

The Natural Rights Basis of American Constitutionalism: Attic Tragedy, Aristotle and Locke

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Abstract

“To understand political power aright, and derive it from its original, we must consider, what state all men are naturally in, and that is, as state of perfect freedom to order their actions, and dispose of their possessions and persons as they see fit, within the bounds of the law of nature, without asking leave, or depending on the will of any other man” John Locke (in Barker, 2007, p.4).

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Introduction:

Radical Beginnings: The Sovereignty of the Individual

Let us begin with a radical statement. If natural rights are to be taken seriously, the concept must mean that the sovereignty of the individual can never be properly given up, delegated, modified or otherwise compromised by the social contract or any other form of agreement, voluntary or coerced. In principle, an individual cannot give up his right to sovereignty over his own person, for this right inheres in his status as a created organic being (Barker, 2007). Even Hobbes agrees that the individual never gives up his right to life, although he may certainly have his life taken from him. Only by ceasing to be a human being can an individual cease to have natural rights. Any statement that suggests that civil society means that an individual surrenders his natural rights in order to attain the benefits of social life is false. One enters civil society in order to preserve natural rights from, in the famous words of Locke, ‘the inconveniences of the state of nature.’ Any suggestion that society has rights which need to be balanced against the rights of the individual is simply false, a category mistake. Society has no rights and cannot have rights. Only individuals have rights. And these are, as the American Constitution states, ‘inalienable’, that is, they cannot be separated from its locus in the human body. Civil society does have powers, but these are to be exercised in the context of the inalienability of natural rights, that is, they are subject to profound constitutional limitations. The most serious implication of this set of ideas is that if

the rights of one citizen are violated by any social policy, no matter how popular or wise, the policy must give way. This is a very difficult idea for Europeans to comprehend much less agree with. Most Americans, we believe, do not adhere to this understanding of their constitutional system. It violates democracy. Of course, America is not a majoritarian democracy. It is a natural rights based constitutional polity, with a form of government that has many democratic characteristics but is seldom ruled by majorities.

“The individual excellences or *aretai* demand conditions: length of life, riches, a proper society to function in. Social organization, the *polis*, provides the means of training in these individual excellences, and it also furnishes the field in which they can operate; it provides the materials and conditions for training in, and for the exercise of, the good life. Ethics and politics are hence two aspects of the same ‘architectonic’ science. The excellences or *aretai* of the individual are formed in the *polis*, in society, and they can function only in the *polis*” (Randall, 1962, p.254)

Discussion- Contradicting Aristotle?

Perhaps the most famous saying in all political philosophy is that man is a political animal, *zoon politikon*. Aristotle seems to have a view that is diametrically opposed to my version of natural rights. Not only must a man live in a *polis* to be fully human, the *polis* is prior to the man. It seems that Aristotle begins with civil society, called the *polis*, and ends with man who is individual only in his birth and death and then profoundly incomplete. Although in the main, I agree with this interpretation of Aristotle, I do so only insofar as his conception of the *polis* can be distinguished from the concept of the state. If *polis* is translated, as it often is, as state or even city-state, Aristotle cannot avoid being turned into a Roman or worse. In Rome, as in most modern states, man is defined by his citizenship and its duties, not by his happiness or any other subjective or personal evaluation. To do this to Aristotle is to misunderstand his thought.

The state in modern terms refers to all the objective assets of a given sovereign territory, including its rules, regulations, laws and all other formal authority. The state is the site of all rational/legal authority, to use Max Weber’s phrase. The French state since 1789 and the German state since 1871 are good examples of this concept. Aristotle’s *polis*, by contrast, is more akin to a collection of citizens, i.e., a group of people under the same constitution (Rackham, 1926). All these words—citizens, constitution, *polis*—have the same root in Greek and not in English, which has been part of the problem.

To distinguish the *polis* from the state is important, for when Aristotle refers to the happiness or well being (*eudemonia*) of the nation (*ethnikos*) or the *polis*, he is referring to the happiness that can only be an attribute of human beings, singly or collectively. The collectivity is more like the spectators of a football match than to the subjects of a modern state. States cannot have emotion-based human attributes, except as metaphors (Edel, 1982). This semantic argument is reinforced when Aristotle’s operational description of a *polis* is appreciated. A *polis* is a group of citizens who know each other well enough to make proper and informed public decisions respecting them, either in the assembly or in the courts (Rackham, 1926). I will argue in my discussion of Locke that his differences with Aristotle regarding constitutionalism are not so great as is generally believed. First, however, I need to sketch a little more of Aristotle’s views, beginning with *telos*.

