Democracy is Not a Philosophy:

Why Moral and Ethical Principles Should be Removed from a Definition of Democracy

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Introduction

The following argument challenges the assumption that democracy has inherent moral and ethical principles of equality, civil liberties protections, direct accountability to the people, or is a moment of collective democratization, because democracy does not have any inherent qualities in and of itself. It merely is one example of group organization in the form of a nation state, or as Aristotle called them: "constitutions" (Aristotle, Politics: Book III). Moral and ethical principles that are superimposed onto a definition of democracy are normative explanations of what political theorists, historians, and political scientists want democracy to be; not what democracy is. This creates issues when comparing democracies, because it creates multiple categories and subcategories of democracies that are too malleable. Furthermore, when critiquing a democracy's history, or actions, an over inclusive definition of democracy generates ill-conceived theories of democracy, such as democratization and democratic backsliding, predicated on moral principles as the foundation of democracy in and of itself. Therefore, it is important to disjoin moral and ethical principles from a definition of democracy in order to give a more precise analysis of a democracy in real-time, and over time, by analyzing whether a democracy's legal system, rule of law, and due process rights live up to the natural rights expectations enshrined in classical liberalism.

In order to construct this argument, first I will provide examples of the varying definitions and beliefs about democracy through classical and modern political theory, and then provide examples of criticisms of these concepts that desire a more expansive definition of democracy. Second, I will construct a minimalist definition of democracy that is more procedural and institutional in order to create a separation between the principles of natural rights and the definitional concept of democracy. Third, I will discuss the differences between the

political philosophies of social contract theory and natural law as argued by Thomas Hobbes, Jean Jacques Rousseau, and John Locke in order to isolate natural rights from municipal law. Finally, I will use historical American jurisprudence as an example to illustrate that a democracy is in a constant state of fluctuation between moments of autocratic power under municipal law, and moments of living up to the moral and ethical principles of natural rights law.

I. Varying Definitions of Democracy

Contemporary definitions of democracy can include a myriad of normative qualities or stipulations to them. This makes it difficult to find consensus on what democracy in the political science and political theory fields means or does not mean. These varying definitions make it easy to critique a democracy, or to create subcategories of democracies to fit whatever analysis an analyst wants. Normally this type of approach would be called begging the question or confirmation bias. Therefore, it is necessary to expose the varying ways in which democracy has been defined, and critiqued, in order to place democracy within a framework of realism over aspirationalism. This is important, because without a consensus on a formal definition of democracy political theory and political science will be subject to an ever-emerging recategorization of democratic idealism.

In Aristotle's: *Politics (330BCE)*, he states that "…democracy is said to be the government of the many (Book III, $1279^{b}8$) and that "democracy [is the view of] the needy" ($1279^{b}7$). For Aristotle, democracy was a "perversion" of a true form of government "…in which the one, or the few, or the many, govern with a view of the common interest; but governments which rule with a view to the private interest, whether of the one, or of the few, or of the many are perversions" ($1279^{a}7$). This distinction is important, because Aristotle argued that virtue of character was important for leaders, and that the common good could be obtained by leaders who

preserved the common interest, but as reality reaffirms over and over again, not all leaders are interested in the common good. Aristotle believed that democracy would not be an effective government for the common good, because the masses would tend to the needs of the "needy" (Book III &IV). This is not a positive definition of democracy that evokes a sense of distrust of the many.

Similarly, in Federalist 10 (1788) James Madison evokes the same distrust of the masses focused on self-interest instead of the common good when discussing the tendency of humans towards faction. Madison described a faction as "…a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest adversed to the rights of other citizens, or to the permanent and aggregate interests of the community." Moreover, in Federalist 55, Madison states that: "…there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form." Here, Madison is arguing two things. First, that his view of democracy is in the same vein of Aristotle: a "depravity" to a true government, and that a representative democracy represents a true government, because it will limit factions. Second, he has defined democracy in terms of having qualities of self-interest due to the "degree of depravity of mankind." These theoretical views of democracy evoke a sense of caution and distrust of other human beings due to the qualities of good and bad that embody humankind.

In 1831, Alexis de Tocqueville described American democracy as "…the equality of conditions" that were shaping American democracy. For Tocqueville, this was important as the American Revolution essentially destroyed the philosophical and legal conception of the divine

right of kings. Therefore, "equality of conditions" is the predicate for legal conditions and would be a definition of democracy in a theoretical state of equality. Tocqueville's conception of democracy thus lacks the skepticism of Aristotle and Madison and appears to be philosophically optimistic.

In 1861, John Stuart Mill, also supported an "equality of conditions," or a rights view of full suffrage as a definition of democracy. In *Considerations on Representative Government,* Mill defines the difference between majoritarianism and democracy. According to Mill:

> "Two very different ideas usually confounded under the name democracy. The pure idea of democracy, according to its definition, is the government of the whole people, equally represented. Democracy, as commonly conceived and hitherto practiced, is the government of the whole people by a mere majority of the people exclusively represented. The former is synonymous with the equality of all citizens; the latter strangely confounded with it, is a government of privilege in favor of the numerical majority, who alone possess practically any voice in the state" (Mill, p. 92)

This definition is important as it attacks the conception of majority rule and focuses on the rights of the minority against a majority. This harkens to Madison's fear of majority factions, but differs in that Mill does not believe that the minority factions are of privilege but are of lesser status. Therefore, in order to protect the interests of the minority a "pure democracy" is a government of the whole people within a defined geographic area. Under this definition, not a single democracy on earth would meet the criteria put forth.

