

THE FIVE FACES OF FREEDOM IN AMERICAN POLITICAL AND CONSTITUTIONAL THOUGHT

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Abstract: In the deepest sense, this Article seeks to bridge the gap between philosophy, political theory, and constitutional law. It examines how our constitutional tradition conceives of freedom, perhaps the most important value in the American legal order. It discusses five distinct though intertwined traditions, each drawn from a different philosophical theory of freedom. These five faces of freedom are (1) the "positive" ideal—freedom as the right to vote and to take part in government, (2) the "negative" ideal—freedom from constraint or government interference, (3) the progressive ideal, (4) self-individuating liberalism—freedom as the right to discover, develop, and express one's core identity, and (5) the "homeostatic-communitarian" ideal—freedom as inhering in a network of communal social relations located within a broader pluralistic society. Each Part provides an overview of the philosophical foundation of one of the faces of freedom and then traces its constitutional development. The Article concludes by discussing how the contours of freedom have changed over the course of our history.

INTRODUCTION

There exists a great gulf between many philosophical conceptions of freedom and prevailing legal ideals concerning the nature of liberty. If we were to ask a philosopher what "freedom" means, we might be answered that it consists of the openness or availability of meaningful choice options to any hypothetical choosing individual.¹

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¹ Accordingly, the greater the number of acts that one can perform, the freer one is. Thus freedom can be increased either by reducing the level of constraint that prevents the individual from choosing otherwise available options, or by increasing the number of available options, choices, or activities. Man in a state of nature may be relatively unconstrained in the first sense, yet his range of available options may be very limited. In contrast, a resident of Manhattan is undoubtedly constrained in a myriad of ways unknown to a Robinson Crusoe, but is "freer" than Crusoe because of the greater range of options available to him. Even though he often is considered a negative liberal, Isaiah Berlin held this more moderate conception of freedom. See ISAIAH BERLIN, *TWO CONCEPTS OF LIBERTY* (1958), *reprinted*

Others with a more naturalistic view of the world conceptualize freedom as the absence of physical or interpersonal conditions that render certain courses of action difficult or impossible.² Other philosophical traditions equate freedom with the capacity for meaningful self-expression in the public domain.³ Others conceive of freedom in interpersonal terms, equating it with the absence of domination.⁴ Still

in LIBERTY 166, 169–78 (Henry Hardy ed., 2002) (consisting of an essay Berlin first delivered in lecture form at the University of Oxford on Oct. 31, 1958).

² This is the classic negative definition of freedom, in which freedom is defined as the absence of constraint. As discussed in Part II, negative theories of freedom come in two varieties: those that conceive of constraint in either physical or political terms. The former view derives from Hobbes; the latter from Locke and his precursors. In fact, there is a spectrum of theories that encompass both ideas to one extent or another. For example, one author argues that “an agent’s overall freedom can be expressed as a *fraction*, which represents the proportion of conceivable actions which the agent is not prevented (by any other agent) from performing.” IAN CARTER, *A MEASURE OF FREEDOM* 28 (1999). Carter’s is the most thorough example of what we might call an “empirical” conception of freedom. It seeks to define freedom in spatial-physical terms as the extent to which possible courses of action are not prevented by other human beings. Empirical theories of freedom seek to “de-normalize” freedom, to show that we can measure freedom without placing a value on the various courses of action that may be open to an actor. For a similar conception of freedom, see FELIX E. OPPENHEIM, *DIMENSIONS OF FREEDOM* 211–27 (1961); see also Felix E. Oppenheim, *Social Freedom and Its Parameters*, 7 J. THEORETICAL POL. 403, 414–19 (1995) (partially revising some of his views). But see Ronald Dworkin, *Liberalism, in PUBLIC AND PRIVATE MORALITY* (Stuart Hampshire ed., 1978), reprinted in *A MATTER OF PRINCIPLE* 181, 189 (1985). Dworkin suggests that a totalitarian state may have more freedom in the empirical sense if it forbids freedom of speech and worship, but has fewer traffic lights than an urban democracy. See *id.* Some freedoms, such as freedom of speech, are more important than others, demonstrating that there is an irreducible normative dimension to our concepts of freedom. See *id.*

One issue confronted by those who hold negative conceptions of freedom is whether a certain course of action must be impossible, or merely difficult (and then how difficult?) for the agent to be considered unfree to perform it. Compare HILLEL STEINER, *AN ESSAY ON RIGHTS* 33–34 (1994) (arguing that it must be impossible), with CARTER, *supra*, at 220, and Oppenheim, *supra*, at 406–07 (claiming that a certain level of difficulty makes one unfree).

³ For perhaps the deepest philosophical interpretation of one version of republican political theory, see HANNAH ARENDT, *THE HUMAN CONDITION* 22–78 (2d ed. 1998) [*hereinafter* ARENDT, *THE HUMAN CONDITION*]. What most distinguishes Arendt’s views from liberal conceptions of freedom is her insistence that liberty is a political value that has nothing to do with human will, or with maximizing choices: “What all Greek philosophers . . . took for granted is that freedom is exclusively located in the political realm . . .” *Id.* at 31; see also HANNAH ARENDT, *What is Freedom?*, in *BETWEEN PAST AND FUTURE* (1968), reprinted in *THE PORTABLE HANNAH ARENDT* 438, 444–55 (Peter Baehr ed., 2000) (“Freedom as related to politics is not a phenomenon of the will” nor is it equivalent to sovereignty; rather, it is the capacity to begin and to sustain political action, collectively).

⁴ Though interpreted in various ways, libertarians, civic republicans, and left-progressives often have equated liberty with an interpersonal state of non-domination. See F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 12 (1960) (stating that freedom means “the possibility of a person’s acting according to his own decisions and plans, in contrast to the position of one who was irrevocably subject to the will of another,” or “independence of

others consider freedom to be an *intrapersonal* ideal, the capacity to act autonomously.⁵ The most ambitious or utopian hold the uncompromising view that freedom is nothing less than the total realization of the human will in the sphere of worldly activity.⁶ Philosophers, alas, have failed to achieve much consensus, but have instead provided a bewildering plethora of answers to the question: What is freedom?⁷

the arbitrary will of another"). This same view of freedom lies at the heart of Rousseau's republicanism: "[E]ach man, in giving himself to all, gives himself to nobody." JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (1762), reprinted in *THE SOCIAL CONTRACT AND DISCOURSES* 179, 192 (G.D.H. Cole trans., 1973). Ironically, the libertarian and republican extremes in political thought share a common conception of freedom.

⁵ Freedom as personal autonomy contrasts most vividly with empirical concepts of freedom in that it holds that free acts must be rational, and not simply the product of volitions or desires. This conception of freedom, which has been central to our ideas from Kant's time but can be traced back to Stoic ideas, is usually viewed as a more "positive" idea of freedom. See *infra* Part I.A (discussing the concept of positive freedom). For contemporary accounts of freedom as autonomous action in accordance with objective rational principles, see generally STANLEY I. BENN, *A THEORY OF FREEDOM* (1988); see also Charles Taylor, *What's Wrong with Negative Liberty*, in *THE IDEA OF FREEDOM* 175 (A. Ryan ed., 1979), reprinted in *PHILOSOPHY AND THE HUMAN SCIENCES* 211, 211-29 (1985). Joseph Raz has offered an account that ensconces this concept of autonomy within a wider communitarian framework. See generally JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986).

⁶ Freedom is sometimes simply defined as the capacity to satisfy one's desires. One is free to the extent that one is able to do what one wishes to do. The desire-satisfaction model of freedom is an extreme conception of positive freedom. See LAWRENCE CROCKER, *POSITIVE LIBERTY* 30-47 (1980). The conception is sometimes attacked by claiming that, if freedom is desire-satisfaction, then one can become more "free" simply by reducing his desires. See Wright Neely, *Freedom and Desire*, 83 *PHIL. REV.* 32, 38 (1974).

A related idea is the notion that freedom is "effective power" to achieve one's desires. See John Dewey, *Liberty and Social Control*, *SOC. FRONTIER*, Nov. 1935, at 41, 41. This idea lies at the heart of the progressive conception of freedom. See Martin Bronfenbrenner, *Two Concepts of Economic Freedom*, 65 *ETHICS* 157, 159-60 (1955) (comparing the classical liberal disjunction between liberty and power and the "neo-liberal" definition of liberty that conjoins the two concepts). But see HAYEK, *supra* note 4, at 16-17 (criticizing this conception).

⁷ See TIM GRAY, *FREEDOM* 17-83 (1991). Gray argues that there are seven core meanings of freedom in philosophical discourse, including the absence of constraint, the capacity and opportunity to make choices, the satisfaction of one's desires, the absence of interference or domination by others, the achievement of personal autonomy, self-determination, and self-mastery. Within each conception of freedom, there are great differences of opinion. For those who adopt the "absence of constraint" model, the term "constraint" can refer to physical constraints, social or legal constraints, or even internal incapacities. Similarly, for those who defend a "republican" ideal, the right to self-government can mean an individual's right to vote, or a more generalized ideal similar to Rousseau's general will.

A recent attempt to subsume all of these definitions under a more general idea suggests that all of these various notions of freedom represent different examples of the same concept—that statements about freedom reflect a triadic relation between an agent, an obstacle, and a goal. According to this view, freedom is simply the freedom of an actor *from* any particular kind of constraint, whether the constraint is internal or external, physical or social, *to* pursue a certain goal or activity, whether the activity be world conquest, self-

Freedom is arguably the central animating value of the American political order, yet American statesmen and political thinkers have done little better than philosophers in arriving at a uniform understanding of the idea.⁸ Beneath every political edifice lies a particular, sometimes inchoate, conception of freedom, but freedom has meant

realization, the demand for a working wage, or the right to an abortion. This definition has the apparent virtue of combining a "negative" and a "positive" dimension of freedom—that freedom is both the freedom of an actor *from* certain constraints, and freedom from these constraints *to* have, or *to* do, or *to* be some particular thing, or activity, or goal. See Gerald C. MacCallum, Jr., *Negative and Positive Freedom*, 76 PHIL. REV. 312 (1967), reprinted in LIBERTY 100, 102–07 (David Miller ed., 1991) (arguing that different conceptions of freedom pick out particular kinds of constraint and goals as worthy of singular focus). The libertarian is most concerned about the kinds of constraints that government creates whereas progressives expand the definition of "constraint" to include obstacles imposed by private forces. Others with a broader conception of constraint have included internal incapacities—physical weakness or disability, the lack of intelligence, or the capacity to persevere. Similarly, various thinkers have differed regarding the goals worthy of focusing on. For the civic republican, freedom means freedom to take part in self-government, for the traditional liberal, it is the freedom to do whatever one wishes, provided that this does not include the violation of another's rights. For others, the goal of freedom may have more philosophical or theological significance. Freedom may be equated with self-realization, even personal salvation. Isaiah Berlin warned us about these more "positive" formulations in his famous essay on negative and positive freedom. See BERLIN, *supra* note 1, at 178–81. MacCallum's point, however, is that freedom has meant all of these things, according to different conceptions, but that the concept in its broadest sense subsumes all of these ideas.

