.

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[111] Md. Const. of 1864, Declaration of Rights, art. 45.

[112] 1 The Debates of the Constitutional Convention of the State of Maryland 139 (1864).

[113] See id. at 149–50.

[114] Md. Const. of 1864 Declaration of Rights, art. II.

[115] Md. Const. Declaration of Rights, art. I. This was not without controversy, however. At the state's 1867 convention, delegates considered altering the provision yet again, leading one to bemoan the fact that it "had been so changed and tampered with by successive conventions, from its original meaning, that it was [now] obscure, and any further alteration would render it almost unintelligible." Debates of the Maryland Constitutional Convention of 1867, at 99 (Philip B. Perlman ed., 1923).

[116] Md. Const. of 1776, Declaration of Rights, ¶ 1.

[117] Md. Const. of 1851, Declaration of Rights, ¶ I.

[118] Md. Const. of 1864, Declaration of Rights, art. II. In 1867, the state held yet another convention, but it did not alter the Purpose of Government Clause.

D. The Fading of "Good of the Whole"

If Maryland's "good of the whole" clause struck a seemingly republican, or even communitarian, note, other states began their existence with slightly more individualistic terminology. Massachusetts, for example, declared that "[g]overnment is instituted for the common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men,"[119] and that "[e]ach individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws."[120] (The individual was expected, in return for this protection, to pay taxes, to render "personal service" when necessary, and to surrender property in the event of a legitimate exercise of eminent domain.[121]) New Hampshire said in 1784 that people "surrender up some of their natural rights" to the government "in order to insure the protection of others," and that "without such an equivalent, the surrender is void."[122] Delaware's 1792 Constitution began by observing that people have inherent rights, and that they inherently possess "power" for "the due exercise" of those rights, and that government exists to "advance their happiness."[123]

As new states began entering the Union, often copying the language of existing state constitutions, patterns began to emerge. Strikingly, the Delaware/Maryland "good of the whole" language stopped appearing in new constitutions after the Revolutionary period, with the outlier exception of Rhode Island in 1842.[124] Instead, after South Carolina's 1790 Constitution declared that government exists to protect the people's "peace, safety, and happiness,"[125] other states adopted that formulation, including—among others—Kentucky,[126] Tennessee,[127] Illinois,[128] Oregon,[129] and Wyoming.[130] Another common expression was that government exists for the "protection,

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[119] Mass. Const. of 1780, pt. 1, art. VII.
[120] Id. art. X.
[121] Id.
[122] N.H. Const. of 1784, pt. 1, art. 3.
[123] Del. Const. of 1792, pmbl.
[124] Rhode Island declared that government exists "for the protection, safety, and happiness of the people," but also that "[a]ll laws . . . should be made for the good of the whole . . . ." R.I. Const. of 1842, art. I, § 2. As noted earlier, this was plainly a rejection of the aristocratic nature of the colonial charter under which the state had been operating since the seventeenth century.
[125] S.C. Const. of 1790, art. IX, § 1.
[126] Ky. Const. of 1792, art. XII, § 2.
[127] Tenn. Const. art. I, § 1.
[128] Ill. Const. of 1818, art. VIII, § 2.
[129] Or. Const. of 1857, art. I, § 1.
[130] Wyo. Const. art. I, § 1.

security, and benefit" of the people. Michigan used this wording in 1837,[131] followed by Iowa in 1846,[132] California in 1850,[133] Minnesota in 1857,[134] North Dakota in 1889,[135] and Oklahoma in 1907.[136]

Some states were decidedly rights-centric in their terminology; Ohio's 1803 Constitution, for example, declared that "all men born equally free and independent," and that government is "organized for the great purpose of protecting their rights and liberties, and securing their independence."[137] South Dakota's 1889 Constitution said it exists to "secure" such "inherent rights" as "enjoying and defending life and liberty, of acquiring and protecting property and the pursuit of happiness."[138] Others were noticeably less emphatic on this point. Several just said government exists for the people's "benefit."[139] (Kansas, Utah, and Idaho said "equal protection and benefit."[140])

For the most part, these different turns of phrase appeared as minor variations of an attempt to describe the police power. Yet the wording of Purpose of Government Clauses could have significant implications at a time when the nature and scope of that power was the subject of heated dispute. These disagreements frequently turned on the degree to which states should be involved in financing or controlling "internal improvement" projects such as highways, canals, and railroads. "[G]overnment incontestably possesses the constitutional power to execute such internal improvements as are called for by the good of the whole," insisted Henry Clay in his famous speech in support of his "American System."[141] Yet the government taxing some to spend for the benefit of others struck many as a violation of the government's duty to protect everyone's rights equally. And in practice, such institutions as the protective tariff that Clay and his allies

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[131] Mich. Const. of 1835, art. I, § 2.
[132] Iowa Const. art. I, § 2.
[133] Cal. Const. of 1850, art. I, § 2.
[134] Minn. Const. of 1857, art. I, § 1 (using the phrase "security, benefit, and protection").
[135] N.D. Const. art. I, § 2.
[136] Okla. Const. art. II, § II–1.
[137] Ohio Const. of 1803, art. VIII, § 1.
[138] S.D. Const. art. VI, § 1.
[139] Miss. Const. of 1817, art. I, § 2; Ala. Const. of 1819, art. I, § 2; Me. Const. art. I, § 2; Fla. Const. of 1845, art. I, § 2; Tex. Const. of 1845, art. I, § 1.
[140] Kan. Const. Bill of Rights art. I, § 2; Utah Const. art. I, § 2; Idaho Const. art. I, § 2.
[141] 1 The Life and Speeches of Henry Clay of Kentucky 183 (1842).

supported resulted in enriching a favored few at the expense of the general public.[142]

This tension was heightened by disagreements regarding the so-called residual sovereignty of the states. In the 1850s, constitutional thinkers were divided over whether states possessed all powers not expressly disclaimed in their constitutions, or whether there were inherent limits on the power of states which could not be transgressed, even if such limits were not explicitly specified in the state constitution. This dispute is reflected in the jurisprudence of the pre-Civil War decades. In 1843, the New York Supreme Court ruled that the power of eminent domain could not be used to take property from one private owner and give it to another because that did not qualify as "legislative power," since legislative power exists for the protection of individual rights, such as property.[143] Ten years later, the Pennsylvania Supreme Court took the opposite view, holding that the state possessed "supreme and unlimited" power, meaning it could do anything it chose, subject only to those "exceptions[] expressly set down in the state constitution."[144] Four years after that, California's Supreme Court agreed with New York's: because government is created for the purpose of protecting rights, it held, the state may not legitimately violate those rights even if its constitution does not explicitly say so.[145]

Ohio's Supreme Court entered the debate in 1852 by holding that the state's Purpose of Government Clause was not inconsistent with a law whereby the state invested taxpayer money in a private railroad.[146] Those supporting the law argued that the state had whatever power was not expressly withheld by the constitution and that "internal improvement" schemes, not being explicitly banned, were therefore constitutional. The court rejected that argument as "much too broadly stated."[147] The Purpose

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[142] See, e.g., Cong. Globe, 27th Cong. 1st Sess. app. 244 (1841) (Rep. John Hastings: "We know the common argument is, that we perpetrate these acts of arbitrary expediency, or rather speculative injustice, for the good of the whole. How can that be…? Is it for finite man to assume the power of exercising speculative injustice upon the whole of his fellow-men under the plea of its being for the good of the whole—for the general welfare?")

[143] Taylor v. Porter & Ford, 4 Hill 140, 144 (N.Y. Sup. Ct. 1843).

[144] Sharpless v. Mayor of Philadelphia, 21 Pa. 147, 160 (1853).

[145] See Billings v. Hall, 7 Cal. 1, 10–13 (1857). Contra Dorman v. State, 34 Ala. 216, 231–35 (1859) (rejecting the proposition that state governments are inherently limited and endorsing instead the omnipotence theory). Cf. Debolt v. Ohio Life Ins. & Tr. Co., 1 Ohio St. 563, 578 (1853) (finding that state could not contract away its power to tax because to do so would, among other things, exceed the Purpose of Government Clause).

[146] Cincinnati, W. & Z.R. Co. v. Clinton Cnty. Comm'rs, 1 Ohio St. 77, 88–89 (1852). The question presented in this case was a subject of intense litigation during this period of "internal improvements." See Timothy Sandefur, The Origins of the Arizona Gift Clause, 36 Regent U.L. Rev. 1 (2024).

[147] *Clinton Cnty. Comm'rs*, 1 Ohio St. at 84.

of Government Clause, which specified that the state was created "for the great purpose of protecting their rights and liberties, and securing their independence," plainly limited state power in implicit as well as explicit ways.[148] Nevertheless, the court took a capacious view of that Clause, holding that the legislature "may lawfully construct roads, canals, and other descriptions of internal improvement," even though these are not, strictly speaking, protecting individual liberties or securing their independence; such projects are "calculated to facilitate the social and business intercourse of the people, and to develop its resources and add to its strength and security," and that was good enough.[149] Consequently, the court upheld the statute. Yet its decision was superseded just months later, when Ohioans adopted a new constitution which expressly forbade state investments in private railroads[150] and scaled back the Purpose of Government Clause to simply say "[g]overnment is instituted for [the people's] equal protection and benefit."[151]

As noted above, the Delaware/Maryland "good of the whole" clause fell into disuse until Missouri revived it 1865,[152] followed by North Carolina in 1868,[153] Colorado in 1876,[154] Georgia in 1877,[155] Louisiana in 1879,[156] Montana in 1889,[157] and Mississippi in 1890.[158] Why Missouri chose to revert to this older language remains unclear, given that the state's 1865 convention debates were not recorded, but a likely explanation is suggested by the timing. Missouri's 1865 constitution, like Maryland's 1864 document, was a "carpetbagger constitution"—that is, a reformist instrument largely forced upon a recalcitrant, southern-sympathizing populace. During the

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[148] See id. at 86 ("[A]ny act passed by [the legislature], not falling fairly within the scope of legislative power, is as clearly void as though expressly prohibited.").