Telos, End, in the sense of what something will become if an unimpeded natural development is allowed to proceed, is the irrefutable sign of what something really is (Rackham, 1926). A boy becomes a man; the essence of man is manhood, the fully developed human being. The essence of manhood is the capacity to reason. Such a man actively engaged in the affairs of

his polis can be presumed to be complete. But what does such a being intend to become? What is *his* purpose, not considered merely as a reasoning organism in the company of others like him more or less in a civil society, but as his ultimate goal? Aristotle's answer is a happy man, for happiness is an end in itself, the only human end that cannot be considered as a means to another end (Randall, 1962). *Eudemonia* is the goal of man. It is importantly the property of an *individual* man, seen as a state of contented well being, an awkward but usually more adequate a definition of *eudemonia* than happiness. *Eudemonia* is not a property of the *polis* considered as a state and cannot be made so, no matter how integral the polis is to fulfilled manhood, no matter how prior it is to manhood.

This obvious, but often insufficiently stressed, point is critical for this analysis, because it indicates how a *polis* is to be judged. Aristotle makes a distinction between a successful *polis* and a good one, just as he distinguishes between a successful and a good man. A good man is one who has a harmonious soul, who lives his life in accordance with moral virtue, which includes an active public life (Apostle, 1984). A good *polis* is one ordered according to justice. The ideal relationship is for a good man to live in a good *polis*. One can recognize a good *polis* by how much it conduces to friendship.

Again, let me emphasize the obvious. Friendship, and all the more so in its ultimate form, is a property of human beings, not the state. It is essential to *eudemonia*. It is in this sense that man as *zoon politikon* needs to be understood. Only in a *polis* can a man have friends as Aristotle defines friendship. Only in a *polis* can man live a life of contented well being. John Cooper makes this point well:

“He holds not only that active friendships of a close and intimate kind are a necessary constituent of the flourishing human life but also that ‘civic friendship’ itself is an essential human good. That is to say, that he holds that every person needs to have close personal friendships in which common and shared activities are the core of the relationship but also that fellow citizens who are not otherwise personally connected ought nonetheless be predisposed to like one another and to wish and do each other well” (Cooper, in Rorty, 1981, p. 303).

The ultimate authority, as well as the locus of *eudemonia*, is the human individual. A tyrannical polis may wield all power, but it can never secure authority over the individuals that constitute its citizenry (Apostle, 1984).

Two critical points need to be made regarding constitutionalism. The first is that in the most significant sense the human individual retains sovereignty over his ultimate objective: *eudemonia*. Secondly, this implies that the polis, regardless of how it is ordered, is limited. It may act tyrannically but never do so legitimately, for tyranny obstructs the natural development of man, interferes with the life of morally virtuous activity, and makes friendship dangerous and problematic (Apostle, 1984).

None of this is to argue that Aristotle should be considered a natural rights political philosopher. As we will see below, he has at least one profound difference and one contingent difference with John Locke and the other natural rights philosophers. It is to say that his constitutionalism is not inconsistent with many of the conditions of such a philosophy. Nor was Aristotle alone among the Greek geniuses who perceived catastrophe in an unlimited polis organization, in other words, a tyrannical power state.

The affair is too grave, if any mortal thinks to pass judgment thereon.... So then stands the case: either course—to suffer them [the Furies] to stay, to drive them forth—is fraught with disaster and perplexity to me.

Athena, (*Eumenides*, Lines 470-1 and 480-4)

The Tragic Vision: Between the Literal and the Expedient

Aristotle knew about three hundred tragedies. Only about one hundred, including small fragments, remain for us. As he refers to them repeatedly in his political works, I make the not very daring assumption that these marvelous dramas had political significance for him. Without making explicit links between Aristotle and Aeschylus, Sophocles or Euripides—that I leave to you—I believe my sketch of the *Eumenides*, *Medea* and *Antigone*, will quite naturally lead you to Aristotle.