Some disagree with MacCallum's formulation, and thus defend Berlin's claim that the negative idea of freedom is more fundamental, arguing that there are some purely negative examples of freedom. John Gray argues, for example, that one can be free from certain obstacles even if one does not know what one wants to have, or to do or to be. See John Gray, *On Negative and Positive Liberty*, 28 POL. STUD. 507 (1980), reprinted in CONCEPTIONS OF LIBERTY IN POLITICAL PHILOSOPHY 321, 328–35 (Zbigniew Pelczynski & John Gray eds., 1984). My own objection is the opposite: that there are some purely positive examples of liberty in which one is free to do something even though one is not free from any particular constraint to do it. For example, I am free to twiddle my thumbs, or to walk to the refrigerator, or to do yoga in my room, even if there is no particular obstacle *from* which I am free to do these things. Thus one can talk about being free to do certain things without reference to an obstacle or a constraint—no constraint is directly relevant to the act under the circumstances.

⁸ Perhaps the most poignant and self-conscious coming-to-terms with distinct ideas of freedom came during the Civil War, when Abraham Lincoln noted that underlying the conflict between North and South were two distinct conceptions of freedom. He said:

The world has never had a good definition of the word liberty, and the American people, just now, are much in want of one. We all declare for liberty; but in using the same *word* we do not all mean the same *thing*. . . . Here are two, not only different, but incompatible things, called by the same name, liberty.

7 ABRAHAM LINCOLN, Address at Sanitary Fair in Baltimore (Apr. 18, 1864), in THE WRITINGS OF ABRAHAM LINCOLN 120 (Arthur Brooks Lapsley ed., 1906).

radically different things in various systems of political thought.⁹ The Framers undoubtedly had varying intuitions about the nature of freedom,¹⁰ but these relatively more rarified differences were obscured by their more palpable disagreements concerning questions of the constitutional structure of government.¹¹ Nevertheless, our ideals of political liberty have always been grounded upon more foundational philosophical intuitions, even when these foundations remain clouded by questions of institutional structure.

The purpose of this Article is to bridge the gap between the world of the philosopher and that of the political thinker or constitutional lawyer by considering the philosophical foundations of our modern ideals of liberty, and by tracing the emanations of these ideas

⁹ As the social philosopher and historian Carl Becker put it:

If one had to choose a single word to express the central meaning of both the communist and the liberal ideologies, it would be the magic but illusive word "liberty." . . . [A]ll revolutions are made in behalf of liberty—liberty in some sense, freedom from some sort of real or fancied restraint or oppression. Unfortunately, there are so many kinds of restraint, so many varieties of oppression, that the word liberty means nothing until it is given a specific content, and with a little massage will take any content you like. Liberty is always "liberty rightly understood"—that is, liberty in the sense intended by the person who happens to be speaking.

CARL L. BECKER, *NEW LIBERTIES FOR OLD* 3–4 (1941).

¹⁰ A voluminous corpus of scholarship over the past half century demonstrates that freedom meant many different things to those of the revolutionary generation. Were the Founders devotees of a natural law conception that equated freedom with law, rationality and limited government? See generally EDWARD S. CORWIN, *LIBERTY AGAINST GOVERNMENT* (1948); Edward S. Corwin, *The Higher Law Background of American Constitutional Law* (pts. 1 & 2), 42 HARV. L. REV. 149, 365 (1928–1929). Or were they proto-liberals, defenders of individual rights? See generally LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1955). Were they latter-day adherents to a classic republican conception of freedom? See generally BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1992); MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT* (1996); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* (1998). Or were their views a mélange of all of these ideas? See generally THOMAS L. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM* (1988); Joyce Appleby, *Republicanism and Ideology*, 37 AM. Q. 461 (1985).

¹¹ Were the differences between Federalists and Anti-Federalists generated by fundamentally different ideas of the good society, or merely by questions of institutional structure? The philosophical differences probably did not rise to the level of conceptual differences concerning the meaning of freedom. Thus, the tendency to equate Anti-Federalist thought with old-time republicanism, and Federalist thought with capitalist and liberal political ideals, is more than an oversimplification—it is inaccurate. See generally *THE ANTI-FEDERALIST* (Herbert J. Storing ed., 1985). The two groups differed most profoundly on the question of the compatibility of liberty with political centralization, but their conceptions of freedom were not radically different. See FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION*, at vii–xii (1985) (arguing that political debates were fostered in part by a hazy and fluctuating political vocabulary).

through constitutional history. It must be admitted at the outset that the project is fraught with intellectual peril. Not only does the philosopher's interest in ultimate meanings diverge significantly from the constitutional lawyer's quest to establish the appropriate institutional conditions of liberty in the political system, but there often exists a great discontinuity between the way philosophers and lawyers use the same terminology.¹² Indeed, philosophers and lawyers often appear to inhabit two different worlds altogether.

This Article traces five distinct "faces" of freedom in American constitutional history, each of which reflects, though often imperfectly, a deeper conception of freedom. Together these five strands make up the fabric of the constitutional tradition of freedom in America. Part I examines freedom as a "positive" value: as the affirmative right to take part in government, or, more generally, as our collective capacity for self-government.¹³ After exploring positive freedom as a philosophical ideal, this Part traces the evolution of the right to vote in America, the changing conception of representation, and, more briefly, the decline of constitutional federalism. In addition, this Part explores the ineluctable tension between positive freedom as an individual value, and the two most significant commitments of twentieth century constitutionalism: equality and the centralization of legal authority at the national level.

¹² For example, philosophers and lawyers use the terms "negative" and "positive" freedom to refer to what some believe are two fundamentally different kinds or aspects of freedom. In its purest philosophical sense, to hold that liberty is a "negative" value is to hold that it is nothing but the absence of constraint. In the political or legal sense, a commitment to negative liberty usually indicates that the defender of this view is a liberal—i.e., that he believes in some form of the ideal of limited government. Certainly there is a connection between holding a negative definition of liberty philosophically and being a political libertarian: if one believes that the only relevant kinds of constraints are those imposed by government, one can define freedom negatively and be a negative liberal. But the two positions seldom accompany one another. Hobbes was perhaps the first philosopher to define freedom in purely negative terms as the absence of constraint, yet the political system he devised was the philosophical antithesis of liberalism. His *Leviathan* was the all-embracing political order that stands in marked contrast to Lockean ideas of limited government. See generally THOMAS HOBBS, *THE LEVIATHAN* 223–427 (C.B. MacPherson ed., Penguin Books 1968) (1651). Conversely, two of the greatest defenders of limited government, Kant and Mill, defined liberty in a positive sense—Kant, as the capacity for personal autonomy; Mill, as self-individuation. Both Kant and Mill held that the mere absence of constraint is a necessary, but not sufficient, condition of freedom—i.e., that limited government is a condition of freedom, but personal autonomy or self-individuation require something additional contributed by the individual.

¹³ See *infra* notes 18–90 and accompanying text.

The second face of freedom, discussed in Part II, is the "negative" ideal: freedom as the absence of government regulation.¹⁴ After exploring the negative ideal in pure form, we survey its constitutional embodiment in a tradition that runs from the natural law ideals of such early cases as *Calder v. Bull* to the economic libertarianism of the *Lochner* era. Here we see that democracy has had a leavening affect on negative freedom. The Article argues that there is both more and less protection of negative liberty today than in the nineteenth century—that the social "spaces" closest to the individual are more fully protected from a wider array of social and political influences today, but that the zone of individual activity is nevertheless more closely circumscribed.

Part III explores the progressive idea of freedom that took form in the late nineteenth and early twentieth centuries.¹⁵ Progressives sought to extend and perfect the negative idea of freedom by broadening the negative liberal's conception of "constraint" to include many more forms of private, as well as public, activity. They also held that social and economic conditions could be as destructive to conditions of individual freedom as could state regulation, or even more so. Freedom, they argued, depends upon the existence of social conditions that facilitate the individual's capacity for meaningful choice under prevailing social conditions. The progressive ideal was characterized by increased equality, skepticism regarding the classical liberal distinction between public and private power, and a desire to limit the sphere of individual choice in a manner that appears paternalistic to those of a more libertarian bent.

The "self-individuating" conception of freedom, surveyed in Part IV, links freedom to the discovery, development, and expression of one's own unique self-identity.¹⁶ The roots of the self-individuating conception of freedom can be traced from Kant, Humbolt, Emerson, and Mill, among others, to contemporary adherents of twentieth century humanistic psychology. Freedom is tied to personal growth, psychological health, and the happiness of the individual. Part IV argues that modern constitutional ideals of privacy, personal autonomy, and self-expression are emanations of a conception of freedom radically distinct from earlier forms of negative liberalism. This Part ends by noting both the promise and the danger of the self-individuating ideal of freedom—that it is the most individualistic of the various conceptions of

¹⁴ See *infra* notes 91–155 and accompanying text.

¹⁵ See *infra* notes 156–245 and accompanying text.

¹⁶ See *infra* notes 246–321 and accompanying text.

freedom, but also the conception most likely to lose its connection with the political world upon which it depends.

Finally, Part V explores what we will call the "homeostatic-communitarian" ideal of freedom, in which freedom depends upon both a horizontal social structure that creates conditions of diversity-in-balance between social, political, and economic groups and institutions, and a vertical differentiation that accommodates community, individual participation, and civic responsibility.¹⁷ The communitarian's moderate conception of social diversity protects the liberal values of social choice and the more democratic virtues of individual participation through the group, even as it safeguards social stability by providing a balance among competing groups. Part V argues that the homeostatic-communitarian idea of freedom transcends the negative-positive distinction, as groups and associations serve both as a negative barrier to oppression from above and as a positive outlet for individual expression from below.

