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Why Neo-republicanism Disregards Natural Rights

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Abstract: The first contribution of this article is a politico-philosophical map that, drawing upon two common sets of arguments against modern natural rights, might help to explain the prevailing neo-republican position on natural rights. Under the label 'abstraction argument', we explore the view that natural rights are a metaphysical construct that usually ends in a violent application of speculative principles to society. Under 'self-interest argument', we discuss the notion that natural rights endorse an atomistic and selfish conception of the human being. Second, we show how Cold War authors replicated these two arguments, conveying a biased, largely anti-republican and anti-democratic view of natural rights to the twentieth century. Third, drawing on these two arguments, we critically assess the narrow view of natural rights inherited by neo-republican scholars.

Keywords: Cold War, democracy, liberalism, Marxism, natural rights, republicanism

The idea of natural rights and its conceptual companion, natural law, are probably among the most pervasive notions in the history of Western social thought. We refer to the broad set of ideas according to which human institutions are, or should be, grounded in a certain rational natural or cosmic order that is up to some point independent from the direct will of those subjected to it. Many of the most important legal-political documents written in the last

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three hundred years rely on some conception of self-evident, fundamental, or inalienable rights, thus pointing to a normative standard independent and protected from the direct will of the sovereign.

As it is not surprising of such prevalent and powerful political language, the normative record of natural rights talk is highly ambivalent. The belief in a just, extra-institutional, immutable and rational order served conflicting purposes in the very same political contexts. The normative double-sidedness of natural rights is perhaps best epitomised in Early Modern Europe. In less than a century, it served to underpin the divine right of kings, secular arguments for absolute sovereignty and revolutionary views leading to the right of subjects to behead unjust rulers (Tuck 1979). Natural rights also sparked the minds of activists and peasants that favoured the common use of land against the emergence of agrarian capitalism (Tully 1980). It equally inspired, however, the moral grammar of the new political economists and the advocates of capitalistic landholding (MacGilvray 2011). Similarly, the existence of a universal normative standard has served as an undying pretext for those who promote imperial ambitions (Pagden 2003). But again, these precise universalistic features of natural rights were fruitfully used by anti-colonial thinkers from all ages and places, from Bartolomé de las Casas or Toussaint Louverture to the Black Panthers or Ho Chi Minh (Chi Minh 1968; Gauthier 2008; Hilliard 2008).

In recent years, democratic and emancipatory thought seems to have good reasons to distrust the language of natural rights. On the one hand, the political significance of natural rights has faded since the Second World War given that – at least in Western developed countries – it almost overlaps with what many consider the obvious: a vague social consensus around the values gathered by the United Nations in the *Universal Declaration of Human Rights,* an acceptance of a minimum degree of human dignity and other 'truisms' holding together market societies and the rule of law (Hart 2012: 193–195). On the other hand, explicit natural law talk today is often indicative of distinct conservative opinions – for instance, a way of stressing the allegedly 'common-good' or 'rational' pedigree of religious views against women's right to abortion or LGBTQ rights (Vermeule 2020). In the face of this, it is not strange to see radical democrats, socialists or left-liberals conceiving of natural rights as an old-age language that naturalises the Western

rule-of-law-and-capitalism status quo or as an ideological rhetoric by which political decisions may pass for common sense.

The 'republican revival' – arguably one of the most important renovations of political philosophy after the end of the Cold War – has not been an exception. In fact, neo-republican scholars have built their tradition, historically and normatively, against the idea of natural rights. The main purpose of this article is to offer a historical map that traces two archetypal critiques of the tradition of natural rights during the last three centuries. These two arguments against modern natural rights may help to partly explain the reasons behind the contemporary neo-republican neglect of that tradition. Our argument proceeds in four sections.

In the first section, we identify two archetypal arguments against the modern idea of natural rights, all of them elaborated by reactionary and liberal thinkers against democratic and popular politics between the seventeenth and nineteenth centuries. The label 'abstraction argument' comprises the idea that natural rights are a metaphysical construct that mostly serves ideological purposes (e.g., to harangue the masses) and that, because of that, it usually ends up in a violent application of speculative principles to society. Under 'self-interest argument', we include the view according to which natural rights endorse an atomistic and selfish conception of the human being, leading to individualistic societies prone to fragmentation, subordination to capitalist markets and so on. It must be noted that our categorisation is not meant to be exhaustive (there are many other arguments against natural rights). Nor does it claim mutual exclusivity (e.g., it does not serve to classify philosophers, it is not always congruent with historical political sympathies).[1] More modestly, we group two specific normative concerns about modern natural rights for heuristic purposes that are exclusively related with the aims of this article: to make a point about how the eighteenth-, nineteenth- and twentieth-century critical receptions of natural rights may help to explain the current neo-republican understanding of rights.

The second section shows how twentieth-century historiography and political philosophy repeated these two archetypical arguments, re-adapting formerly reactionary commonplaces against natural rights to the Cold War bipolar confrontation between liberal and Marxist concerns. In the third section, we show how the

republican revival, first in the history of political thought and later in political philosophy, inherited these Cold War preconceptions of the language of natural rights. The result was the recovering and developing of republicanism as a tradition independent of, and even antithetical to, natural rights. In the fourth section, we discuss two possible normative implications of the inattention to natural rights among neo-republican scholars.

Two Arguments against Modern Natural Rights

The Abstraction Argument: 'That Tenebrous Metaphysics'

One of the most conventional arguments against natural rights is the contention that they are too abstract. That they are, at best, a theoretical device too far from actual politics and institutions. In the worst case, however, this abstraction may lead to the hasty imposition of normative principles alien to the will, traditions, or institutions of a people. Natural rights, according to this view, are the opposite of well-tempered institutions and prudence; they are seen as a dogmatic set of principles that goes against the use of practical reason informed by empirical reality.