[149] Id. at 94.

[150] Sandefur, Origins, supra note 146, at 8.

[151] Ohio Const. of 1851, art. I, § 2; see also id. art. VIII, § 4 ("The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation whatever; nor shall the state ever hereafter become a joint owner, or stockholder, in any company or association in this state, or elsewhere, formed for any purpose whatever.").

[152] Mo. Const. of 1865, art. I, § 4.

[153] N.C. Const. of 1868, art. I, § 2. The "good of the whole" provision remains in the North Carolina Constitution today. In 2015, the provision became the subject of one of the few court cases to interpret its language. In *Dickson v. Rucho*, 781 S.E.2d 404 (N.C. 2015), the state Supreme Court reversed a lower court ruling that found a legislative districting plan unconstitutional because it was not for the "good of the whole." The higher court found that the plaintiffs' argument with respect to this clause was "not based upon a justiciable standard." Id. at 440.

[154] Colo. Const. art. II, § 1.

[155] Ga. Const. of 1877, art. I, § 1, ¶ 1.

[156] La. Const. of 1879, Bill of Rights, art. I.

[157] Mont. Const. of 1889, art. III, § 1.

[158] Miss. Const. art. III, § 5.

Civil War era, northern Republicans typically thought the war had been instigated and overseen by a small minority of wealthy and powerful slave lords who wielded disproportionate authority, thanks to their malapportioned state legislatures and restrictions on voting rights.[159] The "good of the whole" language was therefore likely chosen as a reminder, both to states that had seceded and to those sympathetic to secession (such as Maryland and Missouri), that such efforts were profoundly anti-democratic. In the same vein, North Carolina's 1868 constitution—which, like Missouri's, was adopted while the state was occupied by Union troops—borrowed from those of Ohio and other states in hopes of rendering it more genuinely democratic and modern.[160] This also explains why Georgia inserted the same appeal to democratic values in its post-war "carpetbagger constitution."[161] As we will see in the next section, however, many states were soon forced to confront the ambiguities in the "good of the whole" phraseology.

Explaining the origins of Colorado's and Montana's Purpose of Government Clauses is more complicated. One probable influence was that these states had often suffered during their territorial stages from special-interest legislation obtained through political favoritism, such as franchises, privileges, and subsidies. Some territories—including Montana in 1874—were even denied statehood in part because of the degree to which they had indebted themselves through special-interest legislation. By 1886, these abuses had grown so extensive that Congress intervened, adopting the

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[159] See, e.g., Abraham Lincoln, Message to Congress, July 4, 1861, *in* Abraham Lincoln: Speeches and Writings 1859-1861, at 258 (Don E. Fehrenbacher ed., 1989) ("It may well be questioned whether there is to-day a majority of the legally qualified voters of any State, except, perhaps, South Carolina, in favor of disunion. There is much reason to believe that the Union men are the majority in many, if not in every other one, of the so-called seceded States."). Modern historiography supports Lincoln's view. See generally William W. Freehling, The Road to Disunion: Secessionists Triumphant 1854-1861 (2007) (explaining that secession was largely overseen by a politically entrenched southern elite).

[160] See Hugh Talmage Lefler & Albert Ray Newsome, North Carolina: The History of a Southern State 461 (1954).

[161] Why, then, did Mississippi employ the same language in its 1890 constitution, widely seen as a reactionary effort to undo the racial and democratic progress made in its 1868 Constitution? See Dorothy Overstreet Pratt, Sowing the Wind: The Mississippi Constitutional Convention of 1890 (2017). The explanation seems to be that the 1890 constitution was profoundly anti-democratic—indeed, it was never even ratified by the voters, but was simply promulgated by the legislature—and for that reason, legislators used the "good of the whole" rhetorically as a paternalistic rationale. As one scholar noted shortly afterwards, the choice to approve the constitution through the legislature was done from "considerations of expediency on the part of the white citizens," who were so outnumbered that they thought it "desir[able] to escape the uncertainty of a submission to popular vote." Ellis Paxson Oberholtzer, The Referendum in America 37 (1893). The "good of the whole" phraseology easily lent itself to those who thought the state should be managed by an "enlightened" few for the benefit of all. In any event, Mississippi's actions in 1890 are a monument of political cynicism, and it is therefore unsurprising that those responsible chose to disingenuously recite the "good of the whole" phrasing.

Harrison Act[162] to limit the ability of territorial governments to approve special legislation for the benefit of private businesses. Consequently, as they moved toward statehood, western territories sometimes considered it prudent to incorporate language into their constitutions that would ensure such abuses did not continue in the future.[163]

At the same time, many reformers associated with the Populist movement complained of special privileges for businesses and laid the blame at the feet of courts that treated corporations—especially powerful railroad corporations—as "persons" under the law, and saw in the "good of the whole" language a tool for pushing back against what they saw as limits on beneficent government regulation. For instance, when, in *Chicago & Northwestern Railway Co. v. Dey*, Judge (later Justice) David Brewer struck down Iowa's attempt to restrict the fees charged by railroads, he quoted the state's bill of rights: "I read also in the first section of the bill of rights of this state that 'all men are by nature free and equal, and have certain inalienable rights' . . . . [W]hile that remains as the supreme law of the state, no legislature can directly or indirectly lay its withering or destroying hand on a single dollar invested in the legitimate business of transportation."[164] Shortly afterwards, the state's frustrated Governor responded by quoting Iowa's Purpose of Government Clause:

> Had Judge Brewer taken the pains to read on, he would have found in section 2 of the Bill of Rights the following: "All political power is inherent in the people; government is instituted for the protection, security and benefit of the people." It is strange that the learned Judge failed to see the difference between "men," the creatures of God, "by nature free and equal," and possessing certain inalienable rights," and corporations, the creatures of man, having no rights except those which the State sees fit to give them.[165]

In short, as the twentieth century approached, Populists increasingly sought to expand government power to control what they saw as the excessive power of corporations, and, although neither Montana nor

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[162] 24 Stat. 170 (1886).

[163] See Jessica Bulman-Pozen & Miriam Seifter, The Democracy Principle in State Constitutions, 119 Mich. L. Rev. 859, 893 (2021) (noting how "state constitutional conventions restricted legislatures from acting in favor of special interests and against the public weal" in response to such concerns).

[164] 35 F. 866, 880 (C.C.S.D. Iowa 1888).

[165] William Larrabee, The Railroad Question 455 (1893) (quoting Iowa Const. art. I, § 2).

Colorado adopted the more extreme Populist proposals into their constitutions—choosing instead what historian Howard Lamar calls "a middle way" between the demands of labor and capital[166]—political leaders in these states and elsewhere remained sensitive about the language of corporate, as distinguished from individual, rights. "It is not the right of the corporations to usurp the functions of government," declared one would-be Pennsylvania constitution-maker in 1891. "[O]ur duty will be to deprive corporations of privileges that interfere with the rights of the people. Give the citizen his right, the corporation its right, equal and exact justice to all and special privileges to none."[167]

A second factor in the evolution of the "good of the whole" language was the question of female suffrage. Although Colorado would not grant women the vote until 1890, the state was more receptive to the idea than most, and during the late nineteenth century, advocates of female suffrage frequently used the phrase "good of the whole" to argue that a purported democracy should not ignore the voices of half of its populace.[168] Less than two months into Colorado's 1876 convention, after the Committee on Rights of Suffrage and Elections chose not to endorse the idea, dissenting members submitted a report arguing that there was "no reason why any portion of our citizens should be disenfranchised."[169] To do so created a "contradiction" within the state's "organic law," they wrote, and they pointed to the bill of rights that the convention had already approved, which said government exists for the "good of the *whole*." That, they said, implicitly meant that "the whole people have no right to disfranchise any part."[170]

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[166] Howard R. Lamar, The Far Southwest, 1846-1912: A Territorial History 253 (rev. ed. 2000) (discussing Colorado's approach).

[167] T.V. Powderly, The Constitution, Tri-Weekly Record (Mahanoy City, Pa.), Oct. 31, 1891, at 1. The author, T.V. Powderly, was a candidate for a proposed constitutional convention which did not go forward. Clarke Courier, Sept. 10, 1891, at 4 ("The nomination of General Master Workman Powderly as delegate at large to the constitutional convention by the republican party is attracting much attention throughout Pennsylvania.").

[168] See, e.g., 3 Official Report of the Debates and Proceedings in the Nebraska Constitutional Convention assembled in Lincoln 296 (Addison E. Sheldon & Albert Watkins, eds., 1913) (objecting to "the men of Nebraska fail[ing] to use the elective franchise to the good of the whole people"); Report in the Senate of the United States, Woman's Tribune, Mar. 16, 1889, at 3 (reprinting report by Senate Committee on Woman Suffrage urging adoption of constitutional amendment because extension of franchise "has resulted in untold good to the whole race"); William I. Bowditch, The Right to Govern Ourselves, Woman's J., Jan. 14, 1888, at 17 (arguing for women's suffrage because "government . . . though established by . . . men acting alone . . . was established for the common good of the whole people"); Annual Meeting: Colorado Woman Suffrage Association, Woman's J., Feb. 3, 1877, at 37, 40 (reporting on resolutions of the state convention that began with a good of the whole clause).

[169] Proceedings of the Constitutional Convention, Held in Denver, December 20, 1875, 267 (1907).

[170] Id. at 267–68 (emphasis added).

Therefore, although the phrase "good of the whole" might at first seem to imply a "classical republican" emphasis on communitarian and democratic values, as opposed to individualistic or libertarian values, the reality is more complex. Indeed, while the phrase might seem to justify extensive government involvement in economic and social life, many at the time read it as *limiting* such involvement, or at least as implicitly forbidding government from legislating in a manner that curtailed the rights of some for the benefit of others—i.e., class legislation. This became clear in 1899, when Colorado's Supreme Court struck down a law restricting the number of hours employees could work in smelters. While acknowledging that "[t]he welfare of the people is indeed the supreme law," the court concluded that this slogan could not justify "a law whose object is to protect a man against himself" by violating his right to choose his own terms of employment.[171] Such a statute, by "violating private rights," resulted in "[the] promotion of the welfare of less than the entire people," which violated the "good of the whole" principle.[172] In other words, the court saw the "good of the whole" as akin to an equal protection requirement, which prohibited legislation that deprived a category of citizens of freedom without a corresponding public benefit.[173]

III. THE WASHINGTON/ARIZONA MODEL: "INDIVIDUAL LIBERTY"

A. Narrowing the Scope of Government

The next step in the evolution of Purpose of Government Clauses came in the 1870s, a decade marked by a severe economic depression (brought on in large part by government overspending[174]), when Missouri, Alabama, and Louisiana adopted new constitutions and, in the process, sought to specify with more precision what government exists to do.

