

No Natural Rights, No Liberal State, Treitschke and Locke

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Abstract

Without a natural rights based constitution, a liberal state is a contradiction in terms. No definition of liberalism allows for an absolute state, a state which admits of no limits, no check on what it believes is in its interest, whether legally expressed or not. The Public Interest, the Will of the Majority, National Security—not these or any other concepts which are invoked to override limitations to the Power State’s activities can operate in a liberal state, for in their application, these concepts and many others undermine the liberties essential to a liberal state. Non-liberal states accept this forthrightly. They speak of trade-offs between liberty and security and the like, assuming in the bargain that rights are always subject to the state’s Will or to the state’s understanding of the public interest. Treitschke is a classic example of a self-proclaimed liberal who believed in the absolute sovereignty of the State. By contrast, the natural rights theorist, John Locke believed that liberalism admitted of no state determined rights. Rights are natural, ordained by Creation and cannot in principle be subject to emendation or compromise by any sovereign authority.

Thus the newly stirring national feelings that had played so vital a role in the emancipation of the people and the emergence of democracy stood in constant danger of turning into dictatorship and destruction.... Even more startling [than Mazzini] was the transformation of the influential historian Heinrich von Treitschke from Saxonian liberal and anti-Bismarckian to the ideologist of the Prusso-German power state with a nationalist mission.

Karl Dietrich Bracher¹

These lectures [Treitschke’s *Politics*] can be read as a warning against *Machtpolitik* and its distorting perspectives anywhere; self-centered and arrogant nationalism, which believes in a national mission, in national superiority over other peoples, will find here a frightening mirror....

Hans Kohn²

Introduction: the Power State

Since the rise of Rome, the justification of the power state in the West has been its own preservation. This is the chief consequence of the separation of citizens from the state, a result of the parsing of the Greek identity of citizens, constitution and polis. The sovereignty of the state no longer meant the sovereignty of the polis, taken as a collection of citizens. Citizens, no matter the form of government, became *subjects* (in both senses of the word) of state power. As nation-states became the preferred form of political organization, sovereignty was reinforced by the near religious claims of the nation. Sovereignty was not merely an assertion of ultimate power; it was the source of meaning, temporal and transcendent.

¹ Bracher, K.D., *The German Dictatorship*, translated by Jean Steinberg, Penguin, Middlesex, England, 1970, p.25

² Kohn, H., from the introduction to Treitschke, Heinrich von, *Politics*, translated by Blanche Dugdale and Torben de Bille, Harcourt, NY, 1963, p.xvii

The most profound indicator of the power state has been its chief attribute, its propensity for violence, domestic and foreign. As nation-states developed, the ability of the individual to resist its power has diminished to near zero. Although judicial protections have existed in some of these states, they have been held hostage to the needs of state or national security. After all, as U.S. Supreme Court Justice Jackson, said, ‘the Constitution is not a suicide pact.’ Internationally, the violence of nation-states has achieved unprecedented proportions, as wars became not only instruments of policy but ways of asserting national identity. This is why wars have tended to continue years after the ostensible purpose of war, the achievement of political objectives, is no longer possible. The strategic objectives of WW I were over by November, 1914; those of WW II, by January, 1943; yet the bloodletting of millions went on for years. It took four years to withdraw from Vietnam, after Nixon-Kissinger knew it was folly. How long with the current debacle in Iraq continue? The short answer to this question is, just as long as the power state believes it is necessary, for in matters of national security its power is virtually absolute.

I shall be satisfied if you have learned from these lectures how complex every historical fact is, how carefully every political judgment must be considered. If you have learned this humility of genuine scholarship in my lectures, I shall be satisfied.