Inequality and the lack of full suffrage is an important critique on democracy and often is used as a tool to expose that idealism and reality are not one in the same. Prominent contemporary literature such as: W.E.B. DuBois's "*Black Reconstruction in America…*" and

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C.L.R. James's "*The Black Jacobins…,"* illustrate the experiences that black slaves endured, and focuses on the contributions enslaved, and freed black peoples, gave to the British colonies of North America, the European colonies in the Caribbean, and in the United States. These experiences are intended to argue that due to the lack of equality under the law, or the ability to freely exercise basic freedom within these democracies, that these were not true democracies at all until full suffrage was realized.

Similarly, Pamela Paxton's "*Women's Suffrage in the Measurement of Democracy…*" provides another important critique on the the definition of democracy as encompassing full suffrage. Paxton importantly points out that up until her analysis that historical critiques of full suffrage have conspicuously left out women's struggles to gain their right to vote. In the opening of her analysis, she states that: "[c]ontemporary scholars' definitions of democracy typically involve universal suffrage. These definitions are generally inclusive requiring all adults of a certain geographic area to have certain political privileges." However, her criticism is based on when women won their right to vote as the marker of when a democracy became a full democracy (Paxton, p.1). Thus, when comparing democracies around the world all countries that were considered democracies were not democracies until women had the right to vote (Ibid, p.92).

Even if one agrees with these critiques as I do, it further exposes why there is a problem with multiple definitions of democracy, because it makes it more difficult to compare democracies, or to qualify at what stage a country is a democracy.

In yet another example of what a definition of democracy should be is the conception of democratization by Sheldon Wolin. In Sheldon Wolin's *Fugitive Democracy*, he defines democracy as a moment of revolution that starts the path to a fulfilled conception of democracy

(p.77). He poses a tension between revolution, which he defines as a political movement against the status quo, and a constitution, which he defines as a structured political system with governmental authority. (p.84). His main criticism is that a constitutional democracy, based on the view of democracy that Aristotle and Madison held, is flawed and biased. Therefore, a constitution is a selective addition to democracy onto preexisting institutions that lack democratic principles. In contrast, democratic constitutionalism is the people having control of the choice of its institutions. For Wolin, democracy is a tool of revolution for the people not a philosophy of ideas. Thus, democracy is a moment of democratization allowing the people to have more control over the government (p 84 - 92.)

In recognition of the problem with fluid definitions of democracy modern political theorists, such as Joseph Schumpeter and Robert Dahl, have attempted to define or more procedural definition of democracy based on a foundational level of how a democracy functions, instead of philosophical principles, or based on the skepticism of human nature.

In Joseph Schumpeter's: *Capitalism, Socialism, and Democracy*, (1942) he clarifies the 18th Century definition of democracy as an "…institutional arrangement for arriving at political decisions which realizes the common good…through the election of individuals who are to assemble in order to carry out this will" (p.275). In contrast, his minimalist or procedural definition of democracy is described as an "…institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote (p.293). Here, Schumpeter is critiquing the definition of democracy predicated on the common good that is based on aspirational principles, and defines democracy simply in terms of how power is transferred from the polis to elected leaders.

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Moreover, in Robert Dahl's: *Polyarchy,* (1972) Dahl critiques the definition of democracy as an ideal "political system [which] one of the characteristics…is the quality of being completely or almost completely responsive to all its citizens. Whether such a system actually exists, has existed, or can exist need not concern us for the moment' (p.2). This clarification is important as Dahl is replacing the normative definitions on what democracy should mean and replacing it with a conception that more resembles the real world we live in.

His analysis compares an idealism of democracy against practical regimes called Polyarchies. "Polyarchies…may be thought of as relatively (but incompletely) democratized regimes, or, to put it another way, polyarchies are regimes that have been substantially popularized and liberalized, that is, highly inclusive and extensively open to public contestation" (p.8). By limiting the definition of democracy to formalistic procedures and institutions that are foundational aspects of democracy, Dahl is able to redefine a democracy as a genre of government: a Polyarchy.

For Dahl, only 3 requirements are needed to keep a regime accountable to the people: 1) the ability of the people "to formulate their preferences, 2) the ability of the people "to signify their preferences to their fellow citizens and the government by individual and collective action," and 3) "to have their preferences weighed equally in the conduct of the government, that is, weighted with no discrimination because of the context or source of the preference" (p.2). Of course, this brings us right back to what attributes, or rights, would be entangled in this 3-point requirement of democracy. Dahl expands on these 3 points to include institutional fundamentals as freedom of expression, association, and the right to vote for political leaders that "compete for votes" (p.3).

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Although Dahl has attempted to separate normative claims in his definition of democracy, he realizes that in order for his theory of Polyachry to be sound he must address the rights issue as requirements for a democracy. Therefore, even though he is not defining democracy as having rights, equality, full suffrage, or a moment of revolutionary democratization, he still realizes that these rights are inherently connected with a free society where a government is accountable to its citizens.

David Collier and Steven Levitsky explain this conundrum effectively in their article: "*Democracy with Adjectives*." They point out that the problem with having so many definitions of democracy is that it creates issues with "conceptual stretching" (p.442). This may lead "…researchers…confront[ing] a particular case that is classified as a democracy on the basis of the commonly accepted definition yet is not seen as fully democratic in light of a larger shared understanding of the concept" (Ibid).

