A Discussion of Rights and the Constitution

I) Civil Rights and Natural Law

The most important criteria when critiquing a historical document is to look at the document through the lens of its time. To do otherwise undermines the clarity of the analysis. However, that does not mean, from a philosophical and legal perspective, a historical document is uncriticizable. The United States Constitution itself was ground breaking, as it dismantled the claim of the divine right of kings used for millennia to assert authority over the people. It was the first legal document that structured government around the concept of limited power of the government, and asserted that the natural rights of the citizens are retained by Natural Law. Despite the philosophical truism of natural rights as the foundation for the United States Constitution, not all members of the human race in the young nation were allowed to assert their natural rights. Thus, this posits a reasonable question, was the Constitution a *sincere* document regarding civil rights for all?

A) Philosophical Background of Natural Law

In Locke's Two Treatises of Government, he reasoned that Natural Law emanates from God in a state of nature that is devoid of a political community. In the state of nature, the individual possesses natural rights that are endowed by God. These rights include, but are not limited to, the right to the fruit of one's labor, the right of self-preservation, and the right of autonomy to choose one's own path of happiness. The affirmation of freewill, the right to protect yourself, and the right to the fruit of one's labor is essential, as these rights, among others, are retained by the individual once they enter into a political community from the state of nature.

In contrast to Natural Law, is municipal law or manmade law. Municipal law is any legislative law passed by any form of government which is procedural in nature and can be devoid of, and in some cases directly conflict with, the philosophical foundation of Natural Law.

A Discussion of Rights and the Constitution

The power of Natural Law, is that it is the essential check on municipal law. Municipal law by its very nature is subject to review of Natural Law's edicts under the Constitution. Nonetheless, a municipal law comes with real world repercussions and consequences if it is never subject to the scrutiny of natural rights review.

From this perspective, municipal law and the principles of Natural Law that are enshrined in the Constitution, historically come into direct conflict with the legal treatment of native tribes, women, and enslaved Africans. Thus, a critical analysis of the effect of municipal law on these groups, in contrast to their natural rights under Natural Law, is essential to determine the *sincerity* of the Constitution.

B) Native Tribes and the Tools of Municipal Law

The struggle between native tribes and the Europeans that flooded the New World for commodities, opportunity, land, and religious freedom is a perfect example of municipal law being used as a tool to undermine the truism of Natural Law. To further complicate this struggle was the lack of bargaining power the native tribes had when it came to negotiations with Europeans over land and their own autonomy. The Constitution itself asserts the recognition that native tribes had their own separate governments. Article I, Section 8, Clause 3, asserts the right of the federal government to have exclusive rights to trade with native tribes. This asserted the separate nature of native tribes and the government of the United States. Article I Section 2, Clause 3, affirms authority over those who are eligible to be taxed. This meant that if native tribes remained on their land, they would not be taxed like citizens, but if they wanted to assimilate into the United States as citizens, they would be duly taxed under the authority of the federal government. These two clauses fundamentally asserted that native tribes were not citizens of the United States, and thus limited in their capacity for redress under the Constitution.

A Discussion of Rights and the Constitution

Prior to the Articles of Confederation and the the Revolutionary War, British colonists were well aware of the different tribes and their diverging interests. The native tribes were not uniform in their governments and each had their own allies and enemies. Some of the tribes were matriarchies or patriarchies, and others governed themselves in coalitions such as the Iroquois Nation. Some even reimagined themselves with a similar Constitution to the United States Constitution as the Cherokee Nation did with the Cherokee Constitution of 1827.

During the French and Indian Wars (1754-1763), native tribes made alliances with different foreign powers that each had vested interest in the native tribes' lands. Also, these nations possessed the military technology and soldiers to continue to assert their interests indefinitely. At the Constitutional Convention (1787), the Founders recognized the precarious position the new nation was under with the ability of native tribes to make alliances with the adversaries of the newly formed government. Under this type of unstable existence, it would be impossible for the newly formed nation to assert authority over its boundaries, and assure its citizens an existence devoid of a perpetual state of war or the threat of war. It is within this reality that natural rights and municipal law come into conflict.

The first use of municipal law to undermine the autonomy of native tribes was the Trade and Intercourse Act of 1790 (the Act). The Act's purpose was to control who could trade with native tribes. Prior to the Act, anyone could freely trade with native tribes. This allowed individual native tribal members to assert their natural rights and use the fruit of their labor to trade in commodities or knowledge with anyone. The Act made this practice punishable by fines or prison time, which dramatically changed the relationship between native tribes and the citizens of the United States. The Acts ultimate effect was that it separated native people as a whole, leaving individual U.S. citizens with no legal ability to trade with native tribes. The lack

of trade between individuals destroyed the intimate human relationships that are created through engagement in reciprocal relationships in free-markets.

It is often asserted that native tribes did not have a concept of property rights in the land. However, this assertion is myopic in the face of evidence of native tribal member's ownership of property and of numerous tribes' communal claims to hunting and burial lands. Through the concept of communal tribal ownership of property native tribal councils could control individual tribal members' ability to sell land that they claimed a right to. It also provided a tool for the United States government to use municipal law to undermine the natural rights of individual native tribal members willing to engage in a free market.

