

University of California, Los Angeles

Beyond Individual Rights and Private Property:

Understanding Lockean Liberty in American Constitutional Jurisprudence, 1937-2023

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*Abstract*

*Scholars have connected liberty and John Locke's ideas to constitutional thought since the 1700s; however, current scholars fail to understand Lockean liberty in American constitutional jurisprudence, defining Lockean liberty through the binary between the individual and the community while ignoring Locke's concern for social cohesion. Here, I analyze American judicial opinions (1937-2023) to address those gaps and craft an original definition of Lockean liberty incorporating social cohesion. I argue that American federal judges turn to Lockean liberty to address the tension between individual and community rights, unifying these liberties while favoring individual rights. Lockean liberty in American constitutional jurisprudence draws upon consent and reason, promotes toleration and social bonds, limits the government's abilities while granting it some powers, and advocates for the rule of law. Lockean liberties mutually reinforce social cohesion and include various agents, deconstructing the binary in Locke's theory. Thus, Locke still influences American constitutional jurisprudence in a way that is not recognized, with implications for how we should understand liberalism beyond the individual-community binary in American constitutional thought.*

Political and legal theorists often connect John Locke's political philosophy to the United States, its Constitution, and American liberty. Locke was a British philosopher in the 1600s who is now often referred to as "America's Philosopher," a label that emerged as American political and legal scholars used Locke to promote individual liberty, liberalism, and limited government (Curti 1937; Lutz 1988, 11). When looking at liberty in Locke's liberal philosophy, scholars view Locke as creating a firm divide between individual and community rights to emphasize the autonomy and liberty of the individual, which causes them to neglect potential arguments about complementarity and social cohesion in Locke. That neglect also arises because scholars analyze the *Second Treatise of Government* over judicial opinions and other Lockean texts (Bell 2014).

Moreover, the study of constitutional jurisprudence alongside Lockean liberty is primarily restricted to the 18th century. With minimal analysis of modern judicial opinions on constitutional rights, scholars fail to address the judicial understanding of Lockean liberty and Locke's value of social cohesion. The literature needs a new way of understanding Lockean liberty, leading to two crucial questions: *To what extent has Locke's liberal philosophy on liberty influenced American federal constitutional jurisprudence in the 20th and 21st centuries? How do judges interpret Lockean liberty in American jurisprudence, affecting how we should understand the history of liberalism and Lockean liberalism within American constitutional jurisprudence?*

American judicial opinions in constitutional cases from 1937 to 2023 provide new evidence that could answer those questions. Over 60 opinions from various federal courts reference the ideas of Lockean liberty from the *Second Treatise of Government* and *Letter Concerning Toleration* in relation to the Constitution. I analyze 39 opinions to determine why judges turn to Locke in their decisions and how they understand his philosophy.<sup>1</sup> Understanding

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<sup>1</sup> See table 1 for a complete list of the included cases and figure 1 for graphs depicting the time frame of all cases that cite Locke from 1937 to 2023.

how Lockean liberty impacts jurisprudence today will help scholars better understand the liberal principles within the Constitution. More importantly, by looking at how Locke is cited in these judicial documents, I create an extensive definition of Lockean liberty that reveals the social cohesion aspects of Locke's theory, deconstructing the binary between individual and community rights and encouraging scholars to understand Lockean liberty in a new light.

Thus, in this thesis, *I argue that judges in American federal courts turn to Locke's Second Treatise of Government and Letter Concerning Toleration when they want to stress the general complementarity and connection between the Lockean liberty of the individual and the community in response to the tension between individual and community rights arising from their cases and the political context of the United States. The judges favor individual liberty unless there is a significant interest in the community—showing that the judges care about social cohesion. By looking at American jurisprudence from 1937 to 2023, I argue that Lockean liberty does not only favor the individual and private property, as most scholars understand it, but also draws upon consent and reason, promotes toleration and social bonds in the community, limits some government powers, and advocates for the rule of law for a cohesive community. Lockean liberty includes liberties exclusive to the individual, the government, and the community. Thus, Lockean liberalism continues to influence American constitutional thought, implying that political theorists' understanding of both Locke's theory and liberalism in general need to shift so that the theoretical definition aligns with the judicial understanding of liberalism.*

This thesis proceeds in ten sections. First, I explain how scholars studied the American reception of Locke and inconsistently defined Lockean liberty. The second section defines key Lockean concepts and methodology terms, leading to the third section on my methodology and data collection. The fourth section addresses how judges define Lockean liberty and incorporate

it into their opinions—redefining Lockean liberty—and the fifth section explains why the judges turn to Locke. The sixth section analyzes Locke’s influence on constitutional jurisprudence from 1937 to 2023. The seventh and eighth sections address counterarguments and weaknesses, respectively, in this thesis. The ninth section addresses how this thesis changes the way we should both interpret Locke’s philosophy as promoting the individual and community together and view how Locke’s philosophy impacts judicial decisions about the Constitution. In the tenth and final section, I conclude by explaining why scholars should revise their views of liberalism throughout the history of American constitutional thought, looking beyond Locke’s theory in the judicial opinions while still weaving together the themes of liberty and social cohesion.

### ***1. Contradictions, Disagreements, and Gaps in the Literature on Lockean Liberty***

Throughout the history of the United States, Locke has influenced American politics and government values (Goldie 1999). However, Americans focus on different parts of Locke’s theory in each century—and the literature contests Locke’s influence and public understanding of his theory. Two to three perspectives on each century prevail in the literature; one perspective argues that Locke was well received, another argues that Americans opposed Locke’s philosophy, and a third one argues Locke was partially influential. This thesis aligns with those that argue that Locke was well received and impacted constitutional rights. Also, the literature on Lockean liberty focuses on four narrow aspects of Lockean liberty: natural liberty, negative and positive liberty, restricted liberty, and government and community liberty. Within each of those four themes, two to three groups exist that interpret Lockean liberty differently, resulting in over ten groups total in this subset of the literature. Nonetheless, scholars neglect judicial sources and continue the individual–community binary of Lockean liberty, ignoring his complete views on community rights and his goal of social cohesion for liberty in society.

## 1a. Historical Perspectives

### *American Reception of Locke in the 1700s*

Because of the creation of the United States and the Constitution in the 18th century, many scholars focus on this period, debating Locke's relevancy and impact. Some scholars, including Merle Curti, Louis Hartz, and Richard Epstein argue that Locke's *Second Treatise of Government* greatly influenced the Constitution and the United States in the 1700s. Americans were drawn to the right of revolution and liberty espoused in the *Second Treatise of Government*, which justified their revolution (Bradley 2019; Ward 2015). Americans understood Locke as fighting for individual rights—continuing the individual–community binary in Locke's theory (Farr 2008; Zagari 1998). Other scholars, including J.G.A. Pocock, Morton Horwitz, and Michael J. Sandel, argue that Locke had no influence in the 1700s because Americans were more impacted by Machiavelli, Blackstone, and Hobbes (Pocock 1975). To these scholars, politics in the 1700s focused more on civic virtue and community building; these scholars err by not connecting Locke's social cohesion to the American view of politics at that time.

Lastly, a few scholars argue that Locke's *Essay Concerning Human Understanding* and the *Letter Concerning Toleration* were more influential. Claire Rydell Arcenas (2022) argues that the *Essay Concerning Human Understanding* was well received in the United States because it aligned with how parents wanted to raise their children. Steven M. Dworetz (1989) argues that the *Letter Concerning Toleration* was well received because of its Christian doctrine—Dworetz indirectly brings social cohesion and liberty together in the literature. Regardless, the literature is divided on how potent Locke's influence was during the 1700s.

### *American Reception of Locke in the 1800s*

At the beginning of the 19th century, Americans still drew upon Locke, showing how he

was well received. For example, in 1801, a newspaper connected Locke to Thomas Jefferson, continuing 18th-century ideas of government (Thompson 2019). Further, Locke's ideas of liberty, toleration, and separation of powers appeared in state constitutions (Bispham 1876; Corwin 1928). However, the current literature is divided on the continued reception of Locke as the century progressed. One group argues that after the early 1800s, Locke became irrelevant (Arcenas 2022). People turned to other Enlightenment philosophers, and Locke became restricted to his time (Bell 2014). Further, Locke's ideology became muddled; Locke's "life, liberty, and property" philosophy was no longer apparent, even though the binary continued (Arcenas 2022; Pocock 1975). Another group argues that Locke was still well received by the American public because of his theory of individual liberty and property (May 1976). For example, in 1895, Locke was referenced in a news article to defend farmers' rights (Arneil 1996). Also, the debates surrounding law revision, taxation, and migration were connected to Locke's *Second Treatise of Government*, drawing upon his arguments about the aims of government and natural rights—those debates did not discuss social cohesion and liberty (Scalia 1996). Once again, no majority agrees on Locke's general influence in the 19th century.

#### *American Reception of Locke in the 1900s*

Lastly, the literature is divided into two groups on Locke's reception in the 20th century. Before describing the two groups, however, it is essential to note the distinctiveness of the 20th century because I am analyzing opinions from this period. From the New Deal to the rise of communism and fascism, the United States had to directly confront its understanding of liberty (Chafe n.d.; *Library of Congress* n.d.). The threats of Nazi Germany and the Soviet Union caused the United States to create a homogenous national identity (George 1999). Nonetheless, the rise of the administrative state and "big government" caused some political and legal figures

to turn away from originalism, while others turned to the United States' traditional conservative values of limited government, individual rights, family, private property, and minimal taxes (Skowronek 1997). There were also multiple protests for equal rights for various minority groups—the discussion of rights, liberty, and the community was essential to the 20th-century American mind, creating the potential for a distinctive turn to Lockean liberty (Bromley 2020).

The first group of scholars who focus on Locke in the 20th century advocate for Locke's return to the American mind through the ideas of private property, individual rights, and limited government in the fight against communism. *The Second Treatise of Government* and the individual–community binary became widespread in this period (Arcenas 2022). Further, scholars reinterpreted Locke and crafted the “fable of liberalism,” making Locke the father of liberalism (Bell 2014; Stanton 2018). Liberalism includes the values of limited government, individual rights, independence, and expansive freedom within the Constitution. Social cohesion seemed too similar to communism, so this aspect of Lockean liberty was neglected (Hartz 1955).

However, other scholars criticize Locke, arguing that Americans understood Locke similar to those who promoted liberalism but did not approve of Locke's ideas. According to these scholars, Americans rejected Locke's ideas in the 1900s because of the harm capitalism had caused, blaming the prioritization of individual rights over community rights—even though these scholars err by neglecting Locke's social cohesion and community liberty views (Sandel 1996). Further, these scholars incorrectly argue that Americans stepped away from Lockean ideology because Americans wanted a return to the community for social welfare.

In the 1900s, many interpretations of Locke emerged even though the interpretation of Locke in the courtroom is not discussed in the literature. Locke became a conservative, liberal, socialist, Marxist, racist, and theologian (Arcenas 2022; Dunn 1990). Furthermore, his definition



of liberty varied across four themes even though scholars agreed that liberty is an essential concept in the American understanding of Locke (Bell 2014).

### **1b. Current Definitions of Lockean Liberty in the Literature**

#### *Natural Liberty*

Lockean liberty as natural liberty is the most common definition in the literature. Scholars who support this view argue that Lockean liberty is man's ability to know and act on his will (Klausen 2007). This liberty exists in each person and can rarely be restricted (Powell 1996). Thus, these scholars define natural liberty through the binary between individual and community rights, favoring individual rights. However, the justification of natural liberty varies. One group argues that natural liberty is solely connected to reason (Heyman 2018). Another bases its interpretation of liberty on Locke's Christian beliefs (D.L. Wardle 2002; LaSelva 2015). Different justifications shape the potency of the divide between the individual and community in Lockean liberty—even though both groups err by creating such a divide.

The literature also varies on exactly what natural liberty includes. While scholars agree that natural liberty includes free will, religion, and happiness, they disagree on the meaning of "inalienable rights" (Cranston 1986). Some argue that the natural inalienable rights in the Constitution are not connected to Lockean liberty (Calabresi and Vickery 2015, 1357). Another group views "inalienable" as all-encompassing to the individual so that these rights restrict the community (Ricks 2020). Without the social cohesion point to weave together Lockean liberty, defining Lockean liberty as natural liberty creates a confusing, incomplete definition.

#### *Negative and Positive Liberty*

Parts of the literature analyze positive and negative rights, debating which rights matter more in Locke's theory. The central group argues that Lockean liberty should be understood in

terms of strictly negative rights—refuting social cohesion and political harmony as significant to liberty. To this group, liberty is the right to not be under an arbitrary will (Halldenius 2003). Moreover, this includes the “right to not” have anything negative happen to oneself, such as the right to not have one’s property, life, mind, speech, or afterlife taken (LaSelva 2015; Stanton 2018). Further, understanding liberty in the negative sense reduces the power of the government and favors the autonomy of the individual, introducing the concept of consent into the literature. However, scholars disagree on the significance of consent to Lockean liberty (Dworetz 1989; Horwitz 1976; Scalia 1996). Consent in Locke’s philosophy precludes the discussion of the social contract and community, so these scholars do not consider social cohesion as a part of liberty—this thesis will fix that by studying consent and Lockean liberty in the judicial opinions.

Some scholars still interpret Lockean liberty as including positive rights. Liberty creates positive rights for pleasure in life—this perspective starts to break free from the individual–community binary. These rights are revealed in the government’s laws, allowing the individual to benefit from being in the community (Corwin 1928). These rights are privileges rather than being inherent; these rights do not extend to stateless people in Lockean philosophy (Klausen 2007). Also, scholars interpret toleration as allowing for the restriction of liberty in Locke’s doctrine, showing how the concept of social cohesion is always involved in Lockean liberty (Fawcett 2014; LaSelva 2015). This literature stresses the rights to property, religion, education, and thought—differing from the rights granted through the view of negative Lockean liberty.

### *Restricted Liberty*

Rather than focusing on the specific rights liberty bestows on an individual, these scholars interpret Lockean liberty in restricted or unrestricted terms and debate whether individual liberty is absolute and cannot be severely restricted, continuing the mistaken binary of

the individual and community in Lockean liberty. The primary interpretation is that Lockean liberty can barely be restricted. These scholars argue that the social contract preserves individual liberty, limiting the government's powers. These scholars rely heavily on the rule of law, which allows humans to know what few restrictions exist on their liberty (Corwin 1928). Locke promotes the rights of individuals first, and so this group takes the free-enterprise view of Locke—even though these scholars do partially connect to the social cohesion view of Locke. The government cannot take away one's property, enforce severe taxation, or promote a single belief as the only correct belief, showing how one's liberty is minimally restricted.

The other interpretation of this literature is that Locke does not advocate for autonomy above all else. Because the social contract and government were made for the benefit of the people, liberty can be restricted to preserve the government's ends, such as cohesion. For example, liberty does not give people the right to constantly accumulate property and wealth (Bailey and Thorseth 2017). Absolute liberty existed in the State of Nature and frequently led to the State of War, so these scholars correctly state that liberty must be restricted for the harmony of the community. Therefore, liberty depends on others agreeing to respect the community and each other's liberty. Nonetheless, scholars disagree on the level of acceptable restriction, with confusing implications for legal actors using Lockean liberty in practice—restricted Lockean liberty, thus, has no agreed-upon definition or explicit connection to social harmony.

### *Government and Community Liberty*

Finally, the literature contains two viewpoints on government and community liberty in Locke's philosophy. One viewpoint perpetuates the binary between the individual and community, arguing that the government does not have "liberty" in the sense that individuals do; giving the government and community liberty would reduce the independence that is needed for

individual liberty (Horwitz 1976). Further, no unique liberty arises for the community; parents and religious communities simply have to educate others (Koganzon 2016). However, some scholars argue that, according to Locke, a specific kind of liberty arises in the community that cannot exist in the State of Nature. When individuals join a community, the people become a sovereign unit with liberty. This liberty draws upon the majority will—having the ability to bring about its will in politics (A. H. 1942). By defining virtue, the community cultivates virtuous citizens, showing how it has liberties outside the social contract that cultivate social cohesion.

### **1c. Legal Sources in the Literature and Locke's Relevancy**

To define Lockean liberty and his impact, scholars rely upon the Constitution, Declaration of Independence, and state constitutions during the Founding Era. Scholars now rely heavily on the Bill of Rights, connecting those rights to Lockean liberty (Ackerman 1991).

A few scholars draw upon other legal documents and provide a very selective understanding of Lockean liberty in jurisprudence. Specifically, scholars have not paid much attention to judicial opinions from American federal courts when analyzing Locke's impact, which has led them to neglect the social cohesion and other facets of Lockean liberty that this thesis will later reveal. Calabresi and Vickery (2014) analyze case law from 1776 to 1868 to understand Lockean liberty in the Fourteenth Amendment. Their analysis considers judicial opinions but fails to analyze all aspects of Lockean liberty in jurisprudence. LaSelva (2015) analyzes two cases in the United States and one case in Canada to explain how free speech and Locke are applied depending on the country's nature, but LaSelva excludes the value of social cohesion and community in the United States context. Yoshino (2015) refers to *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) to define a kind of liberty that opposes Locke's definition, showing the supposed decreasing influence of Locke on the Fourteenth Amendment; however,

Yoshino continues the binary of the individual and community rather than the social cohesion view in Locke. Notably, I will also analyze *Obergefell v. Hodges* (2015) in this thesis. Reed (2018) analyzes religious liberty through the cases and laws on topics like contraception, creating a narrow view of Lockean liberty. Lastly, Epstein (2017) and Doernberg (1985) provide an overview of the 20th century to construct an understanding of liberalism in the United States.