If kindly, even as they [the Furies] are kindly, ye [citizens] pay them high worship evermore, ye shall surely be pre-eminent, guiding your land and your city in the straight path of righteousness. Athena, (*Eumenides*, Lines 992-5)

The Eumenides and the Necessity of the Political

For our purposes the most important fact regarding the great epiphany, which concludes the Oresteia, is that the Furies remain in the polis, although renamed the Well-disposed. They continue to be a necessary check to a human being's propensity to self-importance, to hubristic disregard of human limits, to confuse expediency with justice or ignore justice completely. The more humans succeed in their rapidly developing polis, the more the world becomes subject to their political manipulation, the more necessary are divine sanctions. More than piety mandates this Aeschylean limit. It is entailed in the inability of man in principle to achieve justice. The political is at best a pragmatic substitute for justice. Used wisely, it would enable human beings greater scope for their actions, for they would have to spend less time and energy fending off a perverse cosmos. Used unwisely, the political would subject humans to divine retribution, to justice, necessarily divine, necessarily inaccessible to humans on their own. Aeschylus' vision of the political is thus profoundly religious. The Gods would still intervene in human affairs, although they are now expected to behave more benignly. Humans are now able to respond to their responsibilities more intelligently. The price for this zone of discretion is that the punishment of transgressions would seem just and not the whimsy of the Gods. The price of adulthood is an uncomplaining acceptance of punishment when deserved. However much humans might long to be playthings again, there could be no turning back.

It does not take much imagination to translate Aeschylus's vision into constitutional terms. With the discovery of the political, with the establishment of the propriety and the necessity of having the citizens determine their own affairs, comes the necessity of limiting this power. Power—even legitimate power, manifested in the decisions of a democratic citizenry in accordance with their own rules—has to be limited, lest human nature allow the expedient to overwhelm justice. Justice, for Aeschylus, embodied in the Furies, is not subject to reason and is therefore immune to the tricks and sophistries of men. Justice exists as a divine limitation to the power of citizens as well as tyrants.

Respect for your oaths is gone, and I cannot tell whether you think that the gods of old no longer rule or that new ordinances have now been set up by mortals, since you are surely aware that you have not kept your oath to me.

Medea to Jason,
(*Medea*, Lines 492-4)

Medea and the Politicization of the Implacable

At the end of the great 5th century, Euripides would have none of this Aeschylean epiphany. Euripides retains the need for reconciliation, as well as, an appreciation of its political mode. There similarities cease. As is his wont, Euripides raises the ante, asking even more from humans than Aeschylus. There would be no help from the Gods. They, Old and New, would be forces of retribution. Their wrath could be avoided only by human action. Fortunately, humans

have at their disposal a mode of settling disputes among themselves which could achieve far more than could be accomplished in a world fraught with Aeschylean limits. Failure would of course unleash untold horror, all the worse for having all too human sources, however much they might be imputed to the gods. *Medea* is a tale of failure. Within its gruesome unfolding, however, lies what might be, if humans could fulfill their political responsibilities.

Recall Medea's emphasis on obligation, on the requirement to keep oaths and fulfill promises. Throughout the play, from the first speech to line 1392, the chord is sounded. In my view, obligation in *Medea* amounts to the politicization of implacable divine ordinances. It is not an exaggerated pre-political sense of obligation that drives Medea to chthonic revenge. It is not Medea's lack of political sophistication that unleashes the furies within her breast. Quite to the contrary, it is Jason's inability to appreciate the requirements of the new political order. It is his denial of obligation that provokes Medea's awesome retribution. Jason insulted the body politic, opening a wound into which ancient plagues would pour and fester. If the presence of obligation is necessary to the political order, if its absence implied the unleashing of the Furies, an understanding of obligation becomes essential to the appreciation of Euripides' notion of the political. And to the understanding of *Medea*.

For Euripides obligation is thoroughly human and thus at the disposal of men and women. Whether its ultimate source is divine or not, whether its failure to govern human action would be sanctioned by man or God, obligation is entirely comprised of human relations. In this respect it is profoundly rational. Consider, by contrast, the reason the political became necessary in *The Eumenides*. A conflict between one divine order and another creates contradictory demands on Orestes. The political becomes a way of *not* fulfilling one obligation in order to fulfill another. However one views Orestes' final status, absolved and stained or absolved and purified, there can be no doubt that the political solution enables the polis to continue with every prospect of success. At the very least, the polis would no longer be prey to the contradictory admonitions of the Gods. Humans would still suffer for their errors, but these mistakes, however inevitably grounded in human imperfection or the indeterminacy of events, would not be implied by strife between deities. Men and women would pollute themselves. They would not, however, be polluted by virtue of their existence.