In 1810, at Old Vincennes, Tecumseh gave a speech representing the Shawnee, and by consequence other native tribes, where he asserted the concept of communal property rights as a virtue for the common good of all native tribes. He claimed that by legal right the native tribes owned the land through possession of first in time, except for travel ways and hunting grounds as they would be used by all. However, he also claimed that those who "…[sit] down on his blanket or skins, which he has thrown upon the ground; and until he leaves it, no other has a right." (p.40). This is inherently a claim to the ownership of property. Thus, the concept of communal property was merely a legal tool used by the tribes to stop the increasing spread of Europeans into native lands. It was not a philosophical or religious claim of serenity and harmony with the land, nor a claim of ignorance of the concept of property rights. As Tecumseh stated in his speech: "The way, and only way, to check and stop this evil [of European spread], is, for all red men to unite in claiming a common and equal right in the land…" (p.40). This is a claim of municipal law, not a philosophical claim of natural right. The common argument that native tribes did not possesses the concept of individual property rights, undermines the intelligence and

humanity of native tribes. The native tribes were well aware of property rights and interests, as they owned, and made claim to property, as simply stated by Tecumseh above.

However, it can easily be argued that this analysis is using a scalpel to carve out the legal argument used for the concept of reparations in response to the ill treatment of native tribes, but that would be a mistake. By recognizing that native tribes are just as human, intelligent, and sophisticated as the societies of Europeans, the claim of being tricked is no longer a valid claim. A valid claim would be that the treaties themselves were the consequences of contracts of adhesion. Native tribes lacked bargaining power due to their technological inferiority, and therefore used whatever legal tool they could to equal out the balance of power. This is conscious and deliberate thought, not ignorance of the concept of individual property rights.

Unfortunately, whether deliberate action as argued above, or out of ignorance as is commonly argued, the United States Supreme Court and numerous State courts systematically stripped away the rights of individual native tribal members to maintain property ownership and the ability to sell that interest at will. In Jackson v. Wood (1810), two sons inherited land from their father, Hongost Tewahengriahaken, a native Oneidan who was given land for service in the Revolutionary War. The sons subsequently sold the land after inheriting it. The New York court held that native tribal members could not leave land through a testamentary will. Nor could their heirs freely sell the property, because a New York municipal law required state approval for the sale of property by any native individual. The court used the concept of communal property rights, as advocated by Tecumseh, against the sons and asserted that when the father died, the property reverted back to native communal property. Thus, the sons had no individual right to the interest in the property. This case is a prime example of the concept of communal property rights being used to disadvantage native individuals.

Similarly, in Johnson v. M'Intosh, (1823) the Supreme Court of the United States held that land that was sold by the Piankeshaw tribe to Joshua Johnson's father prior to the Revolutionary War was no longer valid. The Court reasoned that a transfer of property under the British government lost its authority under the concept of the right of discovery and the right of conquest. Thus, Johnson had no right to the property because the contract was not valid under U.S. law. Once again, the concept of property rights interpreted through municipal law undermined the natural right ownership interest in property of native individuals.

Although there are numerous examples of municipal law being used to undermine native tribal member's natural rights, for brevity's sake, the question must be asked, was the Constitution *sincere* with regard to the civil rights of native tribes? To answer this, the Constitution merely asserts the autonomy of native tribes as noncitizens of the United States, but individual tribes and its members would still be subject to Natural Law. Therefore, the recognition of their independence in the Constitution is what affirms their natural rights under Natural Law on a foundational level. Thus, when municipal law is incorporated into the concept of communal property rights asserted by native tribes, it becomes a legal tool to circumvent the natural rights of native tribal members through the mere expression of power. Since, municipal law by its very nature is subject to review by Natural Law, the Constitution is *sincere* in regards to native tribes' civil rights, because it is the only means of redress within a system in which native tribes are their own separate and independent governments. However, this explanation does not put into context the real threat an independent government existing autonomously, within another country's territorial boundaries would bring about. So, international law would not apply, and municipal law is applicable only as an expression of power. Therefore, natural law, as affirmed by the Constitution, is the only legal argument native tribes can make.

A Discussion of Rights and the Constitution

C) Women's Natural Rights Under the Constitution

Many religious societies, including Christians and Muslims, have a patriarchal structure to them. During the 17th century, the Protestant Revolution created new Christian based religions that sought religious freedom in the New World. Based on God's law, or more precisely stated, sola scriptura (which means the Bible is the word of God), women are blamed for the original sin of eating from the tree of knowledge. In the Book of Genesis, Eve is punished for not obeying God's commandment to not eat from the tree of knowledge. On a psychological level, God as the Father punishes Eve for seeking knowledge, or punishes her for merely being tricked by the Devil. No mercy, no forgiveness, no understanding, but banishment from his love and protection. This negative view of women in the Bible has been used by men throughout time to justify positions of authority over women within domestic relationships.

English Common Law solidified the subordinate legal position of women by effectively removing their natural rights to own property and dispose of it as they please. Under the concept of coverture, a woman lost all of her property to her husband and legally became one entity with her husband the moment she was married. To modern sensibilities this concept is morally repugnant. However, during the Constitutional Convention this was not only the law, but was part of the religious structure of Christian families around the world.

In 1849, Lucretia Mott, vehemently argued against the subordinate legal and social position of women and advocated to abolish slavery. As a Quaker, her view of Christianity was that God created all of his children equal, and none were subordinate to another. In her speech: Discourse on Woman, Mott stated that: "Those only who are in the wrong dread discussion. The light alarms those only who feel the need of darkness." (Mott, 144). Mott eloquently was putting society on notice of Natural Law's supervenience onto municipal and religious law.