This point is clearly shown in a frequent early modern accusation against any attempt to bring about political and economic equality by appealing to a divinely ordained state of natural freedom and equality among all members of humanity. Early seventeenth-century English radicals were received by their opponents with this charge: 'Instead of Legal Rights and the Laws and Customs of the nation, the Sectaries … will not submit, but cry out for natural Rights derived from Adam and right reason' (Edwards 1646: 16). Preaching or writing in favour of prelapsarian equality was often related with recent experiences of popular movements that had tried to imprudently bring 'heaven on earth' against all known social institutions – exemplified in the figure of Thomas Müntzer or the anabaptist dictatorship in Münster (Bloch [1961] 1996: 29–31). Conservative and moderate Protestants all over Europe were systematically reminded of the bloody consequences of any previous experiments in popular government rooted in the idea of natural equality and freedom as a way of cornering democratic interpretations of natural rights by radical dissenters (Guerrero 2020).

But it was in the wake of the American and French Revolutions that the abstraction argument became a relevant political weapon in the anti-republican armoury. It was spread among the moderate and conservative intellectual circles of post-revolutionary Europe through the writings of Edmund Burke. He stands out as one of the most prominent and seminal critics, not of natural rights as such, but of the form that they displayed under the Age of Revolutions. Far from denying the existence of any rights, he vindicated those not derived 'from abstract principles "as the rights of men" but as the rights of Englishmen, and as a patrimony derived from their forefathers'. Against abstract metaphysics, it was circumstance 'what render[s] every civil and political scheme beneficial or noxious to mankind'. For this very reason, 'the science of constructing a commonwealth, or renovating it, or reforming it, is, like every other experimental science, not to be taught a priori' (Burke [1790] 2003: 28, 7, 51).

In his *Reflections on the Revolution in France,* Burke incarnated what Albert O. Hirschman called 'the argument from perversity' as applied to the principle of political equality (Hirschman 1991: 7–9). By trying to renew the entire social order with good intentions, Burke advises, the cure risks being worse than the disease: 'Those who attempt to level, never equalise'. Moreover, the attempt to elevate the dispossessed classes to the status of active citizenship turned out to be a great deception, because a clique of conspirators constituted a new oligarchy and manipulated the lower classes: 'Here end all the deceitful dreams and visions of the equality and rights of men. In "the Serbonian bog" of this base oligarchy they are all absorbed, sunk, and lost for ever'.

Natural rights, according to the British conservative, jeopardise the basis of European civilisation and its beneficial impact on the world. Moreover, the rhetoric of human rights threatened colonial systems, encouraging the rebellion of the enslaved blacks against the creoles (Burke [1790] 2003: 42, 166, 188). Abhorred by the events in France, Burke established a conceptual connection between the metaphysical character of natural rights and violent, ruthless crimes: 'This sort of people are so taken up with their theories about the rights of man, that they have totally forgotten his nature. Without opening one new avenue to the understanding, they have succeeded in stopping up those that lead to the heart'. The condemnation could not be more impassioned: 'In the groves

of their academy, at the end of every vista, you see nothing but the gallows' (Burke [1790] 2003: 54–55, 66).

Without a doubt, the development of the French Revolution marked a watershed in the history of natural rights. Associated with the Montagnards and the Terror, natural rights were removed from the French constitutions by the meticulous striving of Pierre Daunou during the constitutional debate of 1795. His colleague Boissy d'Anglas revitalised Burke's arguments in front of the Assembly: 'we have so painfully acquired the certainty that the happiest metaphysical conceptions can produce the most disastrous effects' (quoted in Bosc 2013: 157–159). It was also then, in the aftermath of this constitutional debate, when Jeremy Bentham, by that time living in France, coined for the first time the phrase 'nonsense upon stilts' to deride human rights. For Bentham, natural rights were 'terrorist language', the language of Robespierre: '*Natural Rights* is simple non-sense: natural and imprescriptible rights, rhetorical nonsense – nonsense upon stilts' (Bentham 1843: 501).

The abstraction argument arrived at Germany too, where natural-rights theories had been dominant in philosophical discussions. Some authors understood these theories as calling into question hereditary privileges. This was particularly the case of the conservative critics of Kantian philosophy. For August Wilhelm Rehberg, the a priori system of natural rights would endorse anarchy since perfect equality would dissolve the most basic social institutions. Justus Möser attributed the excess of the Revolution to 'the scholarly theory of the rights of man'. And we find Friederich von Gentz – the translator of Burke's seminal work – saying that 'the philosopher creates systems; the rabble forges murderous weapons from them' (all quoted in Maliks 2013: 190).

According to many European writers, the problem was not only that natural rights were 'too' abstract or theoretical. The problem was that such an abstract ideology, so far removed from existing institutions, needed massive amounts of political power to carry through its principles. It was an excuse to destroy what were considered good old institutions and to set in motion a new order in which the individual was left unprotected against the supreme power of the state. In the minds of these thinkers, the shadow of a terrorist state led by a popular government meddling with traditional relationships of domination loomed behind any natural-rights

talk in the mouths and writings of plebeian leaders, landless peasants, wage-labourers or slaves. On more than a few occasions, the abstraction argument goes hand in hand with the idea of democratic anarchy. Expressed by the disenfranchised, the idea that any political and legal institution should be justifiable and accountable to any member of the political community – or even to any member of humanity – became an omen of plebeian tyranny.

These arguments were updated by the emergent French liberalism. Their cause was to safeguard individual rights against the state and the people, that is, to check and control state power while seeking to prevent revolution. Whereas it could seem that post-revolutionary liberals wanted to assume a normative standard protected from the general will,[2] the truth is they rejected natural-rights theories. Benjamin Constant and Madame de Staël repeated the abstraction argument for the same purposes as Burke. According to Constant, writing in 1815, the French public had seen their revolutionary man 'indulging in the most exaggerated opinions … disdaining considerations drawn from facts, despising the real and tangible world and reasoning about the social state as enthusiasts, about passions as geometers, about human sufferings as physicists' (Constant [1815] 1988: 220).

Germaine de Staël made use of the same argument in several writings between 1794 and 1798: 'This chimerical system of equality … combines the exalted enthusiasm inspired by metaphysical abstractions with the all too real fury that the interests of fortune and ambition arouse in all men; it is dogma and plunder, principle and pride' (Staël 1820: 50). It was metaphysical abstractions that ignited the tyrannical potential of the lower orders and unlimited violence, because natural-rights defenders wanted 'to confuse their conduct in sophistries, to express their actions by a metaphysical language, as if they could place them in abstraction and thus blur their bloody characters' (Staël [1798] 1906: 153).