By using cases and other sources, scholars interpret the relevance of Lockean liberty in three ways. First, scholars turn to Locke's definition of liberty when there is a question of the Constitution's meaning or the Founding Fathers' intent. Lockean liberty is often used as the traditional understanding to oppose the modern understanding—continuing the binary of the individual versus the community. Second, Lockean liberty applies frequently when studying the Fourteenth Amendment. Lastly, the literature shows that Lockean liberty seems relevant during religious debates and toleration, drawing the line between civil and religious liberty. However, these analyses do not point to a pattern to explain Locke's relevancy or create a comprehensive definition of liberty with the framework of social cohesion. Their data lack all 63 opinions that cite Locke from 1937 to 2023, weakening these scholars' arguments. Further, by not seeing the overarching relevancy of Lockean liberty, these scholars neglect other aspects of Lockean liberty, ignoring the nuanced definition of Lockean liberty that exists in American jurisprudence.

### **1d. Gaps in the Literature and Solutions**

The literature suffers from too much focus on how political theorists understand Locke's role in the Founding Era. If Locke truly impacted the Constitution, an analysis of how legal actors understand Locke's theory in judicial opinions is needed. Scholars have not analyzed many cases and opinions alongside Lockean liberty, suggesting that Locke's philosophy is not connected to constitutional law when, in fact, Lockean liberal philosophy is significantly

connected to constitutional law (Shklar 1964). Further, while a few scholars attempt to use jurisprudence, few use the cases from the 20th and 21st centuries that can reveal the continued impact and understanding of Lockean liberty. Lastly, within the understanding of Lockean liberty, the literature does not agree upon a definition that unites all elements of Lockean liberty. Most scholars insist on understanding Lockean liberty through a mutually exclusive binary of the community and individual. Such insistence creates paradoxes in the definition of Lockean liberty, as seen with ideas on positive rights, negative rights, natural liberty, and political liberty. The literature needs to abandon the binary view of the community and individual and look to a new framework—social cohesion—that makes Lockean liberty more harmonious.

Therefore, I strive to address those gaps by creating a new dataset of case opinions, broadening the time frame of the literature, and highlighting how judges interpret Lockean liberty alongside the Constitution. This thesis aligns with scholars arguing that Americans both turned to and relied upon Locke’s philosophy in the 20th century; this thesis does not align with any one group on Lockean liberty because I focus on multiple facets of Lockean liberty rather than just one theme, incorporating social cohesion to comprehensively weave together the ideas espoused in Lockean liberty. With a new understanding of Lockean liberty, scholars can better understand the connection between constitutional rights, social cohesion, and liberalism.

## ***2. Definitions***

Through a close reading of Locke’s *Second Treatise of Government* and *Letter Concerning Toleration*, I defined various terms that will be foundational to both understanding my methodology and how the judges are understanding Lockean liberty in their opinions.

Scholars generalize Locke’s philosophy as focusing on individual rights and property; however, I define *Lockean liberalism* as the belief that government should be limited and

preserve citizens' rights to liberty, consent, education, toleration, and property. These liberal principles justify a limited government that builds a community and follows Locke's Law of Nature. Social cohesion and harmony are critical for the most beneficial kind of liberty that is neither strictly individualistic nor anti-government. The community and government each have a semblance of liberty and should be allowed to exercise it to maximize the self-preservation of all.

Locke introduces his definition of the *Law of Nature* in the *Second Treatise of Government* to describe the rights of humankind and to connect those rights to the community:

“that being all *equal and independent*, no one ought to harm another in his life, health, liberty, or possessions...every one [sic], as he is *bound to preserve himself*, and not to quit his station wilfully [sic], so by the like reason, when his own preservation comes not in competition, ought he, as much as he can, *to preserve the rest of mankind*.” (Locke 1980, II.6)

The Law of Nature dictates how people must behave toward themselves and others and teaches people about their intrinsic value as human beings. Lockean liberalism, thus, promotes the idea that man is naturally “equal and independent,” so natural rights are inalienable and universal. This concept of “natural rights” is related to Locke's Christian beliefs, arguing that the Law of Nature reveals God's will while orienting everyone toward the public good (IX.131).

Therefore, the Law of Nature originates from religion but is accessible to anyone with reason. The Law of Nature enters society through the legislature but is also prevalent in social groups (XI.134). Social groups foster societal bonds, encouraging others to preserve the whole group and recognizing the inherent value of each person. Social groups inherently reduce a person's self-centeredness so that one can realize and fulfill one's duties to others in the group. Locke views religious groups as the most fundamental for teaching about the Law of Nature because of the emphasis on compassion and morality for obtaining an afterlife. Those without societal bonds are less likely to follow the Law of Nature and feel obligated to help others in the community, which is why Locke views atheists negatively (Locke 1983, 56).

So, in Lockean liberalism, a man exists foremost as an independent individual with rights, but those rights rely on *societal bonds*. Individual rights are only properly preserved and understood within a community (Locke 1980, XI.136). The Law of Nature fosters a community of trust that will punish transgressors who violate others' rights and create a "State of War" (Locke 1983, 27). The State of War exists when an individual commits harm against another, creating a state of violence and insecurity (Locke 1980, III.19). The State of War exemplifies how, in the State of Nature, there were no societal bonds with one's neighbors. Individuals created societal bonds to avoid the State of War. Lockean liberalism, thus, prioritizes the individual and creates a helpful political community in which individuals actively participate. Various communities—from a paternal to a civil society—exist to reinforce the social and political bonds. Loyalty and participation are cultivated because the Law of Nature defines justice as preserving one's and the community's interests (II.6). With increased trust and compassion, individuals and the community have more liberty and security than before.

Moreover, to maintain political harmony in society and enable others to benefit from the newfound liberty, the government must educate the people (VI.58). Education is crucial so that one can develop and act on one's reason. According to Locke, only those with education and knowledge of their own will can exercise reason; therefore, children do not have reason until their parents fully educate them in the paternal society (VI.71). Once one has reason, one can understand the Law of Nature and make pertinent decisions relating to political affairs and religious matters. The government must respect people's reason and allow them to act upon it.

Further, to enable individuals to exercise their reason thoroughly, the Law of Nature endows positive and negative rights—what Locke calls "civil interests" in the *Letter Concerning Toleration*—in each person, which gives individuals the right to act or the right to not have



something done to them (Locke 1983, 26). Locke defines *liberty* as having “a standing rule to live by, common to every one of that society, and made by the legislative power erected in it: a liberty to follow [one’s] own will in all things, where the rule prescribes not” (Locke 1980, IV.22). Liberty in a society is not the same as the liberty in the State of Nature; liberty in the State of Nature has no limits. Lockean liberty in a community, instead, follows the rule of law: “Where there is no law, there is no freedom...for who could be free, when another man’s humor might domineer over him?” (VI.57) Government is required to establish the community’s will and the law, but individuals are not subject to arbitrary rules that extremely restrict their liberty.

For example, there are limits on the government to preserve an individual’s choice and liberty in religious matters. The church must be separated from the state because there is no clear answer on which religion will bring Heaven (Locke 1983, 28-29). Thus, *toleration* protects individual liberty and the community’s cohesiveness. Toleration includes respecting one’s reason and beliefs when there is no known correct answer (36). The government cannot impose one religion because religion connects to the right to “life,” and the government cannot take one’s life—especially one’s heavenly life—away to preserve political cohesion. However, toleration protects religious practices so long as they do not oppose the Law of Nature or the community—Locke uses Catholicism to show how political cohesion allows for religion to not be tolerated if it risks the political community (39-40; 50). If a religion destroys or refuses to promote societal bonds in a political community, then the government can restrict the liberty of that religion.

Beyond toleration, Lockean liberalism centers its view of liberty on *consent*. Everyone consents to the government restricting aspects of one’s natural liberty for the greater good and security of most of their rights (Locke 1980, XI.141-142). Consent covers political matters (e.g., style of government) and personal matters (e.g., property and religion). If the government starts

to abuse its power, individuals can revoke their consent and revolt to create a new government (XIII.149). However, consent can be limited in society by majority rule; one cannot revolt if one is in the minority and disagrees with a specific policy unless it blatantly violates one's essential rights (namely, liberty and life) or the Law of Nature (VIII.97-98).

The relations between consent and liberty further arise with *private property*. Property extends to one's body, life, money, land, house, furniture, and mind (Locke 1983, 26). The government cannot arbitrarily take anything away—from one's land to one's mind. One's private property is, thus, protected and essential for exercising liberty (Locke 1980, XI.138). Property is crucial to the depiction of individual liberty, allowing Locke to argue that individual liberty can warrant limits on the government if deemed reasonable. Property preserves independence, fosters trust in the community, and allows for mutual love and social bonds between men.

Lockean liberalism relies on a *limited government* so that the government can protect political cohesion, be tolerant, and foster social bonds to create community rights. Further, with the standard of the Law of Nature, individuals and the government can now judge what should be allowed for individuals and the government to do. Most importantly, the government cannot oppose the Law of Nature—the rule of law and liberty must prevail for social cohesion.

Lastly, I crafted definitions for two terms critical to the Methodology section. The first term is the *tension between community and individual rights*. This tension arises from the question: When should a nation prioritize the community's liberty before the individual's? The question of individual and community rights emerges during social movements or opposition to American values, so this term indicates when the courts may turn to Lockean liberty.<sup>2</sup> The

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<sup>2</sup> Refer to figure 2a for a model that portrays my hypothesis on the causal mechanisms that bring Locke's theory into the courtroom; refer to figure 2b for a model that hypothesizes the significance of Locke's impact on constitutional jurisprudence.

second term is *constitutional jurisprudence*, which refers to how judges interpret the Constitution by applying constitutional rights to a case. This term is used to define how Lockean liberty is used in the opinions when addressing the tension between individual and community rights.

### ***3. Methodology: Crafting a New Definition of Lockean Liberty***

To fill the gaps in the literature and using the above definitions, I partook in a theory-building process alongside the empirical components from my new dataset.

There are 63 federal court opinions, accessible through *LexisNexis* and *Hein Online*, that cite Locke from 1937 to 2023—I searched for these cases from March to June 2023. I also found the relevant oral argument transcripts on *Supreme Court National Archives*. While this number may seem small as American federal courts make decisions daily, Lockean liberty appears when courts cite an opinion that cited Locke or when courts espouse Lockean principles.

Within this dataset, I only examined 39 of the 63 available opinions.<sup>3</sup> For each case, I recorded the court it was decided in; the Lockean text used; a link to the opinion and oral argument transcript if applicable; the political context in the United States at the time of the case; the judge's political leaning; if the decision was kept; the citation to Locke; the part of the Constitution referenced; if the judge supported Locke; the judge's view of Lockean liberty; and the connection to individual and community rights. I also analyzed the oral argument transcript if it was available for each case. These opinions all draw upon different parts of Lockean liberty and vary in how they cite Locke. The cases also represent a variety of political contexts, as I looked at two centuries when the United States underwent much political and social turmoil.<sup>4</sup>

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<sup>3</sup> See table 1 for the list of the opinions analyzed in this thesis.

<sup>4</sup> As a brief aside, the other 24 opinions were not analyzed because they did not relate to the *Second Treatise of Government* or *Letter Concerning Toleration*, only briefly mentioned Locke without a connection to the judge's argument, or did not refer to any Lockean text. See table 2 for a list of those opinions.

Moreover, I chose the 39 opinions because of the limited access to materials, selected time frame, and court focus for this thesis. The dataset on *Lexis Nexis* does not provide many case opinions before 1937, which is why I focus on 1937 onward—even though it does impose some limits on the thesis and implications for the extent of understanding Lockean liberty. Two opinions from before 1937 that cite Locke were found but not included.<sup>5</sup> By neglecting the beginning of the 20th century, this thesis will not include the constitutional jurisprudence that began in 1905 with the decision of *Lochner v. New York*, 198 U.S. 45 (1905). While the opinion does not cite Locke, this decision on property, “liberty of contract,” and the Due Process Clause infused Locke into constitutional jurisprudence (McCormack 2005). Without a discussion of the *Lochner* era, this thesis does not cover the more property and labor rights version of Lockean liberty that emerged in *Lochner v. New York* (1905), so this thesis does not provide a complete overview of constitutional jurisprudence on Lockean liberty in the 20th century (Mayer 2009).

Within this dataset, I looked for two leading indicators of Locke’s influence and Lockean liberty: citations to Lockean texts in judicial opinions and references to Locke’s ideas.<sup>6</sup> Such citations appear in the body of the opinion, footnotes, endnotes, dissent, or concurrence.<sup>7</sup> All citations show Locke’s philosophy being interwoven into constitutional thought. Lawyers referencing Locke in their oral arguments would also indicate Locke’s influence. If Lockean ideas appear, they will impact the judicial decision and, thus, become embedded in constitutional thought. I consider these Lockean principles to be limited government, preservation of individual rights, religious toleration, the importance of education, the political act of consent, and the

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<sup>5</sup> Before the 1930s, I found only two cases that cite Locke (*United States ex rel. John Turner v. Williams*, 194 U.S. 279 (1904) and *Myers, Administratrix, v. United States*, 272 U.S. 52 (1926)).

<sup>6</sup> Refer to figure 3 to see the kind of Lockean text used in the opinions.

<sup>7</sup> Refer to figure 4 for a graph that shows the percentage of where Locke appears in the opinions

promotion of social bonds. Nonetheless, using those principles in opinions or lawyers' arguments indicates Lockean liberty's influence on constitutional thought.

To specifically study Lockean liberty, I categorized the cases into five themes: religious liberty; liberty as consent; liberty's connection to the community or government; liberty as the rule of law; and liberty as property or labor. These five themes are based on the citations to Locke. However, multiple cases can have more than one theme of Lockean liberty, thus showing why a comprehensive definition of Lockean liberty is needed in the literature.<sup>8</sup> Those cases that refer to various themes were categorized as belonging to all referred themes—no theme was prioritized over the other. Further, I draw distinctions between their justifications for liberty or rights in the analysis section to show the intersectionality of the themes.

Moreover, I measured the question of individual and community rights by looking at the American domestic environment and politics at the time each case was decided. This question is linked to constitutional thought, as federal courts face cases on the First, Second, Fourth, Fifth, and Fourteenth Amendments and Articles I and II. These constitutional indicators address an individual's rights or the structure of government, so considering the question of community and individual rights in the courtroom allows for a judicial reconstruction of American liberty.

Beyond studying Lockean liberty through the five themes, I also studied Locke's relative influence compared to citations to other philosophers in the opinions and transcripts I read. I considered what philosophers were being cited and the magnitude of those references. Citations to other philosophers like Blackstone will reduce Locke's impact on constitutional thought. Finally, Locke's influence will be examined alongside the Martin-Quinn Index score of Supreme Court justices citing him as Locke is often seen as a more conservative philosopher.

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<sup>8</sup> Refer to figure 5 for a graph on the number of opinions for each theme of Lockean liberty.

Using those indicators, key terms, and the dataset of case opinions, I hypothesized that courts would use Locke when the tension between community and individual rights encourages judges to turn to the Founding Era philosophies. If references to Locke increase, Lockean liberty would prevail, revealing Locke's impact to be significant on constitutional jurisprudence. To examine my hypotheses, I read through the case opinions to understand the case and its decision. I also looked at the case's facts and the American environment to understand what is causing the question of community and individual rights to emerge. Then, I examined the references to Locke's texts to see how the judges or lawyers used, interpreted, and analyzed Locke in their arguments. Finally, I combined the cases into five themes and defined Lockean liberty.

#### ***4. Judicial Use and Understanding of Lockean Liberty***

Judges weave constitutional jurisprudence and Locke's philosophy of liberty in their opinions from 1937 to 2023. Some judges agree with Locke while others disagree—yet Locke continues to appear through references in the majority, dissent, and concurrence when the judges use the Constitution to understand what (if any) liberties the individual, community, and government can exercise. These judges do not necessarily understand Lockean liberty as strictly belonging to an individual, complicating the typical understanding of Lockean liberty as individual rights and private property. Thus, constitutional jurisprudence understands Lockean liberty as the ability to understand and be governed by laws in a society, obeying the laws while not being arbitrarily restricted, acting for oneself and the public good, using one's consent and reason, allowing the government to limit liberty for harmony, and promoting toleration.

##### **4a. Religious Liberty**

Drawing upon Locke's *Letter Concerning Toleration*, judges analyze Lockean liberty in eight opinions through the lens of religious liberty and connect it to the First, Fourth, and

Fourteenth Amendments. Of those eight opinions, four decisions agree with Lockean liberty, three decisions reject Lockean liberty, and one decision only rejects certain aspects. Also, five decisions prioritize individual rights over community rights. Religious Lockean liberty is a more expansive liberty reserved for individuals to exercise but can still be restricted to preserve cohesion. These opinions exclusively draw upon Locke's *Letter Concerning Toleration* to define religious liberty. Reading these eight opinions, I found that constitutional jurisprudence interprets religious Lockean liberty through the necessary and complete divide between the church and the state, the duties and limits of public education and associations, toleration, the role of mental conscience, and the significance of government and community interests.