Unfortunately, the stereotype of women's inferiority had been intrenched in Western societies since Constantine declared the Roman Empire as the Roman Catholic Empire.

A prime example of municipal law undermining the natural rights of women in America, is the: Trial of Mrs. Packard. In 1866, the state of Illinois passed legislation that allowed a husband to institutionalize his wife if he declared her to be insane. Based solely on the husband's claim that his wife was crazy, his wife could legally be detained and placed in an asylum without any due process. Mrs. Packard spent 3 years imprisoned without a trial based solely on the word of her husband, which stripped her of her natural rights through implementation of municipal law that was based on the stereotype of women's role in society. So, with this background, was the Constitution *sincere* in regards to women's civil rights?

If the Constitution was intended to deny women their rights under it, it would have stated their separate nature under it. Devoid of this language, the Constitution does not separate women into non-citizens, thus their natural rights are protected from governmental intrusion under it. It may be argued that men intended to keep their position of power as evidenced by the Illinois law; however, this type of municipal law is based on a societal stereotype, and only exists as long as the prejudice exists. This means that municipal laws that are intended to strip women of their natural rights can be attacked constitutionally based on Natural Law. Thus, it can be soundly argued that the Constitution is *sincere* in affirming the natural rights of women.

D) Enslaved African Americans' Natural Rights Under the Constitution

Slavery is in itself immoral and unethical. Unfortunately, the human condition can create free-riders that look to ride on the backs of others for their own benefit. Thus, an economic analysis is a good starting point to begin to analyze slavery's role in American economics during the time of the Constitutional Convention and the interests and realities therein.

A Discussion of Rights and the Constitution

Slavery is a virus that infects free markets. Its presence manipulates the market by artificially creating lower prices in the market that a free-market laborer cannot compete with. The institution of slavery's effects on the market is like a lock on a free-flowing body of water. It stops the natural flow of water, contains a small portion of it, and lowers or raises the level of the water isolated in the lock. Similarly, slavery locks in a portion of the market and artificially lowers the price point of commodities which protects them from competition in a free market. The institution of slavery steals the fruit of the labor of the enslaved, steals their humanity, and strips them of their natural rights. John Locke called this state of existence the state of war. The state of war is a state of existence that justifies the enslaved to rebel and use lethal force against their oppressor. Unfortunately, life is not that easy or lacking in complexity.

All humans are social beings and rely on friendships, family, and intimate relationships to find meaning in their daily lives. With the understanding of the sanctity of close human relationships, slave holders used those bonds as methods of control and punishment. Frederick Douglass astutely illuminated this manipulation of human emotion in his book: Narrative of the Life of Frederick Douglass. In Chapter X, Douglass tells of his experience with the self-proclaimed "slave breaker" Mr. Covey, who used the relationships between the enslaved as tools of compliance and punishment. When Douglass and a group of other enslaved men planned an escape, the insidious practice of punishing the loved ones of the runaways is the tool that stopped the escape, and ensured the status quo.

The use of human emotions as tools of punishment are the shackles that bind individuals from engaging in a state of war without reservation. Furthermore, the lack of a human emotional connection to those whose labor is being stolen sustains a lack of urgency to end the practice. Thus, during the Constitutional Convention, the advocates of slavery's threat to not ratify the

Constitution, which resulted in the 3/5 compromise, solidified the ratification of the Constitution and the continuation of slavery, because the institution of slavery was never subject to an emotional connection to the enslaved.

Within this context, the Constitution is *sincere* in that it formerly does not acknowledge the word slavery, or the institution of slavery, which sheltered the natural rights debate of the enslaved for a future time. That debate ended with the surrender of the South during the Civil War and the ratification of the 13th, 14th, and 15th Amendments. These Amendments specifically assert that enslaved Africans are free and have all rights and privileges of citizenship. Moreover, these Amendments reaffirm the declaration that Natural Law is the foundation of the Constitution, and asserts the authority of Natural Law over municipal laws of the states or of the federal government.

Conclusion

In summation, the Constitution is a *sincere* document as it declares the natural rights of the individual under Natural Law against the interests and power of the group. The Constitution provides for a procedure of redress against the government for a loss of an individual's civil rights. Thus, the Constitution is not antiquated, a nice idea, or inherently flawed, because the Constitution itself is the primary check on municipal law's ability to reinforce prejudice and fear. If not for the claim of Natural Law as the foundation of American Jurisprudence under the Constitution, native tribes, women, and enslaved Africans would have no legal redress. Thus, the Constitution's assertion of natural rights is in itself a philosophical and legal shield against totalitarianism and despotism that flows from the implementation of unjust municipal laws.

A Discussion of Rights and the Constitution

II) An Argument for the Inclusion of Children's Rights Under the Constitution

In recent decades the advocates for the decentralization of the family, in regards to the parent's role as the nurturers and guiders of their children's social, emotional, and logical development, argue in favor of a pseudo-independence of the child from the family, or the child as a quasi-ward of the state i.e., "it takes a village to raise a child." Beyond the absurdity of this claim on a biological level of intimacy between parents and their offspring, this claim is based on anti-democratic principles that perceives to posit that the government is the grantor of rights, not as being limited by the natural rights of the sovereign citizens as declared in the Constitution. However, in the early 19th century, the lack of legislation outlawing child labor in factories and coal mines, legally allowed the family to assume the fruit of the labor of the child for the benefit of the family despite the interests of the child. Within in this limited scope, would it be reasonable to enumerate children's rights in the Constitution and how might these protections have looked?