By this point in history, natural rights had become a tomahawk that political rivals threw one another to discredit opponents – a strategy even used against thinkers who did not support such doctrines. During the hard Russian campaign, in 1813, an enraged Napoleon could speak precisely in these terms against the *société des idéologues* that had helped him rise to power (Constant and Staël among them):

> It is to ideology – to that tenebrous metaphysics which, by subtly seeking the first causes, wants to found the legislation of peoples on these bases, instead of adjusting the laws to the knowledge of the human heart and to the lessons of history – that we must attribute all the misfortunes that our beautiful France has experienced. Who proclaimed the principle of insurrection as a duty? Who has flattered the people by proclaiming that they have a sovereignty they were incapable of exercising? (Bonaparte 1853: 578–579).

The Self-Interest Argument: 'The Universal Egoism, Natural Fruit of a Time that Had Broken All the Bonds'

Another distinctive set of arguments against the natural law tradition insists on its selfish consequences.[3] This is especially the case of natural rights in the concrete sense of subjective rights or individual normative claims derived from reason, natural law, divine command, and so on. If the abstraction argument identified above is a consequence of the historical relationship between natural rights and plebeian politics, the self-interest argument is the outcome of the intertwinement between natural rights and the emergence of modern law in capitalistic societies. The idea of a human natural order to which societies tend if left free from coercion fascinated the French physiocrats and the German economists of the Enlightenment (Gauthier 2002; Müller 1990). The language of natural law and natural rights is also the moral groundwork of English and Scottish political economy (MacGilvray 2011). The natural right to the fruits of one's own labour, the natural right to travel and trade, or the divine duty to improve newly discovered wastelands – by nature, a common property of all humanity – have been identified among the basic normative claims that justified capitalistic production and colonial dominion (Macpherson 1962; Pagden 2003; E. M. Wood [1999] 2016).

As symbol of the emerging modern society, natural rights even became anathema for the defenders of a supposedly genuine understanding of natural law. It was common among proponents of a more traditional Aristotelian-Thomistic conception of natural law to call attention to the egotistic and individualising implications of some apparently new understandings of natural rights. This point can be found, for instance, in the seventeenth-century scholarly efforts to challenge Thomas Hobbes's natural-right voluntarism (Parkin 1999). It is also found in the German conservative Justus Möser and

his typical late eighteenth-century fixation with the atomistic and selfish consequences of the rights of man, since they gave entitlements without previous contribution (Beiser 2011: 96–97).

A similar concern with natural rights has inspired a wide range of Catholic commentators from all ages (Brett 2015).[4] Their contention was practically the same. Natural jurisprudence and its classic belief in an objective natural order commanded by God had been perverted into the modern idea of subjective right. Natural law, a former bulwark of justice, order and tradition had become the deformed touchtone of modern society; a society built upon individual rights, self-interest and unilateral will – the perfect footing for the rising commercial society run by secular institutions. In the words of the conservative nineteenth-century Spanish historian Marcelino Menéndez Pelayo, liberalism was 'politics without God, in other words *political naturalism*' (2003: VIII, 823).

The self-interest argument also took hold among the early conservative witnesses of the French Revolution. For the French Catholic Joseph de Maistre, when men act upon 'their' rights, they only do it vicariously. This means that they must answer to the divine superior will that had granted those rights in the first place. Properly understood, this means that, in politics, 'man does everything and does nothing' (Maistre 1814: 16). When this is not the case, institutions will fail. In other words, society breaks apart when man does not follow the objective criterion set by God – or, in case of doubt, 'his prime minister in the department of this world, *the time*' (Maistre 1814: 44). For Maistre's fellow reactionary, Louis de Bonald, the revolutionary events in France were doing precisely this. To assemble political and social institutions starting from subjective natural rights – presumably refusing subjection to any order not deducible from the will of each individual – meant replacing a time-tested social fabric with the mere aggregation of self-interest. 'Remove God from this world', Bonald wrote, and 'man then owes nothing to his fellow man, society is no longer possible, and all duties cease when power no longer exists' (quoted in Lacroix and Pranchère 2018: 134).

For the traditionalist opponents of the post-revolutionary civil society, customary social relationships and institutions were much more than sources of domination and unjust hierarchies. Custom also involved duties toward the weak. The natural-rights

philosophies and its apparent institutional counterparts (e.g., modern civil law, secularisation, abolition of guilds and other traditional regulations of trade) also did away with institutions in charge of preventing social fragmentation thanks to the protection of the poor (de Dijn 2008: 40–67; Thompson [1991] 1993: 259–351). In this respect, originally counterrevolutionary views of modernisation in which natural rights were seen as the philosophical foundation of an individualistic and selfish new society attracted other adherents far from the reactionary field. Many normative traces of what we have identified as the 'self-interest argument' were inherited by the early sociological tradition, precisely through the conservative diagnosis of modernisation. It is widely recognised that the working hypotheses of major thinkers such as Alexis de Tocqueville, Auguste Comte or Émile Durkheim are partly indebted to the political science of the counterrevolution (Lacroix and Pranchère 2018: 108–126, 155–156; Nisbet 1966; Piguet 2011). And the German sociology of Ferdinand Tönnies, to name another especially clear example, was born out of an analogous movement – a conscious recovery of conservative natural law insights by Ludwig von Haller and Julius Stahl as assimilated by the German Historical School of Jurisprudence (Bond 2011, 2013: 321–377).