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[171] In re Morgan, 58 P. 1071, 1075 (Colo. 1899).

[172] Id.

[173] See also V.F. Nourse & Sarah A. Maguire, The Lost History of Governance and Equal Protection, 58 Duke L.J. 955, 967 (2009) (citing *Morgan* as one of many cases which held that "legislation that benefited or burdened the few" instead of serving "the common benefit" was unconstitutional class legislation). The *Morgan* decision was overturned by a constitutional amendment in 1902. Colo. Const. art. V, § 25a. Six decades later, Justice Albert Frantz offered a similar view in *Rabinoff v. District Court*, 360 P.2d 114 (Colo. 1961). That case involved a challenge to the constitutionality of the state's Urban Renewal Act, which empowered state officials to condemn and demolish "blighted" communities. The court upheld the law, but Frantz dissented on the grounds that the law was not for the "good of the whole." See id. at 127 (Frantz, J., dissenting). In his opinion, the authors of the "good of the whole" language believed that "preserving certain rights of individuals as inherent and inalienable" *was* the good of the whole, and that individual rights must take precedence over schemes for improving society. Id. at 128 (Frantz, J., dissenting).

[174] C. Vann Woodward, Origins of the New South 1877-1913, at 29–30 (1951)

Missouri's convention came first, opening in May of 1875. This convention, "demonstrat[ing] an awareness of modern economic needs,"[175] birthed many lasting innovations in constitutional law.[176] Among other things, it revised the state's Purpose of Government Clause. The first step in the revision came on May 18, when its Bill of Rights Committee proposed replacing the 1865 version of the Clause with a statement that "all political power is vested in the people of the state, with those limitations only which are imposed on them by the Constitution of the United States, and that the Government hereby established is clothed with that portion of the political power thus inherent in the people, which is defined, ascertained, and committed to some department thereof by this instrument."[177] That sparked a long and passionate debate over the nature of federal-state relations, which only ended when the proposal was abandoned and the 1864 "good of the whole" language retained.[178] One exasperated observer grumbled afterward that the "good of the whole" language was "execrable" and only expressed a "[f]rothy sentiment."[179]

Reformers were not done, however. They also sought to adopt a new provision to clarify what exactly the "good of the whole" is. On June 2, the Bill of Rights Committee recommended adding a clause declaring

> [t]hat all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty and the enjoyment of the gains of their own industry; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails of its chief design.[180]

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[175] William F. Swindler, Missouri Constitutions: History, Theory and Practice, 23 Mo. L. Rev. 32, 55 (1958).

[176] Among other things, Missouri introduced a number of innovations to protect private property. See Timothy Sandefur, Eminent Domain in the Constitutions of Arizona, Washington, and Other States, 18 NYU J.L. & Liberty 167, 181–83 (2024); Timothy Sandefur, The "Mandatory" Clauses of State Constitutions, 60 Gonz. L. Rev. 159, 183–84 (2025).

[177] 1 Debates of the Missouri Constitutional Convention of 1875, at 530 (Isidor Loeb & Floyd C. Shoemaker eds., 1930).

[178] See 2 Debates of the Missouri Constitutional Convention of 1875, at 94 (Isidor Loeb & Floyd C. Shoemaker eds., 1932). See also The Missouri Constitutional Convention, 2 Cent. L.J. 342, 342 (1875) (describing the debate).

[179] W.P.W., The Missouri Constitutional Convention, 2 Cent. L.J. 390, 391 (1875).

[180] 4 Debates of the Missouri Constitutional Convention of 1875, at 45–46 (Isidor Loeb & Floyd C. Shoemaker eds., 1938).

This language combined a "free labor" conception of the individual's right to earn a living and retain the benefits of his or her economic activity[181] with a Populist desire to restrict the legislature's power to grant special benefits to particular cities. The clause, explained delegate Thomas Gantt, meant that "the main office of government is the security of life, liberty, and property—the protection of those things—not protection in the sense in which capital is employed in thousands of industries in order to render bloated one or two in some favored locality—not protection in that sense, but equal protection to all, so that every man may sit secure under the shadow of his own vine and fig tree, and have none to make him afraid."[182]

Gantt's reference to "bloated" localities alluded to a common source of political dispute: the "special legislation" that allowed some cities to enjoy commercial and legal privileges denied to others—which the 1875 Convention would also seek to curtail by imposing a more vigorous prohibition on special laws.[183] The "gains of one's industry" language indicated a belief in economic individualism, yet it was not a strictly *laissez-faire* conception, as evidenced by another delegate's proposal to eliminate the words "principal" and "chief" because they appeared to "qualify the [government's] power too much."[184] Gantt replied that such a clarification was unnecessary because his proposal did not say that securing individual rights was government's *sole* task, just its *chief* task.[185] Still, as Missouri courts soon made clear, this language strongly protected the right of Missourians to make their own economic decisions.[186]

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[181] The term "free labor ideology," introduced by historian Eric Foner, refers to a belief in self-ownership and an ideal of economic self-determination, free of unjustified interference by others or by the state. See Eric Foner, Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War 17 (1970). Although Foner claimed that this was an advent of the nineteenth century, it is actually identical to the Lockean classical liberalism that underlay the American Revolution.

[182] 1 Debates of the Missouri Constitutional Convention of 1875, at 430 (Isidor Loeb & Floyd C. Shoemaker eds., 1930) (remarks of Mr. Gantt). Gantt was alluding to Micah 4:4, which was George Washington's favorite Bible verse. Carl J. Richard, The Founders and the Bible 75 (2016). Gantt (1814–1889) served as U.S. District Attorney. He served in the Union Army, and, after the war, as a state court judge. John Davison Lawson, 16 American State Trials 84 n.11 (1928).

[183] Mo. Const. of 1875, art. IV, § 53.

[184] 4 Debates of the Missouri Constitutional Convention of 1875 at 50 (Isidor Loeb & Floyd C. Shoemaker eds., 1938) (remarks of Mr. Massey).

[185] See id. at 51 (remarks of Mr. Gantt).

[186] In *State v. Loomis*, 22 S.W. 350 (Mo. 1893) (en banc), the court reversed an earlier ruling that upheld a law against the payment of wages in scrip. The lower court had rejected the argument that the statute violated the Purpose of Government Clause; the rights specified in the constitution, it said, are "held in subordination to the rights of society," and if government did not "interfere[] [in the market] in behalf of the weak against the strong," it would "fail[] 'of its chief design.'" State v. Loomis, 20 S.W. 332, 335–37 (Mo. 1892). The high court reversed this, agreeing that the state could regulate industries

A few months later, Alabama began its own constitutional convention, aiming, among other things, to rein in the state's extravagant post-war spending.[187] Because the convention debates were never published, we cannot know for certain what led its members to adopt a new Purpose of Government Clause. But it seems likely that they sought to embrace a more *laissez-faire* conception to halt wasteful and unequal state intervention in the economy. In fact, the wording they adopted was even more individualistic than Missouri's: "the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty, and property, and when the government assumes other functions it is usurpation and oppression."[188]

This, declared attorney Hilary Herbert,[189] in a speech devoted to persuading Alabamians to ratify the convention's work, was "the key-note of the new Constitution."[190] It marked a repudiation of "the idea of parental authority over all the people of the State, and the consequent duty and power to care for them and control their business," which had in the past been used as the rationale for government spending on internal improvements projects.

> The power to force money from an unwilling tax-payer to build a railroad for others, the power to levy forced subscriptions to carry out the schemes of any association, the power to take the property of any one citizen without compensation and apply it to the purposes of another, is a power in the government to rob, and if bad men are in power, the result is, as we have witnessed in Alabama, robbery by wholesale. By the new Constitution all power to make internal improvements, or to lend the credit of the

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"so as to secure the health and safety of the employes [sic]," but holding that it could not "undertake to deny to the persons engaged in the two designated pursuits [of mining and farming] the right to make and enforce the most ordinary everyday contracts,—a right accorded to all other persons." 22 S.W. at 351–52.

[187] 1 E. Benjamin Andrews, The History of the Last Quarter-Century in the United States 124 (1896).

[188] Ala. Const. art I, § 35. This Clause, which remains in the Alabama Constitution today, has not been faithfully applied. In *Churchill v. Bd. of Trs. of Univ. of Alabama in Birmingham*, 409 So. 2d 1382, 1389 (Ala. 1982), the court appeared to use a rational basis analysis to uphold the legality of a government venture to dispense hearing aids—obviously not the protection of life, liberty, or property—on the grounds that this was "reasonably related to and promotive of the educational, research, and service mission of a modern university." Likewise, in *1568 Montgomery Highway, Inc. v. City of Hoover*, 45 So. 3d 319, 343 (Ala. 2010), it upheld a prohibition on the sale of sexual devices—again, far beyond the protection of life, liberty, and property—based on the state's alleged "general welfare interest in protecting minors and unwilling adults from exposure to sexual devices."

[189] Herbert (1834–1919), later served in Congress and as Secretary of the Navy in the Cleveland administration. Kevin Spann, Hilary Abner Herbert, Encyclopedia of Alabama (last updated July 7, 2023), https://encyclopediaofalabama.org/article/hilary-abner-herbert/.

[190] Col. H.A. Herbert's Speech on the Constitution, Montgomery Advertiser, Oct. 16, 1875, at 2.