So, where does this leave us then? Are we to simply just choose a definition of democracy that agrees with our predispositions, and political ideologies, and argue for that interpretation in our analysis? Or must we jettison the concepts of liberty, equality, and fraternity often associated with democracy for a formalistic definition of democracy? Or is there another way? Do we not already have a way to test whether a democracy lives up to the principles of natural rights and civil liberties, without having to resort to creative categories and sub-categories of democracies like genres of music at a record store?

I believe there is, and that is to provide a limited, yet realistic, definition of democracy and then judge that democracy based on whether its rule of law, legal precedent, and due process aligns with the philosophical principles of natural rights. In essence, we will separate the definition of democracy from the principles of natural rights as two separate but intimately

connected conceptions of theory and form, but are experienced through the rule of law, i.e., what it actually feels like to live under the power of a democracy.

A. Proposed Minimalist Definition of Democracy

One of the major strengths of Common Law is that the concepts, elements, and principles of the law are shared by all lawyers in every nation that stem from British Common Law. Under Common Law, the definition for battery always has 2 elements: a) an intentional "harmful or offensive contact with the person of the other or third person…and b) a harmful or offensive contact…directly or indirectly results (Restatement (Second) of Torts, §13 (1965). This gives a unified definition of an action that is applicable to the real world beyond normative conceptions of what battery should or should not mean.

Political science and political theory could benefit greatly by adopting this legalistic style of concrete definitions with corresponding elements, and apply it to an agreed upon definition of democracy that is practical and more institutional based. To foster a step towards consensus, the following is a proposed minimalist definition of democracy with the following elements: 1) Free and fair ability to vote for representatives, 2) competitive elections for office, 3) separation of powers within the government, 4) institutional ability of representatives to govern, and 5) effective due process.

Here, of course the immediate criticism is that I'm simply doing what all other political theorist have done and envisioned yet one more normative definition of democracy. However, this minimalist definition is a synthesis of definitions that have been used in other analyses in order to focus on the institutional nature of a democracy, instead of focusing on the qualities of natural rights at this stage in the analysis. This allows for the beneficial critiques of democracy

stated above, but shifts them into a legalistic critique and not one based on the differences in diverging definitions of democracy.

Therefore, when a democracy acts in opposition to natural rights principles it does not mean it is no longer a democracy, an unrealized democracy, or backsliding into another form of government, it means that that democracy is acting in a way that creates less freedom for its citizens. This may be due to factions as Madison warned, where elected officials are acting in their own self-interest instead of the people they represent, or it may be due to war, crisis, or imposing political ideology as morality onto the people. Either way, when a democracy imposes an unjust law, or acts unjustly under the color of law undermining the natural rights of its citizens, it is still doing so through a democratic process. Thus, it is important to recognize that a democracy can, and often does, undermine natural rights by majority vote and the creation of legislation by representatives of that democracy.

II. Classical Liberalism and Natural Rights

So, why is it so important to separate moral and ethical principles of natural rights and full suffrage from definitions of democracy? The power in doing so allows for an analysis that is not predicated on an aspirational conception of democracy, but one based on how natural rights, under natural law, fit into a concept of rule by the consent of the governed.

In moral philosophy, there are arguments that posit that there are metaphysical moral and ethical principles that are a priori. These principles exist on a fundamental level of existence and are known to rational beings by their experience in being alive. There are different schools of thought on moral philosophy such as: Aristotle's virtue ethics (See: *Nicomachean Ethics*), Emmanual Kant's deontological rules or categorical imperative (See: *Groundwork of the Metaphysics of Morals*), Jermey Bentham's utilitarianism (See: *An Introduction to the Principles*

of Moral and Legislation), Thomas Hobbes's social contract theory, Jean-Jacques Rousseau's secular social contract theory, John Locke's natural rights law, or John Rawls's veil of ignorance (See: *A Theory of Justice*). Despite these different schools of thought, there is a moral principle of importance called the supervenience principle that unifies them all.

The supervenience principle states that a set of principles supervenes onto another set of principles creating a causal chain of logic. "In slogan form, "there cannot be an A-difference without a B -difference" (plato.stanford.edu). Simply, metaphysical moral and ethical principles exist in an objectively true nature at all times, and an application of these principles in the physical world cannot differ from these principles without there being a change in objectively moral principles first. Thus, the supervenience principle is important for our discussion because it gathers the moral and ethical principles that are often superimposed onto a definition of democracy, and gives them a home upon which governance and the rule of law can be judged based on their congruence with moral and ethical principles.

Here, for brevity's sake only the moral philosophies of Thomas Hobbes, Jean Jacques Rousseau, and John Locke, and their component political theories, will be analyzed in order to place natural law, and classical liberalism, into context of the realities of a functioning democratic state.

Natural law and the hypothetical concept of a state of nature are important foundations for the differences in the political conceptions and moral philosophies of Thomas Hobbes, Jean Jacques Rousseau, and John Locke. Each of these political philosophers viewed the state of nature, and whether natural rights extended from the state of nature under natural law, in very different ways.