The discussion of the constitutional development of these various traditions is not intended to be exhaustive. This would be a daunting task, and quite impossible in article form. Thus, particular cases and developments are used here to illustrate the broader themes. In the largest sense, this Article seeks to answer the following questions: How have the contours and the measure of our freedom changed over the course of American constitutional history? In what sense, and to what extent, are we still a free people?

I. FREEDOM AS DEMOCRATIC SELF-GOVERNMENT: THE POSITIVE CONCEPTION OF LIBERTY

A. *Positive Freedom in Philosophical Thought*

Any attempt to survey competing conceptions of freedom must begin with a mainstay of recent political theory, the distinction between "negative" and "positive" freedom. From Bentham on, philosophers have used the terms positive and negative freedom to distinguish two kinds, or dimensions, of freedom.¹⁸ The basic distinction, though not

¹⁷ See *supra* notes 323-376 and accompanying text.

¹⁸ F. A. Hayek traced the negative/positive distinction back to Hegel. See HAYEK, *supra* note 4, at 425 n.26. Bentham had actually used the terminology in drawing the distinction some thirty years earlier, in 1776, in a letter to John Lind. See DOUGLAS G. LONG, BENTHAM ON LIBERTY 54-55 (1977). Shortly after Bentham wrote, Kant made important use of the terms in his moral and political writings. See IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS (1785), reprinted in ETHICAL PHILOSOPHY 1, 12, 26 (James W. Elling-

the terminology, can be traced back at least as far as Aristotle.¹⁹ In 1958, Oxford intellectual historian Isaiah Berlin published a now-famous essay that breathed new life into the old distinction. He contrasted the opposed ideals of freedom that lie at the heart of liberalism and capitalism, on one hand, and various forms of Marxist and totalitarian political theory, on the other.²⁰

As Berlin drew the dichotomy, negative freedom is measured by "the area within which the subject . . . is or should be left to do or be what he is able to do or be without interference by other persons."²¹ Positive freedom, in contrast, involves the following question: "What, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?"²² More directly, the "'positive' sense of the word 'liberty' derives from the wish on the part of the individual to be his own master."²³ It implies more than mere

ton trans., 1983). Writing around the same time, Edmund Burke made offhand reference to the same distinction. EDMUND BURKE, LETTER TO THE SHERIFFS OF BRISTOL (1777), reprinted in *THE PORTABLE CONSERVATIVE READER* 3, 5 (Russell Kirk ed., 1982). One must thus assume that, by the 1780s, the distinction was already commonplace.

Isaiah Berlin restored the distinction to modern prominence in 1958. See generally BERLIN, *supra* note 1. In this work, Berlin argues that, although there is a sense in which positive freedom is a legitimate conception of freedom, there are grave political dangers in associating freedom with the various positive conceptions. Most particularly, conceptions of positive freedom lead down a slippery slope to various forms of totalitarianism. See *id.* at 178–81. Intellectually, positive freedom also tends to be confused with such other values, wholly distinct from freedom, as equality, self-realization, and forms of collective self-government, such as the republic devised by Rousseau, that are inimical to liberty as the liberal understands it.

¹⁹ Aristotle wrote that there are two kinds of freedom that track the negative and positive ideals: the freedom to live as one wishes and the freedom to take part in self-government. ARISTOTLE, *POLITICS*, reprinted in *THE BASIC WORKS OF ARISTOTLE* 1113, 1265–66 (Richard McKeon ed., 1941).

²⁰ BERLIN, *supra* note 1, at 200–17.

²¹ *Id.* at 169. He goes on to write the following:

Political liberty in this sense is simply the area within which a man can act unobstructed by others. If I am prevented by others from doing what I could otherwise do, I am to that degree unfree; and if this area is contracted by other men beyond a certain minimum, I can be described as being coerced, or, it may be, enslaved.

Id.

²² *Id.*

²³ *Id.* at 178. Berlin states the following:

But there is no necessary connection between individual [negative] liberty and democratic rule [positive liberty]. The answer to the question "Who governs me?" is logically distinct from the question "How far does government interfere with me?" It is in this difference that the great contrast between the two concepts of negative and positive liberty, in the end, consists.

non-interference, encompassing as well the affirmative capacity to exercise one's human capacities to achieve one's ends. For the "negative liberal," there are many things that we are "free" to do, but that we are nevertheless *unable* to do.²⁴ In contrast, as freedom is increasingly equated with the (internal and external) capacity to achieve one's goals, it assumes a "positive" quality as well.²⁵ Because different conceptions of positive freedom are important to all but the second face of freedom surveyed here, we should take a moment to parse its various meanings.

There is considerable ambiguity in the concept of positive freedom—much more so than its negative correlate. The term "positive freedom" is actually used in three fundamentally different (if overlapping) ways by philosophers, lawyers, and others. In the most common *political* sense, positive freedom is simply the freedom to take part in self-government, whatever this may entail in a particular political system.²⁶ Positive freedom has a second, more general conception often employed by philosophers: the affirmative freedom to have, or to do, or to be anything the actor might wish to have, do, or be.²⁷ Positive freedom in this sense requires not only the absence of constraint, but also the affirmative support or even the guarantee (by others or by the state) to assist in the realization of one's goals. The use of the term "positive right" in jurisprudential circles, distinguishing such rights from merely "negative" rights, reflects this second meaning: a positive right is an affirmative guarantee to some right or

Id. at 177.

²⁴ Negative conceptions of freedom do not consider internal incapacities as impediments to freedom, whereas positive conceptions are more likely to view them so. *See infra* notes 91–98 and accompanying text (discussing the negative liberal's narrow idea of constraint).

²⁵ Charles Taylor calls negative liberty an "opportunity" concept, in that it merely opens an opportunity for successful action without guaranteeing the outcome of the act. *See* Taylor, *supra* note 5, at 213.

²⁶ "Self-government" is an ambiguous term. It may mean simply that each individual has a vote, as in modern representative democracy, or it may entail a right of direct participation in government, as it did for the ancient Greeks—a right of every citizen to debate and vote upon the laws, to administer government, and to adjudicate cases. In Rousseau's conception, self-government referred to the collective capacity of the citizenry to reflect the "general will" of the state. Rousseau renounced both direct participation and representative forms of government as inimical to genuine self-government, but many have seen his system as profoundly tyrannical. *See generally* BENJAMIN R. BARBER, *STRONG DEMOCRACY* (1984) (defending a direct participation conception); ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* (1989) (describing a "polyarchic" model of democracy); DAVID HELD, *MODELS OF DEMOCRACY* (1987) (surveying different models of democracy).

²⁷ *See* CROCKER, *supra* note 6, at 10–11; *cf.* MacCallum, *supra* note 7, at 117.

entitlement.²⁸ Finally, philosophers use "positive freedom" in a third, intra-personal sense, representing a condition of full personal autonomy, or even self-realization.²⁹ To be positively free in this sense is to act from appropriate sources of motivation—to act rationally, rather than to be moved precipitously by passion.³⁰

In certain forms of political thought, particularly classical and modern civic republican theory, these three senses of positive freedom often are interwoven in various ways. For example, some have argued that one cannot live a fully autonomous life without possessing a right to participate in politics; thus, the first, political sense of positive freedom is a necessary condition of the third, intrapersonal sense.³¹ Autonomy may also depend upon a high degree of positive freedom in the second sense; one cannot be autonomous without a

²⁸ Most constitutional rights in the American system are "negative" in that they guarantee that government will not prevent the achievement of some goal (becoming wealthy) or the performance of some activity (expressing oneself). There is no guarantee of an affirmative right to either of these things, of course. This distinction is illustrated by the example of the abortion right. A woman has a negative right to an abortion in that states are prohibited from criminalizing abortion. See *Roe v. Wade*, 410 U.S. 113, 164 (1973). The U.S. Supreme Court has declined to turn this into a quasi-positive right, holding that women have no right to government assistance in the form of payment for the procedure. See *Maher v. Roe*, 432 U.S. 464, 469 (1977) (upholding a state regulation that denied Medicaid payments for nontherapeutic abortions); *Harris v. McRae*, 448 U.S. 297, 316 (1980) (upholding a similar federal measure).

²⁹ Charles Taylor has argued that "[d]octrines of positive freedom are concerned with a view of freedom which involves essentially the exercising of control over one's life. On this view, one is free only to the extent that one has effectively determined oneself and the shape of one's life." Taylor, *supra* note 5, at 213; see also BENN, *supra* note 5, at 199–212 (outlining a similar theory); Gary Watson, *Free Agency*, 72 J. PHIL. 205, 205–20 (1975) (arguing that autonomy requires that one desire the same objects of behavior that one values).

³⁰ Although this third idea of positive freedom is an intrapersonal concept, this idea has influenced our interpretations of positive freedom in the first, political sense. Genuine collective self-government is viewed to require restraints on the expression of popular impulses. Checks and balances and the representative feature of government itself are conceived of as "enlarging and refining" popular impulse, as the collective equivalent of unrestrained volition in the action of the individual.

Some political thinkers sympathetic with the republican political tradition have argued that the intrapersonal sense of freedom used by modern thinkers is derivative of the political sense. Indeed, Hannah Arendt argues that the Stoics, who gained influence around the time of the demise of the Greek city-state, began to view freedom in this intrapersonal sense. Thus the defeat of freedom in its real, worldly, political sense caused philosophers to retreat into the realm of the self and to begin to think about freedom intrapersonally. See ARENDT, *THE HUMAN CONDITION*, *supra* note 3, at 438–60; see also MICHEL FOUCAULT, *THE CARE OF THE SELF* 81–95 (Robert Hurley trans., Vintage Books 1988) (1984) (defending the same notion).