Although this Aeschylean solution has to be seen as a clear advance in the development of the political, unfulfilled obligations are the price paid to avoid the cycle of revenge and retribution. In one case, humans would remain in need of absolution. In another, they would remain stained, convicted if only by themselves of crime. The political might have save citizens of the new order from the indiscriminate death dealing of the Furies. It could not save Orestes from his awareness that he is a matricide. Political necessity now stands in lieu of the catastrophe that prior implacable and contradictory divine ordinances implied. But that is all. The polis could go on, but it could never achieve justice anymore than Orestes could regain innocence. Hence the irreducible significance of the gods in the Aeschylean cosmos.

The gods are necessary because man cannot in principle achieve justice. His existential situation is tragic, because it precludes justice. The gods can provide no remedy, even if they wanted to, for they too must bow to the necessitous. Athena quite pointedly does not resolve the tragic dilemma implied by the impossibility of achieving justice. Instead she provides a mechanism, and not an especially subtle one, for avoiding the dilemma's most catastrophic consequence, the unending cycle of revenge and retribution. At most she leaves open the question whether divine justice exists. What is clear is that man has no access to it, even through her good offices. The best Aeschylus can do in the face of contradictory injunctions from the gods, a circumstance which means man must be guilty no matter what he does, is to suggest that man limit his tendencies towards hubristic excess, most especially his erroneous belief that justice is in his province and his tendency to abuse political power, whether in the pursuit of a necessarily flawed notion of justice or for partisan gain.

Euripidean obligation, by contrast, is totally political, that is, within the dispensation of man, and therefore much more rational than the Aeschylean. It is subject to reason and its limits not to divine injunction. Unable to demand compliance to what could not have been fulfilled, the gods are an irrelevancy so long as the needs of the political order are met. There is no contradictory set of obligations in *Medea*. Medea does not demand vengeance because Jason fulfilled the wishes of another divinity. (Jason would be less odious had he been susceptible to divine forces like Aphrodite, as he claims he was when he married Medea.) She avenges herself because Jason prefers leading a more comfortable life to keeping his promises. Jason succumbs to middle aged ambition not to a divine injunction, much less a divinely ordained obsession. Jason's preferences could not be helped. His willingness to act on them in defiance of his sworn duty nevertheless has to be avoided. If Jason were allowed to shirk his responsibilities to Medea and his children so easily, there could be no basis beyond material calculation for any human relationship. The family would be subject to the preferences, material or otherwise, that any males could enforce.

So far Euripides follows Aeschylus. Not content with the Aeschylean political—a notion which leaves justice unattainable by human means—Euripides needs a mode of conflict resolution which brings (or leaves) justice within the polis and susceptible to the political. One approach would be to do something about the contradictory "laws" (or other conflicts) human nature implies. Two options are available: (1) remove contradiction by changing human nature; that is, make human beings perfectly rational; (2) or make the strife contradiction implies less implacable; that is, to politicize the implacable.

Euripides chooses the second course. Initially following Aeschylus, he brings the erstwhile implacable in the form of an absolute injunction into the political/judicial process, where its implacability is compromised by its very presence in a rational procedure. What happens to the absolute in the Euripidean political process differs from *The Eumenides*. There is no transformation of the Angry Ones into the Well-Disposed. Instead there is an interpenetration of the substance of the absolute with the political process, the implacable becoming placable, the divine becoming human—but not the absolute becoming relative. At least not in the ordinary sense of the term or in an ordinary way.

To relativize the absolute is for Euripides just as unacceptable as to banish it to the realm of the Gods. Any such compromise would defeat his aim of bringing justice within the polis. Euripides is simply not willing to capitulate to relativism or to either a bland or narrow self-interest conception of human nature. His object is to retain all of human nature, including its irrational elements, with all its capacities for creation and destruction, for the self-fulfillment which only individual achievement or self-abnegation could produce. This is the task of the political, the justification of the polis. Its mode is the political/judicial process. Its cardinal concept is obligation.

Obligation performs this important function, because it faces in two directions: toward substantive justice ("it is required" and content is significant) and toward procedural due process ("you must keep your promises" irrespective of content): toward an absolute injunction (the Will of God or the Necessities of Nature) and toward a contractual agreement (the will of the parties). Furthermore, it blends the idea of mere self-interest and divine requirement by imbuing voluntary agreements (uncoerced promises) the properties of the nearly absolute. Agreements could only be properly broken by mutual consent. Unilateral abrogation would justify retribution. Although a promise may not be required, once made it has the force of law—its provisions could be justly enforced; its violation justly punished.