H. Treitschke³

II. Treitschke’s Limited State

Although Bracher would disagree, Treitschke believed that his ‘transformation’ is mispremised, for he remained a liberal in what he believed the most profound and the only viable meaning of the concept. The State was limited. It had only one sphere of activity, the security of its sovereignty from both external and internal enemies. And in this it was limited, for it can properly deal with only the ‘exterior of men’s lives.’ Notwithstanding the sincerity of his beliefs, Treitschke undermined this limitation, a process which validates Kohn’s conviction that Treitschke’s idea of the *Machtpolitik* destroys the very notion of liberalism, even in the restricted Treitschke understood it. Although I cannot undertake a full treatment of Treitschke in the parameters of an essay, I believe a sense, if incomplete, of his views is possible. By listing a

³ Treitschke, *op. cit.*, xvi

series of quotations it is possible to see how Treitschke undermined his own notion of the limited state. This process is not entirely fair to the great German historian. A truncated view of Treitschke may be justifiable, however, because I employ his ideas only to illustrate why Locke's conception of natural rights may be the most important theoretical way to limit the modern nation-state. I believe, although I do not demonstrate, that Treitschke's State is intrinsically authoritarian. In other words, his State does not tend to authoritarianism under certain propitious circumstance. It is authoritarian in principle and come close to verging on the totalitarian, Treitschke to the contrary notwithstanding.

This point can be seen by a comparison of the 'liberal' Treitschke with the 'authoritarian' one.⁴

'The State is the constituted people [p.3].'

'The State is the public force for Offence and Defense. It is above all Power which makes its will to prevail, it is not the totality of all the people as Hegel assumes in his deification of it. The nation is not entirely comprised in the State, but the State protects and embraces the people's life, regulating its external aspects on every side [p.14].'

'The State alone can be universally and genuinely just, and this because it concerns itself with external order alone [p.30].'

All of these quotations can be read in an illiberal sense. Nevertheless, in the sense of dealing only with the external and public side of human life and by placing the State under the obligation to be 'universally and genuinely just' in its pursuit of national security and by separating his State from the Spiritual State of Hegel, Treitschke can be said to be liberal. The difficulty with this formulation, however, is supplied by Treitschke himself. Consider the following quotations:

'Nothing is truer than the Biblical doctrine of Original Sin, which is not to be uprooted by civilization to whatever point you may bring it....[p.xvii].'

'The State is born in a community whenever a group or an individual has achieved sovereignty by imposing its will upon the whole body [p.16].'

'Law and peace and order cannot spring from the manifold and eternally clashing interests of society, but from the power which stands above it, armed with the strength to restrain its wild passions [p.27].'

⁴ All quotations unless otherwise indicated are from Treitschke, *op. cit.*

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‘The greatness of the State lies precisely in its power of uniting the past with the present and the future; and consequently no individual has the right to regard the State as the servant of his own aims but is bound by moral duty and physical necessity to subordinate himself to it, while the state lies under the obligation to concern itself with the life of its citizens by extending to them its help and protection [p.35-6].’

‘The pure individualism of the Natural Law teaching came to the preposterous conclusion that the citizen has the right to desert the State if it declares a war which he holds to be unjust. But since his first duty is obedience, such unfettered power cannot be granted to his individual conscience [p.57].’

‘Every man may speak the truth, and the State must not prevent him, but Truth is a subjective conception, and the right to declare it openly is accompanied by the no less binding duty to refrain from doing public harm by the spoken word [p.82].’

‘The grandeur of war lies in the utter annihilation of puny man in the great conception of the State, and brings out the full magnificence of his sacrifice of fellow-countrymen for one another [p.39].’

‘The right of arms distinguishes the State from all other forms of corporate life... The other test of sovereignty is the right to determine independently the limits of its power...[p.18].’

‘The State decides the measure of the citizen’s share in the Constitution. 37

‘Without war no State could be [p.38].’

‘It is war which fosters the political idealism which the materialist rejects [p.39].’

‘The strength of the State is founded solely upon positive Rights. Its aim is to endow certain expressions of the will with the binding force of agreements. If, then, we regard as the cradle of the State a contract whose validity is derived from the State itself, we are obviously putting the cart before the horse. We cannot found the State upon a contract which in its turn can only be conceived within that State [p.5].’

‘Compulsory education is a phrase. It should rather be called compulsory freedom; for here the State exercises force against the folly and indolence of the conscienceless parents who would leave their children to grow up like mushrooms.... Our educational system strikes its roots so deep within the individual that through it the modern man is far more deeply bound to the State than he was in the Middle Ages [p.42].’