Lockean religious liberty is founded on a clear separation of church and state. In *School District of Abington Township, Pennsylvania, et al. v. Schempp et al.*, 83 S. Ct. 1560 (1963), Justice Brennan begins his concurring opinion with Locke: "[As] John Locke ventured in 1689, 'I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other'" (School District of Abington Township, Pennsylvania, et al. v. Schempp et al., 83 S. Ct. 1560, 1575 [U.S. 1963]). Brennan views Locke as predicting the need for the First Amendment because these "just bounds" are necessary for man's rights and social cohesion. The religious community and political community have different leaders. Neither leader has absolute power over the other and neither leader can generally dictate what the other does. However, the political community can restrict the religious community for the end of social cohesion. Regardless, in this case, the court struck down mandatory reading of the Bible at public schools in Pennsylvania because this provision blended the church and the state. Public schools are connected to the government through taxes (1582). While parents can choose not to send their children to public schools, and

the students can excuse themselves from the classroom while reading the Bible, those provisions do not justify the infringement of religious liberty. Since public schools must serve secular functions, there can be no preference for one religion to preserve both the educational and religious liberties of the children and the trust in the community. The individual right to religious liberty comes before a school district's right to use the Bible for order and structure.

While disagreeing with Locke, Justice Burger further interprets the division of church and state as dividing religious and political liberty. In *McDaniel v. Paty*, 89 S. Ct. 1322 (1978), a Tennessee priest ran to be a delegate to a state constitutional convention but was barred from doing so. A Tennessee law disqualified candidates if they were priests or other religious figures in their religious organizations to preserve the division between the church and the state. Lockean liberty aligns with this law, allowing the religious liberty of each community member to trump the political liberty of an individual: “Earlier, John Locke argued for confining the authority of the English clergy ‘within the bounds of the church, nor can it in any manner be extended to civil affairs; because the church itself is a thing absolutely separate and distinct from the commonwealth’” (*McDaniel v. Paty*. 89 S. Ct. 1322, 1326 [U.S. 1978]). The risk of a religious figure holding a political office is too great for those who disagree with that religion.

Therefore, Lockean liberty creates a hierarchy between religious and political liberty, favoring the religious liberty of the community for the sake of the general liberty of everyone. As demonstrated in Justice White’s concurrence, this hierarchy allows the religious liberty of the community to come before the political liberty of the community. Even though the community voted for the priest and he won the election, the principle of church and state separation allows for rejecting a democratic vote (1337). However, while Justice Burger uses Lockean liberty in his opinion, he ultimately rejects Locke, saying that the priest has a right to hold a political



office. The First Amendment allows one to exercise religion freely, including becoming a priest (1327). The state cannot restrict that right or make one choose between religious liberty and political liberty—the law in question states that if the priest decides to stop his duties and seemingly renounce his religion, he could be eligible for office. Since the court interprets that law as religious discrimination, the court strikes that law down and opposes Lockean liberty.

*Fratello v. Archdiocese of N.Y.*, 863 F.3d 190 (2017) further clarifies the need for church and state separation for religious liberty even though it has repercussions for individual rights. In this case, a former principal of a Roman Catholic School sued the school for discrimination and retaliation because it terminated her contract. When making the decision, Judge Sack discusses Locke in the opinion footnotes: “The conception of a ‘church as a voluntary association’ of individual conscience can be traced to the philosopher John Locke” (*Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 201 [2d Cir. 2017]). Since individuals consent to join a religious community, the political community has to respect their consent and the integrity of the religious community. Mental conscience allows one to join any religious organization and limits one’s liberty to seek redress against that organization. The government cannot intrude into private matters so that it is not accused of forcing decisions on a church. One way the church preserves its liberty over private issues—such as contract termination—is through the “ministerial exception” in the First Amendment (192). If one serves in a ministerial capacity, that individual cannot claim discrimination by one’s religious group and seek redress in court. Since this principal served in a minister role in the school, she is included in the ministerial exception, and the religious liberty of the Roman Catholic school restricts her right to labor liberty. Lockean religious liberty in constitutional jurisprudence allows for prioritizing community rights over the individual, showing how individuals are not the only ones who can exercise religious liberty.

Nonetheless, religious liberty can still be restricted by the government. In *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 732 F. Supp. 1467 (1989), the Church of Lukumi Babalu practiced animal sacrifices during eight days of worship and initiation. After the church bought a warehouse to serve this purpose, the city of Hialeah passed an ordinance making animal sacrifices illegal because of public health concerns. While Judge Spellman interprets Lockean religious liberty as “absolute” in the First and Fourteenth Amendments and rejects it, Spellman’s decision ultimately aligns with Locke’s argument for restricting religious liberty (*Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 732 F. Supp. 1467, 1483 [S.D. Fla. 1987]). In the *Letter Concerning Toleration*, Locke believes that “The Publick [sic] Good is the Rule and Measure of all Law-making”—if a religious practice can be secular and is harmful to the “Publick Good,” the government can restrict that practice (Locke 1983, 39). Thus, Spellman’s decision that the ordinance was valid because of the government’s interests in public welfare and social cohesion aligns with Locke’s religious liberty. When the community’s interests in secular practices are great enough, the First Amendment does not fully protect religious liberty, aligning with Lockean liberty.

This view of limited Lockean religious liberty is further supported in *Priests for Life v. United States HHS*, 808 F.3d 1 (2015). In the dissent, Judge Brown and Judge Henderson argue that the Founders—specifically Madison—drew upon Lockean liberty: “The right to freely exercise one’s religion is not—and was not intended to be—absolute” (*Priests for Life v. United States HHS*, 808 F.3d 1, 5 [D.C. Cir. 2015]). Even though Locke advocates for “establishing clear boundaries” between civil government and religion, the government can implement measures to restrict religious liberty so long as it establishes no governmental “authority over men’s souls” (4-5). Public versus private distinctions are critical to understanding Lockean

liberty because the government can only limit public matters if it has a valid interest. In this case, the court questions if the Affordable Care Act can require employers to provide contraceptive access or access to insurance companies for their employees. While the majority upholds it as valid, the dissent uses Locke to reject the law, saying that government interests in contraceptive access did not justify forcing religious individuals to go against their beliefs in any regard, and the striking down of the law did not risk social harmony.

Similar to *Priests for Life v. United States HHS* (2015), *Gilardi v. United States HHS*, 733 F.3d 1201 (2013) also questions the provisions about abortion and contraceptive care in the Affordable Care Act. In this case, the Gilardi brothers, who owned an insurance company, argued that the Affordable Care Act infringed on their First Amendment rights by forcing them to pay a fine or offer contraceptive and abortion access in their insurance plans. While the court remanded the decision to lower courts, Judge Brown's opinion quotes Locke: "The Framers of the Constitution clearly embraced the philosophical insight that government coercion of moral agency is odious. According to Locke, penalties are impertinent if they are used to compel men 'to quit the dictates of their own consciences'" (*Gilardi v. United States HHS*, 733 F.3d 1201, 1217 [D.C. Cir. 2013]). To preserve humanity, there must be a balance between government rights and an individual's right to free belief and religious expression. As discussed in *Fratello v. Archdiocese of N.Y.* (2017), religious liberty is intricately connected to one's mental conscience. The government cannot force one person to go against one's religion—such as by forcing them to offer abortion and contraceptive access or pay a yearly fine of \$14 million. However, a government can force a secular company to provide that access. Thus, companies cannot exercise religious liberty and pursue protection under the First Amendment.

Another way of restricting religious liberty and not extending toleration to all was seen in

*Welsh v. Boy Scouts of America*, 742 F. Supp. 1413 (1990). Religion—or lack of a religious belief—restricts an individual’s liberty when the religion hurts national security, breaks laws, or injures other’s liberty. In this case, the Tiger Club strand of Boy Scouts did not let a father and son join because they did not acknowledge a belief in God. Judge Rovner uses Locke to say how, in the past, atheists were not tolerated because Locke did not promote toleration for everyone; now, public organizations have to tolerate atheists under Title II of the Civil Rights Act of 1964 and the First Amendment (*Welsh v. Boy Scouts of America*, 742 F. Supp. 1413, 1434 [N.D. Ill. 1990]). Thus, this case demonstrates how Lockean liberty does not fully align with constitutional rights as Locke promotes a more restrictive view of atheists because of his care for social bonds.

Lastly, *Minersville School District v. Gobitis*, 198 F.2d 683 (1939) brings together the various themes of religious liberty discussed above: religious liberty tends to prioritize the individual, there must be a divide between both the church and state and public and private entities, and education is crucial for liberty. Since there are so many different religions, each religion deserves respect. In *Minersville School District v. Gobitis* (1939), Jehovah’s Witnesses were expelled from their school for refusing to salute the American flag. Judge Clark references Locke in a footnote, arguing that each man has a right to happiness and cannot be compelled by the government to sacrifice that right (*Minersville School District v. Gobitis*, 198 F.2d 683, 686 [3d Cir. 1939]). Religious liberty includes the right to education and happiness—education cultivates social bonds that benefit society. Forcing children to salute the flag does not guarantee civic bonds and patriotism, just like children not saluting the flag does not guarantee future treason (691). While freedom can be limited for society’s needs, the government can only restrict it sparingly to preserve the religious liberty of individuals and religious groups.

Constitutional jurisprudence supports most parts of Locke’s religious liberty,

emphasizing a divide between both the church and state and public and private entities, toleration, mental conscience, choice, and happiness. Both individuals and communities can exercise this religious liberty. Religious liberty can be limited for significant government, but it can also restrict political liberty or the general liberty of individuals. Religious liberty is critical for the entire community to have trust in each other, promoting social cohesion in all relations. Thus, Lockean religious liberty does not promote an individual-exclusive right, but it is still connected to the First and Fourteenth Amendments, affecting American religious liberty today.

#### **4b. Liberty Through Consent**

As implied in the religious liberty analyses of Lockean liberty, constitutional jurisprudence uses consent to interpret Lockean liberty alongside constitutional rights. Judges in 19 opinions use consent in their construction of liberty—three opinions overlap with those about religious liberty. These 19 opinions draw upon both Locke’s *Second Treatise of Government* and *Letter Concerning Toleration*. Of these opinions, 12 agree with Locke’s philosophy, five reject it, and two accept and reject certain elements. Eleven opinions prioritize individual rights; the other eight emphasize community or government rights over the individual. While the decisions alternate between individual and community rights, these opinions primarily analyze individual rights, distinguishing this section from the next. These 19 opinions intertwine Lockean liberty with the First, Fourth, Fifth, Sixth, Seventh, and Eleventh Amendments and Articles I, II, and III. Judges use consent to define Lockean liberty as limiting the government via the social contract for political harmony; creating principles for criminal proceedings; obeying the majority; upholding an individual’s right to privacy, marriage, and association; differentiating citizen rights from foreign rights; and protecting one’s choice, autonomy, and mind.

The three cases that overlap with religious liberty are *Minersville School District v.*

*Gobitis* (1939), *Gilardi v. United States HHS* (2013), and *Fratello v. Archdiocese of N.Y.* (2017).

These judges define consent in Lockean terms; consent is a voluntary agreement between at least two people, creating restrictions or clarifying principles of engagement. Consent is the opposite of coercion as consent draws upon the reason of mankind: “All the life and power of religion consists in the inward persuasion of the mind, and it is impossible for the understanding to be compelled to the belief of anything by the force of magistrate’s power” (*Minersville School District v. Gobitis*, 198 F.2d 683, 686 [3d Cir. 1937]). Consent exists to preserve man’s free will—consent must originate in “the inward persuasion of the mind.” *Gilardi v. United States HHS* (2013) further stresses that the government cannot say religious beliefs are wrong as those beliefs are subjective. *Fratello v. Archdiocese of N.Y.* (2017) also discusses how one’s capacity of thought enables one to voluntarily join a group, such as a religious one.

Just like one can consent and choose one’s religion, one can also consent and choose one’s political beliefs, which means government must respect individual beliefs. In *Committee for Indus. Org. v. Hague*, 25 F. Supp 127 (1938), Judge Clark considers the right of resistance alongside the right to free speech in the First Amendment. When people consent to a government, they reserve their right to revolution and the right to question the government because Locke—and Judge Clark—view those rights as “necessary to salvation” (*Committee for Indus. Org. v. Hague*, 25 F. Supp 127, 132 [D.N.J. 1939]; see also 140). Therefore, one can have beliefs, even if those beliefs discuss the right to revolution (e.g., communism). As long as one’s beliefs about revolution do not reap harm upon society or greatly disturb social cohesion, the government must respect those beliefs. So, individuals consent and choose their beliefs and governments, which means one’s consent impacts government functions.

Several opinions interpret Lockean liberty by incorporating consent’s impact on the

Nondelegation Doctrine into their arguments. The Nondelegation Doctrine stems from Article I in the Constitution, limiting the legislature's ability to delegate authority to other organizations or branches. *Industrial Union Department, AFL-CIO v. American Petroleum Institute et al.*, 100 S. Ct. 2844 (1980) connects an individual's consent to the Nondelegation Doctrine. In this case, the justices consider whether the Secretary of State exceeded the power given to him by Congress to change the exposure limit of benzene. Since the Secretary of State did not establish a verifiable threshold and find enough proof for the leukemia risks of benzene exposure, he exceeded his powers, infringing on the liberty of the companies and American individuals. The concurring opinion draws upon Locke to support the Court's decision: "Locke wrote that "[the] power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws'" (Industrial Union Department, AFL-CIO v. American Petroleum Institute et al., 100 S. Ct. 2844, 2889 [U.S. 1980]). The "positive voluntary grant" is individuals' consent when creating a government, agreeing on what liberties will be restricted. Individual liberty is at risk if the government violates that agreement and trust. Therefore, consent is crucial for preserving one's liberty, giving liberty to individuals, and imposing limits on government.

Similarly, *Mistretta v. United States*, 109 S. Ct. 647 (1989) considers whether Congress could make a commission to establish sentencing guidelines for unity in criminal law sentencing in the United States. However, unlike *Industrial Union Department, AFL-CIO v. American Petroleum Institute et al.* (1980), the Supreme Court majority decides that Congress could delegate this power because it was not excessive but crucial for criminal justice sentencing nationwide. Therefore, according to the Court, consent does not impose an absolute limit on the government to preserve individual liberty; the government can transgress that consent and

delegate power beyond what is explicitly stated in the Constitution to benefit the community. To oppose the majority's decision and restriction of the power of consent for individuals, Justice Scalia uses Locke—and the exact quote used in *Industrial Union Department, AFL-CIO v. American Petroleum Institute et al.* (1980)—in his dissent, emphasizing that the legislature only has the power “to make laws, and not to make legislators” (*Mistretta v. United States*, 109 S. Ct. 647, 679 [U.S. 1980]). That emphasis also appears in Scalia's dissent in *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 116 S. Ct. 637 (1996) alongside the same Lockean quote (*Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 116 S. Ct. 637, 647 [U.S. 1996]). Lockean liberty, then, restricts the legislature in line with the social contract and social cohesion.

Lockean liberty, as understood in constitutional jurisprudence, relies upon consent and the social contract to preserve individual liberty and restrict the liberty or delegation ability of the legislature. Specifically, *Jarkesy v. SEC*, 34 F.4th 446 (2022) demonstrates how understanding consent's impact on preserving liberty is crucial for correctly applying the Seventh Amendment in fraud proceedings. Congress granted the Securities and Exchange Commission (SEC) too much power, resulting in an individual unconstitutionally losing their right to a jury trial. To support her argument, Judge Elrod draws upon Locke's *Second Treatise of Government*: “As John Locke—a particularly influential thinker at the Founding—explained...‘when the people have said we will submit to rules, and be governed by laws made by such men, and in such forms, nobody else can say other men shall make laws for them; nor can the people be bound by any laws but such as are enacted by those whom they have chosen and authorised to make laws for them’” (*Jarkesy v. SEC*, 34 F.4th 446, 460 [5th Cir. 2022]). Since men did not consent to this ability of the SEC, the SEC cannot limit individual liberty—even to benefit the community.



According to Lockean liberty, only the legislature (i.e., Congress) can pass laws that will restrict individual liberty for the benefit of the community, as argued in the dissent of *Gundy v. United States*, 139 S. Ct. 2116 (2019). This case considers Congress' ability to delegate authority to the Attorney General to create requirements for the registration of sex offenders. While this delegation may benefit the public good, it needs to be decided by the representatives of the people in government, not the Attorney General, so the dissent—using the same quote as *Jarkesy v. SEC* (2022)—argues that the delegation was harmful to one's liberty and consent (*Gundy v. United States*, 139 S. Ct. 2116, 2133-2134 [U.S. 2019]). So, judges interpret Lockean liberty as not allowing any delegation of legislative powers. In *Department of Transportation et al. v. Association of American Railroads*, 135 S. Ct. 1225 (2015), Justice Thomas' concurrence explains why Locke accepts restrictions that reduce government efficiency: "Locke, for example, acknowledged that a legislative body 'is usually too numerous, and so too slow'...But he saw that as a benefit for legislation, for he believed that creating rules of private conduct should be an irregular and infrequent occurrence" (*Department of Transportation et al. v. Association of American Railroads*, 135 S. Ct. 1225, 1251 [U.S. 2015]). Consent is critical because it slows down the laws the legislature can pass, ensuring one's individual liberty remains expansive.