> State, or to contract new debts, with a guarded exception applying only to the necessities of the government itself, or to levy any forced subscriptions upon any town, city or county, is absolutely inhibited.[191]

Lawyer Thomas Herndon, who had served at the Convention, agreed.[192] He told voters that this clause was "[a] grand declaration!," and that it "embod[ied] a whole theory of government."[193] Three years later, the editors of the *(Selma) Southern Argus* reiterated that the "sole object" language had been designed to make clear that "government was established to protect the life and liberty and property of its citizens, and not to build railways or steamboats to enrich monster corporations . . . [not] to give the citizen property to enjoy; but to protect him in the enjoyment of what he may get."[194] And, indeed, the Alabama Supreme Court relied on the clause in 1904 to declare peonage laws unconstitutional.[195]

In 1879, Louisiana held a new constitutional convention, too. That state's constitution was unusual, in that it had it never included a Bill of Rights or other prefatory language until 1868. That year, it adopted a constitution with a Bill of Rights and a Purpose of Government Clause which simply said that "governments are instituted" to "secure" the "inalienable rights" that all people have, including "life, liberty, and the pursuit of happiness."[196] But at the 1879 convention—the first after the end of Reconstruction and the withdrawal of Union troops—the state chose to adopt a "good of the whole" provision, while also modifying it with additional language. The Bill of Rights Committee initially proposed: "Government is the agency of the sovereign power, and may not rightfully exceed its prescribed functions. Public officers are the agents, trustees and servants of the people, and at all

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[191] Id.

[192] Herndon (1828–1883) had also participated in the convention that drafted Alabama's 1861 Constitution. He later served in Congress. Joshua Shiver, Thomas Herndon, Encyclopedia of Alabama (last updated Apr. 25, 2025), https://encyclopediaofalabama.org/article/thomas-herndon/.

[193] Thomas H. Herndon, Canvass for the New Constitution, The West Alabamian, Nov. 10, 1875, at 1.

[194] The Voice of Alabama, Southern Argus (Selma), July 12, 1878, at 1. See also C.C. Langdon, The Texas Pacific Railway, Montgomery Advertiser, Sep. 24, 1878, at 2 (citing the clause in argument against internal improvement projects). In 1880, Governor Rufus Cobb cited the clause as having helped restore the economy of Alabama by preventing legislators from investing in "[t]empting schemes for the development of the latent resources of the state [that] look well on paper." Rufus Cobb, Message of Governor Cobb, Montgomery Advertiser, Nov. 11, 1880, at 1.

[195] Toney v. State, 37 So. 332, 333 (Ala. 1904).

[196] La. Const. of 1868, Title I, art. I.

times amenable to them."[197] But the convention instead decided to copy Alabama's more forthright statement, renouncing government involvement in economic undertakings entirely. While it retained the "good of the whole" phrase, it added: "[Government's] only legitimate end is to protect the citizen in the enjoyment of life, liberty and property, and when it assumes other functions it is usurpation and oppression."[198]

This new terminology reflected a public impression that the Reconstruction-era government of Louisiana had engaged in reckless overspending (and indeed the state was deeply in debt[199]) as well as corruption resulting from what one historian has called the state's "frantic struggle for internal improvements."[200] Constitutional reformers thus hoped to rein in what was viewed as extravagance resulting from government involvement in private enterprise. As lawyer Charles E. Fenner[201] explained in a speech urging Louisianans to approve the 1879 constitution, the new Purpose of Government Clause was "a formulation of the last results of modern philosophical speculation upon the theory and science of government. The world suffers from too much government . . . . The people require from government simple protection—nothing more."[202] Government, he said (in arguments that anticipated the discoveries of the twentieth-century Austrian school of economics and public choice theory), is institutionally incapable of efficiently controlling an economy.[203] The editors of the *New Orleans Times-Democrat* agreed. The Clause, they said, reflected the proposition that "the government is limited in its powers to the express grants of the constitution," thereby ensuring "reform and economy."[204] More than fifteen years later, historian William Lecky would observe that the new phrasing "expresses admirably the best spirit of

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[197] Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana 42 (1879). This language was borrowed in part from the newly adopted Georgia Constitution. See Ga. Const. of 1877, art. I, § 1, ¶ 1.

[198] La. Const. of 1879, art. I.

[199] Joe Gray Taylor, Louisiana Reconstructed 1863-1877, at 84–88, 178–79, 202–03 (1974); Ted Tunnell, Crucible of Reconstruction: War, Radicalism and Race in Louisiana 1862-1877, at 174 (1984).

[200] Taylor, supra note 199, at 86. Taylor observes that by the 1870s, a large portion of the state's debt was due to "guarantees to railroads and canals," which although not realized, certainly fed the impression that the state was in arrears resulting from subsidies to private industry. Id. at 203.

[201] Fenner (1834–1911) had been a member of the Louisiana legislature during Reconstruction and was appointed to the state Supreme Court in 1880, where he served until 1894. Appendix U: In Memoriam, *in* Report of the Louisiana Bar Association for 1912-1913, La. Bar Ass'n 398, 399 (1913).

[202] The New Constitution, New Orleans Daily Democrat, Nov. 23, 1879, at 1.

[203] See id. Fenner drew his economic argument from Richard Whately, Introductory Lectures on Political Economy (1832), which he quoted in his speech. Whately was a significant influence on the Austrian school. See The Elgar Companion to Austrian Economics 289 (Peter Boettke ed., 1994).

[204] Characteristics of the Constitution, New Orleans Daily Democrat, July 27, 1879, at 4.

American statesmanship. . . . Politicians may job and cheat and maladminister, but they can only do so within narrow limits."[205]

In short, by the dawn of the twentieth century, some constitution-makers had come to see the Delaware/Maryland "good of the whole" model—which originated as a pledge of democratic equality and resistance to colonial exploitation—as unacceptably vague. There had always been a tension between the classical liberal conception of government's responsibilities as a rights-protector and the broader conception of it as a resource-developer. That tension had encouraged reckless government spending, as well as "job[bing], cheat[ing], and maladminister[ing],"[206] often in the service of what lobbyists characterized as the public good. By modifying the "good of the whole" language, Missouri, Alabama, and Louisiana sought to rein in those excesses and thus eliminate that tension in their 1870s constitutions.[207] But as the nineteenth century came to an end, it was to explode with much greater force in other states.

B. The Individual Versus the Collective

In his 1889 book *The State*, then-professor Woodrow Wilson differentiated between what he called the "constituent" and "ministrant" powers of government—the former encompassing the long-accepted functions of protecting life, liberty, and property, and the latter including "functions undertaken, not by way of *governing*, but by way of advancing the general interests of society . . . functions which assist without constituting social organization."[208] Those who, like Wilson, supported an

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[205] 1 William Edward Hartpole Lecky, Democracy and Liberty 118 (rev. ed. 1899).

[206] Id.

[207] Louisiana courts were not rigorous in enforcing the newly revised "good of the whole" clause. In 1887, the state Supreme Court upheld a Sunday-closing law, rejecting the argument that it was "usurpation," by simply asserting that it was unimaginable that the constitution's authors could really have meant what they said. See State ex rel. Walker v. Judge of Section A, Crim. Dist. Ct., 1 So. 437, 442–43 (La. 1887).

A version of Louisiana's 1879 language remains in the state constitution today. In 1973, that state held a constitutional convention which modernized the language to read: "All government, of right, originates with the people, is founded on their will alone, and is instituted to protect the rights of the individual and for the good of the whole. Its only legitimate ends are to secure justice for all, preserve peace, protect the rights, and promote the happiness and general welfare of the people. The rights enumerated in this Article are inalienable by the state and shall be preserved inviolate by the state." La. Const. art. I, § 1. One of the principal drafters of this clause explained that Louisiana's was "the first state or national constitution to be influenced by modern libertarian writers," including specifically Ayn Rand, Milton Friedman, and David Nolan, among others. Louis "Woody" Jenkins, The Declaration of Rights, 21 Loy. L. Rev. 9, 10 (1975). According to Jenkins, the new Clause was meant to repudiate the doctrine of collective rights, thus marking a "dramatic change in philosophy" which nevertheless echoed the principles of the state's first founders. Id. at 9.

[208] Woodrow Wilson, The State 638 (1889).

expansive, "ministrant" view of government tended to see the "good of the whole" terminology as a basis for arguing that public projects which benefited society in general were within government's proper scope, even if conducted at the cost of individual rights. And as socialist theories gained popularity toward the dawn of the twentieth century, arguments for restricting individual freedoms for the benefit of "the whole" grew increasingly common.

In fact, by the time Wilson wrote these words, intellectuals were embracing socialism on an unprecedented scale. In 1888, Edward Bellamy's utopian novel *Looking Backward*, which predicted a socialist future of material plenty, was a smash best-seller.[209] Bellamy's admirers founded clubs throughout America, including in the Pacific Northwest, where they even started a colony in Oregon called Bellamy[210]—just one of many socialist communes established in the region.[211] Possibly even more influential was Henry George's *Progress and Poverty*, published in 1879, which argued that all land should be held in common. This idea gained many adherents, leading George to predict in 1887 that a new political party would emerge aimed at abolishing "our present treatment of land as individual property."[212] Writers, too, focused on the central point in the dispute over capitalism: the relative claims of the individual and society. "Private property has two sides, the individual and the social," wrote Progressive economist Richard Ely, "but the social side is dominant. Private property is, according to [socialism], maintained for social purposes. It exists for the sake of society."[213]

On the opposite end of the spectrum, thinkers such as William Graham Sumner and Herbert Spencer were publishing attacks on collectivist economic theories, including Sumner's *What Social Classes Owe to Each Other* (1883) and Spencer's *The Man Versus the State* (1885). "The State gives equal rights and equal chances just because it does not mean to give anything else," wrote Sumner. "It sets each man on his feet, and gives him leave to run, just because it does not mean to carry him."[214] Spencer agreed,

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[209] Tom Peyser, Looking Back at Looking Backward, Reason (Aug./Sept. 2000), https://reason.com/2000/08/01/looking-back-at-looking-backwa/.