Even though natural rights played a significant part in the plebeian political languages of almost every modern revolutionary process, the left-wing critique of post-revolutionary forms of dominion and dispossession – now hidden under the fictitious equal liberty of contract – also took aim at the idea of natural rights. Another founder of German sociology, Karl Marx, questioned in these terms the pretended universal character of human rights in his *On the Jewish Question,* written in 1844: 'the *droits de l'homme* as distinct from the *droits du citoyen,* are nothing but the rights of a member of civil society (*bürgerliche Gesellschaft*)'. The political revolution of the bourgeoisie had dissolved feudal institutions in a double movement which left individuals isolated and constituted the liberal state. As members of that civil society, it is their self-interest that prevails:

> None of the so-called rights of man, therefore, go beyond egoistic man, beyond man as a member of civil society, that is, an individual withdrawn into himself, into the confines of his private interests and private caprice, and separated from the community. In the rights of man, he is

> far from being conceived as a species-being; on the contrary, species-life itself, society, appears as a framework external to the individuals, as a restriction of their original independence. (Marx and Engels 1975: 162, 164)[5]

The collection of evidence gathered here provides us with a first global view. At the turn of the eighteenth century, natural rights were still part of a lively tradition that gave republican freedom a concrete positive content with democratising consequences – civil and political equality, popular sovereignty, redistribution of land, national independence and so on.[6] After the Thermidorian Reaction in 1794, however, the 'rights of man' gradually became a synonym for plebeian terror. Besides, the creation of the science of political economy allowed the middle classes to abandon the language of natural rights while still using a 'progressive' discourse against the Ancien Régime. Natural rights were increasingly taken as 'primitivism', a vestige of the past entailing social agendas that threatened the existence of the very commercial society (Claeys 2007: 68–98). With some notable exceptions (most of them later assimilated by the labour movement), natural rights as a language of political and economic emancipation were losing ground.[7]

By the end of the nineteenth century, natural rights had received two significant intellectual and political deathblows. For different reasons, it had been crushed by two of the major research programmes of the post-revolutionary age. Utilitarianism and positivism, on the one hand, reduced the normative tradition of natural rights to a void deistic rhetoric with no place in modern legal and political science. Natural rights were rendered a mere metaphysical abstraction that could have at best a heuristic role in the development of economic models inhabited by profit-maximising agents; or used as a mere analogy, an inessential descriptive role in sociology. Historicism, on the other hand, had ended natural rights by setting an empirical or made-up 'community' against the insolent revolutionary attempt of building society anew upon apparently universal principles and against the homogenising effects of those principles that sometimes served to arbitrarily destroy cultural diversity.

Politically opposed by reactionaries, romantics and liberals, and increasingly despised by the leading currents of the labour movement, the language of natural rights during the nineteenth century was ready to develop into a depoliticised rational support for the

new systems of positive law.[8] By the beginning of the twentieth century, natural rights had lost much of its democratic and emancipatory allure. Almost abandoned, they could become exactly what many of its opponents feared – a self-justifying formalistic language in the service of the capitalistic status quo. In 1927, the great American liberal jurist Morris R. Cohen could lament that, unfortunately: 'whether because of the general decline of juristic philosophy after Hegel or because law has become more interested in defending property against attacks by socialists, the doctrine of natural rights has remained in the negative state and has never developed into a doctrine of the positive contents of rights' (Cohen 1927: 21). Although some progressive forces continuously invoked discourses of human rights, there is not a single reference to human rights in any European constitutional text between 1794 and 1945 (Domènech 2012).[9] During the struggle against fascism, some pointed out that a revival of democratic natural law was happening (Neumann 1964: 69) and when Nazism was defeated, human dignity was consecrated in the 1948 *Declaration* in terms inherited from the language of natural rights. But the Cold War was the trigger for a new (or not so new) critique and reappropriation of the tradition of natural rights. This time, however, it was not only reactionaries, socialists and liberals that fed into these arguments against natural rights, but also those who were rescuing republicanism from oblivion.

Natural Rights in the Cold War

The Cold War divided Europe and created a bipolar dynamic of global dimensions that encompassed everything: from the arms race and spying to psychological and cultural warfare (McCarthyism and Zhdanovism, CIA and the Congress for Cultural Freedom, etc.). It was a stifling intellectual climate in which theories seemed to be obliged to serve one side or the other (Judt 2005; Saunders 2013; Scott-Smith 2002). In this context, some Western thinkers became obsessed with the category of 'totalitarianism', focusing on the historical political theories that supposedly backed up the excessive accumulation of state power (Traverso 2002).

What we have identified as the 'abstraction argument' was a fundamental ingredient in the cold-warrior cocktail against socialism.

A particularly biased and historically reactionary view of democratic natural rights was turned into a liberal weapon against communism. Its goal was to denounce the dangers of theorizing and practicing too much social equality or the risks of stirring the democratic masses without proper institutional checks against popular sovereignty. Although all this did not involve a complete rejection of the tradition of natural rights, the fact remained that, as one of the most important French historians of law put it in 1961, '[s]ocialism or communism can just as well commend themselves to Kant's first principles' (Villey [1961] 2000: 91).

In the field of history, a cold warrior such as Jacob Talmon argued that there had been two antagonistic conceptions of democracy since the eighteenth century. One was 'empirical and liberal' and the other 'totalitarian and messianic'. His famous idea of 'totalitarian democracy' was clearly indebted to the two arguments identified above:

> To reach man *per se* all differences and inequalities had to be eliminated. And so very soon the ethical idea of the rights of man acquired the character of an egalitarian social ideal. All the emphasis came to be placed on the destruction of inequalities, on bringing down the privileged to the level of common humanity, and on sweeping away all intermediate centres of power and allegiance, whether social classes, regional communities, professional groups or corporations. Nothing was left to stand between man and the State. The power of the State, unchecked by any intermediate agencies, became unlimited. (Talmon 1952: 250)

Talmon's bipolar distinction was of course not alien to his historiographical context. It has a family resemblance with one of the most important contributions of Walter Ullmann (1961) to the history of medieval political thought: the difference between 'ascending' and 'descending' themes of government. The 'ascending' conception was related to a 'practical thesis' about the origins of government: power arises from the community and its institutions, creating a governmental organisation that can be traced back to a certain community. The 'descending' conception is linked to the 'abstract thesis', exemplified by theocracy: power is distributed downwards, conferred to minor officers that answer to a top source of power. According to Ullmann, places where a dense feudal sociopolitical fabric was established, the movement from theocracy to

constitutional government was smoother. That such feudal rights and freedoms could end up being seen as 'natural rights' by seventeenth- and eighteenth-century Englishmen was unsurprising. Natural rights were a simple ex-post rationalisation of existent common-law and feudal practices. But what about other places lacking such a time-honoured and institutionalised prudence?