Locke's theory still uses consent to impose restrictions on the authority of individuals so that the government can preserve individual liberty and cultivate the community. For example, Lockean liberty and consent impact criminal proceedings related to the Fifth Amendment and Due Process Clause. In *United States v. Tarlowski*, 305 F. Supp. 112 (1969), Judge Weinstein considers if evidence from an Internal Revenue Service (IRS) investigation was invalid. Tarlowski—a citizen—was questioned about his failure to file income tax returns without his accountant present, even though he asked for his accountant to be present. While the IRS agent

read Tarlowski his *Miranda* rights, Tarlowski did not consent to an IRS agent reducing his freedom. The IRS agent violated Tarlowksi's Fifth Amendment right as this agent acted on authority he did not have. For support, Judge Weinstein cites Locke: "[Whosoever] in authority exceeds the power given him by the law, and makes use of the force he has under his command to compass that upon the subject which the law allows not, ceases in that to be a magistrate, and acting without authority may be opposed, as any other man who by force invades the right of another" (United States v. Tarlowski, 305 F. Supp. 112, 121 [E.D.N.Y. 1969]).

Consent is an essential aspect of liberty to ensure the State of War does not occur in the political community. The right to an attorney, the right to a trial, and the right not to be subjected to another's arbitrary will are all incorporated into the Bill of Rights through the Fifth, Sixth, and Ninth Amendments. *Department of Transportation et al. v. Association of American Railroads*, 135 S. Ct. 1225 (2015) also uses this analysis of consent in the Fifth Amendment to preserve individual liberty and restrict a public entity's liberty against an individual. Consent ensures individuals can "be free from 'the inconstant, uncertain, unknown, arbitrary will of another man'" according to Locke and Justice Thomas (*Department of Transportation et al. v. Association of American Railroads*, 135 S. Ct. 1225, 1245 [U.S. 2015]). There can be no compulsion or unfair treatment of one's rights in criminal proceedings, even if they are guilty of a crime; legal justice must be consistently carried out.

However, as seen in constitutional jurisprudence, consent does not prohibit all limitations on individual liberty. When men consent to the social contract, they consent to surrender some of their liberty to preserve the community. Specifically, they agree to be ruled by majority rule so long as the majority follows the Law of Nature. This analysis appears in *United States v. Keys*, 991 F.2d 797 (1993). Judge Batchelder incorporates Lockean liberty and consent in her opinion

on tax evasion by beginning with a quote from Locke's *Second Treatise of Government*: "And thus every man, by consenting with others to make one body polity under one government, puts himself under an obligation to every one [sic] of that society to submit to the determination of the majority" (United States v. Keys, 991 F.2d 797, 797 [6th Cir. 1993]). Since Congress has the power of majority rule and the power to draft income tax laws, Congress does not require every individual to consent to an income tax law (797). Instead, the support of the majority is enough; the minority must accept its defeat because of social bonds and trust in the community. The minority is still required to pay taxes; otherwise, the social contract loses meaning. Moreover, by placing the rule of the majority in Congress, the social contract confirms that the government is held accountable to the consent and will of the people and is responsible for social cohesion.

This concept also appears in the dissent in *Obergefell v. Hodges* (2015). The judges in this case discuss the right of homosexuals to marry and receive recognition from the states they live in; the majority opinion strikes down laws in Ohio, Kentucky, Michigan, and Tennessee that refused to recognize same-sex marriage. The dissent does not view the laws as unconstitutional because it upholds the democratic processes and Lockean liberty. Justice Thomas uses Locke to argue that men submit to the "majority of the community" when they join a society and that "society would cease to function if it required unanimous consent to laws" (*Obergefell v. Hodges*, 135 S. Ct. 2584, 2637 [U.S. 2015]). The majority's laws must be respected to preserve social cohesion, so the judges can only strike them down if they violate the Constitution. Since the Constitution does not explicitly or implicitly create a right to the benefits and recognition of marriage, the Supreme Court has no authority to strike down this law. It must preserve the majority's liberty at the cost to some individuals. Lockean liberty and consent can conflict with the Equal Protection of the Fourteenth Amendment; Lockean liberty is not perfectly integrated

into constitutional jurisprudence even if Locke saw humans as naturally equal (Locke 1980, II.6). Nonetheless, Lockean liberty uses consent to place sovereignty in the people—the majority—and limits the various freedoms of the individual, community, and government.

The limits on individual liberty are further seen through the differentiation between a citizen and a foreigner. *United States v. Verdugo-Urquidez*, 856 F.2d 1214 (1988) discusses whether a Mexican citizen could claim Fourth Amendment protection and invalidate the evidence from the seizure of his house in Mexico by American and Mexican officials. While the majority opinion grants him Fourth Amendment protection and the liberty to be free from that violation, the dissent uses Lockean liberty to argue that he did not have the right to claim the Fourth Amendment. Lockean liberty is reserved for the citizens because they both consent to and grant some allegiance to the government—social cohesion only matters for the internal community (*United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1233 [9th. Cir. 1988]). One only earns liberty and the rights in a community by consenting to give up some natural liberty.

Even though any individual can consent to a government, that individual must consent to that government's rules and live in the community before invoking those rights for protection, as seen in *Al-Hela v. Biden*, 66 F.4th 217 (2022). In this case, the plaintiff was imprisoned in Guantanamo Bay as an enemy combatant and denied habeas corpus. He sought protection and remedy under the Sixth and Fourteenth Amendments. The majority opinion and dissent agree that Al-Hela received all due process due to an enemy combatant; however, the dissent argues that no foreigner can claim due process when detained abroad and brought to a prison that was not in American territory. Al-Hela did not have the “reciprocal obligations” that exist “between the government and resident aliens” that Locke defines in the *Second Treatise of Government* (*Al-Hela v. Biden*, 66 F.4th 217, 258 [D.C. Cir. 2022]). Since American laws do not extend to

territories not owned by the United States, foreigners cannot claim to exercise or deserve the liberty granted by the Constitution, showing the limitations of Lockean individual liberty.

However, the Fourth Amendment would have applied if Verdugo-Urquidez or Al-Hela were citizens. The burden would be on the government to prove that the search and seizure were reasonable and were for social cohesion. One has the right to consent to what happens to their property; the government must follow strict rules to respect consent. In *United States v. Foster*, U.S. Dis. LEXIS 235371 (2022), Foster challenges the evidence used to catch him for drug trafficking under the Fourth Amendment. One's cell phone receipts are property, so one should be free from the government performing tower dumps to gather personal information (*United States v. Foster*, U.S. Dis. LEXIS 235371, 14-16 [D. Alaska 2022]). Since the Fourth Amendment includes protection of one's ideas and beliefs, the government needs a reasonable interest to violate one's liberty. The justices rule the government had a strong community interest because Foster was found putting swastikas at seven locations (4-6). Consenting to a society confirms that one will care about social bonds; when one stops caring for social bonds and everyone's security, the government can restrict individual liberty. Thus, Lockean liberty and consent promote the Fourth Amendment, the Law of Nature, and social bonds.

Further, the government cannot decide to infringe on an individual's rights arbitrarily; if the government mistakenly infringes on those rights, even with a warrant, the government cannot claim immunity. In *Briggs v. Malley*, 748 F.2d 715 (1984), a police officer arrested the plaintiffs with an insufficient warrant and inadequate affidavit. The wrongful intrusion of one's rights risks social cohesion and trust in the community. So, both the judge and police officer could be held liable for the wrongful intrusion on the plaintiff's Fourth Amendment rights. In the opinion, Judge Bownes quotes Locke when arguing that police have to respect the limits consent imposes

on the social contract: “Mankind will be in a far worse condition than in the state [sic] of Nature if they shall have armed or a few men with the joint power...to force them to obey at pleasure the exorbitant and unlimited decrees of their sudden thoughts....without having any measures set down which may guide and justify their actions” (Briggs v. Malley, 748 F.2d 715, 719 [1st Cir. 1984]). Thus, consent and respecting consent are crucial for preserving man—which is why the Fourth Amendment with Lockean liberty is expansive in constitutional jurisprudence.

In addition to the Fourth Amendment, Lockean liberty is connected to the First Amendment’s right to free association via consent. In *Scales v. United States*, 81 S. Ct. 1469 (1961), the Supreme Court considers if the Smith Act was unconstitutional because the act declared it a felony to be in an organization that promoted the violent overthrow of the United States. While the majority finds the act to be constitutional and allowed the conviction of a man for being a member of the Communist Party, the dissent uses Locke to disagree. Individual’s consent preserves one’s right to associate with who one wants, and consent also preserves one’s right to revolution: “As John Locke says, ‘The people shall be judge’” (*Scales v. United States*, 81 S. Ct. 1469, 1511 [U.S. 1961]). Therefore, one has the liberty to associate with anyone they like and choose their political beliefs because those are essential rights from the social contract, according to the interpretation of Locke’s theory in constitutional jurisprudence.

Moreover, consent and privacy include marriage. Beyond the majority-rule analysis discussed earlier, *Obergefell v. Hodges* (2015) connects consent and privacy in Lockean liberty. Privacy includes one’s ability to choose who to marry, and the government cannot restrict one’s liberty and choice of marriage. Lockean liberty connects privacy to institutions that existed before the government—“As Locke had explained” that “the first society was between man and wife,” there exists a natural right to marriage (*Obergefell v. Hodges*, 135 S. Ct. 2584, 2636 [U.S.

2015]). Marriage as an institution predates the creation of the government, and consenting to a government does not forsake one's consent to the prior institutions. As Justice Thomas writes in his dissent, "Liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement [because] the founding-era understanding of liberty was heavily influenced by John Locke" (2634). So, Lockean liberty from consent consists of negative rights, preserving one's privacy. However, while one can choose same-sex marriage, one cannot expect government benefits from the marriage institution because that misunderstands the inherently private nature of marriage that exists outside the government's control. Thus, Lockean liberty can sometimes partially align with the Fourteenth Amendment.

The Fourteenth Amendment also connects consent and liberty to the Due Process Clause. In *In re Cincinnati Radiation Litigation*, 874 F. Supp. 796 (1995), African American patients who were not in their final stage of cancer were subjected to radiation experiments without their consent, which led to their deaths or increased injuries. The patients in this experiment were not informed about the dangerous experiments and did not sign any release forms. The point of the experiment was to understand the impact radiation could have on American troops; even though the government had a potentially plausible interest, the government and scientists did not follow the Due Process Clause, violating the liberty of the patients with cancer. Consent preserves one's liberty and autonomy, which is crystallized in the Fourteenth Amendment; "For John Locke, the ideological father of the American Revolution, liberty was freedom from restraint, and the exercise of coercive power by the sovereign was always suspect" (*In re Cincinnati Radiation Litigation*, 874 F. Supp. 796, 815 [S.D. Ohio Western 1995]). An official or business using coercion violates the Due Process Clause as such actions reduce individual liberty in the community. Moreover, autonomy includes one's body and the choice to subject one's own body

to pain—the government or another person cannot make that choice for someone else. Consent promotes maximum liberty of the individual and awareness of one’s rights, and the Constitution protects that liberty, further showing how Lockean liberty focuses on negative rights. Individual rights, thus, usually come before the community when discussing liberty and consent.

In constitutional jurisprudence, judges use the concept of consent to understand Lockean liberty and impose limits on various community members. These judges create a definition of Lockean liberty that limits the authority and abilities of the government, grants rights only to citizens, justifies all actions according to the social contract and preserves the individual’s liberty to defend one’s autonomy, privacy, right to specific provisions in criminal proceedings, association, and marriage. Individuals can exercise consent and derive Lockean liberty from that consent, but that liberty is intricately connected to the government’s end of social cohesion. Lockean liberty respects the natural reason of man, requires consent, and promotes a more individual-focused liberty in the community; constitutional jurisprudence, thus, interweaves this kind of liberty into a variety of constitutional amendments and cases.

#### **4c. Liberty’s Connection to the Community and Government**

Judges also use the liberty of the community and government to understand and incorporate Lockean liberty into constitutional jurisprudence. Thirteen opinions use this framework, and most of them draw upon Locke’s *Second Treatise of Government*. Seven decisions agree with Locke, three disagree, and three partially agree. Eight decisions favor the community, implying that this interpretation of Lockean liberty shows the community emphasis in Locke’s philosophy. Analyzing those references to Locke in the opinion or the footnotes, I found that constitutional jurisprudence understands Lockean liberty to apply to groups, giving the government and other communities specific rights and agency. The liberties include specific



legislative powers, the separation of powers, the preservation of the community, the pursuit of justice, and the promotion of religious autonomy.

Of the 13 opinions, eight overlap with the analysis on consent and liberty—five of those relate to the Nondelegation Doctrine. Although there is overlap in the Lockean citation, this kind of analysis differs from the consent analysis because the opinions consider the liberty and role of government aside from consent and individual liberty. Those five overlapping cases are *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.* (1996), *Industrial Union Department, AFL-CIO v. American Petroleum Institute et al.* (1980), *Mistretta v. United States* (1989), *Gundy v. United States* (2019), and *Jarkesy v. SEC* (2022). The judges all quote Locke’s *Second Treatise of Government* in their case opinions, arguing that the legislature cannot make legislators—which is interpreted as limiting the legislature for individual liberty. However, the Nondelegation Doctrine also defines the liberty of the legislature. The legislature can “make laws” (*Mistretta v. United States*, 109 S. Ct. 647, 679 [U.S. 1989]). For the government to attain its goals, it needs power and the agency to implement laws. Therefore, the legislature has the power to set standards for sexual offender registration for the Attorney General Office, pass laws about income taxes and bank procedures, and create a threshold for exposure to potentially harmful chemicals. Lockean liberty and constitutional jurisprudence do not view the legislature as just a limited institution that must obey the people. The legislature must be active but slow. The Nondelegation Doctrine, thus, exists for the sake of the legislature, ensuring it maintains its agency and liberty to preserve the community and develop social bonds within the group. Community interests can prevail, and the legislature needs freedom to pass laws for that purpose.

Further, just like the legislature, the public majority also has some liberty, as seen in the analysis of Lockean liberty in constitutional jurisprudence. The consent analysis of *United States*

*v. Keys (1993)* and *Obergefell v. Hodges (2015)* shows how individual liberty can be restricted within a community. Therefore, the majority also has communal liberty. This liberty includes the ability to impose the majority will on others through the laws in Locke's theory. The majority—often a political party—does not have to submit to the minority, even though compromise should be sought. Being a majority grants the community a specific kind of agency, power, and liberty. So, the majority can decide that all should pay taxes to the government or what the institution of marriage should include. That liberty, according to Locke, can only be exercised by the majority to maintain a general harmony in the community and must also be respected.

Beyond the legislature and majority having their own Lockean liberty, each branch of government has its own liberty, which emerges in the analysis of the principle of the separation of powers. The Constitution created the legislative branch, executive branch, and judicial branch. Each branch has its own power and responsibility, which aligns with Locke's understanding of governmental powers. Justice Thomas' dissent in *Wellness International Network, Ltd., et al. v. Sharif*, 135 S. Ct. 1931 (2015) quotes Locke's *Second Treatise of Government*: "In this context, the judicial power is the power 'to determine all differences according to the established law'; the legislative power is the power to make that 'established law'; and the executive power is the power 'to back and support the sentence, and to give it due execution'" (*Wellness International Network, Ltd., et al. v. Sharif*, 135 S. Ct. 1931, 1963 [U.S. 2015]). Those three powers were made in the social contract, defining our government. The judicial branch needs the freedom and ability to decide on the constitutionality of the laws; the executive branch needs the liberty to enforce and support the laws; and the legislative branch needs the liberty to craft laws.

Moreover, since each branch has its power, they must be separated. Each branch is free but limited, as its liberty is restricted to its specific power. In *Wellness International Network*,

*Ltd., et al. v. Sharif* (2015), the Supreme Court considers whether Congress was allowed to give clear criteria for jurisdiction for bankruptcy courts—the dissent argues that Congress’ decision was unconstitutional because Congress cannot bring judicial power into itself. The judicial branch must remain separate to address disputes about private rights. Without being separate from the other branches, the liberty of the judicial branch would be significantly reduced, leading to a reduction of the judicial branch’s ability to be helpful. Similarly, as espoused in *Mistretta v. United States* (1989), the branches cannot delegate their powers: “That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution” (*Mistretta v. United States*, 109 S. Ct. 647, 679 [U.S. 1989]). The Constitution, thus, favors Lockean liberty by defining the rights of the government while also imposing some limits for social cohesion.