[210] See John Terry, Oregon's Trails: Early Commune Didn't Last Long, The Oregonian, Aug. 22, 2009, https://www.oregonlive.com/O/2009/08/oregons_trails_early_commune_d.html. See also James J. Kopp, Looking Backward at Edward Bellamy's Influence in Oregon, 1888–1936, 104 Or. Hist. Q. 62 (2003).

[211] James A. Halseth, Social Disorganization and Discontent in Late Nineteenth-Century Washington 171 (1974) (Ph.D. dissertation, Texas Tech University).

[212] Henry George, The New Party, 145 N. Am. Rev. 1, 5 (1887).

[213] Richard T. Ely, Strength and Weakness of Socialism 196 (1894).

[214] William Graham Sumner, What Social Classes Owe Each Other 41 (1883).

declaring that the "duty of the state," was to "insur[e] to each individual the unhindered pursuit of the objects of life, within limits set by others' like pursuits . . . ."[215] The Scottish writer John Rae was even more on point. There were two ways of understanding democracy, he observed in *Contemporary Socialism* (1884). In America, "the State [is] nothing more than an association for mutual protection—an association, like any other, having its own definite work to do and no more" and "individual rights are so general a possession that any encroachment upon them in the name of the majority would always tread on interests numerous and strong enough to raise an effectual resistance."[216] European socialism, by contrast, "look[s] with utmost contempt upon the American idea of the State being a kind of joint-stock association organized for a circumscribed purpose and with limited powers . . . ."[217] Instead, European socialism held that "[t]he individual is . . . nothing; the State is all in all. Property is only so much of the national estate conditionally conceded to the individual."[218]

The socialist Workingmen's Party was founded in Philadelphia in 1876, adopting as its official program a demand that "[a]ll industrial enterprises . . . be placed under the control of the government as fast as practicable and operated by free cooperative trades unions for the good of the whole people."[219] Membership in that party was relatively sparse in the western states, with about 2,000 members in Washington and Oregon and about 1,800 in California in 1887,[220] but socialist influence was still significant in the Pacific Northwest. It ranged from the peaceful—as with the several socialist utopian communities that sprang up in the Territory[221]—to the violent, as with the clashes that erupted between labor unions and management in mining districts.[222] When labor riots erupted in Newcastle, Washington, in January 1889, the governor was forced to call out the militia. "[W]e must strengthen the guard," the militia's commander reported, "as a

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[215] Herbert Spencer, The Man Versus the State 93 (1885).

[216] John Rae, Contemporary Socialism 21 (1884).

[217] Id. at 23.

[218] Id. at 16.

[219] Philip S. Foner, The Workingmen's Party of the United States: A History of the First Marxist Party in the Americas 34–35 (1984).

[220] Morris Hillquit, History of Socialism in the United States 254 (4th ed. 1906). In California, the Workingmen's movement quickly reached its climax with the convening of the state's second constitutional convention, which began in 1878. Carl Brent Swisher, Motivation and Political Technique in the California Constitutional Convention 10 (1930).

[221] Carlos A. Schwatnes, Radical Heritage: Labor, Socialism, and Reform in Washington and British Columbia, 1885–1917, at 87 (1979).

[222] See Alan A. Hynding, The Coal Miners of Washington Territory: Labor Troubles in 1888-89, 12 Ariz. & West 221 (1970).

terror to the anarchistic spirit which has been stimulated by the vile demagogues who are preaching to the people that property is plutocracy, and that labor has no rights apart from those granted by a minority organized for the purpose of dominating it."[223] As in California, organized labor in Washington focused much of its fury on Chinese immigrants and members of other minorities who worked long hours for low wages and thus prevented white laborers from holding out for higher wages.[224] But others argued that companies had the right to hire whomever they wished and workers the right to take whatever jobs they chose. These clashes highlighted the tension between collectivistic political doctrines focused on the supposed "good of the whole" and individualistic doctrines centered around the right to autonomy.

Questions regarding the primacy of individual rights were therefore very much on the minds of the residents of Washington Territory when its Constitutional Convention began work in July 1889.[225] In the same issue that alerted the people to upcoming elections for the convention, the *(Port Angeles) Olympic-Tribune*, a newspaper devoted to the doctrines of Henry George, published a speech by a Georgist lauding who celebrated Henry for his principle that "all men [should] be taxed for the public privilege they enjoy—the exclusive occupancy of the land which belongs by common right to all the people."[226] Just weeks after the convention began, Tacoma clergyman W.E. Copeland preached a sermon on *Looking Backward*, lauding socialism because it would ensure that "what belongs to the whole people would be used for the good of all."[227]

By contrast, the editor of *The Oregonian* was repulsed by the influence of George and Bellamy. "For feudalism and paternalism modern civilization has substituted individualism," he declared.[228] Socialism was an "absurd doctrine, which holds society responsible for the failure of the individual rather than the individual for his own faults and failures."[229] Yet, despite that

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[223] Biennial Report of the Adjutant General of the State of Washington 22 (1893).

[224] See generally Jean Pfaelzer, Driven Out: The Forgotten War against Chinese Americans (2007) (describing anti-Chinese sentiment in western states at the time).

[225] In the run-up to the convention, prominent businessman George Heilbron began publishing a series of articles in the Seattle Post-Intelligencer about how state constitutions work. One installment focused on declarations of rights and Purpose of Government Clauses. Quoting John Stuart Mill, Heilbron explained that bills of rights exist "to properly guard against any encroachment upon freedom of opinion and individual rights, and also to secure to all the people certain privileges and immunities deemed essential to the public welfare . . . ." George H. Heilbron, State Constitutions, Seattle Post-Intelligencer, Mar. 3, 1889, at 4.

[226] Jefferson and Progress, Olympic-Tribune (Port Angeles), Apr. 26, 1889, at 1.

[227] Looking Backward, Tacoma Daily Ledger, July 29, 1889, at 4.

[228] Social Discontent, The Morning Oregonian, Oct. 15, 1889, at 6.

[229] Id.

absurdity, socialism was "supported by men of intelligence like Henry George . . . [and] Edward Bellamy . . . . Government today contents itself in securing to the individual the achievements of his individual efforts, it protects his individual liberty, property and freedom to pursue his own road . . . . Bellamy would abolish thrift by abolishing its motive and aspiration, by abolishing individual production and individual accumulation."[230] Another anti-Bellamy writer, editor of Port Townsend's *The Morning Leader*, concluded that "[i]f Edward Bellamy accomplished nothing else," he had at least "done this country a good service in arousing a strong spirit of individualism" in opposition to his ideas.[231]

Yet Populists, Progressives, or even Socialists were not necessarily openly hostile to individualism. On the contrary, as noted earlier, many who objected to the so-called plutocracy did so on the grounds that "trusts" and "monopolies" obtained special privileges from the government in violation of individual rights.[232] Opponents of protectionist tariffs, for example, often invoked this argument. In an article urging reform of the McKinley Administration's protectionism, Olympia's *Washington Standard* editorialized that "[e]very day the real issue which has always existed between the Democratic party and the opposition . . . is becoming more clear. It is individual rights against the influence of capital; the prosperity of the masses before the aggrandizement of the few."[233] The 1884 Democratic Party platform announced that "[w]hile we favor all legislation which will tend to the equitable distribution of property, to the prevention of monopoly, and to the strict enforcement of individual rights against corporate abuses, we hold that the welfare of society depends upon a scrupulous regard for the rights of property as defined by law."[234] And when the Washington Republican Party met in the weeks preceding that state's Constitutional Convention, it voted down a resolution declaring corporations "soulless and conscienceless" and demanding that the convention add "reasonable provisions for the restraint and control of such corporations existing or doing business within the limits of this State."[235]

In other words, those seeking greater government control over business often spoke in individualistic terms, complaining that courts were

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[230] Id.

[231] The Force of Individualism, The Morning Leader, Port Townsend, Dec. 11, 1889, at 2.

[232] See supra Section II.D.

[233] The Tariff Bill, Washington Standard, May 16, 1884, at 2.

[234] The Political Reformation of 1884: A Democratic Campaign Book 5 (1884).

[235] Nominating Delegates, The Seattle Press, May 7, 1889, at 5. That convention eventually adopted a more modest resolution urging "proper restraint of all corporate powers." Seattle Press, May 9, 1889, at 5.

insufficiently attentive to the rights of individuals and too solicitous of those of corporations.[236] Western state constitution-makers, including in Washington, would thus focus on curtailing the power of railroads and other corporations to lobby for special privileges, thus blending what in today's world would appear to be pro- and anti-free market approaches. For example, they forbade railroads from distributing free passes to government officials[237] and barred the legislature from granting special privileges to corporations.[238] Perhaps most revealingly, Washington barred corporations from "employ[ing] an armed body of men,"[239] a move that reflected the violence and tension that arose when businesses (especially mining companies) hired Pinkerton and other detective agencies as strikebreakers in the years immediately preceding the Washington Constitution's adoption.[240]

Property and labor disputes were not the only contexts in which the tension between individual rights and the "good of the whole" came to the fore. Another was Prohibition. In 1880, Kansas adopted statewide prohibition by constitutional amendment, and, after furious controversy, this was upheld by the U.S. Supreme Court in 1887.[241] Anti-prohibitionists naturally regarded the question of the purchase, sale, and use of intoxicating

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[236] See, e.g., Agricultural, The Morning Oregonian, July 23, 1889, at 3 ("We hear and see a great deal concerning trusts, and the need of legislation to put them down, but a little reflection will convince any person that it will not be easy to accomplish this most desirable object. The question arises as to the power of law to affect individual rights and business or organization."); Should Be Investigated, The Williams News, Sep. 19, 1903, at 1 ("If the government [were] looking out for the good of all it would avoid doing anything that would deprive the citizen of his individual rights, and that is what is being done when large corporations are allowed to surrender worthless land, given them as a bonus by the government, and take up valuable tracts elsewhere.").

[237] Wash. Const. art. XII, § 20.

[238] Id. art. I, § 12.

[239] Id. art. I, § 24.