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A. Hobbes

In Thomas Hobbe's *Leviathan,* Chapter 13: *"Of the Natural Conditions of Mankind as Concerning their Felicity, and Misery,* he depicts the state of nature as one that allows individuals unbridled freedom to use their labor and mind to take possession of anything they put their minds to, under the caveat that all individuals are not created equal (pgs. 99 – 100). This interpretation of the state of nature creates natural rights of the individual to own anything she can control or dominate. Therefore, due to the inequality in the capabilities of individuals, humans are in a constant state of war with one another. Fighting over possession and control of goods, territorial rights, or mastery over others. This creates three "…causes of quarrel. First, Competition; Secondly, Diffidence; Thirdly, Glory. The first maketh men invade for Gain; the second, for Safety; and the third, for Reputation" (p.101). This description of mankind paints a picture of endless violence, no unification of resource power, uncertainty, fear, and famously a life that is "…solitary, poore, nasty, brutish, and short" (p.102).

In a Hobbesian state of nature there is no common power, no law, and where there is no law there is only injustice (p.103). Based on this description it would only make sense that rational beings would desire to escape this condition and seek common goals or a common good. In order to accomplish shared goals, and shed the constant state of war with one another, individuals must be willing to give up their natural rights in exchange for peace (p.105). They must be willing to lay their rights aside by "…simply Renouncing…or by Transferring it to another" (p.106). However, when an individual transfers their rights to another they do so in consideration of something of value (p.107). This is the foundational legal concept of the elements of contract law.

From this concept of consideration, there is also an initial offer, acceptance, and then consideration. This is an analogy of Hobbes's social contract theory. Here, Hobbes is setting up the argument that due to the state of nature, an individual would give up most rights for protection and security to an absolute sovereign or strong monarch. In essence, the absolute sovereign offers security and peace in exchange for obedience. The individual is supposed to see value in security and thus will transfer almost all of their natural rights to the sovereign formalizing the contract. According to Hobbes, this form of social contract theory is predicated on an individual viewing the exchange of natural rights for security as rational. In our modern world, especially in American democracy, this conception of a common good is readily rejected and would be perceived as an irrational path towards totalitarianism. It is intuitively and rationally understood that the rachet effect of centralized power will never reset in favor of the natural rights of the individual under this schema.

B. Rousseau

Jean Jacques Rousseau had a different take on the state of nature that aligned with Hobbe's view of the brutal nature of existence outside of a commonwealth or an institutional society. However, Rousseau argued that there were no real substantive natural rights in the state of nature. In Rousseau's famous treatise: *On the Social Contract,* he states poetically in the opening of Chapter 1, that: "[m]an is born free, and everywhere he is in chains. He who believes himself the master of others does not escape being more of a slave than they" (p.17). This passage's poetic nature can be interpreted in many ways. However, in the context of the state of nature and natural rights arguments, Rousseau is making a deep philosophical claim. Here, to be free means to be free of the desire to have power over others. In a state of nature where there is

no common interest, having power over others means, just as Hobbes' viewed it: might makes right.

Rousseau argues that this type of human existence is untenable in the long run and therefore a reciprocal desire to leave the state of nature will naturally and rationally create a "social compact" (p.23). "The clauses of this contract are so determined by the nature of the act…everywhere tacitly accepted and acknowledged" (p.24). Here, this means that individuals entering into a social contract, or born into a social contract, tacitly consent to its authority merely by living within its borders and benefiting from its collective social goods. Furthermore, Rousseau argues that:

> "…in giving himself to all, each person gives himself to no one. And since there is no association over whom he does not acquire the same right that he would grant others over himself, he gains the equivalent of everything he loses, along with a greater amount of force to preserve what he has" (p.24).

Here, the distinction between the desire to enter into a social contract in Hobbes's formulation versus Rousseau's is important, because Rousseau's argument is that an individual joins a society through a metaphorical social contract that benefits all through gaining civil liberty, not through natural liberty. Whereas, Hobbes's argument is predicated on merely gaining security through force. For Rousseau, natural liberty is "…limited solely by the force of the individual involved…" and civil liberty "…which is limited by the general will" creates a "…civil state of moral liberty, which alone makes man truly the master of himself" (p.27).

Thus, under Rousseau's theory of natural rights, and natural law, one only truly gains substantive rights in a civil society and can never actually maintain natural rights in a state of

nature. This is a secular claim that is different than Hobbes and Locke who make appeals to metaphysical authority for the creation of natural rights.

C. Locke

John Locke's view of the state of nature is similar to both Hobbes and Rousseau in the sense that there is an aspect of realism to it. There is a recognition of the selfish, or amoral, person in a state of nature where violence could be used to take from others what they had. However, in Locke's: *Second Treatise of Government* (1690), his argument for a state of nature, and the natural rights that all individuals have from the state of nature, are set out in a different context. In Chapter II §4, Locke argues there is an innate equality of individuals in a state of nature. This is an important argument in order to dispel the claim made by monarchs at the time that they were divinely chosen to rule over others, and that from birth, they were superior to those they ruled over. Locke described this equal state of mankind as:

> "…a state of perfect freedom to order their actions and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man. A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another…" (p.8).

This passage lays out that from a state of nature no one individual is chosen to rule over others or is inherently better than another.

However, unlike Hobbes, Locke recognizes in § 6 that in the state of nature there are still rules that bind interactions, and even though the state of nature is a:

> "…state of liberty, yet it is not a state of license…The state of nature has a law of nature to govern it, which obliges everyone: and reason, which is that law…that

> being all equal and independent no one ought to harm another in his life, health, liberty, or possessions…" (p.9).