Constitutional jurisprudence further justifies the government having liberty because of the ends of government—allowing individual liberty to be restricted following Locke’s philosophy. In *Leaders of a Beautiful Struggle v. Baltimore Police Department*, 979 F.3d 219 (2020), a city surveillance program is deemed constitutional, even though the plaintiffs argued it violated their First and Fourth Amendment rights. Judge Wilkinson uses Locke in the majority opinion to establish that the police department had the liberty to use the surveillance program because of the end of government: “The Founders believed that government must exist for the ‘mutual preservation of the [people’s] lives, liberties, and estates’” (*Leaders of a Beautiful Struggle v. Baltimore Police Department*, 979 F.3d 219, 233 [4th Cir. 2020]). Baltimore was suffering from a rise in homicides so the government and police used a surveillance program to track movement around crime scenes and arrest suspects. The aerial surveillance program was allowed because Baltimore restricted it: it only operated during the day; the data was only

accessed after a crime occurred; the public was aware of the program; and the data did not include information about race, gender, or the clothes of the suspect. Therefore, this program was used for the government's end of community preservation; the police department acted within its liberty bounds, showing how Lockean liberty can favor the community over the individual.

Another specific liberty that only belongs to the government is the pursuit of criminal justice in Lockean liberty. As demonstrated in *Robertson v. Watson*, 130 S. Ct. 2184 (2010), only the government can pursue criminal proceedings; individuals cannot seek criminal contempt. The government has the liberty to punish crimes because the individuals gave up that liberty when they left the State of Nature, according to Locke (*Robertson v. Watson*, 130 S. Ct. 2184, 2187; 2190 [U.S. 2010]). Crimes are seen as harmful to the community, so the community must punish the criminal. This preserves cohesion in the community, preventing the chaos that occurs in the State of Nature. Thus, the Constitution not only limits the conduct of the government toward the accused but ensures private individuals do not have the same liberty as the government.

Lockean liberty also extends to the states, as seen in the dissent in *Alden et al. v. Maine*, 119 S. Ct. 2240 (1999). This case considers whether states have immunity from private suits for damages; the plaintiff is seeking overtime pay and remedy from Maine under the Fair Labor and Standards Act. The majority argues that since the state did not consent to suits brought under the Fair Labor and Standards Act, state liberty is protected under the Eleventh Amendment. While the majority does not quote Locke, the dissent insists that the majority bases its argument on Locke's theory of immunity (*Alden et al. v. Maine*, 119 S. Ct. 2240, 2272 [U.S. 1999]). Thus, the states have some Lockean liberty because of federalism, which posits states as "individuals" with some powers they do not give up in a new social contract. States have immunity in some private cases, limiting the liberty of individuals to seek redress under the Constitution.

Communities also have a kind of Lockean liberty espoused in jurisprudence. For example, the religious community has the liberty to be primarily autonomous from the government. In *Fratello v. Archdiocese of N.Y.* (2017), the judge uses Locke to argue that the government could not decide labor disputes between the church and ministerial figures. The church was free to determine its employees, and the government could not declare if it participated in employment discrimination. While the church's liberty can be restricted, Lockean liberty grants the community some autonomy distinct from individual liberty.

Constitutional jurisprudence supports most aspects of the Lockean liberties of the government and community. The judges define government and community liberty according to specific powers the government and state can exercise, the separation of powers, clear ends of government, the limits on criminal prosecution, and autonomy for specific communities. However, government and community liberty can be limited if such actions threaten individual liberty or trust in the social contract. Like religious liberty, Lockean liberty does not promote an individual-exclusive right to liberty but one connected to social cohesion and harmony.

#### **4d. Liberty as Rule of Law**

Judges understand and incorporate Lockean liberty into constitutional jurisprudence by connecting liberty and the rule of law in ten opinions and using Locke's *Second Treatise of Government* and the *Letter Concerning Toleration*. Seven opinions agree with Lockean liberty as pronounced through the rule of law, two disagree, and one agrees only with specific parts.<sup>9</sup> Both individuals and the government have distinct liberties they can exercise according to the rule of law analysis. The Constitution is connected through the First, Fourth, and Fifth Amendments and various laws. Constitutional jurisprudence interprets the rule of law as a liberator in society that

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<sup>9</sup> As a brief aside, some opinions overlap with prior analyses on consent and religious liberty.

promotes flexibility and toleration, allows for the use of prerogative while reducing arbitrariness, requires obedience and awareness, and emphasizes due process in the law.

Constitutional jurisprudence understands Lockean liberty as the freedom to act under the rule of law. Without the rule of law or understanding of the law, there would be no harmony and, thus, no respect for social bonds in the community, turning society back into a State of Nature. This understanding of Lockean liberty was espoused in *Newfield v. Ryan*, 91 F.2d 700 (1937) as Judge Hutcheson quotes Locke in a footnote to support the "principle that law is liberator" (*Newfield v. Ryan*, 91 F.2d 700, 703 [5th Cir. 1937]). In this case, the judges consider whether a company obeying subpoenas for telegraphs infringed on its customers' Fourth and Fifth Amendment rights. Locke declared that any government official "has no will, no power, but that of the law" to prevent the State of War from occurring again (703). Therefore, as long as the government official followed the law when crafting the subpoena and the company obeyed the law in delivering the subpoena, individual rights were not unjustifiably infringed upon, especially because the customers were not being tried via the telegraphs. The liberty of the customers was limited because they were living under laws that must be obeyed—subpoenas are necessary for social order. The law, thus, liberates by making its individuals aware of the law and ensuring that officials match their actions to the law.

Moreover, all limits on liberty need to be espoused in the law, reducing the government's potential to restrict one's freedom arbitrarily. In *Dennis v. United States*, 71 S. Ct. 857 (1951), the justices consider communism, the First Amendment, and the right to free speech. The dissent argues that the Smith Act violated the plaintiffs' First Amendment rights, claiming that "this idea that the limit on freedom of speech or press should be set only by an actual overt act was not new. It has been asserted by a long line of distinguished thinkers including John Locke" (*Dennis*

v. United States, 71 S. Ct. 857, 907 [U.S. 1951]). Liberty can only be limited by express laws. The rule of law needs to be explicit so that all know how to be free under the law. Moreover, Justice Douglas argues that communism does not warrant a restriction of free speech because the laws and political processes must be trusted. Since the laws need to be trusted, it can be assumed that the laws both uphold the Law of Nature and promote the liberty of all in the government.

However, Lockean liberty includes more than knowing how to be free under the law. In constitutional jurisprudence, judges also interpret Lockean liberty of government and judicial figures as including interpretation and flexibility in the law. In *In Re Simon II Litigation*, 2002 U.S. Dist. LEXIS 25632 (2002), Judge Weinstein writes that “John Locke warned that sometimes ‘a strict and rigid observation of the laws may do harm’” (In Re Simon II Litigation, 2002 U.S. Dist. LEXIS 25632, 326-327 [E.D.N.Y 2002]). This case includes a class action suit against cigarette manufacturers. Instead of determining one collective outcome, Judge Weinstein decides that there will be trials for each plaintiff, ensuring tort law is flexible to their needs. Further, the trials preserve individual constitutional rights by granting them jury trials. This flexibility is essential for modern liberty as communities and rights change. Judges have specific liberty to interpret the law and do not always choose the most rigid understanding of it. While there can be discrepancies between justice and the rule of law, Lockean liberty exists to try and remedy those discrepancies (326). Thus, Lockean liberty is not just obeying the laws but knowing the laws are responsive to one’s needs; it includes challenging the law and going to court for remedies. The rule of law helps individuals take advantage of their freedom, so it needs to constantly adapt.

Lockean liberty, according to the rule of law, also includes prerogative. *Duquesne Warehouse Co. v. Railroad Retirement Board*, 148 F.2d 473 (1945) considers the definition of employer and employee in the Railroad Retirement Act of 1937 to determine retirement benefits

for a warehouse company. The dissent refutes the majority's opinion and Locke, opposing the idea of prerogative, which is "this power to act according to discretion for the public good, without the prescription of the law and sometimes even against it" (*Duquesne Warehouse Co. v. Railroad Retirement Board*, 148 F.2d 473, 483 [2d Cir. 1945]). Executive officials have a unique liberty that allows them to transgress the rule of law if the public good requires it. Even though the rule of law exists for liberty, human life produces such variety that law cannot cover every detail. If there is no law for the judges to interpret, someone needs to be able to act to create order in society and preserve the overarching liberty of the community. However, this liberty is restricted to the public good and extreme cases of emergency—both according to Locke and the Constitution. Generally, "law is definite, certain, known or knowable rule of action, in existence before, not after the event, justly and impartially applied by known and indifferent judges" (478). The prerogative must be used with public knowledge so the people can determine if they will accept that behavior while knowing what freedoms they can still act under.

However, only executive officers and judges can use prerogative and interpretative power respectfully. Other officials and individuals cannot claim to exercise that power. The rule of law restricts one's freedom to act arbitrarily and put others under one's authority; at the same time, the rule of law frees individuals from being put under a power that goes against their reason, consent, or understanding of the law. These principles emerge in *Briggs v. Malley* (1984), *United States v. Keys* (1993), and *Industrial Union Department, AFL-CIO v. American Petroleum Institute et al.* (1980). Individual liberty is intricately connected to obedience to the laws in Lockean liberty—other officials must obey the law to preserve general individual liberty. However, even if the majority makes the laws and one disagrees with the laws, as seen in *United States v. Tarlowski* (1969), individuals must still obey the law. One's freedom depends on



obeying the rule of law; rejecting the rule of law results in the loss of liberties.

In Lockean liberty, judicial figures must also obey to have the freedom to interpret and make decisions on the law. As pronounced in *Duquesne Warehouse Co. v. Railroad Retirement Board* (1945), lower courts must obey the rulings and logic of the Supreme Court. Lower courts cannot make decisions that willfully go against the Supreme Court; if they obey, they have the liberty to make decisions in a court of law and benefit from other liberties in the community. Beyond judges having to obey the rule of law, religious organizations also have to submit to the rule of law. Secular law can govern aspects of the church. As seen in *McRaney v. North American Mission Board of the Southern Baptist Convention, Inc.* 980 F.3d 1066 (2020), Locke “believed a conflict between the law and matters of faith ‘does not take away the obligation of that law, nor deserve a dispensation’” (*McRaney v. North American Mission Board of the Southern Baptist Convention, Inc.* 980 F.3d 1066, 1078 [5th Cir. 2020]). The majority uses Locke to argue that they have jurisdiction over a Southern Baptist minister and his church. While religious communities have Lockean liberty, the organizations must obey the law to obtain liberty from adherence to the laws. Moreover, the law defines the “bounds” that separate the church and government, and both parties obey those bounds to have liberty (*School District of Abington Township, Pennsylvania, et al. v. Schempp et al.*, 83 S. Ct. 1560, 1575 [U.S. 1963]).

The Lockean rule of law appears repeatedly and indirectly in the opinions. The rule of law is connected with the Due Process Clause and the Bill of Rights. Both promote adherence to the law and define the liberties of the individual and the government while restricting that liberty slightly. None of the 39 opinions directly connected these two ideas in constitutional jurisprudence, even though they are connected in theory. Regardless, constitutional jurisprudence generally agrees with the kind of Lockean liberty that originates from the rule of law. This

liberty includes the awareness of restrictions on one's liberty, allowing one the knowledge and freedom to act within those bounds. The rule of law is foundational for giving men liberty in society, distinguishing civil and political liberty from natural liberty. While the rule of law grants freedom, it also requires obedience by most actors; the executive and judicial branches still have some discretion. Nonetheless, the rule of law is pertinent for creating a harmonious society where individuals and the government can exercise their will and feel free to do so.

#### **4e. Liberty as Property and Labor Rights**

Liberty, as understood through property and labor rights, is the last theme that judges use to understand Lockean liberty alongside the Due Process Clause and various Amendments, such as the Fifth Amendment. Four decisions agree with Lockean liberty as a right to property, two disagree, and four agree with some aspects. Moreover, three decisions favor individual rights, while seven prioritize community rights. Lockean liberty includes the right to have and create property, the right to labor, and the right to be under few restrictions unless there is a significant community interest. Only individuals exercise this kind of Lockean liberty, even though this liberty is critical for individuals to feel secure in a community and to cultivate social cohesion.

Lockean theory is typically understood to promote private property interests of the individual over the community, and this similar idea emerges in constitutional jurisprudence alongside the concern for social cohesion and harmony. In *Nollan v. California Coastal Commission*, 107 S. Ct. 3141 (1987), the Supreme Court considers whether a commission could infringe on one's property for the public's benefit—specifically, allowing individuals to walk ten feet along one's property to the beach. The Supreme Court holds that this order was a taking via the Fifth Amendment and that the commission would have to compensate the family. While the majority's decision aligns with Locke by putting individual property interests before the

community, the dissent refutes Locke, arguing that the majority was “suggesting that the ‘the right to build on one’s own property’ has some privileged natural rights status” (*Nollan v. California Coastal Commission*, 107 S. Ct. 3141, 3160 [U.S. 1987]). Lockean liberty includes the freedom to build on one’s property, showing how individual property rights are extensive and natural. The Fifth Amendment ensures one’s property is never taken arbitrarily, ensuring individuals feel safe. *Nollan v. California Coastal Commission* (1981) aligns with *Wellness International Network, Ltd., et al. v. Sharif* (2015), as both cases argue that property is a significant right for one’s liberty and restricts the government (*Wellness International Network, Ltd., et al. v. Sharif*, 135 S. Ct. 1931, 1965 [U.S. 2015]). Even though the individual is favored, the judges still connect property to social cohesion—if one does not feel one’s property is secure, one will not feel secure or participate in society, defeating the purpose of the social contract.

The Constitution also uses the Fifth Amendment to impose restrictions on companies to preserve individual rights to property. In *Miloszewski v. Sears Roebuck & Co*, 346 F. Supp. 119 (1972), Judge Fox argues that the company was not allowed to break into Miloszewski’s home to take a TV as payment. This violated the Fifth and Fourth Amendments—privacy interests matter more than the company’s need to collect on a debt. Individual liberty must be preserved when it comes to disputes because of property’s connection to social cohesion in the social contract. As Judge Fox writes while interpreting Locke, “Property is, in a derivative sense, a natural right, but there is a hierarchy of values among natural rights...Life and liberty are ends in themselves” (*Miloszewski v. Sears Roebuck & Co*, 346 F. Supp. 119, 121 [W.D. Mich. Southern 1972]). Property lays the foundation for extensive individual liberty in society. If someone’s house can be broken into freely, then one’s life and general liberty may end up being threatened. Therefore, property rights actually intertwine individual and community liberty, showing how one’s

property interests may not always be chosen, as seen by the company losing the case.

Moreover, Lockean liberty has a natural right component, but once in society, it also has a government component. With the rule of law, one's property can be restricted, and one needs to obey those laws; otherwise, one can forsake one's right to property. Liberty as a form of property rights is not absolute for social harmony, as seen in *Baer v. Wauwatosa*, 716 F.2d 1117 (1983). In this case, Judge Posner considers whether an individual convicted of sexual assault could legally have his license to sell guns revoked. Posner holds that the revoking was a taking under the Fifth Amendment as the plaintiff's business counted as a property interest; however, that taking was allowed. While labor (like Locke suggests) gives one the right to property instead of it being "the emanation of state or federal law," a severe crime against the community does not allow one to keep one's property rights (*Baer v. Wauwatosa*, 716 F.2d 1117, 1125 [7th Cir. 1983]). So, judges view the Fifth Amendment as favoring individual liberty with exceptions to preserve social harmony because of property's connection to the government.

Similarly, in *United States v. Foster* (2022), Judge Scoble addresses the Fourth Amendment right to privacy and connects it to Locke's view of property. According to Scoble, "Locke's concept of property...greatly influenced the Framers"; Locke defines property as "a person's rights, ideas, beliefs, and the creative products of their labor" (*United States v. Foster*, 2022 U.S. Dis. LEXIS 235371, 14 [D. Alaska 2022]). Property and privacy help individuals be independent; without the freedom to use one's property and feel safe, individuals are less likely to participate in the community, reducing social cohesion. However, as seen in *United States v. Foster* (2022), property rights can be restricted for the community to prevent another State of War. Thus, the government can only take one's property if there is a concern under the Fourth Amendment or if it provides compensation under the Fifth Amendment.

However, the government rarely has the right to take one's property, whether it is one's mind or life. *Watson v. Hortman*, U.S. Dist. LEXIS 26633 (2009) addresses a malpractice suit, with the plaintiff arguing that a "person 'has a property in his own person'" according to Locke (*Watson v. Hortman*, U.S. Dist. LEXIS 26633, 23 [E.D. Tex. Marshall 2009]). So, property becomes synonymous with bodily autonomy in Lockean liberty, meaning the government cannot harm one's body or life. Moreover, property also includes one's beliefs, as established in *Scales v. United States* (1961). Individuals have the right to choose their political beliefs, even if one considers the idea of revolution. The right of revolution ensures the sovereignty and consent of the people, so the government cannot take away one's beliefs or association promoting those ideas (*Scales v. United States*, 81 S. Ct. 1469, 1511 [U.S. 1961]). So, liberty via property is centered on the individual, allowing them to act and cultivate themselves independently.