A) Role of the Family and Parental Duties

James Kent, the chief Justice of the New York Supreme Court, outlined the rights and duties of parents' obligations to their children under common law in his lecture: Of Parent and Child at Columbia law school (1827). Kent proposed that the duties of parents to their children came naturally from the parents simply being the natural guardians of their children. Parents duties: "consist in maintaining and educating [children] during the season of infancy and youth, and in making reasonable provisions for their future usefulness and happiness in life…" (Kent, p.49). Kent believed that the obligation of a parent's duties was self-evident based on the natural biological bond between parents and children. However, this duty did not remain in perpetuity as

it did in aristocracies and monarchies. The legal obligation of a parent to their child ends when the child enters the age of majority as recognized by law.

In Alexis de Tocqueville's Democracy in America, Chapter VII, Influence of Democracy on the Family, Tocqueville layouts the differences in the legal and social standing of family members in aristocracies vs. democracies. First, Tocqueville addressed the ability to leave testamentary property after the death of the father. Second, he addressed the structure and reliance on family members for economic and social realties.

In regards to property, in an aristocracy the estate of the father, who for all intents and purposes is the lord and representative of the family, is only left to the first-born son. While in America there was no bar or restriction on the testator leaving their property to whomever they chose upon their death. This difference between these two legal systems of wills and estates creates unique relationships legally and socially for the family.

The social dynamic of aristocracies creates a legal recognition of a head of the household under common law. Whether that is the father or the first-born son after the father's death, the legal and social burden of the economic and reputational health of the family rested in the hands of one individual. In essence, aristocracies are mirrors of monarchial systems. Having one member of the family in control of the family's economic stability created reliance on one another. A second born son, or other siblings, would tend to promote and support the endeavors of the father or their eldest brother, because his success or failure directly affected the family as a whole. Tocqueville, recognized that this type of family was more of a business relationship then one based on respect and love. During his experiences in America, he found that a democratic system did not have this type of rigidity.

Tocqueville argued that: "[u]nder democratic laws all the children are perfectly equal and

consequently independent; nothing brings them forcibly together. But keeps them apart; and as they have the same origin, as they are trained under the same root…treated with the same care, and…no peculiar privilege distinguishes or divides them, the affectionate and frank intimacy of early years easily springs up between them." (p.196). For Tocqueville, democracy created equality among family members which promoted mutual respect and love. He believed that the legal ability of children to become their own legal entity at the age of majority was the mechanism that fostered children to rely on their family for education and guidance out of affection, not from mere social or legal obligations.

However, Tocqueville's analysis is limited to those who own property. Many families in America did not own property and lived in urban cities. This necessitated that every family members' economic production was necessary to raise the family out of poverty. This economic reliance on each other to better the family's plight might involve three generations of the family to achieve that goal.

B) Industrialization and Child Labor

Alexander Hamilton recognized the opportunity that industrialization could bring to urban families' economic situation by involving the economic production of women and children. On Dec 5, 1701 Hamilton addressed Congress arguing the benefits of industrialization in manufacturing in the cotton-mills in England. In the 18th century, textile manufacturing was predominately performed by women and children because of the tight spaces the spinning machines created. If a jam occurred in a machine a child's small size and hands would allow them to slip into the small space and remove the jam. However, this put children directly in harm's way of an industrial accident. Moreover, it removed children and mothers from the home.

Nonetheless, to most families the opportunity for extra income was more important for the future benefit of the family than a perpetual state of poverty.

Based on the realities of mass employment of children in textile factories and coal mines in the 19th century, the belief that these children were seeking opportunity began to be questioned. In 1825, the Massachusetts Senate requested an investigation into the issues of child labor. Even though faced with data that children worked 12 to 13 hours a day and 6 days a week, which left no time for education, the Massachusetts Senate decided there was no need for action at that time. Nonetheless, the idea of an uneducated underclass of citizens was laid out in a legislative file allowing for further discussion on the matter.

In 1830, The Merchant's Free Press outlined the dangers of child labor not only based on the lack of education, but based its criticism on the low wages paid to child labor "…that is hardly sufficient to support nature…" The article outlined that the average age of child workers was from 6 to 17, and that child laborers worked from sunup to sundown with only an hour break in the day. This meant that it was impossible for these children to have an education and an opportunity to gain any other experience in the world but to master the machine upon which they worked. It was estimated that only 1/6 of the child laborers employed in these factories could read. Furthermore, if a family member requested that their child or sibling have shorter hours so they could attend school, employers frequently threated to fire the entire family if the child did not work.

Based on the well documented experiences of child labor in factories there is a clear difference between the interests of families involved in factory labor and those engaged in farm labor. Industrialization in urban cities created a different type of work required for the welfare of the family due to the lack of private property in which to farm. This put children in positions of

servitude with low wages that were being taking by the family. In contrast, the work done by children on a farm provided an education in agriculture, economics, meteorology, chemistry, and engineering that was necessary for the success of the farm. Therefore, the labor of a child on a farm is inherently different from the labor of a child in an urban city. Thus, an addition of children's rights to be free of labor may not effectively address this significant difference.