Again, the relationship of these ideas to constitutional limitations on power is obvious. If contracts could be broken with impunity, who would benefit? The strong. Their superiority allows them to enforce agreements without law. The law can only serve to bind them in a way

their weaker contract partner could not. This idea becomes fully constitutional when the power of the state is so limited. Legislation cannot abrogate contracts any more than a tyrant.

Didst hear and heed, or art thou deaf when friends are banned as foes?
Antigone

Nor would I reckon as my private friend a public foe, well knowing that the state is the good ship that holds our fortunes all: farewell to friendship, if she suffers wreck. Creon, *Antigone* (lines 9-10; Creon, lines 486-90)

Friendship: The True Hero of Antigone

It may seem perverse to focus on Haemon rather than Antigone, however, for the purposes of examining constitutionalism, Haemon is more important. Antigone one of many examples of the power of divine law to limit political authority. Haemon adds something new, the power of friendship to perform a similar function and thus also serves as an important link to Aristotle and his major difference with Locke.

First, let us consider love and marriage in *Antigone*, remembering to divorce ourselves from modern romanticism. There is no indication of passionate love (*Eros*) between Antigone and Haemon. They do not speak to each other or even appear on stage together. The only notion of love imputed to them or suggested by them for each other is *philos*.

Until he befriends Antigone and she him in the fullest Aristotelian sense, Haemon is an ordinary sort of Greek boy, who wants to obey his father because he is his father and who wants to obey his king because he is his king. He seems a disappointment to his father. When he seems to succumb to Antigone's influence, his father ridicules him, as only a Greek father can ridicule a weak son. When Haemon turns out not to be weak, he shocks himself as much as his father. How did this transformation come about?

Predictably, his father wrongly blames *Eros*. He should blame *philos*. Just as Aristotle explains, the final form of friendship implies that each party to the relationship sees the other's interests as superior to his own, insofar as they can be distinguished. Each friend sees in the other the best he can become as already actualized. This seems a particular gift of females who often see in their male friends potential that no one else can imagine. Sometimes this imputation of a greater self than meet the eye of strangers actually transforms the object of the friendship. This is what happens to Haemon. The heroic nature of Antigone is reflected back into his soul which he then sees in his own mirror. Through their friendship Antigone has transformed Haemon into a man his father would in other circumstances be proud of. The newly minted man Haemon dies as simply and for the same reason as Antigone: there is no way to live as less than a free person, a person who is sovereign of his or her soul. The state kills them, but it cannot expunge their rights as free human beings, if only expressed once as a resistance to a tyrannical intrusion on their images of themselves, images refracted in each other's eyes with friendship.

The excellences he describes on the basis of his observation are the rather individualistic ideals and values the Athenians actually cherished, not the more socialized and functional ideals and values they sometimes, with an eye on Sparta, thought they ought to cherish (Randall, 1962, p.249).

Confronting Leviathan or was Locke Really a Greek?

To counter Hobbes's bleak picture of bestial and aggressive human nature and its derivative authoritarian police state, John Locke wrote his *Second Treatise on Civil Government*. Locke's agreements with Hobbes are, however, as important as are his many points of

difference. Locke concurs with Hobbes that political authority endowed in a modern state with its monopoly of the use of legitimate force (to use Max Weber's formulation) tends toward tyranny. Locke's civil authority could become Locke's 'leviathan', having perhaps a greater reach than Hobbes's for seeming more consensual. A totalitarian prison needs no walls or guards. This proposition is an inference from Locke's structure of authority, which requires a short exposition.

Like Hobbes, Locke realizes that the state of nature has to be transcended (Locke, p.73). Unlike Hobbes, the driving force is not fear of the war of all against all. Instead, Locke believes that individuals, once they achieve minimal levels of cooperation and division of labor, would realize the 'inconveniences' of the state of nature. Put more positively, individuals, already cooperating in a benign pre-civil society, will perceive advantages resulting from structuring their activities. Locke believes that individual human beings would see the wisdom of providing themselves with formal authority which would serve to guarantee their individual rights, while allowing for ever more complex human cooperation and more elaborate enterprise. Government, or legitimate coercive authority, thus comes into being at the behest of a sovereign people to secure their individual rights and to allow their expression the fullest sort of elaboration. All restrictions of individual liberty entailed by government have to be measured by their capacity to enhance the benefits attendant upon the exercise of natural rights. Think of traffic laws. No one is allowed to drive ninety-five miles per hour in order to allow everyone else to drive at sixty-five in relative safety. This is a clear restriction of liberty, but it is not only justified on utilitarian grounds. More than the greatest good for the greatest number is implied. The individual's freedom to travel is enhanced.