Further, the government cannot take away or harm one's labor without compensation. In *Campo v. United States*, 157 Fed. CI. 584 (2021), the government caused a spillway that damaged oyster beds and reefs where the plaintiffs paid for, planted, harvested, and sold oysters for a living. Because the plaintiffs used labor and benefitted from the oyster beds, those oyster beds counted as their property. So, the government could not be "given 'a power to...endeavor to take away, and destroy the property of the people'" (*Campo v. United States*, 157 Fed. CI. 584, 614 [Fed. CI. 2021]). Individuals deserve not to have their labor taken away; if that right does not exist, people will not feel safe and cultivate social bonds. The government must respect one's labor because of its connection to religion and nature: "God, when he gave the world in common to all mankind, commanded man also to labour, and the penury of his condition required it of him" (*Burrell v. Staff* 60 F.4th 25, 61 [3d Cir. 2023]). Not only do men have liberty to work, but they also must work for their families. In *Burrell v. Staff* 60 F.4th 25 (2023), two fathers did not

pay child support, which led to them working unpaid at a facility. So, those men could not claim this labor violated the Thirteenth Amendment. The government cannot force servitude on someone, but one cannot claim wages if one chooses labor over imprisonment. Therefore, while Lockean liberty includes the right and freedom to work, one may lose the right if one does not fulfill societal obligations—property can put the community interests before individual rights.

Constitutional jurisprudence views Lockean liberty, which originates from property, as primarily promoting individual rights. While there are disputes about this liberty's impact on constitutional rights, Lockean liberty has laid the foundation for the Fifth and Fourth Amendments, preserving one's rights to one's body, mind, labor, and house. This liberty includes natural rights but also is connected to the government as the government can restrict this liberty if the community is threatened. Individual liberty only exists alongside social cohesion and the community having some liberty—even though these themes are more in the background of the opinions. Thus, property and labor liberty is foundational for the exercise of other liberties so individuals feel safe in their communities.

#### **4f. Lockean Liberty Definition According to Constitutional Jurisprudence**

Lockean liberty in the Constitution is more than just “a standing rule to live by, common to every one of that society, and made by the legislative power erected in it: a liberty to follow [one's] own will in all things, where the rule prescribes not” (Locke 1980, IV.22). Liberty is intricately connected to social cohesion. While the rule of law is foundational to the exercise of individual liberty, liberty includes the exercise of powers by the various branches of government, both for justice and the public good. Liberty is not just knowing one's range of actions under the law, as the law is not always interpreted strictly. Nonetheless, Lockean liberty draws upon consent, promotes toleration and social bonds in the community, limits government control while

granting it some powers, and advocates for the rule of law for a harmonious society. Lockean liberty has a more communitarian focus that is typically neglected by scholars. The Law of Nature exists for the preservation of mankind—not the preservation of individuals. Thus, individual and community liberties are mutually reinforcing. Societal liberty exists for men to reach their desired heaven and preserve their consent. Moreover, in Lockean liberty, the social contract and citizenship are stressed, showing the underlying loyalty to one's community even though liberty preserves one's autonomy. Liberty imposes restrictions on both the individual and the government—showing how social cohesion is a constant concern and goal for society.

The Constitution primarily aligns with Locke's definition of liberty, explaining why courts turn to Locke's philosophy in these opinions. Specifically, Lockean liberty is most often understood through the First, Fourth, Fifth, and Fourteenth Amendments and Article I. Within those aspects of the Constitution, Lockean liberty emerges in freedom of expression, freedom of association, the Due Process Clause, the Nondelegation Doctrine, and privacy concerns. All these elements reveal how foundational the rule of law is to the exercise of liberty, while the Ninth Amendment enables the interpretative powers of Lockean liberty to emerge. Moreover, the elements of privacy and the Due Process Clause preserve the individual, which maintains the security of and trust in the whole community; these concepts are used to show how Lockean liberty complicates the understanding of individual liberty. While due process must be followed for citizens, one can forsake one's liberty and right to privacy if one's past behavior threatens the community. Lockean liberty is not absolute or restricted to individuals, which is why it is used when the liberties of the individual and community come into conflict.

### ***5. The Tension Between Community and Individual Rights***

Judges incorporate Lockean liberty into their opinions when the case involves the tension

between individual and community rights. In this section, I show why the tension between individual and community rights led judges to use Locke, the pattern in jurisprudence, why his text was used, and why liberty as a frame of analysis was being used.

Locke only emerged in the opinions, not the oral argument transcripts, impacting the mechanisms that bring Locke into the opinions. I found 11 oral argument transcripts of the 14 Supreme Court opinions that cited Locke, and neither the counsel nor questioning justices discussed Locke. Other philosophers, such as Aristotle, were mentioned in various transcripts. Some oral arguments may indirectly invoke Locke's philosophy through principles of separation of powers, natural rights, private property, consent, and the conjugal society, as done in *Obergefell v. Hodges* (2015) and *Wellness International Network, Ltd., et al. v. Sharif* (2015). However, this link is not strong, as it is muddled through the oral argument transcripts that do not invoke Locke's philosophy at all—as seen with *Industrial Union Department, AFL-CIO v. American Petroleum Institute et al.* (1980). Therefore, the causal mechanisms are connected to when the judges write their opinions in the context of the United States and the case.

In general, judicial figures will use Locke in their opinions when the case questions whether to prioritize individual rights or community rights, inevitably restricting one group's liberty. This question arises when the case invokes some element of the Constitution because that document lays down the fundamental rights of the government and individuals. Lockean liberty was frequently connected to the social context and the First, Fourth, and Fifth Amendments, which promote individual liberty unless a specific action harms the community significantly.

From 1937 to 2023, the United States had to address various movements about individual and community rights alongside international politics, challenging the ideology of the United States. This dataset begins with cases when the country was adjusting from the New Deal and the



rise of the expansive administrative state in the 1930s and 1940s. Then, the United States entered World War II, where American values of freedom and individual rights with limited government were contrasted with the rise of fascism and Nazism. After World War II, the United States entered the Cold War with the Soviet Union, resulting in the United States posing as the opposite of communism—the United States ideology, thus, resulted in a turn to individual rights, freedom to choose one’s religion, respecting the social contract and/or Constitution, and the protection of private property. Those rights were all espoused in the various judicial opinions interpreting Lockean liberty, so Lockean liberty also enters the courtroom when the United States has to turn to its founding principles and original philosophies. Beyond international politics, various social movements for equality and liberty occurred from the 1960s to 2023. People turned to Locke to refuse change or to argue that the Founding Fathers would support this change.<sup>10</sup>

When courts try not to place the individual and community in complete opposition, I argue that courts turn to Lockean liberty, showing the complementarity between individual and community liberty and not severely restricting either. Of the 39 opinions that use Locke, 22 promote individual liberty, and 17 promote community liberty. When looking at the five themes of liberty analysis in judicial opinions, the balance between individual and community rights becomes more equal. For example, in the consent analysis, 11 of the 19 opinions promote individual rights, and eight of the 13 opinions favor community rights in the government and community liberty analysis.<sup>11</sup> Moreover, by changing the decisions to agree with Lockean liberty in each case, the breakdown becomes 24 cases for individual rights and 15 cases for community rights, showing how the ratios of actual data and proposed data are comparable.

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<sup>10</sup> Refer to figure 7 for a model on the explanation of how Lockean liberty enters the courtroom.

<sup>11</sup> See table 3 for charts and figure 6 for graphs that show the breakdown between the majority decision and Locke’s view on individual and community liberties.

The ultimate pattern for choosing individual or community rights in judicial opinions alongside Lockean liberty is to favor individual liberty unless it causes significant harm in the community that would oppose the Law of Nature. Consent, religion, and property favor individual liberty more than the rule of law and community and government liberty analyses. When Lockean liberty is cited in the courtroom, the government has the burden of showing its interest in the community, creating a preference toward individual rights. When choosing community rights, courts determine if one has demonstrated a lack of respect for social bonds and the community; if one has transgressed the law; and if the government has a significant interest in health, welfare, and security. Without the community having rights and some liberty, individual liberty is not entirely protected or as expansive as it could be. By promoting community rights, the court uses Locke to show how modern movements for the community do not oppose the individual rights espoused in the Founding Fathers' thought but increase liberty.

However, not all 20th- and 21st-century cases refer to Locke. Crucial cases to constitutional jurisprudence and liberty are lacking in this analysis, such as *Brown v. Board of Education*, 347 U.S. 483 (1954), *Roe v. Wade*, 410 U.S. 113 (1973), and *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022). Therefore, individual and community rights concerns do not always lead to judges drawing upon Lockean liberty.

Regardless, judges choose Locke as an authoritative figure in these 39 cases. Locke allows the judges to connect their argument and interpretation of the Constitution to the Founding Era and the impactful philosophy at that time, creating a flowing narrative about American individual and community liberty that William Blackstone or Montesquieu do not create. Through the *Second Treatise of Government*, judges can use Locke's philosophy that impacted the Founding Fathers and understand the liberties of the individual and the community

through the social contract. Judges frequently refer to his sections on private property, consent, majority rule, and government powers. The *Letter Concerning Toleration* is used for religious freedom—a concept not mentioned in the *Second Treatise of Government* but crucial to Lockean liberty. Citations to the *Letter Concerning Toleration* often refer to toleration and church–state separation. Finally, the tension between individual and community rights causes judges to use a liberty analysis alongside Locke’s theory because of the presumed binary between the two, where the court is often placed in the middle but often chooses social cohesion over the binary.

### ***6. Complete Influence of Lockean Liberty on Constitutional Jurisprudence***

Lockean liberty has influenced constitutional jurisprudence from 1937 to 2023, even though the level of influence is less significant than hypothesized. Locke’s theory has continued to inform judicial figures in the United States on the relations between individual liberty and the government, understanding what rights all should have and what limits should be imposed upon the government. However, between 1937 and 2023, the courts used a more communitarian understanding of Lockean liberty—a liberty that depends on social bonds and is connected to the common good—showing how Locke’s influence has not always been about “life, liberty, and property” (Arcenas 2022). Lockean liberty’s influence is found by looking at its role in the decisions, cases in which it was not used, and when another philosophy was preferred. Lockean liberty is most influential in cases about consent, analyses of the *Second Treatise of Government*, and interpretations of liberty alongside the First, Fourth, and Fifth Amendments.

Citations to and analyses of Lockean liberty appear in the majority opinion, dissent, and concurrence. Most opinions cite Locke once or twice; only *Campo v. United States* (2021) attributes a whole section of the opinion to Lockean liberty. The references to Locke appear in all aspects of the opinions, so Lockean liberty was used inconsistently. Once judges place Locke

into their opinions, most agree with him. The section, reference, or footnote to Locke usually supports the judge's argument but is not crucial to the decision of the opinion however—Locke's usage is for support and to have an authoritative voice on one's side to strengthen one's argument. Locke provides a well-known authority on the liberty of individuals, allowing the opinions to merge theory and practice. Moreover, Locke is often referenced alongside the Founding Fathers, such as James Madison and Thomas Jefferson. So, Lockean liberty is another way for the judges to incorporate Founding Era ideas into their opinions. When the opinions disagree with Locke, some misunderstand him or favor a truly expansive view of government liberty. Regardless, most opinions correctly understand Lockean liberty, showing how the judges have been influenced by it and intentionally incorporated it into jurisprudence so that individual and community rights are nearly inseparable for preserving humanity.

However, Lockean liberty is not used in every constitutional case, so his influence is not as expansive or significant as I hypothesized. As stated earlier, Locke was not cited in landmark cases, such as *Brown v. Board of Education* (1954), *Roe v. Wade* (1973), and *Dobbs v. Jackson Women's Health Organization* (2022). Even though Locke was brought into the analysis of some opinions, the lack of Lockean liberty in these opinions dilutes his influence. By not being used in cases that shaped how all courts now understand abortion rights, property rights, and equality, Lockean liberty is generally, but not always, restricted to cases that do not address newer modern concerns—the cases with Locke are not as distant from the ideas and values of the Founding Era.

Moreover, other philosophers are used in constitutional jurisprudence. Of the 39 opinions analyzed in this thesis, 14 refer to Blackstone, five refer to Montesquieu, two refer to Hobbes, and two refer to Rousseau. The opinions that cite Hobbes, Montesquieu, and Rousseau usually refer to only their names rather than the texts of those philosophers. Judges refer to Blackstone in

their opinions and the oral argument transcripts (e.g., *Robertson v. Watson* [2010]). Also, some opinions refer to Blackstone and cite his texts multiple times, such as in *Alden et al. v. Maine* (1999) and *Obergefell v. Hodges* (2015). Beyond the opinions from the dataset used in the thesis, Blackstone is cited in over 40 opinions using the same criteria to find cases where Locke was cited on *Lexis Nexis*. Blackstone promoted individual liberty like Locke, and scholars often wonder if Locke influenced Blackstone (Zeigler and Vile 2024). Therefore, it is unclear if Locke or Blackstone is more influential—that confusion also appears in the opinions as judges debate Locke’s and Blackstone’s influence on the Constitution.<sup>12</sup> Even though Locke may not be more influential than Blackstone, the citations to Blackstone and other philosophers show how impactful political theory continues to be on constitutional jurisprudence in the United States.

Locke’s influence is most relevant for the right of liberty. In these opinions, the liberty analysis most frequently draws upon consent, showing how Locke is critical to portraying the Constitution as a social contract, which infuses the value of social cohesion into the Constitution and American liberty. Moreover, through the lens of consent, Lockean liberty can best weave together individual and community rights, emphasizing autonomy, one’s choice, and care for the common good. The *Second Treatise of Government* is used more in the opinions than the *Letter Concerning Toleration* because it provides a broader view of liberty—extending past religious toleration. While Lockean liberty has influenced the First Amendment to draw upon church–state separation and promote toleration, Lockean liberty has shaped Article I and the Fourth and Fifth Amendments. Constitutional jurisprudence ensures that individual and governmental interests are

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<sup>12</sup> However, future scholars can use my methods and framework of analysis to examine how Blackstone and other philosophers have impacted the Constitution—through the emphasis of liberty or another right. Future research should address the general relationship between political theory and jurisprudence and which philosopher is most impactful on constitutional thought.

complementary while stressing how important the rule of law is in the United States. Locke is influential on constitutional jurisprudence by strengthening the preference for individual rights and ensuring courts consider the harmony and relational interests of the community.

Locke is used in courts around the United States, ranging from the Supreme Court to the district courts. Since Locke's influence varies by location and by court, his influence in these 39 opinions is spread across the United States. However, the Martin-Quinn Ideology Scores for the Supreme Court justices that cited Locke shows how his influence is not entirely apolitical. Nine justices were conservative-leaning, and five justices were liberal-leaning. Justice Scalia and Justice Thomas were the conservative-leaning justices who used Lockean liberty the most, and Justice Douglas was the liberal-leaning justice who used Lockean liberty the most. The five liberal justices tended to be from the latter half of the 20th century and earlier parts of the 21st century. In contrast, the conservative justices using Lockean liberty were not restricted to a specific period. Thus, Locke influences conservative-leaning justices more than liberal-leaning justices. However, Locke is not strictly conservative—about one-third of the citations to Locke at the Supreme Court come from liberal justices, and these citations do not always refute him. Thus, Locke's influence can transcend the conservative politics usually associated with him.

Locke's political philosophy on liberty has influenced constitutional jurisprudence from 1937 to 2023—most specifically, cases on the First, Fourth, and Fifth Amendments and Article I. While Lockean liberty did not play a critical role in the decisions, his influence transcends geography and is used by conservative- and liberal-leaning justices. Locke's influence is diluted by references to other philosophers, like Blackstone, but his influence is still significant for understanding American liberty through the individual-community relationship.

### ***7. Counterarguments to Locke's Influence***

However, some scholars may still reject Locke's influence and this reconstruction of Lockean liberty. Regarding Locke's influence on constitutional jurisprudence, some scholars may argue that judges solely use Locke as a poster name. By referencing only one sentence in the *Second Treatise of Government*, the judge did not intend for Locke to play a central role in the argument; to these scholars, a small reference does not indicate an actual influence on constitutional jurisprudence. Other scholars may argue that modern judges do not turn to older philosophies—viewing the Constitution as a document that requires new interpretation (Mills 2017). Finally, scholars may argue that judges misunderstand Lockean liberty and inject their views of liberty into Locke. This liberty should be called “Scalian liberty,” not Lockean liberty.

While the citations to Locke may not play an incredibly significant role, the judges purposefully used Locke in their opinions. By intentionally turning to Locke, the judges had to have been influenced by some part of his philosophy. Moreover, the judges usually reference Locke with a quote from one of his texts—by not stating just his name, the judges are not using Locke as a poster name in their opinions. So, his authority and ideas remain linked to constitutional thought. Therefore, the constant use of Locke, regardless of ambiguity, implies that Locke is still connected to constitutional thought; Locke's philosophy can always apply to the present concerns about constitutional rights and the American notion of liberty.

Regarding the second counterargument, most judges understand Lockean liberty correctly, so their understanding and use of him do not reduce his influence. By turning to his texts and using the exact quotes as other judges, the judges construct a uniform but complex Lockean liberty. While the judges vary in which theme they use, those five themes all connect to each other to promote individual rights alongside the public good. While there is variety in interpretation, the variety in court, location, and political leaning demonstrates that Lockean

liberty is a cohesive phenomenon. The judges use the *Second Treatise of Government* and *Letter Concerning Toleration* to add the communal aspect of Lockean liberty that scholars neglect. Therefore, the judges provide a comprehensive, but correct, view of Lockean liberty.