C) Children's' Constitutional Rights

Children that are born or naturalized in the United States are citizens and are guaranteed that their natural rights of autonomy, self-preservation, and the right to the fruit of one's labor are protected from government intrusion under the Constitution. Thus, is it wise to assert new enumerated rights for children based on a supposed separate nature of children from the family, who by all intents and purposes do not fend for themselves, pay taxes, own property, or possess the intellectual and emotional capacity to understand what is in their best interests in the long term?

Children's comprehension of long-term plans and investments in time beyond the mere appetite and pressure of instant gratification is well known. Here, the fear is that by establishing "Children's Rights," as separate from those of other citizens, would dilute what fundamental rights truly mean through an expansion of rights on an absurd foundational basis of autonomous child agents. Children need to be allowed to be children. Adults should not project concepts of autonomy and developed comprehension onto children, because it erodes the role and duties parents have for the wellbeing of the child. Human children require more nurture and education from their parents than any other animal on the planet, and government can never replace the parent's role. Nonetheless, this dependency can be abused when it comes to the fruit of the labor

of children in a factory. From this limited confine of natural rights, there is an argument for the inclusion of children's rights within the Constitution under the 13th Amendment.

The 13th Amendment abolishes slavery and involuntary servitude, except as punishment for a crime in the United States. This Amendment does more than just abolish slavery, it affirms the natural right of the individual to own the fruit of their labor. In recognition that some children in unloving families, or in impoverished ones, may involuntarily be forced to work, the assumption of the fruits of their labor by the family may violate the 13th Amendment. Thus, to protect these children additional language addressing the involuntary labor of children in the 13th Amendment could read: "Neither slavery, involuntary servitude, nor the involuntary servitude of the labor of children under the age of consent, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." This additional language to the 13th Amendment would stop the managers and the board of directors of factories seeking child labor as a tool to artificially reduce their labor costs and increase their profits. Moreover, it would stop family members from assuming the wages of children who could not consent, and yet it would not deny the ability of children to work on farms, or to seek work once they reached a determined age of majority. The additional language to the 13th Amendment would simply deny the opportunity of adults to force children to work and steal the fruit of their labor solely for their benefit.

There is also a second argument that could be made for the addition of language that would protect children's rights to an education, but this argument is not as succinct and is susceptible to intense criticism. In Brown v Board of Education (1954), the Supreme Court held not only that the separate but equal doctrine was unconstitutional, but just as important, the court reasoned that the denial of an adequate education was a denial of the opportunity of a child to

pursue happiness. The Court recognized that knowledge and guidance is essential to have the ability to pursue a life filled with enlightenment instead of ignorance. Based on the reasoning in Brown, it could be argued that an amendment addressing the right to an education might be reasonable.

However, the right to what education, provided by who, and based on what? When a government provides a public education there is no guarantee on its quality. Moreover, a fundamental right to an education puts the citizens in a dangerous position where now the government decides what a good education is, not the individual or parent. Parents are in the best position to provide for their children's educational needs and to choose the manner in which they are raised and nurtured. In Troxel v. Granville (2000), the Supreme Court reaffirmed a parent's liberty right to educate and raise their children as they see fit.

The concept of a fundamental right to an education is a philosophical claim under substantive due process, not necessarily a legal standard. Not until the Sixth Circuit held in Gary B., et al. v. Whitmer, et al. (2020), that if a child goes to a public school, he or she is guaranteed a "basic education." All this meant in the context of the case, is that the plaintiffs had a fundamental right to be able to read after they graduated from a public-school system. This surely is not a high standard by any means, and our society as a whole should be shocked that an American city such as Detroit in the 21st century could fail to meet this basic level of education. This case itself is evidence of a powerful and valid criticism against governmental run education where the system is wholly incapable of providing an essential part of the ability to pursue happiness, like reading. In recognition that children in all cases cannot always choose the location or reputation of an institution that will teach them, the right of the parents to choose the best interests of the child is paramount. Thus, an inclusion of an amendment of a child's

fundamental right to an education is not reasonable, because it supposes the government can replace the duty of the parent to provide for the welfare of the child without checks or balances on the level of education the government is providing.

Conclusion

In summation, based solely on natural rights, the concept of an enumeration of children's rights in addition to their rights of citizenship under the Constitution is problematic to say the least. On one level the argument endorses a "should be" in a normative fashion in regards to a fundamental right to an education, and on another level, the argument against involuntary labor of children finds a comfortable spot in the 13th Amendment.

The calls for a fundamental right to an education dilutes what a fundamental right truly is based on natural rights in a state of nature. Perhaps it could be argued that an advanced and just society would guarantee an education, but who decides what is taught and what is of value? This is not the proper role of a limited government where the people are the sovereign. This argument gets even messier when you add in the Establishment Clause and the Free exercise Clause in regards to education. Thus, based purely on the concept that in the state of nature, the raising of children, protecting them from harm, and providing them an education is the role of the parent, an additional amendment to the Constitution providing for a child's right to an education is inherently flawed.

Finally, this leaves the argument against the involuntary servitude of children for the benefit of the parents and the family as a whole. Although, Congress and President Franklin D. Roosevelt passed the National Industrial Recovery Act (1933) that established a minimum working age of 16 for laborers in factories and other industries, prior to the Act, children from 6 years old to 16 could be forced to work with no limitations for a hundred years of

industrialization. Therefore, this seems to be the only logical argument for an addition of children's rights that would have protected them from working in horrific conditions in factories. Thus, at the time of the ratification of the 13th Amendment, additional language that would protect the natural right to the fruit of one's labor regardless of their age would have been reasonable to include in the Constitution, because it affirms the edict of Natural Law.