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I have left out the many racist views of Treitschke, though they contradict the universalistic aspirations of liberalism, especially in its natural rights versions. Furthermore, I will not discuss the war lust, disguised as idealism, his words manifest. I wish to deal with Treitschke in his own terms, in view of his own understanding of the limited State. As this discussion is a prelude to Locke, allow me to focus on the interrelated notions of constitutionalism, free speech and contract.

In line with his conception that the public expresses itself politically only through the State and with his idea that the State is moral and the people depraved and wild, absent coercive force, it was plain to Treitschke that the idea of a self-constituted people who contract among themselves is absurd. ‘Original sin’ means in this context that the people are simply unable to act with the necessary self-restraint to agree to anything. Secondly, in his view the very idea of contract presupposed the State. In the sense of an agreement enforceable by a court, this statement is unexceptionable. But Treitschke’s view is meant to be more than definitional. He believed there can be no self-binding agreements; the State exists to bind by its monopoly of force. Not a sense of self-conceived necessity or advantage, not a sense of prudent obligation, not a sense of subordinating desire to interest or of immediate interest to long term interest, not a sense of the virtues or pleasures of cooperation—none of these restraints on appetites or instincts can work. The link between his definitional point of contract and his assumption about the depravity of human nature is thus made. Only the force of the State can restrain man who is inherently bestial. This is also what Treitschke meant when he said repeatedly that only the State can be just and moral.

From these premises it follows that only the State can determine the share the citizen has in the constitution and that only the State can determine the limits of its power. Nor can the citizen protest these determinations. Even if he speaks the truth to power, the citizen cannot be protected if the State determines the truth is harmful. (This subject will be treated in more depth below, after a discussion of Locke’s conception of natural rights.) Treitschke sees his State as limited, because it deals only with the exterior life of man (women really do not count as citizens in any meaningful sense). The difficulty is that the State is the sole determinant of what is exterior and what is interior. As an observant Christian, he makes clear that the realm of conscience, especially in spiritual matters, is outside the ken of the State. The difficulty with this limitation is that, given his Lutheran understanding, it goes too far rather than not far enough.

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The State cannot determine the spiritual beliefs of man and should not even try. Under Luther's doctrine of the Two Realms, the Spiritual Realm is radically separated from the Material. Other than the Material demonstrating the utter depravity of man and his world, and thereby making him ready to receive faith, the Spiritual and the Material have no point of intersection. A man may believe what he will, and he may be filled with the God-given faith in the Truth, but there is no role for this Truth in the Material Realm, which is and must remain the arena of Sin, the Devil's playground. There is no justifiable way for a citizen to defy the State, his conscience or faith notwithstanding.

This point is further reinforced by Treitschke's view of education, the classic liberal's basis for the informed citizen. Education is compulsory so that the State may indoctrinate its subjects, especially in view of lax parents. The prime purpose is to create loyalty and obedience to the State. Instead of honoring the individual, education is to fill him with a willingness to sacrifice for the State. His very meaning comes from this sacrifice. It can have no other source. This is the most profound meaning of war. It affords the 'puny man,' otherwise bereft of significance, the chance to immerse himself in the eternal State. A truncated form of liberalism at best.

In sum, the nature of man, the power of the State to determine his place in the constitution, the State's control of education and other social institutions, the banishment of conscience to the Spiritual Realm and many other forms of State power, which I did not discuss, all of these drain Treitschke's liberalism of content. True, it is not Hegel's Spiritual State. Regarding the citizen's ability to act in accord with the difference between Hegel's and Treitschke's conception, there is no difference at all. As a practical matter, the Power State morphs into the totalitarian State without so much as a by your leave or a sieg heil. Two hundred years earlier John Locke, who was dealing with a monarchy which claimed Divine Right, well understood how Leviathan could become total.

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 Locke⁵

III. Locke's Leviathan

A good place to begin is with the most famous defense of a security-driven state, Hobbes's *Leviathan*. To escape the perils of the state of nature, Hobbes argued that rational, if terrified, human beings would surrender all their liberties but one to an authoritarian government in an effort to escape lives that would be 'solitary, nasty, brutish and short'. The reserved liberty was the right to life. No one could rationally give up his or her right to life, Hobbes conceded. Yet, under the coercive control of a leviathan state, how an individual would exercise this right, beyond spitting in the face of an executioner, was left open to question.