### ***8. Weaknesses and Limitations***

Moreover, this thesis has three limitations. First, this thesis has a narrow scope. I only considered federal court opinions from 1937 to 2023 cases that cite the *Second Treatise of Government* or *Letter Concerning Toleration*, and cases. Such a narrow focus reduces the applicability of this thesis and hides potential additional understandings of Lockean liberty throughout the history of the United States. Also, this thesis may be weakened because by not being able to speak with the judges to know why they chose to use Locke, I made my argument only through textual analysis. Lastly, this thesis focuses solely on Locke and his philosophy of liberty. While I considered the citations to other philosophers, I did not analyze those citations. Without an analysis comparing Locke and other philosophers, Locke's influence may seem more or less significant than it truly is. Moreover, the definition of liberty in the Constitution may vary from what Lockean liberty is if the judge relied upon Blackstone or another philosopher.

### ***9. Implications for Lockean Liberalism in American Constitutional Thought***

Nonetheless, this thesis still contributes to the political and legal theory community. The new comprehensive definition of Lockean liberty has implications for how we should understand Locke's philosophy. Prior scholars argued Locke should be understood as favoring only individual rights and promoting extensive individual liberty—aligning with the view of liberalism and capitalism in the 20th century (Hartz 1955). However, constitutional jurisprudence shows how the liberty of the community and the liberty of the individual are intertwined and mutually reinforcing. Without individual liberty, there could be no community



liberty, and vice versa. Regardless, Lockean liberty favors individual liberty and aims to impose minimal restrictions on individual liberty. Those restrictions are justified through the public good and societal bonds. Moreover, Lockean liberty includes various agents who each have their kind of liberty, rights, and purpose in society—Locke does not only consider the individual. Lockean liberalism should not be understood as opposed to the community and government having rights and liberties. Thus, scholars should begin moving away from the standard “life, liberty, and property” framework and start looking to the theme of social cohesion.

Judges are more likely to intertwine community and individual rights in their opinions alongside Lockean liberty, showing how Lockean liberalism continues to influence American constitutional thought. Further, the communities and government have the burden to show the significance of their interest. When Locke is used in the courtroom, the default option in courts will be interpreting the Constitution as expansive for individuals and restricting government liberty—as seen with Article I and the Nondelegation Doctrine. Specifically, Lockean liberty shapes how we view the First, Fourth, and Fifth Amendments. The government must respect free speech, free religious expression, and free association; otherwise, there will be no social bonds, and then the government cannot succeed. By respecting autonomy, the government needs to respect the privacy of its citizens; without that privacy, there would be no individual liberty and, thus, no social cohesion. The Due Process Clause and the rule of law exist to ensure social harmony for all. However, Lockean liberty is not used to analyze each aspect of the Constitution so these implications may then be limited to specific rights.

Because Lockean liberty is connected to the First Amendment, Fourth Amendment, Fifth Amendment, and Article I, this thesis shows how the Locke’s concepts and values—consent, liberty, the rule of law—are made concrete through the rights written into the Constitution. Thus,

Locke's theory has practical uses and shapes Americans' rights today. Because of the influence of Locke in constitutional jurisprudence, Lockean liberty is intricately connected to American liberty. American society, as impacted by Locke's liberal philosophy, is not solely focused on the individual, and such values arise in the Constitution and courts daily.

### ***10. Conclusion: Rethinking Liberalism in American Constitutional Thought***

Lockean liberty helps judges merge community and individual rights for social cohesion when tensions emerge in a constitutional case. Judges define Lockean liberty as a liberty that draws upon consent and reason, promotes toleration and social bonds in the community, limits some government powers, and advocates for the rule of law. Individual liberty connects to an individual's consent and ability to obey the rule of law. Community and government liberty arise from the need to preserve mankind and the social contract, connecting to the Law of Nature. Individual and community liberty are mutually reinforcing because of cohesion, changing the way scholars should understand Lockean liberalism and Locke's impact.

This interpretation of Lockean liberty—and Lockean liberalism—also impacts how the literature should understand liberalism as a whole within the history of American constitutional thought. In the 20th century, Americans turned to the theory of liberalism, insisting that “we [now] live in the epoch of the individual” (Stanton 2018, 602; see also Bell 2014, 699-700). That epoch implies that the binary of the community and individual still prevails, promoting the individual at the cost of the community's liberty (Epstein 2017). However, political theorists defined that epoch and liberalism without considering how judicial figures understand constitutional liberalism. By considering judicial figures' understanding, scholars can realize that we do not solely live in the epoch of the individual. Instead, liberalism creates a theme of social cohesion in American constitutional thought; we live in the epoch of the individual and the

community. Liberalism in constitutional thought does not inherently oppose the community but tries to cultivate the community, promote various liberties, and preserve mankind.

By understanding liberalism in this way, scholars can see how liberalism and its view of liberty do not solely reap individualistic and capitalist harm on the community, weakening the criticisms of liberalism in the 20th century and 21st century (Pocock 1975). Liberalism seeks social bonds so that everyone values their liberty while accepting limits on such liberty for social cohesion. This understanding of liberalism separates it from the propaganda related to the rise of communism, fascism, and totalitarianism—solely looking at it within the context of American constitutional thought. Therefore, scholars should reorient their understanding of liberalism in constitutional thought. To adequately understand liberalism in American constitutional thought, scholars need to look beyond the fable of liberalism and examine liberalism alongside social cohesion and community values in the courtroom so that their understanding of liberalism aligns with the judges' understanding and application of liberalism—and such reorientation begins with changing the way scholars view Lockean liberty and liberalism.

Locke's philosophy of liberty influenced constitutional jurisprudence in the 20th and 21st centuries, enabling the courts to show the complementarity between the liberty of the individual and the liberty of the community and to embed Locke within constitutional thought. Political theory has a practical application in the legal world, and Lockean liberty has been intentionally applied since 1937. Judges have altered the typical understanding of Locke's theory on liberty, stressing that his theory is more than private property and individual freedom. Therefore, although Locke was a British philosopher in the 17th century, the United States Constitution is Lockean, confirming that Locke is an honorary American philosopher who impacts liberalism and constitutional thought today.

### Appendix

Table 1. Analyzed Cases that Cite Locke in the Opinion, 1937-2023

CASE
Newfield v. Ryan (1937)
Committee for Indus. Org. v. Hague (1938)
Minersville School District v. Gobitis (1939)
Duquesne Warehouse Co. v. Railroad Retirement Board (1945)
Dennis v. United States (1951)
Scales v. United States (1961)
School District Of Abington Township, Pennsylvania, et al. v. Schempp et al. (1963)
United States v. Tarlowski (1969)
Miloszewski v. Sears (1972)
McDaniel v. Paty (1978)
Industrial Union Department, AFL-CIO v. American Petroleum Institute et al. (1980)
Baer v. Wauwatosa (1983)
Briggs v. Malley (1984)
Nollan et ux. v. California Coastal Commission (1987)
United States v. Verdugo-Urquidez (1988)
Church Of Lukumi Babalu Aye Inc v. Hialeah (1989)
Mistretta v. United States (1989)
Welsh v. Boy Scouts Of America (1990)
United States v. Keys (1993)
Re: Cincinnati Radiation Litigation (1995)
Bank One Chicago, NA v. Midwest Bank & Trust Co (1996)
Alden et al. v. Maine (1999)
In re Simon II Litigation (2002)
Watson v. Hortman (2009)
Robertson v. Watson (2010)
Gilardi v. United States HHS (2013)
Wellness International Network, Ltd., et al. v. Sharif (2015)
Department of Transportation et al. v. Association of American Railroads (2015)
Obergefell v. Hodges (2015)
Priests for Life v. United States HHS (2015)
Fratello v. Archdiocese of N.Y. (2017)
Gundy v. United States (2019)
Leaders of a Beautiful Struggle v. Baltimore Police Department (2020)
McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc. (2020)
Campo v. United States (2021)
United States v. Foster (2022)
Jarkesy v. Securities and Exchange Commission (2022)
Burrell v. Staff (2023)
Al-Hela v Biden (2023)

Table 2. Cases Not Analyzed that Cite Locke, 1937-2023

CASE
Moran v. Pittsburgh-Des Moines Steel Co. (1948)
Negrich v. Hohn (1965)
Powell v. McCormack (1967)
Clark v. Ellenbogen (1970)
Lynch et al. v. Household Finance Corp. et al. (1972)
Watson v. Branch Country Bank (1974)
Payton v. New York (1980)
Mulroy v. Block (1983)
Ruckelshaus, Administrator, United States Environmental Protection Agency v. Monsanto Co. (1984)
Loper v. New York City Police Dept (1992)
Bothwell v. Republic Tobacco Co. (1995)
Seminole Tribe v. Fla (1996)
City Of Boerne v. Flores (1997)
Clinton v. Jones (1997)
Gordon v Griffith (2000)
Catholic League for Religious & Civ. Rights v. City & County of San Francisco (2009)
Citizens United v. Federal Election Commission (2009)
McDonald v. City of Chicago (2010)
Bishop v. United States ex rel. Holder (2014)
Perez v. Mortgage Bankers Ass'n (2015)
Faludi v. U.S. Shale Sols., LLC (2019)
Md. Shall Issue v Hogan (2020)
Stone v. Austin (2021)
Fridge v. City of Marksville (2022)

Table 3. Case Decisions on the Tension Between Individual and Community Rights

Individual v. Community Rights in Decision	
Community	22
Individual	17

Individual v. Community Rights in Decision if Agreed with Lockean Liberty	
Community	24
Individual	15

Individual v. Community Rights in Decision		
Theme	Individual	Community
Religious Liberty	5	3
Consent	11	8
Government and Community	5	8
Rule of Law	6	4
Property	3	7

Individual v. Community Rights in Decision if Agreed with Lockean Liberty		
Theme	Individual	Community
Religious Liberty	6	2
Consent	11	8
Government and Community	6	7
Rule of Law	6	4
Property	7	3

Figure 1. Timeline of All Federal Judicial Opinions that Directly Cite Locke, 1937-2023

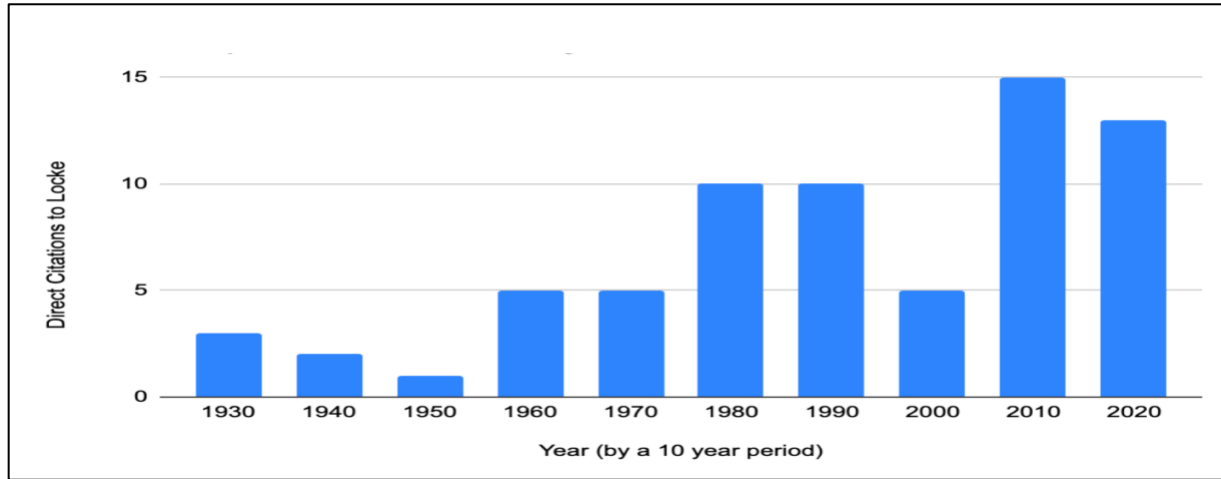


Figure 2a. Hypothesized Causal Mechanisms that Bring Locke into Constitutional Thought

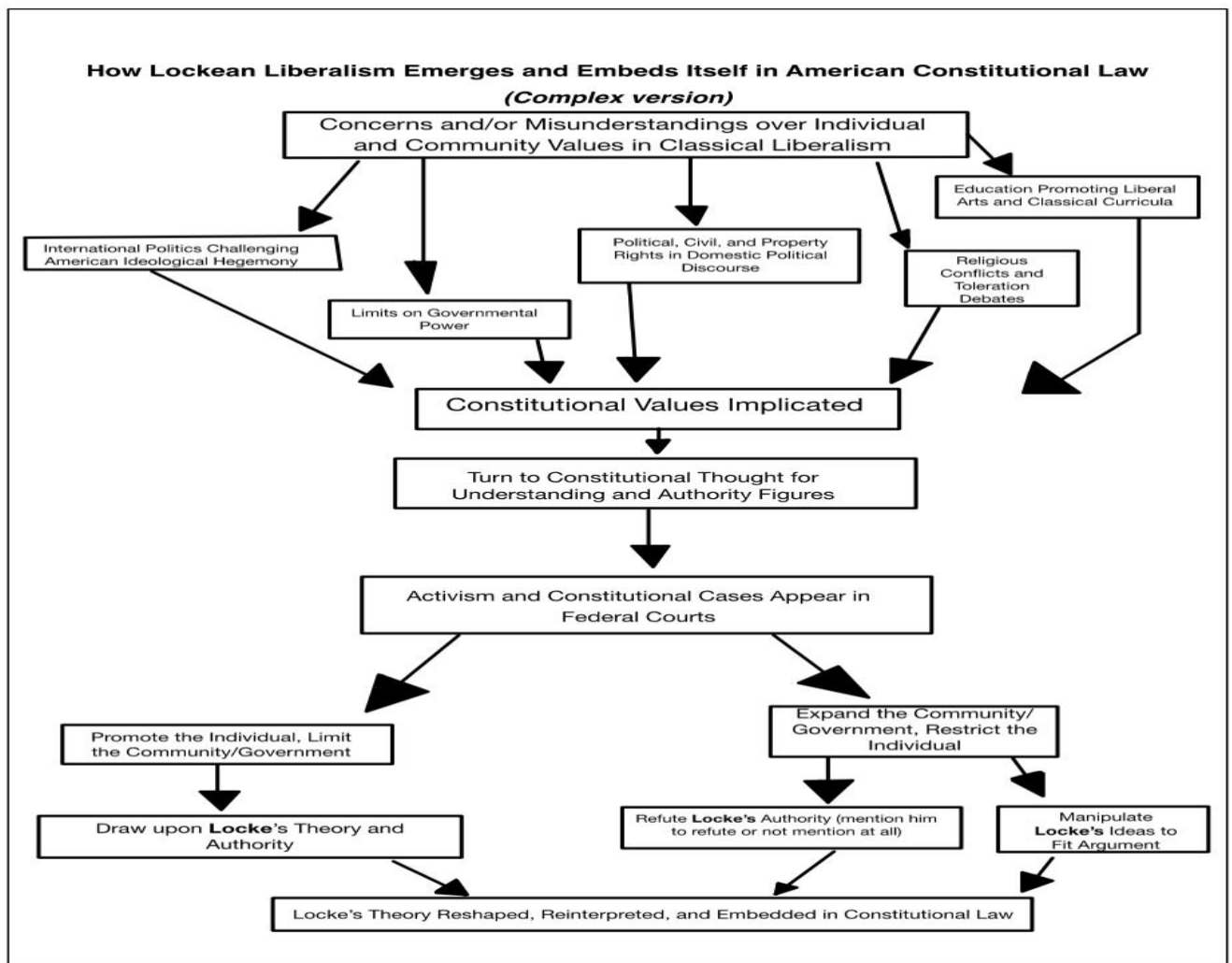


Figure 2b. Hypothesized Significance of Locke's Impact on Constitutional Jurisprudence