Notice also that the justification does not rest on considerations of good policy by government or by the people. Another criterion must be taken into account, the effect of the policy on liberty. Few people would doubt, for example, that laws restricting access to unhealthy foods, especially in a society where obesity is reaching epidemic, would avoid many thousands of deaths. Few would doubt that targeted lobotomies or castrations would limit violent crime. Few would doubt that restricting childbirth to the responsible would avoid much child abuse and neglect. Yet these proposals, assuming their effectiveness, are not seriously proposed, because they would traverse constitutionally protected rights. For Locke these rights require special and powerful protection in precise proportion to the temptation to compromise them in the name of the public good.

This proposition can be clearly inferred from Locke's hierarchy of authority. A believing Christian, Locke placed the God-created universe at the apex. Below this is the natural world, including humanity. It is this group which enters into rudimentary social groups, each of which chooses to enter into a social contract with the members of its group. The purpose of the contracting parties is to establish among them an authoritative structure, a constitutionally ordered government whose purpose is to secure the rights and blessings attendant upon the exercise of those rights. A constitution is a set of rules which allocates and limits the coercive power of the society and its most dangerous instrumentality, the state. The sovereign authority of the parties, who can now be properly called the people, remains intact. Sovereignty is not delegated to either the constitution or the state; the constitution is amendable; the state is derivative. The state serves at the pleasure of the sovereign people under the terms of its constitution.

Locke thus places barriers between what he believed to be the inevitable tyrannical tendencies of government and the people it would try to rule instead of serve. Notice the profound difference from Hobbes, who believes the most dangerous threat to the security of the individual is the behavior of other individuals. For Locke, the most serious danger to the security of the individual is the agent of the people themselves, the state, as Hobbes's *Leviathan* demonstrates. Locke's notion of security is much broader than Hobbes's physical security. Locke's human being is not a terrified humanoid willing to sacrifice all expression

of God-given rights for a security largely illusory. How can one defend one's life against an authoritarian state? Locke's humans are autonomous beings (in Kant's sense) who through the use of reason can fashion a government to meet their needs as human beings endowed with rights which cannot be abrogated by any legitimate force. The government and coercive authority in general exist only to guarantee the widest possible arena for the free expression of these rights, the benefits of which will provide the means for the physical, emotional, and economic independence from the state.

For Hobbes, the question is, how could the coercive state be endured? In Locke, the question is, how could the necessary evil of the state be contained? Alternatively, the question is, how can the people (individually or collectively) be kept from succumbing to a fear which will thrust them into the willing arms of a tyrannical state? Locke's answer centered on the very rights the state is sworn to serve. In Locke's view 'leviathan' does not derive from the inherent and pervasive fear of the people. Locke's 'leviathan' would develop, if the people lose their faith in their own ability to secure through reasoned evaluation of their experience the blessings of liberty. The temptation to tyranny occurs when the people no longer believe that their freedoms can create real independence from coercive authority as much as from fear of the predations of criminals. Fearing chaos and physical insecurity, despairing of their own efforts to protect themselves, they would leap into tyranny believing that only a charismatic leader and his storm troopers could save them. Life, liberty and property are not only natural rights for Locke. They are the means by which a coercive state—tyrannical in its nature—can be controlled. For this basic reason all governmental proposals which limit the expression of individual rights must be justified by much more than their effectiveness or responsiveness to public need. Public policies must enhance the effectiveness of the rights in fact, even while it restricts them in principle. No policies conceived in fear can meet this criterion. Fear is the mortal enemy of reasoned judgment and therefore the most profound ally of tyranny.

When rights are threatened, when freedom is made to justify itself to the terrified, the state of nature, as Hobbes conceives it, is already at hand. Chaos and criminal anarchy are not the effects of the war of all against all, but of the war of the agent (coercive government) against its sovereign, the people. From the perspective of freedom, the worst sort of anarchy is one masked by the security-driven state. Paraphrasing Tacitus, the coercive state drowns individual rights in the terrors of panicked people, creating chaos, and calls it security. Predictably, the demise of freedom would be justified in the name of the right to life, just as Hobbes's Leviathan is justified. But what sort of life? An existence with no motive but fear, with no ambition but physical security, with no hope but a painless death scarcely distinguishable from living?