A Discussion of Rights and the Constitution

III) Natural Law and the Supreme Court's Holdings

The Constitution, as the embodiment of the philosophy of Natural Law, is the primary check against all municipal law. The Judicial Branch of the United States is charged with scrutinizing legislative laws and interpreting the Constitution to protect individual liberty, and ensure a consistent application of the law. But what happens when the Supreme Court gets it wrong? Is that truly the end of the issue? Or does Natural Law overrule the holding of the Court?

A) Compromises that Perpetuated Slavery

Prior to one of the most egregious decisions regarding natural rights by the Supreme Court in Dred Scott v. Sandford (1857), the issue of slavery was not merely a legal issue, but a social and economic one. The pseudo-sciences of the time, such as phrenology and the spurious theories of Samuel Cartwright, were used as tools to prove that the immoral institution of slavery was scientific and just. Samuel Cartwright's: Natural History of the Prognathous Species of Mankind (1851), and his article: Diseases and Peculiarities of the Negro Race (DeBow's Review XI, 1851), exemplified prejudice disguised as science that was wholly devoid of the scientific method. In Cartwright's articles and speeches, he systematically dehumanized the enslaved and proposed that they were inherently a separate species related to monkeys. Moreover, he conjured up mental disorders of the enslaved; one being particularly nefarious called Drapetomania, that caused slaves to want to run away. These types of claims were further developed in 19th and 20th centuries and used in social-darwinism and eugenics. However, it is the use of municipal law predicated on illogic and prejudice, that is the primary tool that perpetuated the institution of slavery.

Since the Constitutional Convention there had been compromise after compromise on the issue of slavery pushing the issue back to a later time. In 1820, the advocates of slavery and the

abolitionists came to another compromise called the Missouri Compromise. At the heart of the Missouri Comprise was the struggle over the control of Congress. The Missouri Compromise stipulated that for each slave state that entered the Union from the territories, a free state must also be admitted. This kept the balance of power equal in the Senate, allowing slave states to continue to assert their interests in Congress, and threaten to leave the Union if their interests were not capitulated to, just as they did at the Constitutional Convention. The Southern states knew that if they lost the Senate, they would lose the ability to continue the institution of slavery; thus, the Missouri Compromise was the mechanism that allowed them to maintain the institution. This was not as the Founding Fathers had hoped. They believed the institution of slavery would fade from the the nation in time, but the longer it continued, the more entrenched the parties' views became. The slave holder's view was based on the sheer magnitude of wealth that was involved in the investment of slavery, and was trying to protect that economic investment. The view of the abolitionists, was the view that slavery violated Natural Law and had no place in a democracy that was based on the concept of individual liberty.

In 1850, Congress passed a new Fugitive Slave Act that further solidified the rights of slave owners. This new Act, now made it a legal duty of local law enforcement officers (L.E.O) to enforce the federal scheme and made L.E. O.'s personally liable to the owner of the slave if they failed to enforce the federal law, despite its violation of the 10th Amendment's non-commandeering doctrine. Nonetheless, politicians constantly looking to solve the issue of slavery never addressed the social prejudices and economic realities of slavery. Of the proposed schemes, like the founding of Liberia to return slaves to Africa, one scheme gained ground called popular sovereignty. Popular sovereignty was the idea that instead of the Missouri Compromise guaranteeing an equal number of slave states and free states, the people of each territory would

choose for themselves if they were a free or slave state. This proposed compromise still did not address the natural rights issue and the Supreme Court had yet to weigh in.

B) Slavery and the Dred Scott Decision

In Dred Scott v. Sandford (1857), the Supreme Court finally weighed in on its position of whether a slave taken into a territory that outlawed slavery was protected from the Fugitive Slave Act, and therefore was protected under the privileges and immunities of that territory's laws.

Dred Scott was born into slavery and was purchased by Dr. John Emerson in Missouri. In 1843, Dr. Emerson, a military surgeon, took Scott into the Wisconsin and Illinois territories where slavery was outlawed by the Missouri Compromise. While in the territories Dr. Emerson allowed Scott to marry Harriet Robinson. After the marriage, Emerson was reassigned to Louisiana and left the Scotts in the territories. While Emerson was in Louisiana, he married Irene Sanford. Emerson and his wife returned to Missouri in 1842 and the Scotts accompanied them.

The following year Emerson died. His widow began to hire out Scott, his wife, and their children for her profit. On April 6, 1846, Scott and his wife sued Emerson's widow for their freedom on the grounds that they lived in a free territory. The Scotts lost in the St. Louis County Circuit Court. Scott appealed in 1850, and this time won. Emerson's widow appealed to the Missouri Supreme Court in 1852. The Missouri Supreme Court reversed and Emerson's widow left Missouri and moved to Massachusetts. She subsequently left her estate in Missouri to her brother John Sanford who was a resident of New York. In 1853, Scott sued Sanford (where Sanford's name is misspelled as Sandford) in a Missouri federal court and lost. Scott appealed to the United States Supreme Court in 1856.

During the same time, in July of 1856, in Galena Illinois, Abraham Lincoln was asked his opinion on the issue of slavery in the American territories and replied: "The Supreme Court of

the United States is the tribunal to decide such questions, and we (Republicans) will submit to its decisions; and if you (Democrats) do also, there will be an end to the matter."