Hobbes arrived at the willingness to trade natural liberties for security from his belief that human beings have been driven by fear—a fear which overwhelms not only reason but all the other emotions combined. A terrified person will trade all his or her freedoms for physical security. Thus formulated Hobbes's position allowed for the following inferences: first, fear is not only pervasive as a motivator of human action; it is the enemy of liberty. Fear convinces (if so rational a term can be said to apply) individuals to throw themselves into the prison of the leviathan state to gain physical security. Second, fear is the most dependable and most powerful ally of coercive authority. What individuals lose in liberty the state gains control over their lives. Individuals purchase security with their only currency, obedience.

To counter this bleak picture of human nature and its derivative social order, John Locke wrote his *Second Treatise on Government*. Locke's agreements with Hobbes were, however, as important for this essay as are his many points of difference. Locke concurred 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 devolves into 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.

⁵ Locke, John: *Second Treatise on Civil Government*, in Barker, E., *Social Contract*, Oxford, 1967, p.4

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Like Hobbes, Locke realized that the state of nature had to be transcended. Unlike Hobbes, the driving force was not fear of the war of all against all. Instead, Locke believed that individuals, once they had achieved 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 believed 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 properly 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 did not rest on considerations of good policy by government or by the people. Another criterion was taken into account, the effect of the policy on liberty. Few people would doubt, for another 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 required 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 was this group which entered into rudimentary civil society by virtue of each member choosing to participate in a 'social contract' with the other members of the group. The purpose of the contracting parties was to establish among them an authoritative structure, a

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constitutionally ordered government whose purpose is to secure the rights and blessings attendant upon the exercise of those rights. The constitution, by definition, 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 to the 'contract,' 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 placed barriers between what he believed to be the essentially tyrannical nature of government and the people it would try to rule rather than serve. Notice a profound difference from Hobbes, who believed the most dangerous threat to the security of the individual was the behavior of other individuals. *For Locke, the most serious danger to the security of the individual was the agent of the people themselves, the state, as Hobbes's Leviathan demonstrated.* Locke's notion of security was much broader than Hobbes's physical security. Locke's human being was conceived not as 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 were 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 exists 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 was, how could the coercive state be endured? In Locke, the question was, 'how could the necessary evil of the state be contained?' Alternatively, the question was, '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' did not derive from the inherent and pervasive fear of the people. Locke's 'leviathan' would develop, when the people lost their faith in their own ability to secure through reasoned evaluation of their experience the blessings of liberty. The temptation to tyranny occurred when the people no longer believed that their freedoms could 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

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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 were not only natural rights for Locke. They were the means by which a coercive state—tyrannical in its nature—can be controlled. For this basic reason, all governmental proposals which might 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. 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 were threatened, when freedom was made to justify itself to the terrified, the state of nature, as Hobbes conceived it, was 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 was 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?

I realize these views may seem over dramatic. No one is speaking of a police state or of trashing constitutional rights. Yet listen to the rhetoric of fear and foreboding. Listen to the proposals which before September 11th were unutterable by responsible officials: secret trials, unlimited detentions, torturing of detainees for information, government sanctioned bureaus of disinformation. Obscene acts of the worst governments are now offered for approval by a society dedicated to constitutionally protected liberties. Notice the rise in religious rhetoric, the arraying of people into the good and the evil, and the demonization of those who dare to dissent. Anglo-American freedoms remain intact, but amid signs of their erosion. It is no good to say that the people demand protection and liberties be damned. First, fear is talking, not the Lockean people. The mass is talking, while the mob gathers, led by cynical demagogues. Second, as James Madison understood, the people cannot destroy liberty and remain citizens of a constitutionally guaranteed civil society. The majority of the people, no less than a minority, threaten liberty when it becomes fearful of its own freedom. Locke's structure of authority, as

modified by Madison, was aimed as much at the people's fear and anxiety, when galvanized into a 'tyranny of the majority', as against the nature of coercive government.

Succumbing to this fear would dishonor the millions who have suffered and died to establish our constitutionally guaranteed rights within the parameters of modern society. More than this, it would sacrifice ourselves, the embodiments of God-given rights, the sovereign people, to our terrors. If we do so, we would prove Hobbes right. We would be no better than cringing brutes, living in squalor, afraid of the dark.