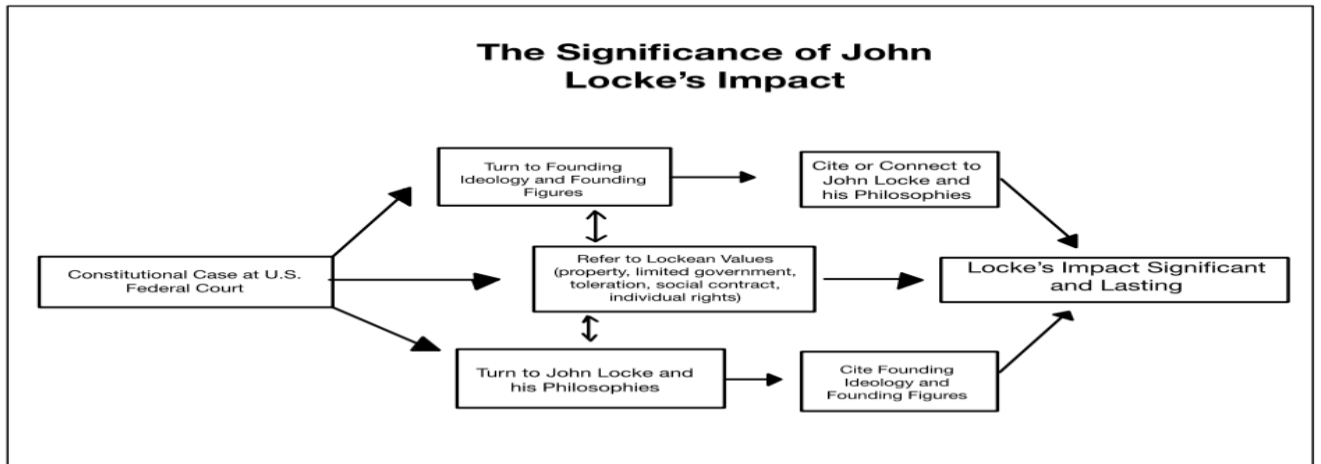


Figure 3. Distribution of Lockean Text Citations in Federal Opinions

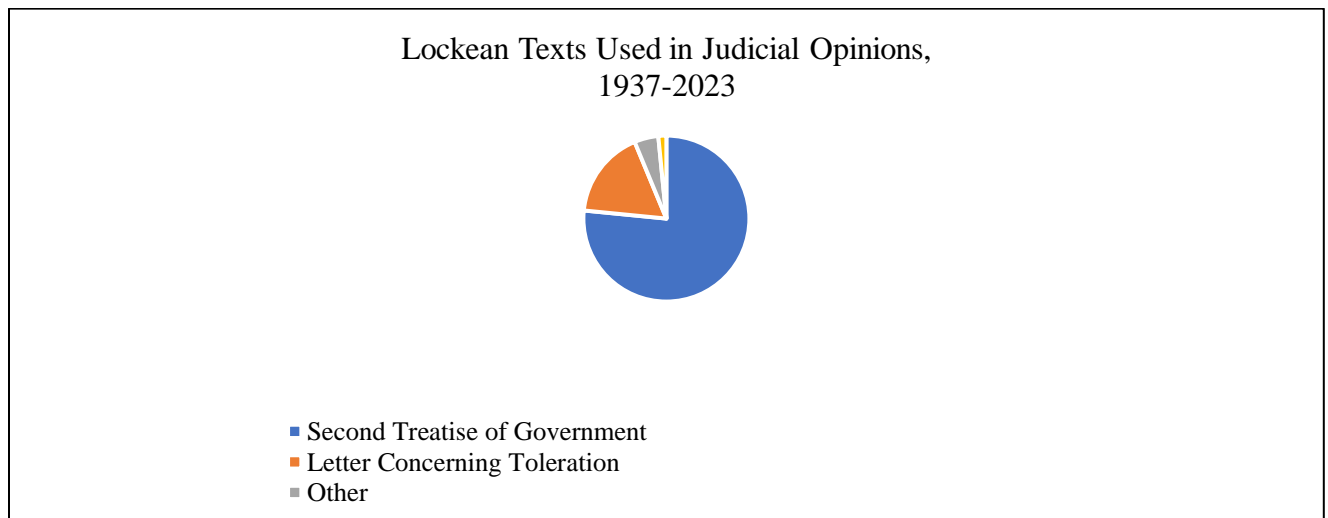


Figure 4. Location of Reference(s) to Locke in Federal Opinions

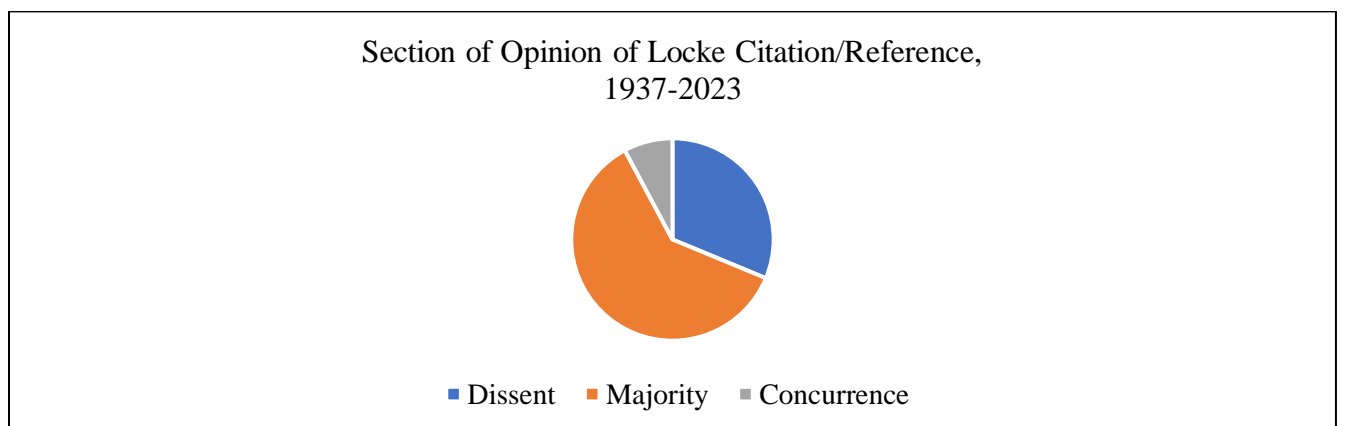


Figure 5. Themes of Lockean Liberty Appearing Across Opinions, 1937-2023

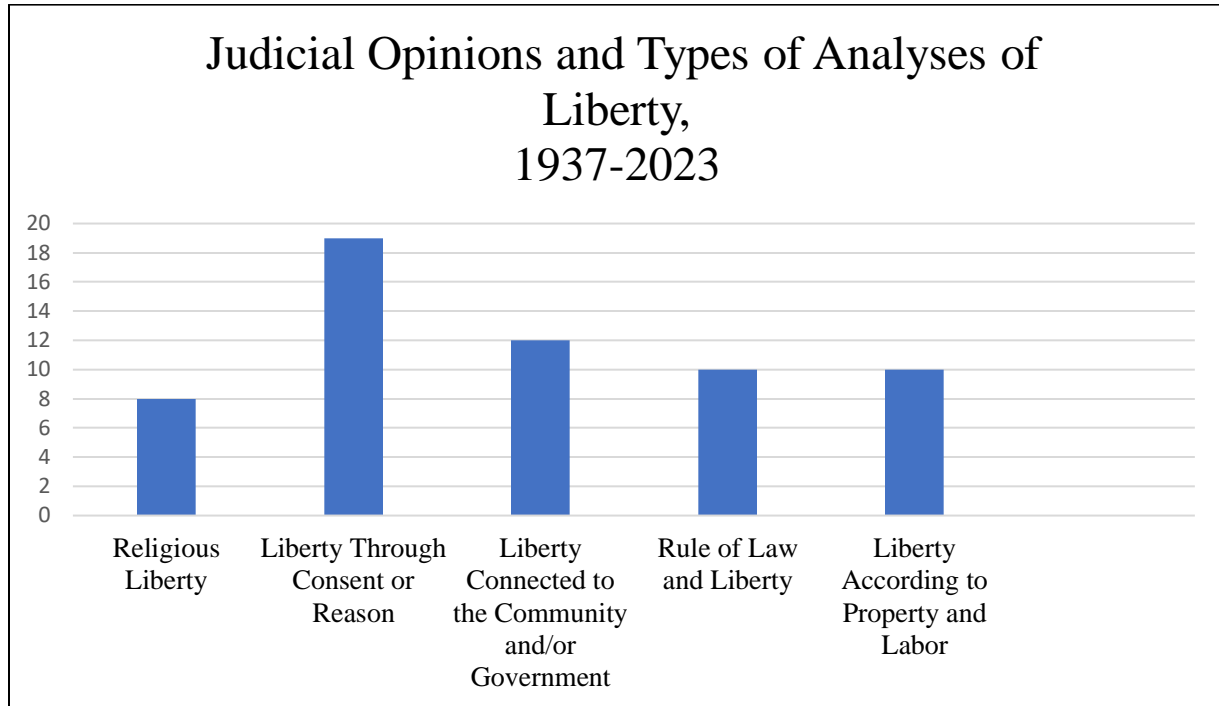
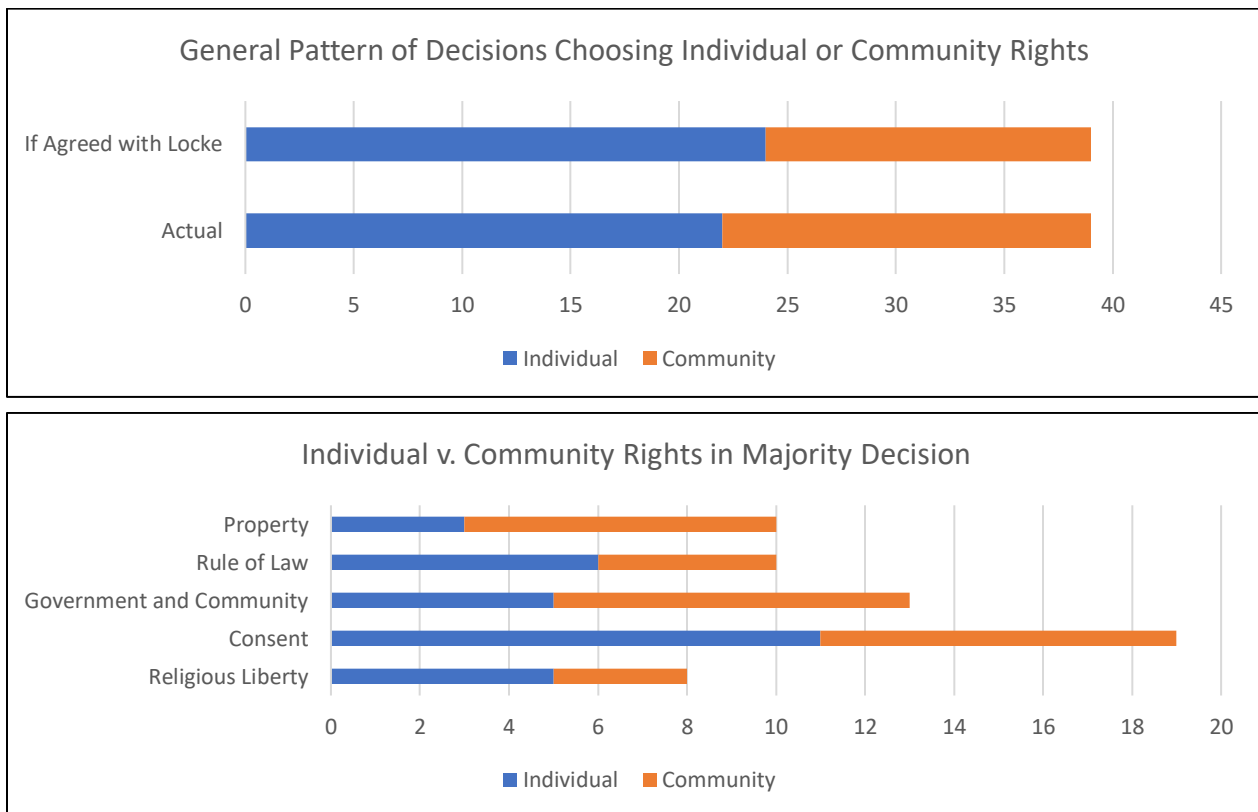


Figure 6. Case Decisions on the Tension Between Individual and Community Rights





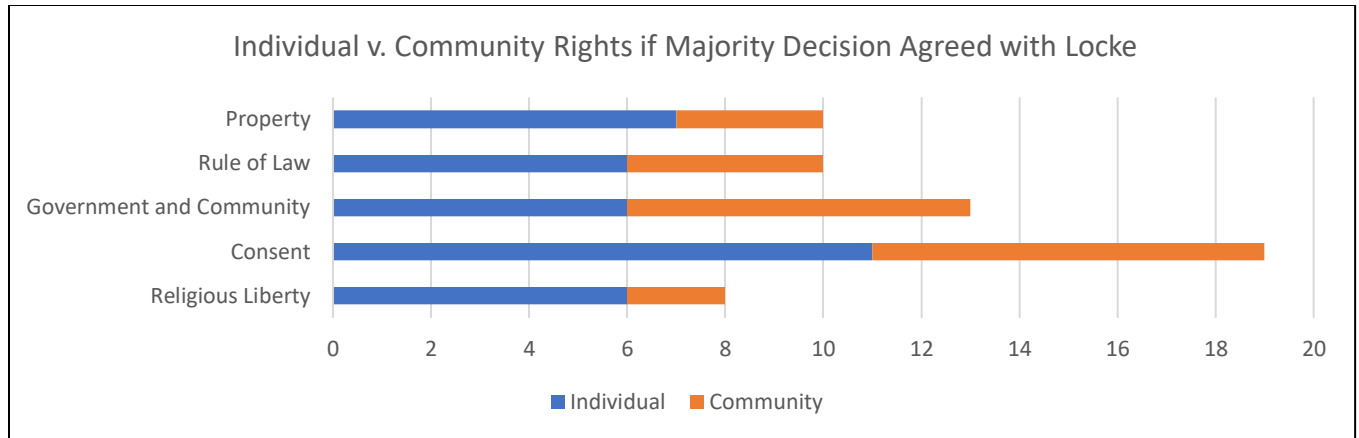
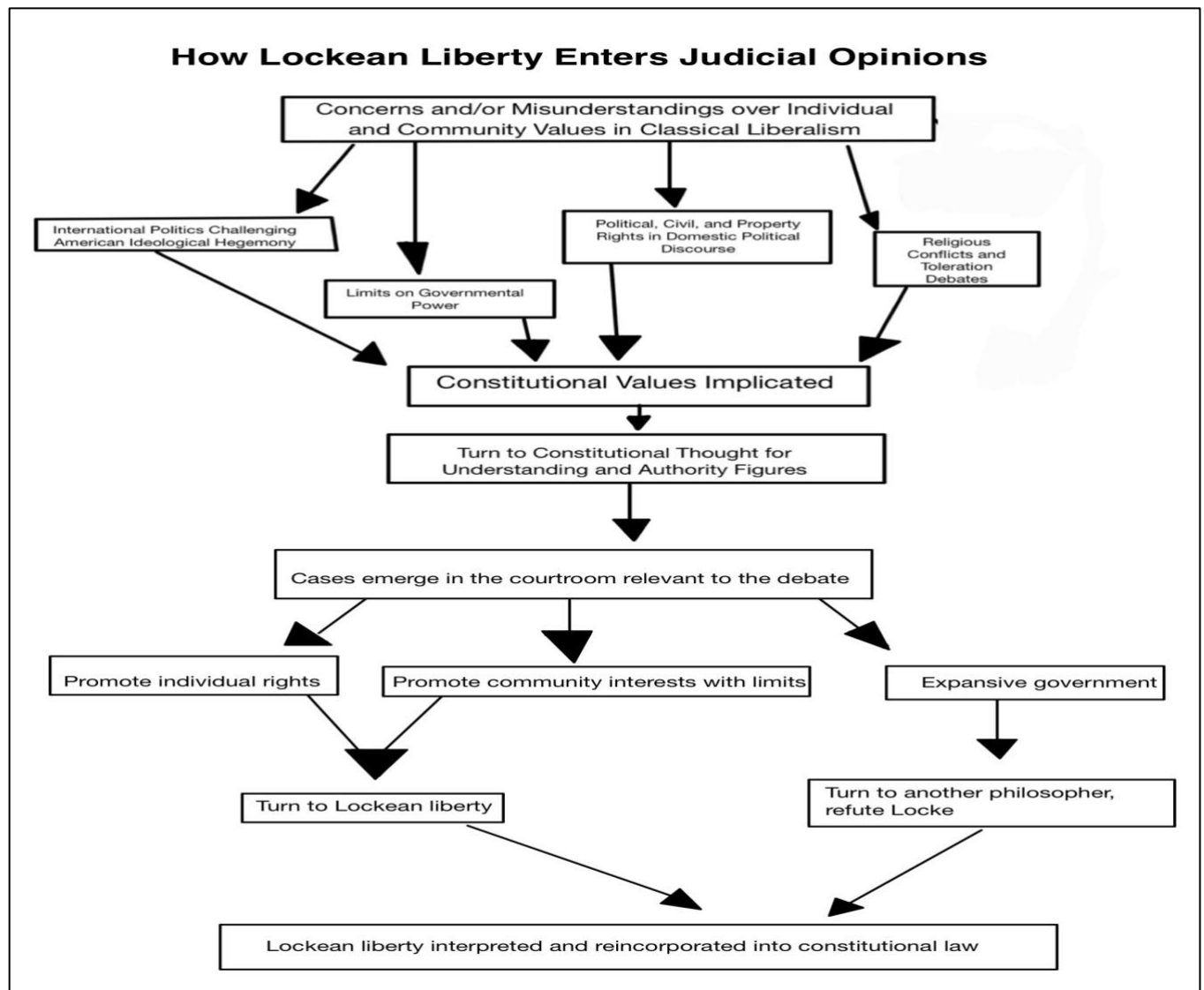


Figure 7. How Lockean Liberty Enters the Courtroom



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