> How necessary the factual, if not the ideological, preparation is can be easily demonstrated by the feverish upheaval that followed the declaration of the French Constituante in 1789 on the inalienability of human rights: the French ground had not in the past been cultivated for the reception of these enchanting doctrines which were, as yet, no more than mere philosophic and theoretical speculations. The influence of the antecedent ideology in France turned such panoplied assertions into powerful instruments of bloody and contagious revolution. (Ullmann 1966: 96)

Interestingly, Ullmann's far-reaching hypotheses about medieval government also served him to evaluate contemporary world events: 'The Russian Revolution of 1917, too, incontrovertibly proved how much revolutionary energy – fed and sustained by pure dogmatic speculation – could be released, when all historical precedents, tradition, and, above all, preparation were wanting' (Ullmann 1966: 97–98).

With different degrees of theoretical refinement, empirical sensibility and partisan intentions, many other renowned scholars indulged in these abrupt historical dichotomies with a 'presentist' bent during the Cold War years. What we have designated as the 'abstraction argument' became a convenient historic-philosophical weapon to identify a truly liberal natural-rights tradition able to be the moral grammar of the capitalist West. This venerable tradition needed to be isolated from an exceedingly democratic (or levelling, or revolutionary, or statist) natural-rights tradition that had paved the road to socialist serfdom. A good, properly liberal, and not unreasonably egalitarian natural rights tradition had to be recovered against that other old tradition of natural rights that questioned property and sparked plebian revolution (Whyte 2019). Rousseau and the Montagnard period in France served to understand Lenin and the USSR, and vice versa; everything connected thanks to an old Burkean theme against revolutionary natural rights.[10]

However, not everyone was working on the removal of an apparently 'collectivist' germ at the core of the Western tradition of

rights. Many other Cold War conservative philosophers looked for the distorted natural rights origins of the modern egotistic ethos. In this, some of them were following the historically conventional attitude of the Catholic Church against the 'rights of man'. The moral disquiet about the atomistic results of capitalist modernity that we have identified above as the 'self-interest argument' can be found in many of the twentieth century attempts to recover a more classic – Aristotelian, Stoic, Thomistic – understanding of natural law. The efforts to find someone to blame for the discontinuity between (modern) natural rights and (classical) natural law are good illustration of this attitude. Michel Villey (1986) encapsulates this approach better than anyone: *jusnaturalisme* is a 'pathogenic virus' to be treated with Aristotle, the *Digest* and Thomas Aquinas. William of Ockham was to blame because his legal thought was 'born of the negation of the ancient, classical, objective order' (Villey [1961] 2001: 171). Thomas Hobbes was Leo Strauss's scapegoat – an 'imprudent', 'first plebeian philosopher' who was 'deservedly punished' (Strauss 1953: 166). Even one of the men whose thought contributed to the UN Declaration saw natural law as a victim of the rights-theory of Grotius 'who indeed began deforming it' (Maritain 1951: 84).[11]

On the other side of the ideological Iron Curtain, Marxists considered eternal doctrines to be reified and static abstractions. Many Marxists claim to have no need for an external, hypostatised theory to assess existing society – that was precisely the mistake of 'utopian' socialism. As they cannot accept a fixed generic essence of human beings, it is apparent that natural rights should be expelled from their programmes. In this sense, natural rights can only be the reified ideology of an emergent bourgeois class and its Robinsonades (Macpherson 1962; for the expression, see Marx and Engels 1989: 17).

Louis Althusser was to hold as well that natural rights theories were only the sophisticated expression of the self-interested bourgeois individuals. According to the main representative of Marxist structuralism – for whom positive law was merely a superstructure designed to guarantee the reproduction of capitalist societies (Althusser 1971: 127–188) – the 'political philosophy of natural law' was to prevail everywhere, 'to submerge everything', it was something 'in which the rising bourgeoisie found its self-image'

(quoted in Lewis 2014). In the opinion of the Italian philosopher Lucio Colletti, the 'liberal-natural-law conception' conceives a fully realised individual at the moral level that has innate and inalienable rights independently of every social relationship, something he derives from 'transcendental investiture'. Society is then not an end by itself, and men consider each other merely a means, living under 'a politico-juridical order which, through the law, consolidates and reinforces the absolute prerogatives of the "natural man" in his isolation and separation from others' (Colletti (1969) 1972: 149–151).

More than a few twentieth-century Marxists replicated the same image. For the Canadian historian Neal Wood, for instance, 'the structure of a natural rights argument could arise historically only after acceptance of the essential assumption of the "individual versus the collectivity"' (N. Wood 1978: 365).[12] Other Marxists blended the abstraction and self-interest arguments. The Frankfurt School philosopher Max Horkheimer wrote that the abstractions of the French Revolution paved the way for totalitarian barbarity ([1942] 1973: 7). From our point of view, it is important to stress that many twentieth-century Marxists shared the view of natural rights as a marker of liberalism.[13]

Neo-republicanism and Natural Rights

The intellectual history of the republican revival is embedded in the epochal framework we have described.[14] The groundbreaking works of Zera Fink and Hans Baron allowed the Western republican tradition to be recovered from oblivion and revalued. But in doing so, natural rights disappeared or became downgraded to a secondary role in the history of European thought (Baron 1955; Fink 1945: 21, 102, 151). The republican hypothesis in the historiography of the American Revolution followed a similar path: to seek an alternative to Lockean natural rights in the ideological sources of the founders (Bailyn 1967; G. S. Wood 1969). Machiavellian civic virtue and Polibian mixed government gathered all the attention, and they were seen as antithetical to Lockean natural rights and liberal self-interest (Zuckert 1994).[15]

Despite some efforts to exclude her, Hannah Arendt has been properly identified as a key early scholar in the republican revival,

particularly if we have in mind the relationship between neo-republicanism and rights. Her early critique of human rights mixes Burkean and Marxist concerns (Arendt [1951] 1973). And considering her prototypic Cold War notion of 'totalitarianism' and her later civic worry with the decay of American public life, it is not surprising to find her comfortable in a sort of Tocquevillian conservative republicanism in which many neo-republicans could fit – wary of the disintegrating effects of unbridled capitalism but distrustful of popular sovereignty. As we saw with Talmon and Ullmann above, in Arendt's *On Revolution* we find Montagnard natural rights associated with Lenin and Bolshevism (Arendt 1963: 65–56). And advancing the hypotheses of later historians, her understanding of the American founders underplays Lockean natural rights in favour of classical Roman and English republican sources (Arendt 1963).