[240] See generally Darrell A. H. Miller, Prohibitions on Private Armies in Seven State Constitutions, *in* New Histories of Gun Rights and Regulation: Essays on the Place of Guns in American Law and Society (Joseph Blocher, et al., eds., 2023) (describing the origin of the constitutional ban on bodies of armed men). A related concern was the employment of private gunslingers such as Wells Fargo agents James B. Hume, John B. Thacker, and Fred J. Dodge, who pursued robbers on the western frontier. Delegates at the Washington Convention considered a proposal to ban all private detective agencies and to forbid the arrest of any person "other than [by] constitutionally qualified officers." Journal of the Washington State Constitutional Convention, 1889, at 150 (Beverly Paulik Rosenow, ed., 1999) [hereinafter Washington Journal]. The Bill of Rights Committee subsumed this proposal in the Private Affairs Clause, Wash. Const. art. I, § 7, which forbids interference with private affairs "without authority of law," thus forbidding self-help law-enforcement practices. See also Timothy Sandefur, The Arizona "Private Affairs" Clause, 51 Ariz. St. L.J. 723, 740–41 (2019) (discussing applicability of the clause to vigilantism).

[241] Mugler v. Kansas, 123 U.S. 623, 675 (1887).

liquors as a matter of individual rights.[242] Advocates of a ban on liquor often countered that it would actually facilitate the protection of individual rights against the "crime and suffering" that resulted from drinking.[243] But in any event, Republicans and Democrats preferred to postpone that debate. Both parties adopted resolutions urging delegates at the Washington convention not to include prohibition in the state's fundamental law.[244]

There were likely two additional influences at work on the minds of the Washington Convention's delegates: the Civil War and the centennial of the U.S. Constitution in 1889. In the decades after the War, the contrast between the rights of the individual and the purported rights of the state was still a timely political question.[245] Southern politicians and intellectuals continued to speak and write emphatically in defense of the "states' rights" doctrines of the previous decades.[246] And commemorations of the Constitution's 100th anniversary often included reflections on its importance in securing the rights of the individual, often in contrast to "states' rights."[247]

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[242] Thus, for example, a letter to the editor of the *Oregonian* in 1888 warned that it was "impossible to legislate to prohibit [alcohol] without trampling upon individual rights . . . . Once you attempt to settle these questions by law you usurp the province and trample under foot the right of individual choice without which there can be no self-government." The Third Party, The Morning Oregonian, Apr. 28, 1888, at 3. Prohibitionists, in turn, argued that banning alcohol would actually protect individual rights "by preventing unjust taxation and theft, whether by the saloon or other means." Prohibition Premises, The Morning Oregonian, Oct. 4, 1886, at 1. In *Campbell v. Jackman Bros*., 118 N.W. 755, 758 (Iowa 1908), the Iowa Supreme Court upheld a prohibition law against a challenge based on the state's Purpose of Government Clause, which used the "protection, security and benefit" formulation. The court had done the same a half century earlier in *Santo v. State*, 2 Iowa 165, 183 (1855).

[243] See, e.g., Temperance Department, Albany Democrat (Oregon), Oct. 7, 1887, at 4.

[244] District Convention, East Washingtonian, May 11, 1889, at 2; The First Step, The Spokesman-Review, May 5, 1889, at 2; The Chosen Few, The Spokesman-Review, May 8, 1889, at 1; Spokane Politics, Seattle Post-Intelligencer, May 8, 1889, at 8.

[245] Thus, for example, at the California Constitutional Convention of 1878–79, delegates debated whether to add to the Purpose of Government Clause which had been adopted in 1850, in order to assert that "the people of the State have the inherent, sole, and exclusive right to regulate their internal government" and "to determine what is detrimental to the well-being of the state, and to exhaust the power of the State to prohibit and prevent it." 1 Debates and Proceedings of the Constitutional Convention of the State of California 233 (1880). This language was intended to expand the state's authority to persecute Chinese immigrants. The proposal failed. See id. at 234.

[246] See, e.g., Speech of Hon. John W. Daniel in the Senate of the United States, State Rights (Feb. 23, 1889); Jefferson Davis, The Rise of and Fall of the Confederate Government (1881); James B. Waller, The True Doctrine of State Rights (1880).

[247] See, e.g., Ex-President Cleveland's Address, Seattle Post-Intelligencer, May 1, 1889, at 1 (quoting Cleveland: "That our people are jealous of their individual rights and freedom is proved by the fact that no one in place or power has dared to openly assail them."); The Century Gone, The Morning Oregonian, Apr. 30, 1889, at 6 (arguing that in the years since 1789, Americans had "maintained and even enlarged the domain of individual freedom, and have created the spirit of national life. Never were individual rights so secure as today."); 1 History of the Celebration of the One Hundredth Anniversary of the Promulgation of the Constitution of the United States 371 (Hampton L. Carson ed., 1889) ("If the prohibitions and limitation of the charters of government cannot be enforced in favor of individual rights,

It was in this context that Washington constitution-makers began their work on July 4, 1889. A week later, delegate Allen Weir[248] proposed a bill of rights that included a "Purpose of Government" Clause using the same language as California's recent constitution—i.e., that government exists "for [the people's] peace, safety, and happiness."[249] This was submitted to the Bill of Rights Committee, which on July 25 reported back its recommendation that the Clause instead read "governments derive their just powers from the consent of the governed and are established to protect and maintain individual rights."[250] (The phrase "protect and maintain," which had become commonplace by the 1880s,[251] originated with William Blackstone, who wrote in his *Commentaries* that constitutions provide legal rights as "barriers to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property."[252]) The convention agreed to this rephrasing, and officially adopted it on August 6, 1889.[253]

C. The Washington and Arizona Conventions

Washington's Purpose of Government marked not only the first use of this formula, but the first time the phrase "individual rights" ever appeared in any American constitution.[254] Rather than parroting the language used by other states, Washingtonians chose to assert, in strikingly modern style, that governments exist to protect and maintain the rights of individuals, and nothing more. As if to underscore that point, they also made Washington's

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by the judgments of the judicial tribunals, then there are and can be no barriers against the exactions and despotism of arbitrary power."); Samuel Miller, Memorial Oration, The Philadelphia Times, Sep. 18, 1887 ("[H]istory points us to no government in which the freedom of the citizen and the rights of property have been better protected and life and liberty more firmly secured.").

[248] Weir (1854–1916) was a newspaper editor and lawyer who later served as Washington's first Secretary of State. Washington's Secretaries of State – Past and Present, Wash. Sec'y of State, https://www.sos.wa.gov/about-office/washingtons-secretaries-state-past-and-present (last visited Sept. 8, 2026).

[249] Washington Journal, supra note 240, at 51. This same formulation had been proposed by attorney William Lair Hill, whose draft constitution, published in the newspapers on the Convention's opening day, had a strong influence on the delegates. See Brian Snure, A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington State Constitution, 67 Wash. L. Rev. 669, 685 (1992).

[250] Washington Journal, supra note 240, at 154.

[251] See, e.g., Grover Cleveland, Letter Accepting Nomination (1888), *reprinted in* The Writings and Speeches of Grover Cleveland 15, 16 (George F. Parker ed., 1892). Cf. James W. Ely, Jr., Property Rights in American History 319 (1997) (noting that Justices Stephen Field and Thomas Cooley, among others, adhered to the "protect and maintain" principle articulated by William Cullen Bryant).

[252] 1 William Blackstone, Commentaries *141.

[253] Washington Journal, supra note 240, at 268.

[254] Cf. Snure, supra note 249, at 675 (arguing that this specificity makes clear that "the emphasis on protecting individual rights" lies "[a]t the heart of the Washington Constitution").

Constitution the first to entirely eschew the phrase "right of the people," which appears repeatedly in the federal Constitution and appeared in many state constitutions at the time,[255] and which was interpreted by some as contemplating only collective, not individual rights.[256] The "right of the people" phrase fell slowly into disfavor over the latter nineteenth century; Pennsylvania's 1873 Constitution omitted it but used the collective "right of the citizens" in certain places.[257] Texas in 1876 and Montana in 1889 likewise omitted "right of the people," but did use such phrases as "the people shall be secure."[258] It was Washington's draft 1878 constitution that first excluded all such collective phrasing (except for its "baby Ninth Amendment," which referred to "other[] [rights] retained by the people"[259]), and eleven years later, that state became the first to adopt a constitution that specified individual rights exclusively.

Washington's 1889 Bill of Rights also employed the term "individual" in several other places. Section 23, for example, protected "[t]he right of the individual citizen to bear arms in defense of himself, or the State,"[260] and Section 31 asserted that "[a] frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government."[261] Again, although state constitutions had since 1776 asserted the importance of frequently recurring to fundamental principles, Washington's was the first to assert their relevance to the security of *individual* rights.[262]

Other states admitted to the union at this time tended to employ older phrases in their Purpose of Government Clauses—for instance, Idaho used

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[255] See, e.g., U.S. Const. amends. I, II, IV; Cal. Const. of 1879, art. I, § 19; Fla. Const. of 1868.

[256] This was most striking in cases involving the right to a jury trial, which was held to be a collective right and thus not waivable by the defendant. See Hopt v. People, 110 U.S. 574, 578–79 (1884). The waivability of the jury trial right was a question that preoccupied many constitutional conventions during the nineteenth century. See, e.g., 1 Debates and Proceedings of the Constitutional Convention of the State of California 255 (1880); Debates and Proceedings of the Constitutional Convention for the Territory of Minnesota 97 (T.F. Andrews ed., 1858); Debates of the Convention to Amend the Constitution of Pennsylvania 220 (1873). Some courts had also held that the Second Amendment's "right of the people" language indicated that it only protected "a political and not an individual right." State v. Buzzard, 4 Ark. 18, 35 (1842) (Lacy, J., dissenting) (characterizing the view of the Court's majority).

[257] See, e.g., Pa. Const. of 1873, art. I, § 21.

[258] Tex. Const. of 1876, art. I, § 9; Mont. Const. of 1889, art. III, § 7.

[259] Wash. Const. of 1878, art. I, § 30 (not approved). The term "baby Ninth Amendment" refers to state adjuncts of the federal Ninth Amendment. See Anthony B. Sanders, Baby Ninth Amendments (2023).