³¹ See BARBER, *supra* note 26, at 215–17; PHILIP PETTIT, *A THEORY OF FREEDOM* 125–51 (2001).

guaranteed right to minimal income, housing, or a right to work.³² Finally, some civic republicans have maintained that genuine self-government, positive freedom in the first sense, requires that each individual who has a role in public deliberation must interact only as an autonomous person—that the first sense of positive freedom depends upon the exercise of positive freedom in the third sense.³³

Underlying these three senses of positive freedom is an even deeper ambiguity: conceptions of positive freedom waver between interpretations that emphasize the *outcome* of a particular act and those that place priority upon the *process* or the *character of the action*.³⁴ In other words, ideas of positive freedom often hover ambiguously between an "achievement" concept and an "exercise" concept.³⁵ Positive liberty as an achievement idea requires that, for the actor to be free, he must be successful in realizing the object of his action, or minimally, he must have some realistic opportunity to do so. The second conception of positive freedom falls closest to the achievement idea, as does its legal corollary, the idea of a positive right. In contrast, many communitarians and civic republicans have defended an exercise version of the concept.³⁶ To be free is to be able to exercise one's right to participate in politics (collectively) or to exercise one's highest human capabilities (individually) by acting autonomously. Although the exercise and achievement ideas cannot

³² See Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659, 680.

³³ Accordingly, the constitutional system is viewed to have an important function in "screening out" bad or "distorted" preferences. See generally Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

³⁴ Outcome-oriented conceptions of positive freedom are more utilitarian, in that an act is free only if the actor is able to achieve the consequence sought. In contrast, process views of positive freedom, like those of Kantian moral thought and process conceptions of politics generally, value merely acting in a certain way, irrespective of consequences. In this sense, these two interpretations of positive freedom share some of the characteristics of consequentialist and non-consequentialist moral theories, respectively. Consequential notions of positive freedom underplay the role of the actor and the moral quality of his action, whereas non-consequentialist notions view an individual as "free" even if he is not able to achieve the object of his action.

³⁵ CROCKER, *supra* note 6, at 3-7.

³⁶ See Taylor, *supra* note 5, at 213 (discussing freedom as "an exercise concept"). Barber criticizes the liberal idea of freedom as "stasis" as standing "in stark opposition to the idea of politics as activity, motion, will, choice, self-determination, and self-realization," the positive ideals of freedom he defends. BARBER, *supra* note 26, at 36; see also HELD, *supra* note 26, at 71 ("A core element of freedom derives from the *actual capacity* to pursue different choices and courses of action . . .").

be disentangled completely from one another;³⁷ they nevertheless point in very different directions, both philosophically and politically.³⁸

Throughout Part I, positive freedom is used in the first, political sense—a sense that emphasizes the capacity of the individual to exercise his or her right to take part in the political process.³⁹ A rough

³⁷ To exercise positive freedom meaningfully requires that the individual have some ability to influence the general course of affairs or to achieve his highest aims as an individual. Thus, exercise of rights must be measured by the likelihood of success. To "achieve" some end, the actor must play a role in the process—i.e., one must exercise one's capacities to achieve the end, rather than merely be given something. Nevertheless, there is a different emphasis for those who hold that the actor is not really "free" unless he is successful in achieving his goal.

Because the ideas are interconnected, some progressives adopted a middle position: to be free is to have the "effective power" to achieve one's aims. Freedom as effective power implies the capacity to achieve one's goals without requiring success in every case. It is having the resources—physical, economic, and psychological—to achieve one's goals. See T.H. Green, *Liberal Legislation and Freedom of Contract* (1888), reprinted in LIBERTY, *supra* note 7, at 21, 21–32; Dewey, *supra* note 6, at 41 ("[L]iberty . . . is power, effective power to do specific things."). More recent progressive liberals approximate the same idea. See JOHN RAWLS, A THEORY OF JUSTICE 204 (1971) (distinguishing freedom from the *value* of freedom, which is diminished when one lacks the resources of power to achieve one's goals).

³⁸ The tension between the "achievement" and "exercise" ideas of positive freedom is central to competing conceptions of the democratic process. The Greek theory of democracy placed a greater emphasis upon the exercise ideal than we do today. This is the central meaning of the *viata activa* [active life] in Arendt's *The Human Condition*. See ARENDT, THE HUMAN CONDITION, *supra* note 3, at 7–17. The right to participate in the political process was a mark of one's humanity, through which the individual became a full and active member of the community. Positive freedom thus had an intrinsic value distinct from the achievement of particular political ends. Thus, "[u]nder no circumstances could politics be only a means to protect society . . ." *Id.* at 31. Rather, "freedom is the essential condition of what the Greeks called felicity, *eudaimonia*," or genuine happiness and well-being. *Id.* In contrast, the modern democratic process is viewed instrumentally, as a means for securing certain social conditions, rather than as an expression of freedom, individually or collectively. Utilitarian conceptions of politics view democracy as the most efficient form of collective preference maximization. Liberals view democracy as a means to freedom, rather than an expression of freedom: democracy guarantees freedom when freedom is conceived as the equal distribution of some system of individual rights. Democracy preserves freedom because it is unlikely that a majority will consent to limit rights that are shared widely. See HELD, *supra* note 26, at 43 (characterizing the instrumentalist view of democracy as "protective democracy"). Instrumentalist views of democracy are consistent with the utilitarian and materialist orientation of modern political thought, and with liberalism's emphasis upon freedom as a nonpolitical condition of the individual. Political participation is viewed as not intrinsically valuable, but only as a necessary means to protecting one's rights.

³⁹ Positive freedom is used in the narrowest sense here, as a measure of the individual's role in electoral politics. Political positive freedom may be given a broader meaning, however, as any action by which the individual can change his society through organized political activity. This would encompass the individual's right to associate with others for the purpose of political activities and the right to express oneself freely. In a still broader

measure of individual positive freedom in the American political order can be ascertained by considering the evolution of the right to vote, by examining the changing nature of the relationship between citizens and their political representatives, and by surveying the extent of political centralization, which is so inimical to positive freedom in any sense of the idea.

B. *The Right to Vote: From Positive Freedom to Civic Inclusion*

The right to vote is the simplest and most direct expression of positive freedom in the American political system. Although there could be no more distinct commitment to positive liberty as a constitutional value than in the recognition of a right to vote, the U.S. Constitution itself does not explicitly recognize such a right. Indeed, not until 1966 did the U.S. Supreme Court recognize a right to vote in something approaching a broad constitutional sense.⁴⁰ Before that, the gradual extension of the right to vote occurred piecemeal, on a group-by-group basis, through legislative and constitutional reform.⁴¹ What is most striking about the development of the right to vote throughout American history is that its growth has proceeded not from a commitment to positive liberty or the value of political participation as such, but as a consequence of growing egalitarianism in American politics. As an eminent constitutional scholar has put it, "[e]lection-related rights display the special feature that the equality with which they are made available, rather than the *fact* of their availability or absence, ordinarily proves decisive."⁴²

In contrast to modern sensibilities, the Framers' views of the significance of the right to vote were tied closely to issues of personal liberty—and in particular, to the old republican conviction that the

sense, positive freedom might extend to activities that are not, strictly speaking, "political" at all—for example, the right to take part in community self-policing, corporate self-governance, or university governance. In the broadest sense, the idea of positive freedom could encompass every form of interpersonal activity by which the individual has some effect on his or her normative world or social environment.

The concept of "positive freedom" is thus as malleable as the idea of the "political" upon which it is based. At its furthest reaches, if "the personal is political," as some have argued, then positive freedom in its broadest sense extends to every act by which the individual is able to exert himself to change the conditions of his world.

⁴⁰ See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666, 670 (1966) (recognizing the right to vote as a fundamental interest protected by the Equal Protection Clause).

⁴¹ See generally ALEXANDER KEYSSAR, *THE RIGHT TO VOTE* (2000) for a broad survey of the development of voting rights.

⁴² LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1062 (2d ed. 1988).

exercise of political liberty required a great degree of personal and economic independence.⁴³ At the time of the framing of the Constitution, these sentiments formed the principle that only the propertied should be permitted to vote. In this vein, some of the Framers were fond of citing Blackstone, who proclaimed that:

The true reason of requiring any qualification, with regard to property, in voters, is to exclude such persons as are in so mean a situation that they are esteemed to have no will of their own. If these persons had votes, they would be tempted to dispose of them under some undue influence or other.⁴⁴

Gouverneur Morris expressed precisely this view, shared by many, arguing at the Constitutional Convention:

Give the votes to people who have no property, and they will sell them to the rich who will be able to buy them. We should not confine our attention to the present moment. The time is not distant when this Country will abound with mechanics & manufacturers who will receive their bread from their employers. Will such men be the secure & faithful Guardians of liberty?⁴⁵

John Adams and Alexander Hamilton concurred, and cited Harrington and Blackstone in this regard⁴⁶—and they might well have included

⁴³ Seventeenth-century English republicans argued that “to live in a condition of dependence is in itself a source and a form of constraint. As soon as you recognise that you are living in such a condition, this will serve in itself to constrain you from exercising a number of your civil rights.” QUENTIN SKINNER, *LIBERTY BEFORE LIBERALISM* 84 (1998). These arguments, well known and widely accepted by eighteenth-century political thinkers, gave aristocratic political inclinations a philosophical pedigree that persisted until well after the American Revolution.

⁴⁴ 1 WILLIAM BLACKSTONE, *COMMENTARIES* *171.

⁴⁵ JAMES MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787*, at 402 (Ohio Univ. Press 1966) (1920) (footnote omitted). Incidentally, for those who think that this was all a subterfuge—that those who held this view were simply attempting to stave off democracy by ensuring that the wealthy would maintain political power—it is worth noting that Morris is arguing against the interests of the capitalists. Even conservatives such as Morris feared that the republic would be undermined by economic interests. Thus, if there was a strong measure of antidemocratic sentiment in this view at the time, it was nevertheless a view equally wary of oligarchic influences.

⁴⁶ These ideas have been developed at length in a number of important scholarly treatments. See JOHN PHILLIP REID, *THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION* 68–73 (1988); MORTON WHITE, *THE PHILOSOPHY OF THE AMERICAN REVOLUTION* 262–67 (1978); David Thomas König, *Jurisprudence and Social Policy in the New Republic*, in *DEVISING LIBERTY* 178, 188–96 (David Thomas König ed., 1995).