J. G. A. Pocock, whose conception of the law explicitly draws upon Arendt, consolidated some of the early trends of the republican revival (Pocock 1985: 44; 1975: 66–67, 561–562). According to his seminal interpretation, the history of political thought had been dominated by the 'natural-law paradigm'. Republicanism could appear on stage only by breaking up this perspective, because it was born in opposition to that juridical language (Pocock 1985: 37–39). It is not by chance that these historians focused on the Italian Renaissance in which the languages of natural law and natural rights were absent from the discourses of celebrated republicans such as Francesco Guicciardini or Niccolò Machiavelli. The works of Fink, Baron, Pocock and others set in motion an incredibly fertile historical research programme and put forward arguments that later neo-republicans were to develop.

It is well known that the republican revival consists of two moments. During the first decades, scholars, such as Arendt, Pocock and, later, Michael Sandel – later called 'neo-Athenians' – emphasised the idea of self-realisation through civic participation and the cultivation of virtue. The second moment is associated with the names of the 'neo-Romans', particularly Quentin Skinner and Philip Pettit. From the point of view of the latter, participation and virtue only were means to safeguard republican liberty, now defined as the absence of domination or arbitrary interferences (Dagger 2011; Gourevitch 2015; Lovett 2018).

It must be said that owing to prevailing neo-Roman interpretation, juridical language and the rule of law came back as a part of republicanism. But natural rights did not. It is quite paradoxical that the neo-Romans – whose views of the republican tradition were up to some point articulated in contrast to the neo-Athenians – inherited uncritically the view on natural rights set forth by Pocock (Hamel 2013). This movement has almost no exceptions.[16] Maurizio Viroli, for example, considered theories of 'natural' rights (or 'innate' or 'inalienable') to be 'distinctive features of liberalism', something that does not belong to the republican arsenal of ideas, which rather defend laws and customs (Viroli 2002: 7). Likewise, Cass Sunstein argued that 'understandings that point to pre-political or natural rights are entirely foreign to republicanism' (1988: 1551). In the same vein, Quentin Skinner invited us to abandon that 'gothic vision of politics' that states that liberty is a natural right to be maintained, a negative view of liberty consisting of 'mere dogmas'. The republican tradition shows, says the author, that 'the attainment of social freedom cannot be a matter of securing personal rights, since it indispensably requires the performance of social duties' (Skinner 2002a: 161, 211).

Finally, Philip Pettit incorporated this Pocockian reading or natural rights in his philosophical systematisation of the republican research programme. From his perspective, the a priori trait of natural rights discredits them to belong to the republican discourse to the extent that a deontological approach would close the debate on which institutions advance freedom more effectively. Rights must be the outcome of collective debate and consent, not to be provided in advance whatever the context may be (Pettit 1997: 99–101; see as well Bourdeau 2009; Spitz 1990). In his celebrated work *Republicanism,* Pettit stated:

> My inclination is to think that when republicans spoke of natural rights, however, they generally meant to argue that certain legal rights were essential means of achieving freedom as non-domination, and that the description of such rights as natural did not have more than rhetorical significance for them. In particular, it did not imply that the rights were fundamental norms that called to be honoured in deontological fashion. (Pettit 1997: 101)

Lately, this neo-republican view of rights has inspired an extreme position that deserves to be noted. Confronted with the evidence that most eighteenth-century French republicans were strong advocates of natural-rights theories, Pettit's argument of mere 'rhetorical

significance' is close to collapse. However, Dan Edelstein offers a solution in *The Terror of Natural Rights*: eighteenth-century French republicanism would be a degenerate variant, Jacobinism being its highest and logical expression. Its proponents advocated replacing civil laws with natural law,[17] which in the end could only be a hollowing out of the principle of national sovereignty. Insofar as nature replaces law, anyone who breaks the law is outside nature and can be eliminated in cold blood. In Edelstein's account, the Terror flows naturally from the *Déclaration des Droits de l'Homme et du Citoyen* (Edelstein 2009).[18] With a more subtle partisan approach to intellectual history, Pettit (2013) made an analogous movement with his recent efforts to distinguish between the neo-Roman Anglo-Atlantic republicanism from the communitarian French-German republicanism (epitomised by Rousseau and Kant) – repeating almost verbatim the bipolar Cold War (and nineteenth-century anti-republican) condemnation of political theories that advocate for the indivisibility of sovereignty at the expense of the mixed constitution.[19]

Conclusions

The main contribution of this article is a politico-philosophical map that, drawing upon two cross-party and centuries-old sets of arguments against natural rights, might help to explain the prevailing neo-republican position on natural rights. To sum up, what lies at the heart of the neo-republican views considered above is a rigid understanding of natural rights as too abstract and unreal to inspire historical republicans, who are more inclined to prudence, empiricism and institutional design. At the same time, natural rights are seen as the foundation of negative liberty and liberalism, as opposed to the *vivere civile* claimed by the neo-Athenians or to the consequentialist conception of the law from the neo-Roman perspective. Our point is not that neo-republicans mechanically reproduced the old arguments against natural rights, but that they recast them in a new fashion. These views, however, arguably leaned on longstanding political and scholarly assumptions about natural rights reinforced during the Cold War.

Freedom as non-domination, the most important normative concept distilled by neo-republicanism, was conceptually construed as an older alternative to Isaiah Berlin's Cold War dichotomy of

positive and negative liberties (Pettit 1997; Skinner 1984, 2002b). The promise of non-domination was the awareness against public and private threats to freedom; a concept of liberty shielded against both the arbitrary power of the state and the arbitrary power of private agents (much of it founded on private property rights in capitalist societies). Republican freedom was then retrieved as a third way, as a historically neglected political tradition that could overcome two Cold War historical anxieties, presented now by the neo-republicans in Latin robes: imperium and dominium.

In the way in which neo-republicans understand them and with a historical perspective, imperium and dominium can be seen as the transcription of the two traditional arguments against natural rights that we have tried to identify so far.[20] The 'abstraction argument' against natural rights is concerned with much of what neo-republicans today call imperium: the fear of radical democracy and an excessively activist state, ultimately meaning the tyranny of the majority or a populist clique. The 'self-interest argument' against natural rights reminds of what neo-republicans term dominium: the fear of a pure non-interference liberalism, seen as a mere validation of unbridled capitalism and other forms of oppression based on private power.