The Supreme Court gave Lincoln, the nation, and the Scotts its opinion on the matter in its notorious majority opinion written by Chief Justice Roger B. Taney. The Court held that a slave was not a citizen, and thus was not protected under the privileges and immunities of the Constitution. Since, Scott was not a citizen, but was regarded as chattel property, he had no standing to sue in court. The court reasoned that slaves were brought into the country until 1808 thus there was no intent for them to become citizens. The Court refused to address the issue of natural rights and further held that the Missouri Compromise was unconstitutional, because there was no explicit power in the Constitution that allowed Congress the ability to acquire territory and to govern it permanently in that character.

Justice Benjamin R. Curtis's dissent argued that the majority opinion was highly flawed as blacks were already considered citizens from the time of the Constitutional Convention in New York, New Jersey, North Carolina, New Hampshire, and Massachusetts. Moreover, in those states the descendants of slaves had the right to vote. Justice Curtis further argued that the Court had no authority to overturn the Missouri Compromise, and that slavery violated Natural Law. Thus, as slavery was only supported by municipal law, Congress had the plenary power to regulate municipal law through legislative acts.

Nonetheless, the Court's holding not only sealed the fate of the Scotts, but hardened the lines among the parties on the issue of slavery. These issues would be debated once again by Stephan A. Douglas and Abraham Lincoln in their debates of 1858.

C) Lincoln-Douglas Debates

In 1858, Abraham Lincoln and Stephan A. Douglas ran against each other for a senatorial

seat representing Illinois. During the debates, Douglas argued that the territories themselves should choose if they were slave states or free states. Douglas believed this would allow individual citizens to decide through the power of their vote if the state would be pro-slave or not. Thus, rejecting the power of the federal government to decide that one state is free and another slave. At first blush, popular sovereignty would appear to support democracy, and be an essential form of compromise with the increasing calls by Southern states to secede from the Union; however, Lincoln knew that the issue was an issue of natural rights, not an issue of compromise and democratic choice. For abolitionists, the institution of slavery was against Natural Law, and although Lincoln was not a strict abolitionist, he understood that the prejudices and economic interests of slavery would not simply go away in light of the Supreme Court's decision in Dred Scott v. Sanford (1857).

After the debates, Lincoln narrowly lost the Senate seat to Douglas, but won the nomination of the Republican party for President, and won the presidential election on November 6, 1860. Lincoln's victory was the end of the perpetual compromises on the issue of slavery when on December 20th, 1860, South Carolina became the first southern state to formally secede from the Union. Seven more southern states would secede by March, and on April 12, 1861, the first shots of the Civil War began with the shelling of Fort Sumter in Charleston, South Carolina.

D) Reconstruction Amendments

On April 9, 1865, with the surrender of the Confederate Army of Northern Virginia under General Robert E. Lee to Union General Ulysses S. Grant, at Appomattox Court House in Central Virginia, the Civil War was effectively over. With a Union victory, Congress took advantage of their pollical power as the only representatives in Congress devoid of any Southern

representation and passed the 13th, 14th, and 15th Amendments. These Amendments overruled the immoral holding of Dred Scott, and should have ended the issue of slavery once and for all, but that was not the case. The entrenched prejudice against black individuals emboldened by pseudo-science in the vein of Samuel Cartwright, and the newly developed philosophy of Social-Darwinism, (famously expressed by Herbert Spencer's claim of the "survival of the fittest," wrongfully based on Charles Darwin's ground-breaking theory of evolution in his book: On the Origin of Species (1859)), would be used to subordinate newly freed-people and their children.

E) Black Codes After the Civil War

A prime example of municipal law being used to continue the subordination of freedmen and freedwomen was the so-called Mississippi Civil Rights Act of 1865. In order to protect the interests of previous slave holders, the legislature of Mississippi reimagined the Fugitive Slave Acts into new vagrancy laws, and merely changed the language from master and slave to master and apprentice.

Under the Mississippi Civil Rights Act (the Act), freedmen and mulattos could only rent homes or apartments in incorporated towns zoned exclusively as black. They could not intermarry, they could not testify against a white person, and most importantly, they must prove that they had a job with a handwritten license from the mayor in the town in which they lived in. If they were working outside the town in which they lived in, they also had to have a license that authorized their work outside of that town. These licenses could be revoked at any time. If an individual was stopped by any white person, and could not produce the evidence required by the Act, the individual was considered a vagrant under the law and could be arrested. Upon their subsequent trial, they had no right to testify on their own behalf, and after conviction, the county would rent them out to plantations filling county coffers.

The Act did not stop there. If a black individual quit his or her job, they could be arrested by any individual or police officer and be carried back to their employer against their will. The said officer or person who arrested and returned a putative vagrant, was entitled to $5.00 as payment. Moreover, the Act allowed minor children, who were either orphaned or in poverty, to be turned over to the clerk of the probate court of that municipality, who would then rent them out on bond to a master. In essence, the counties became the new slave traders, because now it had the exclusive right to control where black people lived and worked while receiving fees for the service.

In order to make the Act appear to be for the welfare of the community, it also stipulated that every county levy a head tax on every freed person from the age of 18 to 60, not to exceed $1.00, which was intended to create a fund called the Freedman's Pauper Fund. This fund was supposedly for the maintenance of indigent freedman. It is important to recognize though, that the welfare of impoverished black citizens of Mississippi was being funded by the taxation of only black citizens, not based on the taxes of all citizens of Mississippi as a whole. This is not a concept of a social safety net for the benefit of all a state's citizens, but one that declares one citizen is inherently different from another.