[260] Wash. Const. of 1878, art. I, § 24.

[261] Id. art. I, § 32.

[262] Compare id. with Va. Const. of 1776, Declaration of Rights, § 15 ("[N]o free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue and by frequent recurrence to fundamental principles.").

the "equal protection and benefit" formula[263] and Wyoming adopted "peace, safety, and happiness"[264]—or to adopt language that seems markedly less individualistic. Oklahoma, for example, used the phrase "protection, security, and benefit, and to promote [the people's] general welfare,"[265] and New Mexico chose "is founded upon their will, and is instituted solely for their good."[266] Utah, which held a constitutional convention in 1895, did borrow Washington's "frequent recurrence" clause, with its reference to "individual rights,"[267] but its Purpose of Government Clause was taken from Idaho's "equal protection and benefit" language.[268] Washington alone chose to consistently use the term "individual rights."

The significance of this change did not escape the notice of legal scholar Frederic Stimson who, in his 1908 treatise *The Law of the Federal and State Constitutions of the United States*, remarked that the terminology was principally aimed "against socialistic government."[269] Washington's "definite recognition of the claims of the individual against socialistic government is a decided novelty," he argued.[270] Still, alongside this prioritization of the individual was an express concern about private corporate power, as reflected in its prohibition on "armed bod[ies] of men,"[271] and restrictions on prices charged by railroads.[272]

Two years later, in 1910, Arizona chose to follow Washington's lead—and the record shows that that choice was quite deliberate. Two decades earlier, Arizonans had prepared a draft constitution, which contained a Purpose of Government Clause declaring: "Governments are instituted among men for the security of life, liberty, and property, and derive their just powers from the consent of the governed . . . ."[273] That constitution was not approved, however, and now Arizonans offered a far more rights-oriented perspective. The 1910 Convention's Bill of Rights Committee began the debate by borrowing heavily from Washington's Constitution and proposing

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[263] Idaho Const. of 1889, art. I, § 2.

[264] Wyo. Const. of 1889, art. I, § 1.

[265] Okla. Const. of 1907, art. II, § 1.

[266] N.M. Const. of 1910, art. II, § 2. New Mexico did not record the debates at its Constitutional Convention, but it appears that the "solely for their good" phrase was a modification of the "good of the whole" language. See Abolition of the Grand Jury is Considered, Albuquerque Journal, Oct. 16, 1910, at 6 (noting introduction of "good of the whole" language).

[267] Utah Const. of 1895, art. I, § 27.

[268] Id. art. I, § 2.

[269] Frederic Jesup Stimson, The Law of the Federal and State Constitutions of the United States 126 (1908).

[270] Id.

[271] Wash. Const. of 1878, art. I, § 24.

[272] Id. art. XII, §§ 15, 18.

[273] Ariz. Const. of 1891, art. II, § 1 (not approved).

a Purpose of Government Clause asserting that government exists to "protect and maintain individual rights."[274]

Some members objected. Democrat Fred Ingraham[275] of Yuma County moved to add the phrase "and social" before "rights," so that the Clause would declare government's purpose to be the protection and maintenance of social or collective rights, as well.[276] That motion failed.[277] Ingraham therefore moved that the provision be stricken out entirely.[278] This, too, failed.[279] At that point, Democratic delegate A.F. Parsons[280] joined Ingraham in making his dissatisfaction clear. In a sarcastic move, he asked that the wording of another provision of the Bill of Rights—which secured "[t]he right of petition, and of the people peaceably to assemble for the common good"—be changed by replacing "common" with "individual."[281] This would have made the provision guarantee the right to assemble for the "individual" good—an ironic way of making clear Parsons's view that the "individual rights" language was insufficiently attentive to collective concerns. Yet, once more, the convention rejected the proposal.[282]

Parsons and Ingraham were not done with their opposition to the individual rights language. When the Convention gave its final consideration to the Bill of Rights, Ingraham once more moved to insert the word "common" into the "individual rights" passage.[283] This was again rejected, whereupon Ingraham spoke up. Pointing to the right of assembly clause, he told the delegates, "[y]ou will notice in the third and fourth lines below, you speak of 'common good.'"[284] The implication was clear: he thought it wrong to assert that government exists to serve individual rights rather than the collective good. But his complaint again went nowhere—so once more he moved to change the word "common" in the freedom of assembly clause to "individual," and yet again the majority rejected this.[285] In fact, the convention went even further in emphasizing the significance of the

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[274] Records of the Arizona Constitutional Convention of 1910, at 1399 (John S. Goff, ed., 1994).

[275] Ingraham (1868–1958) was a teacher and lawyer who later became a superior court judge. Id. at 1391.

[276] Id. at 659.

[277] Id.

[278] Id.

[279] Id.

[280] Parsons (1851–1916) was a lawyer and judge in Nebraska before moving to Arizona and continuing the practice of law. Id. at 1395.

[281] Id. at 659.

[282] Id.

[283] Id. at 893.

[284] Id.

[285] Id.

individual. It employed—as Washington and Utah had done—the term "individual rights" in its "frequent recurrence to fundamental principles" clause,[286] and it followed Washington's lead in entirely omitting such collective terms as "right of the people."

This individualism does not mean that Arizona's Constitution was consistently libertarian in the modern sense. On the contrary, while its authors rejected proposals deemed socialist in nature, they adopted many provisions for regulating the economy—everything from an eight-hour work day[287] to workers' compensation[288]—and created a Corporation Commission with power to regulate public service corporations and set rates for certain industries.[289] Nevertheless, Arizona's founders constitutionalized a highly individualistic conception of the political economy. They may have been "Progressives" in a broad sense,[290] but they were anxious not to be seen as socialists,[291] and the Convention's president, George Hunt, was, in the words of a contemporary observer, "committed away from all leanings toward state socialism and in favor of early American individualism."[292] It would thus be more accurate to classify the Arizona Constitution as a work of *western* Progressivism, a distinct political orientation which was at least as concerned with the dangers of big government as with those of big business.[293]

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[286] Ariz. Const. art. II, § 1. Both Washington and Utah had used the singular "individual right" rather than "individual rights," which Arizona employed. In the later twentieth century, political philosophy scholars of the Straussian school sought to distinguish between "right" and "rights," but the reason is obscure. See, e.g., Peter Lawler, Natural Rights and Natural Right, First Things (Sep. 7, 2010), https://firstthings.com/natural-rights-and-natural-right. The theory seems to be that "natural rights" suggests an "atomized" form of individualistic liberalism, whereas "natural right" suggests a more detached sense of universal moral prescription. In any event, while there is no evidence that such subtleties were on the minds of the Washington or Arizona framers, Arizona explicitly chose the plural "rights" over the singular "right."

[287] Ariz. Const. art. XVIII, § 1.

[288] Id. § 8.

[289] Id. art. XV.

[290] Scholars have frequently referred to the Arizona Constitution as "Progressive." See, e.g., Rebecca White Berch et al., Celebrating the Centennial: A Century of Arizona Supreme Court Constitutional Interpretation, 44 Ariz. St. L.J. 461, 468 (2012); E. Garry Grundy, III, Citizen-Legislators, Ariz. Att'y, Sept. 2010, at 12.

[291] As scholar David Berman notes, socialism exerted considerable influence in Arizona during its statehood period. Politics, Labor, and the War on Big Business 7 (2012). But the convention was decidedly anti-socialist in orientation and was praised upon completing its work for having rejected "socialistic fads and isms." The Convention Completes its Work, Bisbee Daily Rev., Dec. 7, 1910, at 4.

[292] Mary Austin, Americans We Like: Hunt of Arizona, The Nation, Nov. 28, 1928, at 573.

[293] See, e.g., Paul Avelar & Keith Diggs, Economic Liberty and the Arizona Constitution: A Survey of Forgotten History, 49 Ariz. St. L.J. 355, 389 (2017) ("[W]estern progressives tended to view both big business and the big government that accompanied it as 'eastern' and dangerous; they had 'a suspicion of corporate and governmental bigness.'") (quoting Michael P. Malone & Richard W. Etulain, The

Their individualism was neither accidental nor coincidental. After all, the cultural meaning of "the American West" was becoming a matter of much discussion during the decades when Washingtonians and Arizonans were writing their constitutions. Frederick Jackson Turner's famous paper on the influence of the frontier experience on the American psyche[294] was still fresh. Artists such as Frederic Remington and Charles Marion Russell, films like *The Great Train Robbery*,[295] and novels like Owen Wister's *The Virginian*[296] stoked a sense that the West was the land of individualism and self-reliance. This was, after all, an America overshadowed by the legacy of Theodore Roosevelt, who both embodied and articulated "the spirit of individualism so characteristic of American life."[297] It is little wonder that Grand Canyon State voters would choose to consecrate that spirit in the opening sentences of their constitution. "Individualism," declared one Arizona newspaper three months after statehood, "is what distinguishes man from the lower animals."[298]

IV. PURPOSE OF GOVERNMENT CLAUSES IN TODAY'S WORLD

Today, Washington, Arizona, and Louisiana[299] are the only states with such strikingly individualistic Purpose of Government Clauses. Although these clauses have usually been regarded as merely precatory, they have had significant consequences in many important cases. This became particularly notable as political leaders came to embrace Woodrow Wilson's "ministrant" theory of government. For example, in 1918, when Oregon's Public Service

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American West: A Twentieth-Century History 64 (1989)). Sean Beienburg has argued that it would be more accurate to view Arizona's constitution as Populist rather than Progressive. The Arizona Constitution: Deeply Skeptical of Power, State Court Report (Sep. 8, 2025), https://statecourtreport.org/our-work/analysis-opinion/arizona-constitution-deeply-skeptical-power.

[294] Frederick Jackson Turner, The Significance of the Frontier in American History (1893), *reprinted in* The Frontier in American History 1–38 (1920).

[295] The Great Train Robbery (Edwin S. Porter 1903).

[296] Owen Wister, The Virginian (1902).