As far as these two concerns historically took the shape of arguments against modern political events fashioned in the language of natural rights, it in fact makes sense for neo-republican scholars to discard natural rights from their political tradition. However, even if neo-republicans today consider natural rights the DNA of liberalism, the truth is that, as we have seen, anti-republican thinkers from all eras have despised the language of natural rights. In fact, early liberals were among its most prominent critics. With a few exceptions, the mainstream neo-republican interpretation of natural rights seems to have been edified upon entrenched Cold War perspectives on the tradition of natural rights. Interestingly, these Cold War philosophical and historical approaches reformulated conservative, liberal and socialist arguments from the eighteenth and nineteenth centuries.

But the history of natural rights is too convoluted to be fitted in the narrow frame that neo-republicans have built for them. They are much more than the ideological cover for the tyranny of abstraction or the moral groundwork of self-interest. We wonder if neo-republicanism has been shooting itself in the foot by assimilating these (many times openly anti-republican) arguments. We believe that the relation

between republicanism and natural rights stands in need of substantial rethinking. We shall confine ourselves to only two reasons that, in the light of what we have mentioned above, might help to concretise a republican reconsideration of the history of natural rights.

In the first place, one of Pettit's arguments in favour of a consequentialist conception of rights is the alleged traditional republican commitment to institutional design, civic virtue and mechanisms of social empowerment. However, these can be read as ways in which historical republicans tried to strengthen the enforcement of rights. In this sense, republicanism may suggest a greater commitment to rights than liberals (Hamel 2017). Rethinking the role of natural-rights theories may be a way to assess the drawbacks of the consequentialist notion of rights that some authors have criticised, even within the neo-republican field (Coffee 2015: 60n12; Costa 2007).

Another reason for reconsidering the relationship between natural rights and republicanism is the systematic unfamiliarity of the mainstream republican revival with democratic or plebeian republicans (see, e.g., Audier 2005: 107; Morelli 2006: 455). Despite the recent attempts to split-up the republican tradition we noted above, we believe that republicanism-cum-natural rights should not be a mere regional concern for those studying the history of 'continental' republicanism. Eighteenth-century English radical republicans, for instance, 'freely mixed rights- and virtue-based theories in support of popular sovereignty' (Claeys 1994: 251). And, as the Putney Debates and many radical groups showed during the seventeenth century, this seems to be the case among earlier English commonwealthmen too. Historically, many times it was the doctrine of natural rights that determined, as a last resort, whether the status of republican freedom was another class-based right or a virtually universal value. That is, it was natural law and natural rights as a language of radical equality that delineated democracy within republicanism. If this were to be the case, scholars focused on recovering plebeian and democratic trends within the republican tradition might be interested in reassessing these uncritically inherited views of the natural rights.

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Notes

1. In Alexis de Tocqueville's view of the French 'Rights of Man', for instance, the charge of abstraction – and its consequence, tyranny – overlaps with the charge that natural rights foster an atomised society without intermediate bodies between

government and individuals. Alternatively, both Louis de Bonald and Karl Marx elaborated positions that we classify under the 'self-interest argument'. This should not be taken to mean that the Catholic reactionary shares a political tradition with the socialist revolutionary. But their critique of modern private law, if emanating from different worldviews, serves to pinpoint a cross-party concern against natural rights that shaped modern social sciences.

2. 'The citizens possess individual rights independently of all social and political authority, and any authority which violates these rights becomes illegitimate' (Constant [1815] 1988: 180).
3. Quotation in heading from Fauveau de Frénilly in 1815, quoted in Piguet (2011: 139).
4. See the Papal Bull *Quod Aliquantum,* March 1791. According to the *Adeo Nota* encyclical signed by Pius VI in April 1791, the 'human rights' proclaimed by the French Assembly were 'contrary to religion and society'. Almost a century later, Leo XIII still complained in *Quod Apostolici Muneris* (1878) that socialists 'proclaim the absolute equality of all men'.
5. Of course, this is far from exhausting Marx's views on natural law and natural rights. For a more complex view that underlies ruptures and especially continuities, see Manjarin (2020) and Domènech and Bertomeu (2015). For an account of how the category of 'individualism' permeated Western Europe as a keyword for describing the new post-revolutionary societies – and how the early socialists counterposed 'socialism' to 'individualism' – see Claeys (1986).
6. This was the case beyond the American and French Revolutions. The feminism of Mary Wollstonecraft ([1792] 2014) was predicated on the language of natural rights. Non-Benthamite English radicals of the time were cultivating a 'painite' (i.e., Thomas Paine) democratic-republican natural-rights tradition that some of them traced back to the Levellers and Diggers (Thompson [1963] 1966: 77–212). The radical and anti-imperialist republicanism of Toussaint Louverture and the Saint Domingue rebels made use of the same language for their own interests (Dubois 2006; Gauthier 2008). Colonial authorities and slave-owning elites panicked after the Haitian revolt and anathematised the natural rights of the *Déclaration* (Guanche 2022). As it could not be otherwise, the 'Atlantic space' of circulation of ideas, symbols and political practices allowed the diffusion of natural rights among the Hispanic independence movements of the early nineteenth century in a mutually constitutive relation between colonies and metropolis. Natural rights were constantly invoked in the republican independence processes (Chiaramonte 2004: 102–134; Morelli 2006). Even the enlightened economist who introduced English political economy in Spain to ground democratic proposals of land reform, Álvaro Flórez Estrada, wove his own theories with a strong commitment to natural rights (Flórez Estrada 2010).
7. For the nineteenth-century exceptions, to name but a few, see the Chartist movement (Chase, 2016), the feminism of the Seneca Falls Convention (Stanton 1881) or the agrarian thought of Georgism (Peddle 2012). Natural rights were present in the work of Filippo Buonarroti *Conspiration pour l'égalité dite de Babeuf,* published in 1828, which was particularly important for the European left (see an analysis in Scotto 2021: 150–154), and in the seminal work of Pierre-Joseph Proudhon *Qu'est-ce que la propriété?* (Proudhon [1840] 2012). The future president of the First Spanish Republic, Francisco Pi i Margall, was a great advocate of a democratic vision of the *ius naturale* (Pi i Margall 1854). For several assessments of the ambivalent role of human rights in the socialist movement, see Wolfang Abendroth (1972: preface), Julius Braunthal (1949), Albert Mathiez (see Bosc and Gauthier 2017) or Arthur Rosenberg (1939: 214–225).
8. This is part of what Habermas (1974: 82–120) termed 'positivization' (*positivierung*) of natural law. The problem is that he seems to use a sociological description

of late eighteenth-century events to comprehend earlier exponents of the natural-rights tradition. That is, his interpretation of previous ideas of natural rights is determined by the way a concrete conception of natural rights became positive law in post-revolutionary constitutional law – thus serving an important function in capitalist societies. In a sophisticated case that we could frame under the 'self-interest argument', the tradition of natural rights seems to be understood by Habermas in a purely retrospective manner, as advancing the future nineteenth-century capitalistic status quo. A similar instance of this contemporary Marxist approach to natural rights may be found in one of Habermas' sources, C. B. Macpherson (1962).