These are natural rights within the state of nature that are governed by the natural law of reason. Furthermore, in Chapter V § 27, Locke expands on the context of possessions as property rights. Here, thinking of property as mere tangibles or ownership over tangibles is too confined. Locke infers much more than this, and this conception is the basis of intellectual property rights as well as tangible property rights. Of property he states that:

> "…every man has property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property" (p.19)

In Chapter 8, § 95 – 99, Locke lays out his argument for the basis of a social contract of civil society based on consent and tacit consent. What is important to note here is the difference in Locke's conception of how natural rights work within a civil society versus Rousseau's conception. Rousseau argued that civil society itself, the joining into a civil society, is what granted substantive and actual rights. But Locke argued that individuals maintain their natural rights from the state of nature when they consent, or tacitly consent, to enter or remain within a civil society. In § 95 Locke argues:

> "MEN being, as has been said, by nature, all free, equal, and independent, no one can put out of this estate, and subjected to the political power of another, without his own consent. The only way whereby any one divests himself of his natural liberty, and puts on the bonds of civil society, is by agreeing with other men to

> join and unite into a community for their comfortable, safe, and peaceable living amongst another, in a secure enjoyment of their properties, and a greater security against any, that are not of it. This any number of men may do, because it injures not the freedom of the rest; they are left as they were in the liberty of the state of nature" (p.52).

Moreover, Locke is sure to clarify the extent to which a government's legislative body is limited in its reach and power over the natural liberty of the people within a society. This is extremely important because it is polarly opposite to Hobbes and Rousseau's power of the state. In §131, Locke states that: "…the power of the society, or legislature constituted by them, can never be supposed to extend further, than the common good; but is obliged to secure every one's property…[and] is bound to govern by established standing laws, promulgated and known to the people, and not by extemporary decrees; by indifferent and upright judges…" (p.68). Thus, the only reason that individuals are inherently free and equal within a society is when the government is limited by its ability to infringe on the natural rights of the people who form it.

Here, the important points to take away for our discussion is that Locke's understanding of natural law is that: 1) it is known by reason, and 2) is predicated on individual natural rights protections being necessary to maintain an equal, fair, and just society. However, there is always a natural pull and power of collectivism by majoritarianism that Locke failed to recognize.

Conclusion

This is the underlining tension between the philosophies of natural law according to Hobbes, Rousseau, and Locke. Hobbes is essentially arguing that all humans want is security and will give up all their natural rights for civil privileges. Rousseau argues that there are no true natural liberties that come from the state of nature because actual and substantive rights come

from the capacity of a civil society to effectuate power, i.e., granting and securing rights. Whereas, Locke is making a fundamentally different argument based on the inherent dignity of the individual. For Locke, the individual does not give up any of their inherent rights to the commonwealth other than the right to be judge and executioner of executive authority. Nonetheless, the individual retains the right of individual thought, bodily autonomy, self-preservation, and the right to ownership of one's labor.

Thus, the key take away is the justification of the authority, i.e., power, of government in its relationship to its citizens. Hobbesian governmental power is predicated on the concept of might makes right. While Lockean governmental power is predicated on the limited reach of a government's ability to infringe on the inherent natural liberty of its citizens which are unalienable to the state.

Before going forward there are expected criticisms over my approach to the readings of Hobbes, Rousseau, and Locke. Critics of my approach will argue that I cherrypicked passages from liberalism's principles merely to fit my argument and failed to point out the contradictions, misogyny, and racism that appear in Locke's Second Treatise. Or that I minimized Rousseau's argument and limited Hobbe's only to the power of the executive. However, my argument is predicated on the supervenience principle. Therefore, claims made by these philosophers that are an affront to moral and ethical principles, such as a defense of slavery, are rejected outright. Thus, only focusing on the natural rights argument itself, in the context of human dignity, resolves this criticism.

There may also be criticism that I moved to quickly from natural law to the concern of natural rights. I counter that my argument for what legitimizes natural law is not based on Locke's appeals to God, or Rousseau's secular civil society argument, but it is based on the

supervenience principle that moral rules in and of themselves supervene onto municipal law. Thus, natural rights are the application of natural law that are coded within the body, and as I will show, judging whether a democracy's municipal law falls in line with natural rights law is the most efficient and clear way to judge whether a democracy is more or less free.

III. Theory Put to the Test

In order to determine whether a democracy is more or less free there must be a two-step analysis taken as stated in the introduction. First, it must be determined that by using the proposed minimalist definition of democracy above, whether a government is a democracy or not. Second, that that democracy will be tested to determine whether its legal system lives up to the moral and ethical principles that are encoded within classical liberalism's natural rights law. Specifically, where the law conforms with these principles that democracy is more-free, and when the law does not conform to these principles, that democracy is less free. This analysis will produce a more accurate critique of the health, strength, and freedom of a democracy in real-time, and over-time, more efficiently than theories like democratization, democratic backsliding, or over inclusive definitions of democracy. The chosen democracy to be analyzed will be the United States

To put this theory to the test I will negate the first step of the analysis in regards to the United States, because it is self-evident that the United States meets all five elements of the proposed minimalist definition of a democracy above, and move onto the second step of the analysis and analyze United States Constitutional law. This analysis will expose a pendulum effect that swings between a Hobbesian type authority of a strong centralized government, and the Lockean natural rights principles enshrined in the Bill of Rights and in substantive rights law.