This portrait of Locke's *Second Treatise* reflects the individualist school of Locke interpreters. No Locke scholar, however, ascribes to Locke the emotive, identity forming, and meaning creating power of Aristotelian friendship. My version of Locke implies that the emotional needs of individuals are a weapon that the modern state will use against him to lure him into a degree of obedience otherwise impossible. Even the rudimentary society which exists before civil society is formed by the social contract is measured by its utility. Men and women cooperate to achieve tasks impossible to complete alone, with sexual reproduction as the archetypal case. Any activity which might compromise the expression of individual rights is suspect in Locke and can only be justified by necessity. And this justification must come from the individual concerned, not any outside person or agency. Sovereignty in Locke begins with and remains with the individual.

Here we come to Locke profound difference with Aristotle. For the Greek philosopher one cannot be a complete man unless he is a participating citizen. This is why the polis is prior to the man. For Locke the participant in the social contract is already a complete man. He needs civil society to better express his rights bearing humans, not to complete them. However, once

in civil society the differences between Locke's citizen and Aristotle's shrink. One critical difference remains: importance of friendship.

For Aristotle friendship is essential to human happiness and the full development of human virtue. It is difficult to conceive of a man of virtue without friends. Its power is essential to the *eudemonia* of the individual. Indeed it might be said that the polis is measured by how much it conduces towards friendship. For Locke friendship plays no such public role. It is possible to infer from Locke's benign state of nature that friendship might subvert the drive to express and protect individual rights. The very source of meaning, virtue, and, therefore, identity Aristotle finds so essential and beneficial, Locke sees as a threat.

This odd assertion can be made less so, if we see man, not in a polis or in a Lockean civil society, but in a modern nation-state. Its nationalistic elements attempt to provide much of the emotional meaning base of its citizens, to a great extent replacing the traditional function of religion. Nationalism is a tribal emotion the state employs to make sacrifices, including the destruction of their and other people's lives. Locke's defense against this sort of tribal violence and its cousins in sectarian strife is to assert the full humanity of the individual independent and prior to the state and civil society.

This theoretical difference with Aristotle must be seen in the context of his times. Locke has good reason to fear the state more than Aristotle fears the polis. Remember Locke's *Second Treatise* follows his *First*, which is a point-by-point refutation of the doctrine of the divine right of kings. Remember also that Locke is attempting to establish a form of government which would not provoke the civil wars that England had experienced for over a century. He believes sectarian controversy, which in Lockean terms can be seen as the power of groups to get men to kill each other, denying others their rights and risking one's own, for no proper purpose. War fought for group values is the ultimate denial of the individual's rights.

For Locke the *phratris* and the *philos* of the polis were replaced by intolerant monotheistic denominations, which see their views as instituted by an all-powerful God and who believe the extension of their sects is a positive duty which could be implemented by force. Locke would sacrifice almost anything, including friendship, to avoid group-based violence. Locke is concerned that 'leviathan' will use man's decent regard for his fellows against his liberties. Locke's willingness to have an emotion free public existence marks a major difference from Aristotle. In the context of his times, however, and given his main purpose to keep government at bay, this difference may not seem so great. In his love of free expression of the human personality and in his hatred of tyranny Locke was as Greek as Aristotle. He is, however, much more concerned than the great Greek with the tyrant that lies within our own breasts, the tyrant who will sacrifice his or her freedom not to be alone in the dark.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.... The very purpose of a Bill of Rights was to withdraw certain subjects from vicissitudes of political controversy, so to place them beyond the reach of majorities and official and to establish them as legal principles to be applied by the courts (Justice Jackson, *West Virginia v. Barnette*, 319 U.S.624 (1943) at 638, 642).

Conclusion- American Constitutionalism

The framers of the American Constitution were unhappy with the weak government of the first regime which emerged during the Revolution against the British. At the same time, they appreciated that the reason for the Revolution was the American unhappiness with

Parliament, which the Americans saw as tyrannical, and not only because they were improperly represented in it. So America, borne with a deep suspicion of legitimate authority, now had to draw up a document which would provide for such authority and yet not lead to the same sort of tyranny. The Constitution of 1787 resulted. Not all Americans were happy with either the effort or the result. They preferred to put up with the inconveniences of the earlier confederation of states rather than risk their liberties by instituting a strong central government. Thomas Jefferson was their leader. The leader of the centralizers, the Federalists, those who demanded a strong federal government was Alexander Hamilton, who detested Jefferson. The principle drafter of the Constitution was James Madison, who was then an ally of Hamilton, but later became president as the leader of the party Jefferson founded. We point these facts out to indicate that despite deep personal and ideological differences, the Constitution seemed to serve the interests of all the adversaries, although they often did not think so at the time.