9. The only exception to this worldwide tendency that we know of is the Mexican Constitution of 1857, Section I (Domènech 2012: 75). Pablo Scotto has brought our attention to the 1848 constitution of the French Second Republic, which said to recognise 'rights and duties preceding and superior to the positive laws'. However, as Scotto notes, this acknowledgment was merely part of the preamble, precisely leaving out of the constitutional text the declaration of natural rights. On this point, see Scotto (2021: 382–383).
10. Lecturing in 1945, Friederich Hayek (1958: 1–32) isolated a 'true individualism' – that respected family and property – from a 'false' 'Cartesian' 'rationalistic individualism' – that tends to violently apply abstract theory into society and develop into socialism – everything with the explicit help of the nineteenth-century antidemocratic concerns of Burke, Lord Acton and Tocqueville. Hand in hand with Hayek's ideas, 1945 brought Karl Popper's famous distinction between 'open' and 'closed' societies, linked respectively with 'piecemeal social engineering' and 'Utopian social engineering'. The Viennese philosopher traced this later utopianism back to Heraclitus and Plato in terms of a civilisational conflict (Popper 2013: 21, 161–189). Along similar lines, we can mention T. D. Weldon's two historical conceptions of government: 'organic', represented in his day by the Soviet Union, and 'mechanic', represented by the United States (Weldon 1947). Or the handbook dichotomy popularised by Anthony Quinton (1967: 9–17): the 'organic theory' of Rousseau and Hegel (the state is the society) is separated from the 'extrinsic theories' of English social contract. And, in the same vein, Robert Nisbet (1974: 625, 635) distinguished 'two traditions of citizenship': Rousseau's 'unitary democracy', about which 'historians have made very clear the line of continuity … to twentieth-century totalitarianisms', and Burke's 'social pluralism', an inspiration to 'decentralise' and 'reduce the present mass of Federal bureaucracies'. These dichotomic divisions of Western legal-political thought influenced even those with other normative concerns. For instance, in 1979, Michel Foucault distinguished a French, revolutionary, 'axiomatic, juridic-deductive approach' to public law versus an English, radical, 'inductive and residual way' (Foucault [1978–79] 2008: 39–41) – to him, however, both ended up in a sort of non-democratic governmentality. It is worth noting that this twentieth-century attempt to isolate a non-revolutionary tradition of natural rights (non-statist, negative, able to hold popular sovereignty) only replicates the early nineteenth-century liberal attempt to separate democracy and state interference from freedom – e.g., 'ancient' vs 'modern' liberty in Benjamin Constant (1988: 102–104), 'Gallican' versus 'Anglican' liberty in Francis Lieber (1853: I, 298–300). On the conscious recovery of this nineteenth-century view in the early days of the Cold War, see Hayek ([1960] 2011: 107–132).
11. For a critique of the approaches that highlight the disruptions between classical natural law and modern natural rights, especially in the work of Michael Villey, see Brian Tierney (2001).
12. The influent Italian philosopher Norberto Bobbio sustained the same idea (Bobbio 1993: 10–12, 18–20).

13. Of course, this is not the whole story. Some important Marxists were standing up for the legacy of natural rights bequeathed in socialism (Abendroth 1972: 15; Bloch 1996: 153–208; Blum 1945: 98; Neumann 1964: 69–95; Rosenberg 1939; Torr 1956: 98, 127).
14. This section draws on some elements previously developed in Martínez-Cava (2020).
15. The great exception here is the work of Caroline Robbins, which recognised the essential role of natural-rights theories as an intrinsic element in the doctrines of the Commonwealthmen. The self-styled 'Real Whigs' kept alive the republican legacy of seventeenth-century republicans such as Harrington, Sidney, Milton or the Levellers. The Real Whigs elaborated their proposals of rotation in office, separation of powers or civic virtue intertwined with the language of natural rights. It is worth mentioning that Robbins pointed out a reason for the decline of natural rights: the 'utilitarian assumptions' accepted by radicals and liberals in the nineteenth century (Robbins [1959] 1968: 3–21).
16. Richard Dagger could be counted here (1997: 19–22).
17. A movement that clearly recalls the reading of natural-rights theories by Pierre Bourdieu (1987: 820n28).
18. In a final twist of this new Cold War script, the author reveals the Burkean apprehension in his attempt to elucidate a continuity between the criminal character of Jacobin politics and 'revolutionary' or 'totalitarian' movements, from late nineteenth-century anarchism or Marxism in toto, through Nazism and on to the War on Terror of George Bush (Edelstein 2009: 264–266). One might wonder to what extent the interpretative frameworks of the Cold War have aged as much as is often claimed.
19. On the point of separating the Western political tradition to save it from totalitarism, see note 10.
20. It may be useful to note here that we are not questioning the very distinction of imperium and dominium. Quite the opposite, we think the democratic normative potential of such distinction depends on stripping it from the rather elitist views sometimes attached to it – especially when imperium is associated with images of excessively unrestrained popular sovereignty. This is the purpose of putting the neo-republican awareness against imperium in the context of long-term historiographic and political views of natural rights. In the same vein, this article is not making the case for a recovery of natural-rights theories in contemporary political debates. Our purpose is to merely discuss how the language of natural rights was transformed, rejected or accepted; and to show how certain politically charged assumptions about them survived, becoming part of twentieth-century scholarly views inherited by neo-republicans.

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