Montesquieu.⁴⁷ The fear that those without property might be subject to coercion was so ubiquitous in the eighteenth century that even those with more egalitarian sensibilities were ambivalent about expanding the franchise. James Madison, for example, first vacillated on the point before ultimately adopting the view that, as between extending the vote to those without property and giving those who held property an exclusive franchise, the former was the lesser of two evils.⁴⁸

A distinct argument marshaled in favor of a limited franchise held that only property holders have sufficient *interest* in the preservation of the nation. According to this "argument from interest," ownership of land evinced a permanent attachment to the country, a connection to the common interest, and even an investment in the future, all of which non-freeholders lacked.⁴⁹ Another argument held that property ownership gave one the requisite worldly experience and *capacity* for making informed and intelligent decisions.⁵⁰ If these arguments strike us today as trumped-up philosophical justifications to limit the right of suffrage to the relatively well off, it should be remembered that they

⁴⁷ See MONTESQUIEU, *THE SPIRIT OF THE LAWS* 160 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748) ("In choosing a representative, all citizens in the various districts should have the right to vote except those whose estate is so humble that they are deemed to have no will of their own.").

⁴⁸ At the federal convention of 1787, Madison expressed the conventional opinion that "the freeholders of the Country would be the safest depositories of Republican liberty" fearing that the landless would "either combine under the influence of their common situation" to deprive others of their property rights or "more probable, they [would] become the tools of opulence & ambition." MADISON, *supra* note 45, at 403-04. By 1821, however, he had changed his opinion. In the notes to a speech delivered in that year, he wrote that "it is better that those having the greater interest at stake namely that of property & persons both, should be deprived of half their share in the Govt.; than, that those having the lesser interest, that of personal rights only, should be deprived of the whole." JAMES MADISON, *Note to Speech on the Right of Suffrage*, in *THE COMPLETE MADISON* 36, 40 (Saul K. Padover ed., 1953).

⁴⁹ George Mason made this argument, but deployed it in defense of a wide conception of suffrage:

[E]very man having evidence of attachment to & permanent common interest with the Society ought to share in all its rights & privileges. . . . [D]oes nothing besides property mark a permanent attachment[?] Ought the merchant, the monied man, the parent of a number of children whose fortunes are to be pursued in his own Country, to be viewed as suspicious characters, and unworthy to be trusted . . . [?]

MADISON, *supra* note 45, at 403.

This justification may underlie the modern practice of excluding aliens from voting and holding political office. See *Sugarman v. Dougall*, 413 U.S. 634, 648-49 (1973).

⁵⁰ See MADISON, *supra* note 45, at 403 (reproducing Gouverneur Morris's statement that "[c]hildren do not vote. Why? [B]ecause they want prudence. . . . The ignorant & the dependent can be as little trusted with the public interest.").

were influenced by a long history of republican political thought that associated landlessness with a state of economic servitude inimical to political liberty.⁵¹

After a long and apparently unresolvable debate, the Constitutional Convention left to the several states the decision as to who should have the right to vote.⁵² Most of the thirteen colonies adopted property requirements for suffrage, but all states that were admitted after the original thirteen colonies uniformly rejected the Blackstonian logic. Every new state allowed the non-propertied to vote, and by the 1850s, each of the original thirteen colonies had changed their laws to follow suit.⁵³

Thereafter, the extension of the franchise took place largely by constitutional amendment. The ratification of the Fifteenth Amendment in 1870 gave the vote to black males,⁵⁴ whereas the Nineteenth Amendment, ratified in 1920, accorded the vote to women.⁵⁵ A second, though less dramatic, wave of expansion came in the 1960s, when the Twenty-Fourth Amendment prohibited the use of poll taxes in federal elections,⁵⁶ and two years later, in 1966, the U.S. Supreme

⁵¹ This view of the inverse relationship between freedom and dependence reflected the not-too-distant memory of the practice of villeinage, which continued into the sixteenth century in England. The English serf was politically and economically dependent upon his superiors; he was viewed as possessing no "will of his own" in view of his economic dependence upon the landholder on whose land he worked. The development of the common law's protection of freedom, including the writ of habeas corpus and the creation of tort rights against false imprisonment, reflected this recent history. See J.H. Baker, *Personal Liberty Under the Common Law of England, 1200-1600*, in *THE ORIGINS OF MODERN FREEDOM IN THE WEST* 178, 184-201 (R.W. Davis ed., 1995).

Those Framers who were lawyers, including John Adams, understood the development of the common law as a reaction to villeinage, and thus viewed personal and political freedom as inherently linked. One's status as a property owner gave one the requisite freedom, interest, and capacity to take part in politics.

⁵² See MADISON, *supra* note 45, at 401-06. U.S. CONST. art. I, § 2, cl. 1 provides that "the Electors in each state shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." Because the State has the power to set the qualifications of electors for state elections, it may do so as well for House and, since the passage of the Seventeenth Amendment, Senate elections.

⁵³ See KEYSSAR, *supra* note 41, at 330-35 tbl.A.2.

⁵⁴ Section 1 of the Fifteenth Amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

⁵⁵ *Id.* amend. XIX. In fact, a number of states had already extended the right to vote to women in the late nineteenth century. Wyoming was the first state to fully franchise women in 1869. See KEYSSAR, *supra* note 41, at 390 tbl.A.20. Many states permitted women to vote under certain circumstances, or in certain matters (for example, school board and municipal elections) beginning with Kentucky in 1839. *Id.* at 387 tbl.A.17.

⁵⁶ The Twenty-Fourth Amendment was ratified in 1964. U.S. CONST. amend. XXIV.

Court, in *Harper v. Virginia Board of Elections*, extended this prohibition to the elections of state officials.⁵⁷ In *Harper*, the Court rejected the last vestiges of the argument from interest when it concluded that a one-dollar-and-fifty-cent poll tax could not be justified on grounds that it ensured voters "will be interested in furthering the State's welfare when they vote."⁵⁸ After *Harper*, there could be no barriers to voting based on the political or economic incapacity of any individual or group.⁵⁹ Finally, the modern expansion of voting rights culminated in the early 1970s. In 1970, the U.S. Supreme Court upheld the constitutionality of a federal ban on literacy tests, reasoning that historically such tests had been used to exclude racial minorities.⁶⁰ A year later, in 1971, the Twenty-Sixth Amendment guaranteed the vote to all citizens age eighteen or older.⁶¹

If this line of developments served the purposes of equality by expanding the circle of political inclusion, a second line of cases served to equalize voting power *within* this circle. Beginning in 1962, in *Baker v. Carr*, the U.S. Supreme Court adopted a principle of "one person, one vote" in instances where demographic patterns or legislative changes resulted in vote dilution across voting districts.⁶² Although the decision seems obviously correct to modern liberals for its

⁵⁷ 383 U.S. at 668-69.

⁵⁸ *Id.* at 674 (Black, J., dissenting).

When I have raised the question, most of my constitutional law students would sooner relinquish their right to vote than their right to operate a motor vehicle. Nevertheless, they support the states' right to collect driver's license fees, but reject the states' interest in collecting voting fees. If the state can charge a fee for a privilege students are more reluctant to give up, why not for the less important privilege? Perhaps these students do not believe the right to vote is important enough to warrant a charge to those who may have difficulty paying for it.

⁵⁹ *See id.* at 670. Indeed, liberal constitutional theorists ultimately turned the argument from interest on its head, arguing that excluding the economically disadvantaged skewed the democratic process by ensuring that political outcomes would illegitimately favor the wealthy. *See* JOHN HART ELY, *DEMOCRACY AND DISTRUST* 136-45 (1980).

⁶⁰ *Oregon v. Mitchell*, 400 U.S. 112, 132-33 (1970). The Court rejected the argument from capacity, even "capacity" interpreted broadly as the ability to read. *See id.*

⁶¹ U.S. CONST. amend XXVI.

⁶² *See* 369 U.S. 186, 237 (1962). In *Baker*, voters challenged the apportionment of representatives to the General Assembly of Tennessee. Voters in urban districts claimed that they were systematically under-represented by a sixty-year-old apportionment statute that allotted representatives on the basis of outdated demographic patterns. Specifically, because of movement from rural to urban areas between 1901, when the statute was enacted, and the late 1950s, there were proportionally fewer state residents in rural districts, with a corresponding increase in urban population. Consequently, urban districts were under-represented, whereas rural districts enjoyed proportionally greater strength at the polls.

democracy-enhancing effects,⁶³ at the time, some feared that Court intervention would undermine positive liberty by pacifying the electorate. In this vein, Justice Felix Frankfurter drew upon the more ancient republican themes of civic virtue and active citizenship, contending in his dissent that recourse for the malapportionment could only come from "an informed, civically militant electorate."⁶⁴ Admonishing the members of the Court for their "umbrageous disposition" in delegating to themselves the role as guardians of democracy, he argued that "[i]n a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives."⁶⁵

For the Greeks, the exercise of political liberty marked our differences as individuals;⁶⁶ for the citizen of modern mass democracy, it evinces our commonality. As a moral and political value, the right to vote today is far more intimately connected to ideas of inclusion and personal worth than to the participatory and achievement-oriented values associated with having a real voice in politics. Those who celebrate these developments point to the sacral nature of political inclusion. As Judith Shklar observed, when we vote "[w]e are taking part in a serious and personally significant ritual."⁶⁷ Lani Guinier took this to mean that "[w]hether or not our side wins, the ritual affirms our

⁶³ To the decision's defenders, the imbalance in the apportionment scheme seemed resistant to change through political means, because, as a result of a constitutional catch-22, the political process could only be altered by a minority who would be unwilling to divest themselves of power. See ELV, *supra* note 59, at 116–25 (arguing for the constitutional validity of *Baker* because of its "representation reinforcing" effects).

⁶⁴ *Baker*, 369 U.S. at 270 (Frankfurter, J., dissenting).

⁶⁵ *Id.* at 267–70 (Frankfurter, J., dissenting). In subsequent cases, the Court found that the right to proportional representation prohibited variations in voting patterns chosen to facilitate the representation of diverse geographical and economic interests. See *Reynolds v. Sims*, 377 U.S. 533, 579–80 (1964). But see *City of Mobile v. Bolden*, 446 U.S. 55, 70 (1980) (holding that disproportionate representation does not prove discriminatory intent in voting plan).

⁶⁶ As Arendt characterized the Greek attitude:

To belong to the few "equals" [in the Greek city state] meant to be permitted to live among one's peers; but the public realm itself, the *polis*, was permeated by a fiercely agonal spirit, where everybody had constantly to distinguish himself from all others The public realm, in other words, was reserved for individuality; it was the only place where men could show who they really and inexchangeably were.

ARENDT, *THE HUMAN CONDITION*, *supra* note 3, at 41.