[297] Theodore Roosevelt, The Winning of the West 73 (1917).

[298] Back to the Constitution, The Copper Era & Morenci Leader, May 10, 1912, at 4.

[299] Still today, Washington, Arizona, and Louisiana (which adopted a new constitution in 1974 modifying its Purpose of Government Clause) remain the only states to use the phrase "individual rights" in their constitutions, although many other states specify particular "individual" rights, such as the right of the individual to possess firearms. See, e.g., Utah Const. art. I, § 6, or to privacy; see, e.g., N.H. Const. art. II-b. Louisiana's 1974 Constitution stated in its preamble that the purpose of adopting the constitution was to "to protect individual rights to life, liberty, and property; afford opportunity for the fullest development of the individual; assure equality of rights; promote the health, safety, education, and welfare of the people; maintain a representative and orderly government; ensure domestic tranquility; provide for the common defense; and secure the blessings of freedom and justice to ourselves and our posterity." La. Const. of 1974, pmbl. See also supra note 207.

Commission imposed price limits on streetcars, a plaintiff argued that this exceeded government's legitimate authority because the state constitution said government exists only to ensure "peace, health and safety," and rate regulation was none of those things.[300] The court rejected this, holding that "the general welfare of the people" fell within those purposes, and rate regulation was therefore within government's proper scope.[301] By contrast, Wisconsin's Supreme Court, in striking down a legislative appropriation for forest preservation in 1915, observed that the Purpose of Government Clause limited the state's power to impose taxes.[302] It was "heresy" to suggest "that the police power is free from constitutional restraints," it said.[303] "Exercise of the police power is impliedly limited by the very spirit and purpose of the constitution to conservation of 'life, liberty, and the pursuit of happiness' and of all other inherent rights, 'to secure which governments are instituted among men.'"[304]

Litigants still occasionally base lawsuits on these provisions today, but courts differ as to their applicability. The Indiana Supreme Court has found that its Purpose of Government Clause, combined with its Lockean natural rights guarantee, is justiciable.[305] The Rhode Island Supreme Court, on the other hand, has declared its Purpose of Government Clause merely "advisory."[306] Washington courts have relied on the "individual rights" language of the clause to narrowly interpret laws relating to intoxication.[307] New Jersey courts, meanwhile, have rejected the idea that the Purpose of Government Clause imposes an affirmative obligation on the state to provide welfare benefits.[308]

More often, judges have found the clauses helpful as interpretive guides when interpreting other constitutional provisions. In *Commonwealth v. Wasson*,[309] for example, Justice Combs cited the clause as one reason the state could not criminally punish "deviate sexual conduct." And in *Seiber v.*

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[300] City of Portland v. Pub. Serv. Comm'n of Oregon, 173 P. 1178, 1180 (Or. 1918).

[301] Id.

[302] State ex rel. Owen v. Donald, 151 N.W. 331, 368–70 (Wis. 1915).

[303] Id. at 370.

[304] Id. at 369.

[305] Members of Med. Licensing Bd. of Ind. v. Planned Parenthood Great Nw., Haw., Alaska, Ind., Ky., Inc., 211 N.E.3d 957, 972 (Ind. 2023).

[306] Sepe v. Daneker, 68 A.2d 101, 105 (R.I. 1949).

[307] State v. Crediford, 927 P.2d 1129, 1131–33 (Wash. 1996). But see City of Seattle v. McConahy, 937 P.2d 1133, 1138 (Wash. 1997) (holding that although state constitution "prohibit[s] legislation that unreasonably interferes with the individual's right to be let alone while engaged in innocent activity," it can prohibit sitting on sidewalks, which interferes with pedestrian traffic).

[308] Franklin v. New Jersey Dep't of Hum. Servs., 543 A.2d 56, 66–68 (N.J. App. Div.), aff'd, 543 A.2d 1 (N.J. 1988).

[309] 842 S.W.2d 487, 502 (Ky. 1992) (Combs, J., concurring).

State, Justice Reynoldson, in dissent, cited it in concluding that the state should be denied tort immunity when it failed to warn of the danger of deer crossings; such immunity ignored the fact that the state exists to protect people, not deer.[310]

As we have seen, Purpose of Government Clauses are not intended to establish pragmatic, enforceable rules; instead, they set forth "meta-norms" to guide constitutional actors. Consequently, the most significant jurisprudential issues these clauses raise are those involving legal presumptions and levels of scrutiny. Perhaps the best-known of these "meta-norms" is the "tiers of scrutiny" theory that courts have employed since the 1930s when reviewing constitutional cases. In applying this theory, courts typically begin with a presumption of constitutionality and require plaintiffs to prove a challenged statute unconstitutional. This presumption of constitutionality is reversed in cases involving laws that intrude on (a small list of) "fundamental" rights or "suspect" classes.[311]

This schema—premised on a judicial prioritization of "democratic accountability"[312]—was copied from the federal courts' analysis of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, which was fashioned in the early twentieth century.[313] Even laying aside the dubious proposition of *state* courts employing doctrines that *federal* courts devised while interpreting an entirely *different constitution*, it is questionable whether this model can be reconciled with Washington's and Arizona's Purpose of Government Clauses, with their explicit language regarding the protection of individual rights. These clauses do not differentiate between "fundamental" and "non-fundamental" rights, and their pronouncement that government exists exclusively to protect the rights of *individuals*—as well as their striking silence regarding collective or social rights—clashes with the majoritarianism implicit in the presumption of constitutionality. The "rational basis" test has often been criticized for loading the dice so heavily in favor of the government as to make it practically impossible in most cases for individuals to vindicate their rights.[314] It is exceedingly hard to reconcile

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[310] 211 N.W.2d 698, 704 (Iowa 1973) (Reynoldson, J., dissenting).

[311] See, e.g., Maryland State Bd. of Educ. v. Bradford, 875 A.2d 703, 723 (Md. 2005); Harvey v. Bd. of Chosen Freeholders of Essex Cnty., 153 A.2d 10, 14 (N.J. 1959).

[312] See Hessick, supra note 51, at 1469–72.

[313] Ashutosh Bhagwat, Purpose Scrutiny in Constitutional Analysis, 85 Cal. L. Rev. 297, 304–09 (1997) (discussing origins of tiers of scrutiny).

[314] See, e.g., Patel v. Texas Department of Licensing & Regulation, 469 S.W.3d 69, 98 (Tex. 2015) (Willett, J., concurring); Hettinga v. United States, 677 F.3d 471, 480 (D.C. Cir. 2012) (Brown, J., concurring). See also Clark Neily, Litigation Without Adjudication: Why the Modern Rational Basis Test

a test that places a "judicial thumb on the government's side of the scales"[315] with the explicit constitutional instruction to preserve and maintain individual rights.

Justices on both states' supreme courts have remarked on this discrepancy. In 1998, Washington Supreme Court Justice Richard Sanders took his colleagues to task for employing the presumption of constitutionality, which he called an "ideological preference which favors the legislative branch at the expense of the . . . individual citizen."[316] Given the belief of the constitution's framers that the legislature was the branch of government "most likely to accumulate excessive power," he thought courts should be skeptical, not deferential, toward legislative assertions of authority; that would better maintain individual rights.[317] In 2020, Justice Bolick of the Arizona Supreme Court agreed. He argued that the presumption of constitutionality is a judge-made doctrine that "elevat[es] . . . legislative or executive power over individual rights," contrary to the state constitution's instructions.[318] That is certainly true; in at least its extreme forms, the deferential "rational basis" test, which reflects a prioritization of democracy over liberty as a constitutional value, runs counter to the Washington and Arizona Constitutions' language describing the purposes of government. But whether either state's courts will see fit to reconsider their jurisprudential approaches remains to be seen.

CONCLUSION

Much recent scholarship has focused on state constitutional protections for "Lockean" natural rights, but state constitutions also contain provisions

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is Unconstitutional, 14 Geo. J.L. & Pub. Pol'y 537, 546 (2016); Dana Berliner, The Federal Rational Basis Test-Fact and Fiction, 14 Geo. J.L. & Pub. Pol'y 373, 399 (2016); Timothy Sandefur, Disputing the Dogma of Deference, 18 Tex. Rev. L. & Pol. 121, 127–34 (2013).

[315] Neily, supra note 314, at 543.

[316] Island County v. State, 955 P.2d 377, 384 (Wash. 1998) (Sanders, J., concurring).

[317] Id. at 388–89. Sanders cited former Washington Supreme Court Justice Robert Utter, who argued in Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491, 507 (1984), that the presumption "seriously hampers the courts' accomplishment of . . . the fundamental purpose of our state's constitution and government: to protect and maintain individual rights." See also Richard B. Sanders & Barbara Mahoney, Restoration of Limited State Constitutional Government: A Dissenter's View, 59 N.Y.U. Ann. Surv. Am. L. 269, 270 (2003) ("To the extent a state government exercises its power to undertake activities beyond those necessary to protect and maintain individual rights, courts must look for specific manifestations of the people's consent that evidence constitutional grants of that authority. But, where a legislature acts without express or necessarily implied authorization of the constitution, it exceeds its authority—even if there is no constitutional provision barring such actions.").

[318] State v. Arevalo, 470 P.3d 644, 653 (Ariz. 2020) (Bolick, J., concurring).

describing the purposes for which government is established, and these deserve attention as well. They range between the "good of the whole" provisions of the first state constitutions to the highly individualistic, even libertarian, "maintain and preserve individual rights" clauses of the Washington and Arizona Constitutions. It is debatable whether the former reflect a "classical republicanism" that downplays individualism—even the classical republicanism of the Revolutionary era was a notably individualistic philosophy of government, and the "good of the whole" clauses were intended to reflect a commitment to democracy without implying unlimited majoritarianism. But it is at least clear that the latter's specific focus on individual rights was deliberate and stands in distinct contrast from the collectivist political philosophies, especially socialism, that were popular in certain circles when these clauses were written. In Washington and Arizona, at least, the explicit constitutional instruction to protect individual freedom casts significant doubt on the validity of such jurisprudential approaches as the "presumption of constitutionality" or the "rational basis test."