Without free speech and assembly, discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to a freedom is an inert people; that public discussion is a public duty... O. W. Holmes⁶

IV. Free Speech: the Anti-Tyrant

To assert the sovereignty of the People is to avail little. Every tyrant, including Hitler and Stalin, has asserted the sovereignty of the People, whether Volk or Proletarian. Hitler ridiculed parliamentary democracy in the name of true democracy, the rule of the Aryan race. Stalin boasted that the Soviet Constitution was the most democratic in the world, so wonderful, it seems, it was never tarnished by use. Less odious rulers, when in crisis, have defaulted to the interests of the power state, always in defense of the People. The only alternative formulation to the needs of the power state lies in the sovereignty of the People as the public expression of the people taken individually, endowed with inalienable rights. This grant of power from private individuals to themselves, collectively understood as the People, does not imply any diminution of rights at all. Nor does it imply a grant of sovereignty to the state. The civil society exists as a matter of convenience, to use Locke's understatement. Government exists to enforce the publicly expressed will of the People, who remain sovereign. It should be noted the concept of the People is not properly considered sovereign in the sense of the possessor of absolute and ultimate authority. The grant of power from individuals to themselves as a collective is conditional on the greater expression of individual liberties than was possible in the state of nature. Absolute public power and natural rights are mutually contradictory.

⁶ *Whitney v. California* 274 U.S. 357 (1927), p.375

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From this perspective the preferred status of free speech in any constitutional system could not be better established. Without the right of free speech, how can the individual or the public expression of individuals make desires known? Without free speech, how can the drift toward tyranny be challenged, checked or publicly noticed? To suggest, as so many who should know better have said, that there is a trade-off between constitutional liberties like free speech and security surrenders freedom before the issue is joined. It assumes that the government is party to the social contract and not its mere instrument, twice removed. At best, it assumes that the People dominate the people as endowed with individual rights, as Rousseau argued against Locke. Only individuals have rights. All other formulations misunderstand the concept of natural rights. The collective is not natural; nor is government. Natural means organically conceived and self-justifying. It does not mean constructed, however necessitous, convenient or beneficial the construction may be. The Constitution, including the Bill of Rights, has made these rights explicit, in a sense positivized them without removing their status as endowments or limiting their number or scope. The Constitution is not a suicide pact. The question, however, is, what is it to protect? The Constitution exists to protect the natural liberties of people within its jurisdiction. It does not exist to preserve the state. Nor must it sacrifice itself for fear of its own provisions. Americans, for example, are a *constituted people*. *They cease to exist when the Constitution ceases to exist*. A human being with natural rights cannot properly be said to exist as a zoo animal, no matter how well fed and secure. A citizen can only exist in freedom. If freedom, in certain circumstances implies the dangers of a jungle, then so be it. The Constitution ceases to be a constitution, save in name, when it does not honor its basis in its framers' natural rights. The U.S. Constitution has not merely a set of words or its interpretations over the past two hundred years. It has been an idea which has transcended the felt necessities of time, the compromises of time and space, or the exigencies of history. It, the idea of constitutionalism based in natural rights (or its myth), must push itself to its full expression, often in the face of contingent reality. This effort is aided immeasurably by a vigilant citizenry jealous of its prerogatives and suspicious of government. Free speech is constitutionalism's principal weapon in this struggle against tyranny and in its drive to fulfillment.

The natural rights basis of free speech cannot guarantee its expression any more than it can limit government's tendency toward absolute power, especially in self-proclaimed emergencies. Having a right does not imply its expression. Its expression does not imply the

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optimum realization of the truth formation process or its efficacy. There may be nothing that can confine Leviathan, least of all one which takes its persona as the embodiment of the People as a nation or race, something divinely ordained, whose protection is beyond all debate and rational inquiry. Nonetheless, an appreciation of the idea, myth, if you prefer, of natural right does ground free speech in life itself. Life, in league with courage and with legal institutions, whose existence is justified by the protection and enhancement of natural liberties, offers the only chance a free people has. Not to avail ourselves of it is to betray our heritage our status as beings endowed with natural rights.

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