⁶⁷ LANI GUINIER, *THE TYRANNY OF THE MAJORITY*, at xiii (1994).

membership in America."⁶⁸ Somewhat more jaundiced, Judge Learned Hand put it this way:

For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. Of course I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture. If you retort that a sheep in the flock may feel something like it; I reply, following Saint Francis, "My brother, the Sheep."⁶⁹

C. *The Decline of Representation*

A second measure of positive freedom is the extent to which the individual citizen has the opportunity to take part directly in government by holding political office. Positive freedom can thus be viewed as inversely proportional to the political distance between citizens and their representatives. The greater the number of political offices open, the greater the sense and reality of participation, and therefore of positive freedom, both among those who may run for office and among those who do not.⁷⁰

At the time of the ratification debates, there were two general conceptions of the function of political representation: one tracking the exercise idea of positive freedom, the other adhering to a more instrumental conception. In other words, representatives act as political proxies for their constituents, radiating their will and tying them to the process of government. In this exercise concept, representatives serve not simply to secure the chosen ends of their constituents, but also *act* for them, and in doing so *disclose* the identity and express the will of the constituents. In contrast, in the instrumental conception, representation serves simply to achieve the best or most just results, substantively, in the eyes of the representatives.

⁶⁸ *Id.*

⁶⁹ LEARNED HAND, *THE BILL OF RIGHTS* 73-74 (1958).

⁷⁰ Of course, even this principle is self-limiting. At a point, too numerous a representative branch becomes chaotic and unproductive, and fails to facilitate a sense of positive freedom simply because each individual representative lacks any significant power. Thus, the goal is to find the appropriate middle ground.

The vast difference between the two conceptions is reflected in the views of some of the Anti-Federalists, on one hand, and such Federalists as Alexander Hamilton, on the other. The Anti-Federalists favored a *process* or exercise conception of representation. Although the average citizen would not participate in politics directly, as in the ancient city-state, representation would serve to reflect the mores and interests of the citizenry as a whole as if they had personally taken part in political deliberation. As the Federal Farmer put it, "a fair and equal representation is that in which the interests, feelings, opinions and views of the people are collected in such a manner as they would be were the people all assembled."⁷¹ Brutus described this ideal with even greater clarity:

The very term, representative, implies, that the person or body chosen for this purpose, should resemble those who appoint them—a representation of the people of America, if it be a true one, must be like the people. It ought to be so constituted, that a person, who is a stranger to the country, might be able to form a just idea of their character, by knowing that of their representatives. They are the sign—the people are the thing signified.⁷²

Although this "re-presentative" theory of representation is not completely divorced from political results—the proper distribution of representatives across classes serves to protect the citizenry and to ensure that its interests are met—these results are a byproduct of the proper distribution of power across classes. In contrast, Federalists such as Alexander Hamilton maintained that representation serves only an instrumental and deliberative role—that the outcome of the

⁷¹ LETTER FROM THE FEDERAL FARMER, VII, Dec. 31, 1787, reprinted in THE ANTI-FEDERALIST, *supra* note 11, at 73, 74.

⁷² *Essay of Brutus*, III, N.Y. J., Nov. 15, 1787, reprinted in THE ANTI-FEDERALIST, *supra* note 11, at 122, 124. Anti-Federalists sought to ensure that a representative expression of popular will would be present as a corrective to government. Thus, some Anti-Federalists went so far as to suggest that representation should reflect the distribution of social and economic classes throughout society. The Federal Farmer argued that different classes of society must be counterbalanced by giving the "aristocratical, democratical, merchantile, [and] mechanic" orders, among others, a distinct role in the representative body. LETTER FROM THE FEDERAL FARMER, *supra* note 71, at 75. Melancton Smith, reminiscent of Aristotle's reliance on a balance of power between the *aristoi* and the *demos*, argued that "the Constitution should be so framed as to admit this [aristocratic] class, together with a sufficient number of the middling class to controul them." Melancton Smith, *Speech of June 21, 1788*, in THE DEBATES AND PROCEEDINGS OF THE CONVENTION OF THE STATE OF NEW YORK (1788), reprinted in THE ANTI-FEDERALIST, *supra* note 11, at 338, 342.

political process is the chief criterion by which to judge the legitimacy and efficacy of the process itself. At the New York ratifying convention, Hamilton argued that the "true touchstone" of public confidence is ensured not by the number of representatives but by the outcome of the deliberation—by "a train of prosperous events, which are the result of wise deliberation and vigorous execution." In this respect, he argued, "large bodies are much less competent than small ones."⁷³

In the long run, Hamilton's outcome-oriented conception has won the day. The reduction in available political positions in the representative branch relative to the number of those represented has proceeded apace from almost the time of the framing of the Constitution. During the debates leading to the ratification of the Constitution, Anti-Federalists pointed out that in the Continental Congress, there were two hundred senators and nearly two thousand representatives from thirteen colonies with a total population of between three and four million.⁷⁴ This meant that there were fewer than two thousand constituents to every representative at the time of the American Revolution. The delegates to the Constitution set the proportion of representatives to constituents at no more than one to every 30,000,⁷⁵—a dramatic reduction in representation. After the first census in 1790, the number of representatives was set at 106 (the census indicated a population of just over 3.9 million inhabitants in the United States).⁷⁶ This resulted in a ratio of roughly one representative for every 37,000 persons. Throughout the nineteenth century, the relative number of representatives to constituents declined continuously. In 1912, the number of representatives was set at 435, the same number as today.⁷⁷ Progressive reformers

⁷³ 2 JONATHAN ELLIOTT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 254 (William S. Hein & Co., Inc. 1996) (1836). As the instrumental conception of representation became more accepted, the number of positions available to citizens could be limited. Indeed, the Hamiltonian conception of representation does not clearly reflect the public will, because it requires merely that representatives, through the deliberative process, reach the "best" results—whether or not they reflect the public will.

⁷⁴ See *Essay of Brutus*, III, *supra* note 72, at 127.

⁷⁵ U.S. CONST. art. I, § 2, cl. 3.

⁷⁶ H.R. REP. NO. 61-1911, at 8 tbl. (1911).

⁷⁷ See Christopher St. John Yates, *A House of Our Own or A House We've Outgrown? An Argument for Increasing the Size of the House of Representatives*, 25 COLUM. J.L. & SOC. PROBS. 157, 157-58 & n.2 (1992); James K. Glassman, *Let's Build a Bigger House: Why Shouldn't the Number of Congressmen Grow with the Population?*, WASH. POST, June 17, 1990, at D2; James K. Glassman, *Why Just 435? After 80 Years, This May Be the Time to Increase the Number of Members of the House*, ROLL CALL, June 11, 1990, at 1.

later successfully sought passage of a bill that capped the House membership at that number.⁷⁸

Today, with a population of about 280 million in the United States, the ratio of representatives to constituents is now one to nearly 650,000, indicating a roughly twenty-fold reduction in the voting power of the average citizen from the date of ratification. If representation had kept pace with the 1790 ratio, there would be roughly 7000 representatives, rather than 435.⁷⁹ Conversely, if the current proportion of constituents to representatives had prevailed in 1790, at the dawn of our nation's history, the original apportionment would have extended to no more than a total of five or six representatives.

Of course, this is just part of the problem. When one considers that the rate of re-election for incumbent members of Congress is currently around ninety-four percent,⁸⁰ it is evident that the average citizen's chances for direct participation at the national level are virtually nil.⁸¹ At state and local levels, the prospect for participation is somewhat greater. There are about 7500 positions nationally as state representative or senator.⁸² Even the state figures are illustrative of the problem, however. Though the states were conceived in the original constitutional plan as analogous, in some respects, to small republics in which representation could be more direct and "face to face" than at the federal level, the current level of representation is thinner in most states than it was at the federal level in 1790. For example, Cali-

⁷⁸ The number was formalized in 1929 by Congressional act, Act of June 18, 1929, ch. 28, 46 Stat. 26 (1929) (current version at 2 U.S.C. § 2a (2000)).

⁷⁹ With current United States population of roughly 280 million, a ratio of one representative for every 37,000 constituents would require more than 7000 representatives.

⁸⁰ Rates of re-election for Congressional incumbents hovered around ninety percent until 1996, when they began to exceed ninety-four percent. In 1996, of 384 House elections, incumbents retained 364 seats and more than half won by over twenty percent of the vote. Eric O'Keefe & Aaron Steelman, *The End of Representation: How Congress Stifles Electoral Competition*, POL'Y ANALYSIS (Cato Inst., Washington, D.C.), Aug. 20, 1997, <http://www.cato.org/pubs/pas/pa-279.html>. The trend continued in the 2002 election when, out of 435 House members, only sixteen incumbents were defeated—eight by other incumbents thrown out of their districts by redistricting, and four by non-incumbents in the party primaries. In only four instances did a non-incumbent challenger beat an incumbent in the general election. DICK MORRIS, *OFF WITH THEIR HEADS* 228 (2003).

⁸¹ Because the current ratio is one representative for every 650,000 constituents, and because over ninety percent of incumbents are re-elected, the odds that any given citizen will be elected to office are one in several million. Indeed, one has a better chance of winning the lottery than of being elected to federal office.

⁸² Nationally, there are 1971 state senate seats and 5411 state representative seats. NAT'L CONFERENCE OF STATE LEGISLATURES, *CURRENT NUMBER OF LEGISLATORS, TERMS OF OFFICE AND NEXT ELECTION YEAR*, at <http://www.ncsl.org/programs/legman/about/numoflegis.htm> (Dec. 2003).

fornia, with a population of approximately thirty million, has a house membership of eighty seats and a senate of only forty.⁸³

Thus, even when state and local representation is counted, realistic opportunities of the average citizen for political participation, either as candidate or in some tertiary capacity, are remarkably scant. This greatly attenuates whatever sense of connection and involvement the average citizen might otherwise feel when choosing his representatives. Anti-Federalists were fond of noting that, under the representational scheme that existed in the colonies at the time of the Revolution, a representative might know, or at least recognize, every one of his constituents. In contrast, today there are few constituents who would recognize their representatives.

D. *Positive Freedom and Political Centralization*

Positive freedom can be measured by a third criterion as well. Not only has the relative power of the individual vote diminished as the distance between citizen and representative has dramatically increased, so too has the relative domain over which it has any significance. The power of the vote has diminished due principally to a number of sweeping constitutional developments that have marked twentieth-century legal history in the United States. This Section only touches generally upon these developments because an extended survey is beyond the scope of this Article, and because they have been well-covered elsewhere.