Tracking this pendulum effect is a more realistic marker to judge a democracy than an historical criticism alone.

A. American Constitutional Law

The Declaration of Independence (1776) (Declaration) is the philosophical foundation for the legitimacy of American Constitutional law. When Thomas Jefferson penned the natural rights argument as: "…truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among them are Life, Liberty, and the pursuit of Happiness…," it was a declaration of natural rights law as outlined by Locke. Almost word for word, the Declaration spelled out the primacy of the rights retained by the individual against the power of an illegitimate state. It is no coincidence that Jefferson was evoking Locke, because he considered him a great philosopher and had a painting of him placed prominently in his home at Monticello, in Charlottesville, VA. (which hangs in the same place today).

In regards to Constitutional law, the Declaration's principles are what are incorporated into what is known as original intent interpretation of Constitutional legal issues. Simply, how did the Founding era, and the representatives of the new American republic, view a legal issue in the context of a limited government where the people retained natural rights from the state of nature. There are primarily two main Constitutional legal interpretations. First, is textualism, that relies on the specific text of the United States Constitution (1788) (Constitution), and to a lesser extent the original intent of the authors of the Constitution. Second, is the living document interpretation, that views the Constitution as a set of principles that is malleable to fit within the times that people live in (Massey and Denning See pages 40 - 52).

There is a third, and often misunderstood interpretation, as described by Harry V. Jaffa in his book: *A New Birth of Freedom* (2000), which became known as originalism (See Chapters 1 and

2). Originalism is different than textualism as it is predicated on the claims in the Declaration as not only legal precedent but are the moral foundations of all American Law. Thus, just as Locke argued, the rule of law must comport with moral and ethical principles that come from natural law.

This is where the supervenience principle matters. In a system of law that is predicated on individuals retaining inherent natural rights from the state of nature, as morally and ethically objectively true, any law that undermines the inherent dignity of the individual would be considered unlawful and unjust. This is the foundation of substantive due process and municipal civil rights law. Here, the difference is that municipal civil rights law comes from statute, such as the Civil Rights Act of 1866, and the Civil Rights Act of 1964, including its Title VII, as legislative Acts. Whereas, substantive rights laws and substantive due process are based on legal case precedent, the 9th Amendment, and the penumbras (shadows) of other enumerated rights in the Bill of Rights of the Constitution.

The 9th Amendment is a lesser known, and hardly debated Amendment in Constitutional law when it comes to substantive rights, which is shocking based on its history during the Constitutional Convention and its explicit wording. The 9th Amendment specifically states that: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Furthermore, in Federalist 84, James Madison states that "…bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous" (The Avalon Project). Due to this fear, he proposed the 9th Amendment to specifically address this issue.

The famous, and to some infamous, penumbras argument is found in Griswold v. Connecticut 381 U.S. 479 (1965) (Griswold), where the Supreme Court of the United States (Court) held that

"…specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." This is a landmark holding for the guaranteed right of privacy and the unenumerated rights doctrine of substantive due process. In essence this holding means that the rule of law must comport to the inherent natural rights that go beyond the enumerated rights in the Bill of Rights. This is the same reasoning found in the 9th Amendment to the Constitution.

Before moving forward, there is a large legal controversy over this interpretation. Advocates for textualism often argue that there are no such rights in the Constitution and that this type of legal interpretation is making up rights and calling it due process. However, I'd argue that that argument is a form of willful blindness due to the history of the 9th Amendment, the original intent of the Declaration, and more importantly, the text of the 9th Amendment itself. If textualists want to argue that the text of the Constitution itself must be followed then they should follow the 9th Amendment and the precedent set forth by Griswold.

So, you may be asking yourself right now what's the point in all of this? The point is that now that we have a basic understanding of Constitutional Law, we can put to the test rules of law that have undermined natural rights, and those that have supported natural rights, in order to assess over time the level of freedom experienced within American democracy.

B. Violations of Natural Rights: Less Free

For this section only a few Constitutional law cases, Articles in the Constitution, and some statutes will be used to expose unjust and unconstitutional laws that have been enforced. The purpose of this section is to show that when laws that are imposed with the intent to undermine the natural rights retained by individuals, and the guarantees of enumerated and

unenumerated rights in the Constitution, citizens live in a less free society. This is where the pendulum of justice swings in the direction of a Hobbesian state of nature: of might makes right.

First and foremost is the original sin of the 3/5th's compromise during the Constitutional Convention. In Article I, Section 2, Clause 3, of the Costitution, which focused on the number of representatives apportioned to each state based on their population, would allow for southern states to include a counting of their slaves as 3/5th a person for population purposes. This compromise was a direct undermining of the principles of natural law and natural rights leaving a less free democracy.

Moreover, the infamous Dred Scott v. Sanford 60 U.S. 393 (1856) decision where Chief Justice Roger Taney wrote the majority opinion of the court that held that "a free negro of the African race, whose ancestors were brought to this country and sold as slaves, is not a 'citizen' within the meaning of the Constitution of the United States." Further, that: "The Constitution of the United States recognizes slaves as property." This meant that even freed or emancipated people under the color of law could be taken and returned as property.