Hamilton, who was practically a monarchist, insisted on judicial review, the process by which legislation is voided. He was afraid of the popular will and wished to develop the national economy. He believed the free flow of capital, protected from legislative interference was essential. Hence the right of contract and property. Jefferson, who was an agrarian, who hated capitalism, even in this early form, insisted on adding the Bill of Rights, the first ten amendments to the Constitution. He was hoping to strengthen the individual against the federal government by reserving powers to the states and by reiterating non-economic liberties, like speech, assembly, and religion. Both accepted the Constitution because they read its ambiguous phrases in accordance with their values and preferences. Both turned out to be partly right and partly wrong.

Hamilton's greatest achievement is the development of the national American economy across the entire continent, largely as a result of the judicial review he so cherished. In John Marshall's Supreme Court Hamilton's principles were given the force of law. Almost all efforts of the states to limit or obstruct American capitalism were defeated by the Court, despite decades of judicial appointments by Jefferson's party and the collapse of Hamilton's. Throughout the 19th century property and other economic rights became deeply entrenched in law, often overriding the wishes of first state and later federal legislatures. Jefferson's greatest achievement is having his Bill of Rights become the world's best protector of the individual's liberty in non-economic as well as economic arenas. Their greatest failure, or at least the failure of those who were leading the country, was the inability of the nation to unify regarding what the Constitution meant regarding the powers of the state governments, an otherwise dry issue that became enflamed over the economic differences between rising capitalism in the North and Plantation Slavery in the South. The defeat of the South settled the constitutional dispute in favor of the North and the individual, eventually including former slaves.

In our view all this occurred because, despite serious differences, the framers of the Constitution and their opponents were all Lockean. Let us quote from some judges, who can serve for the rest.

In 1795 Judge Patterson wrote:

The constitution is the work or will of the people themselves, in their original, sovereign, and unlimited capacity. Law is the work of the legislature in their derivative and subordinate capacity. The one is the work of the Creator, and the other of the creature. [*Van Horne's Lessee v. Dorrance*, Kutler, p.5]

In 1919 Justice Holmes wrote one of the most famous defenses of free speech, which asserted the normalcy and the stupidity of trying to suppress opinions:

The best test of truth is the power of the thought to get itself accepted in the market.... That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless the so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. [*Abrams v. U.S.*, Kutler, p.329]

It is possible to multiply such quotations almost indefinitely. This is not to say that the establishment of liberties has not been a struggle. There have been many delays, aberrations, imperfections, and omissions. The trend over two centuries, however, has been to broaden and deepen the concept of individual rights on the basis that they are embodied in every human being and on the assumption that all authority tends to subvert them.

The practical implication of these quotations is that if you can frame an argument in terms of a violation of an individual's liberty, you will almost certainly win. As the 19th century enshrined economic rights, the 20th established extraordinarily broad and deep non-economic rights, which included the most under privileged Americans. Practically the only way to defeat a rights claim is by showing that it conflicts with another equally powerful right. One classic battleground has centered on the tensions between liberty and equality. Another has been between liberty and privacy. A third has revolved around defendant's rights and freedom of the press. If a right is threatened by government merely to pursue a public policy, the policy will survive a constitutional test only in exceptional circumstances, like a national emergency.

The mechanism for this remarkable state of affairs rests in the judiciary, which has as its leading mandate the protection of individual rights. This is to say that one of the three branches of government established by the Constitution has an obligation to interfere with the other branches, the executive and the legislature, when they are tempted to pass laws which contradict individual liberties. The genius of the Constitution is that it sets the government against itself, and it sets the people in one mode, interest groups, including majorities, against the people considered as individuals. The judiciary thus functions as the direct representative of every individual, as if he were still in Locke's state of nature. In this manner the agent of the Constitution, the government is prevented from becoming the master of the ordainers of the Constitution, the people, by a portion of the government, the judiciary. The ordainers of the Constitution are in one sense a collective, but not in the tribal sense a nation or an *ethnikos*. They act collectively in order to secure individual rights, to make these rights more practicable, as the capacity of government to turn its citizens into subjects becomes greater. An American is someone who believes in the Constitution. All officials take an oath to preserve and defend the Constitution, not the state, not the nation, not the people. Of course individual liberties are always under attack, for the reasons quoted above. It is always possible that Americans will not value their liberties and allow their governments to deny them as a matter of fact if not principle. As Justice Holmes said, it is only an experiment, and experiments can turn out badly.

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