Most important among these developments are the decline of federalism and the rise of political and economic nationalism. The old Jeffersonian idea that the states provided citizens with a forum for political expression,⁸⁴ and even the more recent liberal idea that the states would serve as "laboratories" in which to test diverse programs and policies,⁸⁵ have both faded under the crush of centralization that

⁸³ In other words, despite a population ten times that of the United States in 1790, California has about three-quarters the number of representatives as were in the entire U.S. House of Representatives in 1790. See E. DOTSON WILSON & BRIAN S. EBBERT, *STATE OF CAL., CALIFORNIA'S LEGISLATURE* 80 (Oct. 2000), available at <http://www.leginfo.ca.gov/califleg.html>.

⁸⁴ Jefferson referred to Virginia, and not the United States as a whole, as his "country." See DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 185-221* (1994) (discussing Jefferson's conception of limited federal power and state autonomy as a feature of republican constitutionalism).

⁸⁵ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (chastising conservative justices for using the *Lochner* economic due process right to prevent

dramatically accelerated with the New Deal. Centralization has been facilitated, as a matter of constitutional law, by a greatly expanded interpretation of the commerce power,⁸⁶ by more aggressive use of the spending power,⁸⁷ and by the decline of the Tenth Amendment and related claims of state sovereignty.⁸⁸

Moreover, the rise of the administrative state has served to insulate from electoral pressures what has in effect become a fourth branch of government. Increasingly, Congress has made broad delegations of quasi-legislative power to unelected bureaucrats in a range of important areas, including education, workers' safety, consumer affairs, banking, the environment, energy, taxes, immigration, highway safety, and health.⁸⁹ The growth of the administrative state is typically viewed as a tradeoff—the citizenry forgoing indirect political control in return for technical expertise, efficiency, and coverage (necessary because Congress lacks the knowledge, resources, and time to meet the growing need for administrative management of the diverse areas of modern industrial life). But there can be no doubt that the administrative state represents the antithesis of any conception of government that values positive liberty. This conclusion is reinforced by the recognition that, underlying the imperative for expertise and efficiency, there is another motive that animates the delegation of administrative authority—a motive that is the most despairing of the prospects for self-government. Because democratic agreement can never be reached on the vast array of issues that are ultimately delegated, these decisions are left to unelected administrators. As the devil is always in the details, delegation is a dodge to the increasingly insuperable difficulties of reaching democratic consensus in the highly centralized modern state.⁹⁰

experimentation at the state level). Here, the progressives on the Court sought to advance states' rights against limits imposed by notions of old negative liberalism.

⁸⁶ See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 124–25 (1942); *United States v. Darby*, 312 U.S. 100, 118–23 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36–40 (1937).

⁸⁷ See *Steward Mach. Co. v. Davis*, 301 U.S. 548, 587–93 (1937). But see *South Dakota v. Dole*, 483 U.S. 203, 207–12 (1987) (limiting use of the spending power).

⁸⁸ See *TRIBE*, *supra* note 42, at 378–97.

⁸⁹ See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1676–88 (1975). Theodore Lowi argues that policy making has become the function of a three-way bargaining process between unelected administrators, a few interested politicians, and representatives of the affected industries. THEODORE J. LOWI, *THE END OF LIBERALISM* 55–97 (1969).

⁹⁰ This critique of the administrative state is shared by both libertarians and defenders of liberal democracy. See FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 80–96 (1944) (arguing that delegation results in breakdown of the rule of law); LOWI, *supra* note 89, at 125–56.

Finally, the expanded role of the judiciary, particularly in constitutional jurisprudence, represents yet another significant way in which the power of the vote has been diminished, particularly with respect to state laws. Ironically, over the course of the latter two-thirds of the twentieth century, patterns both of judicial deference and of judicial intervention have undermined positive liberty in American political life. Judicial deference to federal authority, as evidenced by the expansion of the commerce power, has diminished the autonomy of the states, leaving little beyond the reach of federal power. At the same time, judicial intervention on constitutional grounds in a widening swath of state law matters represents a significant limitation to values of positive liberty as reflected in the rights of citizens to enact state laws that reflect their distinctive attitudes and mores.

Contemporary liberals generally do not lament the expansion of federal power, the growth of the administrative state, or the intervention of federal courts; indeed, they typically welcome these developments. They view with distrust the positive libertarian's concern for local autonomy, and consider his fear of judicial intervention and national centralization to be a throwback to states' rights conceptions associated with cultural parochialism and the disenfranchisement of minorities. Certainly these developments were part of the legacy of positive freedom in our nation's history. Nevertheless, the liberal dismisses the value of positive freedom at his own peril, for in the world of politics, in contrast to the domain of philosophy, the negative and positive freedom of the individual are not so easily disentangled.

II. FREEDOM AS LIMITED GOVERNMENT: THE NEGATIVE IDEA

A. *The Dilemma of Negative Freedom*

No tradition has exercised a greater symbolic influence upon the political imagination of Americans over the course of the last two centuries than that which connects liberty to the idea of limited government and, more generally, to the philosophical conviction that freedom is none other than the absence of constraint. There is, however, a great deal of difference between these two ideas. Herein lie the seeds of the dilemma of negative freedom.

"[T]he absence of *externall Impediments*," Hobbes maintained, is all that we mean by "Liberty."⁹¹ A man is free with respect to those

⁹¹ HOBBS, *supra* note 12, at 189 (emphasis added). Hobbes's conception of freedom influenced modern political thought because it offered a materialist conception of free-

activities "which by his strength and wit he is able to do, and is not hindred to doe what he has a will to."⁹² This is a "negative" conception of liberty, in the sense that what it means to be free is that one is not coerced or constrained. Negative freedom is a "residual" idea in the sense that the zone of "free action" is what is left over among the range of one's possible actions after excluding all coerced or constrained acts. Berlin described the extent of one's negative freedom as coextensive with the area of non-interference by other persons.⁹³ But what is to count as a "constraint" or an "interference?" The character of one's "negative liberalism" depends almost entirely upon how broadly one defines constraint.

Negative liberals of all varieties follow Hobbes in arguing that only *external* conditions constrain: One is not "unfree" by virtue of lack of capacity to perform an act.⁹⁴ Even with this significant qualification, however, there is a great deal of dispute about which kinds of external conditions should be considered to be constraints. Generally, defenders of a negative conception of freedom fall into two groups: the first adheres to a Hobbesian physical conception of con-

dom that could be incorporated into positivist forms of political thought. Hobbes's idea was value-free; whether an act is "unfree" depends upon whether the actor is physically constrained from performing it. Indeed, the virtue of Hobbes's conception is that persons are "free" or "unfree" in exactly the same sense as inanimate objects—as a dammed river, which is unfree to run its course. Freedom is the capacity for motion.

⁹² *Id.* at 262. This definition is radically opposed to definitions of freedom that flowed from the Stoic tradition down through the Scholastics that required "free" acts to be rational, and which Hobbes criticized. See *id.* at 127 ("The Definition of the Will, given commonly by the Schooles, that it is a *Rationall Appetite*, is not good."). Hobbes's conception drives a wedge between the rational and the volitional faculties of man and holds that acts are free if they are voluntary, even if they are not rational.

⁹³ BERLIN, *supra* note 1, at 169–70.

⁹⁴ This is perhaps the last line of demarcation distinguishing negative and positive conceptions of freedom. Physical infirmities, various forms of character defects and mental incapacities (stupidity, lack of motivation, weakness of will) along with intra-psychic conditions (internal compulsions, irrational aversions) do not diminish the *freedom* of an agent to perform an act, but merely affect his *ability* to do so. As Berlin stated, "It is not lack of freedom not to fly like an eagle or swim like a whale." BERLIN, *supra* note 1, at 169 n.2. There is general concurrence among philosophers about this. See *id.* at 169 ("[I]ncapacity to attain a goal is not lack of political freedom."); S.I. Benn & W. L. Weinstein, *Being Free to Act and Being a Free Man*, 80 MIND 194, 197–98 (1971) (arguing that there is an important difference between being disabled and being unfree); Bernard Gert, *Coercion and Freedom*, in COERCION at 30, 38 (J. Roland Pennock & John W. Chapman eds., 1972) (stating that a man with no legs is free to dance even if he is unable to, as long as no one is hindering him); Oppenheim, *supra* note 2, at 404–05 (arguing that incapacity marks the relationship between an actor and the action, but not between an actor and another person, which is necessary for social unfreedom).

straint; the second, following a tradition associated with Locke, conceive of unfreedom in moral, political, or juridical terms.

Neo-Hobbesians conceive of freedom and unfreedom in physical terms: unfreedom is a physical relation between an agent and an obstacle characterized by the obstructed movement of the agent.⁹⁵ To qualify as a constraint on freedom, an obstacle must *physically limit* (i.e., prevent or make very difficult) a particular act. Whether an agent is prevented from leaving the country by a natural disaster that has blocked his or her exit, or by confinement in a prison, the result is the same: the agent is unable to leave and is therefore "unfree."⁹⁶

This picture of freedom, however, turns out to be both over-inclusive and under-inclusive from the standpoint of political theory. Physicalist conceptions of constraint are over-inclusive because there are a myriad of forms of physical constraint—for example, the motorist snowed in to his or her driveway, the person who has locked himself or herself out of his or her house—that are not instances of *political* unfreedom.⁹⁷ Neo-Hobbesian conceptions of freedom, however, are also radically under-inclusive from a political standpoint because there may be many instances where a person is not *physically* unfree, but where his or her activity should be politically protected. The person threatened with a fine or imprisonment for exercising a fundamental right is not, in the strict sense, physically unfree to exercise his or her right, but this legal impediment to action should still be considered a constraint on political liberty.⁹⁸ In the end, physical concep-

⁹⁵ HOBBS, *supra* note 12, at 261–62.

⁹⁶ Neo-Hobbesians tend to be conceptual philosophers interested in the idea of freedom in its most general sense. See CHRISTINE SWANTON, FREEDOM 95–100 (1992) (defining constraint in physical terms; issues of freedom and justice are distinct). Similarly, W.A. Parent argues that it is perfectly natural to say that a blizzard rendered an individual unfree to perform an act. William A. Parent, *Some Recent Work on the Concept of Liberty*, 11 AM. PHIL. Q., 149, 159; cf. David Miller, *Constraints on Freedom*, 94 ETHICS 66, 71–72 (1983) (arguing that someone locked in a room may be free or unfree depending upon the moral culpability of the person who locks the door).