Not until the American Civil War (1861-1865), with the ratification of the 13th (1865), 14th (1868) and 15th (1870) Amendments would these injustices from municipal law be challenged and destroyed. However, almost a hundred years of bondage under the legal power of the Articles of Confederation (1777), and the Constitution, would not solve the deeply entrenched attitudes of racism in the United States after the Civil War. In order to continue to oppress emancipated slaves, many states imposed Black Codes and Jim Crowe laws that were intended to "curtail the economic, political, and social freedoms of African Americans…" (constitutioncenter.org).

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In the continued oppression of the natural liberty of African Americans in the emerging Jim Crowe south was the separate but equal doctrine of Plessy v. Ferguson, 163 U.S. 537 (1896). Here, the Court held that an 1890 Louisiana law that segregated rail cars based on race was constitutional and that even though:

> "the object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things, it could not have been intended to abolish distinctions based on color, or to enforce social, as distinguished from political, equality, or a comingling of two races upon terms unsatisfactory to either."

This decision was the foundational holding that became the legal precedent for the separating of schools, shops, movie theatres, churches, bathrooms, motels, and restaurants, etc. based on race. An abhorrent affront to the natural rights principles of natural law and the Declaration's claim of equality.

Last, in Lochner v. New York 198 U.S. 45 (1905), the Court was faced with issues arising under the push for fair working conditions in the United States. In an effort to protect bakers from exposure to fine flour particles, and the long hours that would expose them to these particles, New York enacted a statute limiting the working hours of bakers to no more than 60 hours a week, or over 10 hours a day. The issue was whether the state's statute violated the liberty of Contracts Clause of Article I, Section 10, Clause 1 of the Constitution, and the Due Process Clause of the 14th Amendment.

The Court held that "the statute necessarily interferes with the right of contract between the employer and employees concerning the number of hours in which the latter may labor in the bakery of the employer." Furthermore, that: "There is no reasonable ground for interfering with

the liberty of a person or the right of free contract by determining the the hours of labor in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that are not able to assert their rights and care for themselves…"

What this meant was that despite the imbalances of power in contractual relationships, where an employer could require more than 60 hours a week as a take it or leave it offer, the Court construed that this imbalance of power did not exist, and that employees were choosing to work these hours and could protect themselves from dangerous conditions. The holding in this case is often known as an example where the Court is making up its own rules and was used as precedent to strike down most labor laws until 1937. This case exposes the power of democratic institutions to undermine the foundational principles in contract law of good faith and fair dealing. Where an employee has no bargaining power and the employer is not acting in good faith that contact is unenforceable.

As is clear by just a few of these cases, and a deep dive into Constitutional law will expose many many more, there are plenty of instances where the moral and ethical principles of natural law are undermined by municipal law. So why are these cases important? They are important in this analysis to show that during these times living under American democracy was less free, and these municipal laws did not comport to the natural rights principles of natural law and natural rights that the philosophical premises of liberalism are predicated on. Therefore, the only premise that holds their legality is power. This is a Hobbesian reality of an all-powerful centralized government that has taken all the natural rights from a group of people within its borders, not for their safety, but to steal their labor for the benefit of others.

C. Affirmations of Natural Rights: More Free

This section will show Constitutional case law that falls in line with natural rights and natural law through substantive due process.

In Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), the Court had to confront the separate but equal doctrine in the segregation of schools established in Topeka, Kansas in 1879. The Court merged four similar active cases in South Carolina, Virginia, Delaware, and Washington D.C., in which all were brought by the National Association for the Advancement of Colored People (NAACP). The NAACP argued that segregation caused injury to young black children by creating psychological injury of feelings of inferiority, and that black schools were not equal in quality or substance to white schools.

The Court unanimously held that the separate but equal doctrine from Plessy v. Ferguson, 163 U.S. 537 (1896) had no place in public education and violated the Due Process Clause of the 14th Amendment. Further, that: "Segregation of white and colored children in public schools has a detrimental effect upon the colored children, [and] separating the races is usually interpretated as denoting the inferiority of the negro group." The Court reasoned that segregation violated the equal protection of black children and overturned the institution of segregation in public schools.

This landmark case is important for many reasons. First, after the 13th, 14th, and 15th Amendments, this case dealt with underlaying social issues of racist municipal law. This holding reinforces the premise that a commonwealth, or a civil society, is based on the protection of natural rights and the common good. Second, this case not only protected the natural rights of children from an overreaching government, but reaffirmed the primacy of human dignity in a free society.

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One of the most intuitive natural rights is the right to love who you want without considerations of race, class, or religion. This is self-evident to any rational human being. In Loving v. Virginia, 388 U.S. 1 (1967), Richard and Mildred Loving were married in Washington, D.C. to avoid Virginia's Racial Integrity Act of 1924, that outlawed the marriage between black and white individuals. After their marriage they were criminally charged with miscegenation (cohabitation, sexual relations, marriage, or inbreeding). They initially pled guilty and left Virginia to live in Washington, D.C. However, 5 years later they wished to move back to Virginia and challenged the law with the representation of the American Civil Liberties Union (ACLU).

The issue was "whether a statutory scheme adopted by the state of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment." The Court held that the Virginia law violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment and that: "Marriage is one off 'the basic civil rights of man, 'fundamental to our very existence and survival."

Although, the Court did not state this outright, this decision set the foundation for the view that there was no legitimate interest for a government to be involved in the loving relationships between individuals. This case set the foundation for: Griswold v. Connecticut 381 U.S. 479 (1965), Roe v. Wade 410 U.S. 113 (1973) (Roe), and Obergefell v. Hodges 576 U.S. 644 (2015), that all dealt with the privacy of intimate relationships between married couples to have the right to access birth control, access medical abortions, and the right of same sex couples to marry.