Civil Rights Acts and Civil Rights Cases

After the Civil War all former slave states and some northern states passed similar black codes in an attempt to keep freed people physically separate, and to limit their Constitutional natural rights. In anticipation of these types of municipal laws Congress enacted the Civil Rights Act of 1866. The Act mandated that all citizens, regardless of race or previous condition of servitude, to have the same right "…to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real property, and to full and equal

benefit of all laws and proceedings for the security of person and property….” Violation of the Act was, and still is, a federal crime giving Federal Courts jurisdiction over these violations.

Eleven years later, with the expansion of black codes, Congress passed the Civil Rights Act of 1875. This Act: “entitled [all persons] to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of laws, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.” Simple and straight-forward right? Wrong.

Despite the ratification of the 13th, 14th, and 15th Amendments (Civil War Amendments), and the Civil Rights Acts of 1866 and 1875, municipal laws were used by the states to continue to oppress the liberty of freed people. The Supreme Court once again decided it was due time to give an opinion on the black codes that clearly violated Natural Law, the Civil War Amendments, and the Civil Rights Acts of 1866 and 1875. The Court would give its opinion on the effect of black codes and who the Civil War Amendments applied to in a collation of five cases called: The Civil Rights Cases (1883).

The Civil Rights Cases involved five different instances where black persons were denied the same accommodations to stay at a hotel, ride a train, or to go to a theatre like that of white citizens, in violation of the Civil War Amendments and the Civil Rights Acts. The Court held that the Civil War Amendments and the federal Civil Rights Acts only applied to state actors, not individual’s conduct. The Court reasoned that the 13th Amendment only applied to actual involuntary servitude, and not any other forms of discrimination. It also reasoned that the 14th Amendment only regulated state actors, and thus was not applicable to individual’s acts of discrimination. The Court’s holding meant that all of the legislative intent of Congress to wipe

the scourge of slavery, and the badges of slavery, from the nation now only limited state actors from denying freed people their natural rights.

Justice John Marshall Harlan's dissent skewers the majorities miscarriage of justice and defiance of Congressional intent to ensure the natural rights of all U.S. citizens. Justice Harlan argued that things were not as simple as the majority had argued. He pointed out that some private businesses like trains, theatres, and hotels act as public functions, because they were regulated by the states through state licensing requirements. Thus, the denial of blacks into theatres, hotels, and railroads was not individual acts of racism, but were acts made by quasi-governmental actors in violation of the 14th Amendment's equal protection clause, the 13th Amendment's badges of slavery, and the natural right to freedom of movement. Unfortunately, logic, following the rule of law, and affirming the natural rights of the individual, as Justice Harlan rightfully argued, did not win the day.

E) Segregation, Civil Rights, and the Commerce Clause

Thirteen years later, the Court would solidify its position of racial inequality and what being an equal citizen meant in Plessy v Ferguson (1896). In Plessy, Homer Plessy refused to sit in a car designated for blacks. Plessy was 1/8 African and was considered "octoroon" and would not visibly be considered black. Plessy was intentionally violating the law in order to challenge the constitutionality of the Louisiana separate car law.

The Court reasoned that although the 14th Amendment was intended to promote equality of all races it could not have been intended to abolish all distinctions, or to force social equality where whites did not want to sit next to blacks. The Court held that the separate car law did not violate the Constitution because the doctrine of separate but equal did not infer inferiority, and if an individual black person felt inferior having to sit in a separate car that was their problem.

It would take fifty-eight years for the doctrine of separate but equal to be overturned in Brown v Board of Education (1954). In Brown, the Court held that the reasoning in Plessy was inherently flawed, and separation did in fact cause feelings of inferiority among black children attending separate schools.

It would take another decade for the reasoning in the Civil Rights Cases to be overturned in Heart of Atlanta Motel Inc., v. United States (1964). The Court reasoned that through the Commerce Clause, Congress could enforce the Civil Rights Acts against railroads, theaters, and motels due to their connection to interstate travel, and the right of citizens to freely move between the states and maintain the same privileges and immunities among them.

Conclusion

108 years after Abraham Lincoln argued that a Supreme Court ruling on the issue of slavery "…will be the end to the matter," was clearly erroneous. It may be argued that he was challenging the validity of the Supreme Court's holdings in general, but that position is likely a bit too far. There is no direct evidence to show that Lincoln would have advocated for a position that would invalidate the legitimacy of the Court. However, as a lawyer he would have understood the argument of Natural Law, and even if a holding from the Supreme Court invalidated the institution of slavery, he knew the Court's holding would not be the end of it.

From the truism of natural rights, the Supreme Court's holdings are only valid if they support the natural rights of the individual. Any limitations on those rights must be related to a compelling government interest, and the law must be narrowly tailored to that interest. Thus, the denial of natural rights to any citizen does not end with the Supreme Court's ruling, but continues until the power of government bends to the truism of Natural Law.

Work Cited

- Alexis de Tocqueville's: Democracy in America, Chapter VII, Influence of Democracy on the Family. p. 196

- Cherokee Constitution of 1827

- John Locke: Two Treatises of Government

-United Sates Constitution: Article I, Section 8, Clause 3, Article I Section 2, Clause 3

- Trade and Intercourse Act of 1790

-Tecumseh, Speech at Old Vincennes, 1810. p. 40