These cases are prime examples of the continued struggle of individuals fighting to keep their natural rights against municipal laws that are specifically intended to undermine individual liberty. Unfortunately, in 2022 the Court overturned Roe in Dobbs v. Jackson Women's Health Organization 597 U.S. __ (2022). Now, women again must fight for their natural rights to body autonomy, the right to access medical services, and their right to privacy.

Another natural right that seems intuitive is the right for families to live together whether they are an extended family or direct family members. In Moore v. City of East Cleveland 431 U.S. 494 (1977) the city of East Cleveland, Ohio passed a zoning ordinance that defined family units as only involving immediate family members, i.e., mother, father, and children. The appellant Moore was a grandmother who lived with her son and her two grandsons. The city determined that one of the grandsons who was the cousin of the other grandson was not immediate family and charged Moore criminally for disobeying the city ordinance.

The Court held that: "The strong constitutional protection of the sanctity of the family established in numerous decisions of this Court extends to the family choice involved in this case, and is not confined within an arbitrary boundary drawn on the limits of the nuclear family (essentially a couple and their dependent children)." Furthermore, "When the government intrudes on choices concerning family arrangements, the usual deference to the legislature is inappropriate…" The Court reasoned that there was no legitimate government interest in the zoning ordinance and that family units, have always been, and are more expansive than just immediate family.

Here, once again the natural rights of a family to live in peace and pursue happiness was challenged by majoritarian municipal law. Thankfully, the Court supported and protected the rights of families and individuals to determine for themselves the extent of their family.

Moreover, that the Due Process Clause of the 14th Amendment's right to privacy protects not only married couples right to privacy as in Griswold, but it also protects the rights of families to live in peace without intrusion into their living arrangements.

Here, the key takeaway is that although the Bill of Rights was a contested issue, the 14th Amendment's Due Process Clause and Equal Protection Clause is the tool within our system of federalism that forces the Bill of Rights onto the states. Moreover, that substantive due process and the meaning of the 9th Amendment are intended to limit the government's ability to hinder or deny the natural rights of its citizens.

I have left out many landmark cases that have further protected individuals' natural rights from the power of an intrusive government. An intensive review of Constitutional law will expose many more instances of issues that are important for natural rights protections. Why these cases are important is because they: 1) fall in line with moral and ethical principles under the supervenience principle, and 2) they expose a moment of living in a more-free democracy. These cases are moments that pushed the pendulum from a Hobbesian democracy towards a Lockean natural rights democracy creating a more just and equal society.

There may be criticism in the way I chose these cases and their issues, and that I did not focus on other cases and issues of significance such as gun rights, rights to bodily autonomy and women's healthcare, freedom of expression, surveillance laws, etc. Moreover, that I did not discuss issues concerning activism from the bench. I would simply argue that the issues discussed above are in the context of political theory, not in the context of law review. Therefore, the intent is to show cases that expose a tension between the political theory of Hobbesian power and theory of Lockean natural rights in the real world. These cases help show that democracies are dynamic living societies that are not contained within definitions of

democracy. Thus, by using legal review from moments in American society that reinforce government power, or reinforce individual liberty, we can gather a more explicit way of judging the health of our democracy in accordance with the ideals of classical liberalism.

Conclusion

Political theorists, political scientists, and historians need to do a better job at defining their terms. Arguing that democracy is at stake, that a government is in a moment of democratic backsliding, or arguing whether a government is an actual democracy or not, based on idealistic definitions, or sub-categorical definitions of democracy, misses the point. In moments of inequality under the law, a democracy in and of itself has not changed to another form of government but has swung into a state of Hobbesian reality. Philosophical principles of equality, justice, and natural rights are conceptions that exist outside of definitions of democracy and are found in applications of natural law in a Lockean reality. Therefore, we confuse these principles as normative outcomes of democracy when we add moral and ethical principles into a definition of democracy. It is simply untrue that if a society implements democracy as its chosen form of government that the natural outcomes of this will be equality and liberty.

Now, don't get me wrong, democracy is likely the best form of government to accomplish equality and liberty, but it does not mean that democracy represents these principles ipso facto. Or that a democracy will lay perpetually in a state of freedom with fewer and fewer inequalities based on an expansion and reframing of the definition of democracy. The view that democracy exists in a state of perpetual freedom is more aspirational than it is realistic, but that does not mean that it is not a worthy goal, or one that a just rule of law should be predicated on. Therefore, natural rights law principles are philosophical and legal principles that can be the force that moves the pendulum from the might is right nature of a Hobbesian reality, towards a

Lockean reality where the individual retains inherent dignity and rights despite the power of a strong centralized government.

Thus, in order to determine whether a democracy is more or less free it takes not only a short term in the moment analysis, but a long term one as well by looking at that democracy's rule of law. If the aggregate of law shows a less free society in regards to natural rights then that democracy is less free and vice versa. With this approach it is possible to take a long historical analysis of a democracy and judge whether in the long run that that democracy is less or more free when comparing it to other democracies, and through a short-term analysis capture moments when the pendulum has moved from less free to more free or vice versa. However, I think that any desire for a definitive answer in these regards is unrealistic, and is more in line with political partisanship, and politics, than it is with political theory.

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