⁹⁷ In other words, theories of negative liberty that emphasize the physical dimensions of constraint do not tell us under what conditions the State should relieve the individual of the burden of unfreedom. The indigent man may be unfree to eat at the Ritz and the hungry worker may be unfree to find meaningful and remunerative work, as the hiker is unfree to forge the overflowing river, but it does not necessarily follow that they are entitled to assistance from the State. Indeed, physical conceptions of negative liberty generate a much larger sphere of "unfree" behavior than any government could ever cure.

⁹⁸ Consequently, physical conceptions of unfreedom do not square with the conceptual heart of libertarian theory, because they cannot explain how legal sanctions *physically* constrain the acts they make illegal. Even laws that attach a punishment to certain activities do not make these activities physically impossible. Hobbes was unable to reconcile his in-

tions of freedom tell us little about what kind of political system we ought to have.

In contrast to a physical conception of constraint, neo-Lockeans maintain that freedom contains an irreducible moral dimension. The strictest of these conceptions holds that "unfreedom," at least in the political sense, requires a deliberate human act that violates the rights of the subject.⁹⁹ Thus, neo-Lockean ideals about freedom depend upon a pre-existing scheme of rights that shape the contours of their definition of constraint. An actor will not be considered unfree in the politically relevant sense unless he or she has been prevented from acting, and this prevention violates his or her rights.¹⁰⁰

There are general philosophical objections, however, to purely normative ideas of rights. If normative conclusions about whether a right has been violated depend in part upon intuitions concerning what it means to be unfree, the neo-Lockean cannot answer the question about what it means to be unfree without first drawing upon

intuition that laws limit freedom with his physical conception of freedom. He argued that laws constrain, but only because they impose an external limit on human action. HOBBS, *supra* note 12, at 263-64. But, of course, laws do not constrain in the physical sense. To maintain his physical conception of unfreedom, Hobbes argued that threats cannot be considered constraining because fear, not the external condition imposed by the threat, prevents one from acting. *Id.* at 262-63. But fear of prosecution, rather than a physical barrier imposed by the law, prevents a person from acting in contravention of the law.

⁹⁹ Hayek wrote that

"restraint" . . . presupposes the action of a restraining human agent. In this sense, it usefully reminds us that the infringements on liberty consist largely in people's being prevented from doing things, while "coercion" emphasizes their being made to do particular things. . . . [T]o be precise, we should probably define liberty as the absence of restraint and constraint.

HAYEK, *supra* note 4, at 16-17. Berlin also argues that unfreedom implies coercion and that "[c]oercion implies the deliberate interference of other human beings within the area in which I could otherwise act." BERLIN, *supra* note 1, at 169; see also Gert, *supra* note 89, at 32.

This dispute regarding terminology has profound implications for political theory. For example, Neo-Lockeans insist that freedom can only be limited by deliberate acts that violate the rights of others, leading to their conclusion that impersonal social and economic forces cannot be considered "coercive." The man who cannot find a job at a meaningful wage is not "unfree" as long as the reasons for his failure are the result of impersonal market forces.

¹⁰⁰ This has influenced contemporary libertarian conceptions of coercion. For example, Nozick believed that coercion involved an individual being physically prevented by another agent from doing something he has a right to do. See Robert Nozick, *Coercion*, in *PHILOSOPHY, SCIENCE, AND METHOD* 440, 441-45 (Sidney Morgenbesser et al. eds., 1969). For those of more progressive inclinations, a person can be "coerced" by being manipulated, enticed, or otherwise caused to act by untoward social forces. See John Lawrence Hill, *Exploitation*, 79 CORNELL L. REV. 631, 661-69 (1994) (comparing theories of coercion and exploitation).

some antecedent conclusion that a right has been violated.¹⁰¹ In sum, although we might think that a theory of rights should be informed by a deeper conception of the nature of freedom, neo-Lockeans reverse this: they require a conception of rights as a *prerequisite* to a general theory of freedom. This threatens to embroil these ideas in a vicious circularity, or minimally, to leave unanswered deeper questions about the meaning of freedom.

Herein lies the dilemma of negative freedom. By following the Hobbesian road, philosophers consign their theories of freedom to political irrelevance.¹⁰² The Lockean road, in contrast, not only requires that one relinquish the positivist's quest for a value-free definition of freedom, but threatens a vicious normative circularity as well. Hobbesian conceptions tell us something about the nature of freedom, but with little relevance to our political ideals, whereas neo-Lockean ideas are relevant to political and legal theory, but only by presupposing what it means to be politically unfree in the first place.

If Hobbesian conceptions of freedom go nowhere while Lockeans beg the big questions, some recent negative liberals have attempted to avoid the horns of the dilemma by forging an intermediate position. Most notoriously, in *Two Concepts of Liberty*, Berlin maintained (in a footnote) that negative freedom is a conceptual hybrid, partly empirical and partly normative, which requires us to evaluate the answers to a

¹⁰¹ Negative liberalism depends upon intuitions regarding the physical nature of unfreedom—the actual constraint involved when locked in a room or hindered from passing over land—but the notion also relies on a subtler appeal to a system of rights. Libertarian economist Ludwig von Mises claimed that it would be “inconvenient” to regard natural or civil laws as limiting freedom—provided that such civil laws merely prevent “anti-social acts.” He defined anti-social action as action characterized by aggression and fraud. Consequently, government action that does more than prevent forcible aggression and fraud restricts freedom by violating the rights of those restricted. LUDWIG VON MISES, *HUMAN ACTION* 281 (3d ed. 1963). Von Mises influenced a subsequent generation of economists and philosophers, including F.A. Hayek. See generally HAYEK, *supra* note 90.

¹⁰² Ian Carter, whose brilliant attempt to develop a metric of freedom constitutes the most well-conceived physical conception of freedom to date, admits as much at the end of his book:

[I]t is still possible that those who have had the patience to follow my whole train of thought from the beginning to the end of the book will feel the result to be something of a let-down. Are the inspiring arguments of the noblest of our liberal forefathers in favour of the ideal of freedom to be cashed out into nothing more than the possibility of performing various physical movements? Has something not been lost along the way?

CARTER, *supra* note 2, at 288. To reply—yes, this “something” is the importance of distinguishing between different kinds of bodily movements: those associated with free expression versus those associated with twiddling our thumbs.

number of inquiries: how serious is the constraint; how difficult is it to overcome; do alternatives exist and are they attainable; was the constraining condition caused by a wrongful and direct act of another person, or indirectly as a function of general social or economic conditions; how important was the goal of the act to the actor's purposes; and how great a reduction in the *ex ante* options available to the actor does the condition represent.¹⁰³ The "versatility" of the hybrid conception of freedom permits its adherent to defend any number of positions along the left-right political axis. Yet this position has been criticized by those on the left and on the right for embracing a halfway position that calls into question whether the defender of these views really qualifies as a true negative liberal.¹⁰⁴

B. *The Libertarian Ideal in American Constitutional History*

Political conceptions of negative freedom in their most robust varieties have been cast in two forms: as implementing a system of limited government,¹⁰⁵ and as protecting a consistent scheme of individual

¹⁰³ BERLIN, *supra* note 1, at 177 n.1.

¹⁰⁴ Charles Taylor, for example, argues that this "halfway" position is as normatively-laden as the positive conception that Taylor defends. See Taylor, *supra* note 5, at 218-20. Some have questioned whether Berlin is really a negative liberal. See GRAY, *supra* note 7, at 34 (suggesting that such considerations as whether other meaningful choices exist, the nature or importance of the person's act, and the moral quality of the action that prevents the act—for example, whether it violated the person's rights, or was intentional—are irrelevant from the standpoint of a strict negative conception of freedom). Thus, hybrid "negative" ideas of freedom are broadly consistent with progressive political ideals.

¹⁰⁵ The notion that there are inherent limits on government action is not an invention of the liberal age. Some have traced the idea as far back as Roman law. Bruno Leoni argued that Roman law embodied a "rule of law" idea, that there were inherent limits to legislative authority. See BRUNO LEONI, *FREEDOM AND THE LAW* 85-87 (1961). He maintained that Roman legislation generally affected only what today we would call "public law"—constitutional, administrative, and criminal matters—whereas the *jus civilis* or private law was left largely untouched by statute. *Id.* at 82-84. When statutes were passed, it was with the prescription that if they violated a law, they would not have effect. *Id.* at 85-86. Certainly we find the idea of limited government in its juridical form by the thirteenth century in Europe. Lord Acton called Aquinas "the first Whig" because of Aquinas's basic tenet that sovereign authority, in whatever form it took, was inherently limited by standards of justice imposed by the natural law. The first great English common-law commentator Henrici de Bracton wrote in the thirteenth century that

the king himself ought not to be subject to man, but subject to God and to the law, for the law makes the king. Let the king, then, attribute to the law what the law attributes to him, namely dominion and power; for there is no king where the will and not the law has dominion . . .

HENRICI DE BRACON, *DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE* 39 (Sir Travers Twiss ed., William S. Hein & Co. 1990) (1878).

rights.¹⁰⁶ Strictly speaking, these are distinct ideas, with more radical forms of negative liberalism conceptualizing freedom as a function of limited government.¹⁰⁷ Nevertheless the two ideas, limited government and individual rights, have gradually merged so that today liberals tend to hold that government is limited only *by* rights.

Negative liberal theories of the "classical liberal" or "libertarian" variety can be located along a continuum that defines the permissible scope of government power.¹⁰⁸ At the far extreme are various "minimal

In his wonderful discussion of the development of these ideas, Corwin notes that Bracton believed there could be no relief to the individual whose rights the king violates, other than prayer and divine justice. Corwin, *supra* note 10, at 174-75.

¹⁰⁶ Philosophical conceptions of rights in their modern form did not emerge until the seventeenth century in the rationalist political thought of Hugo Grotius and Samuel Pufendorf. See generally HUGO GROTIIUS, *DE JURE BELLI AC PACIS LIBRE TRES* (Francis W. Kelsey trans., Oxford Univ. Press 1925) (1625); SAMUEL A. PUFENDORF, *DE JURE NATURAE ET GENTIUM* (Minerva 1967) (1759). These ideas influenced Locke and, a century later, the American revolutionaries.

Ideals of limited government and those of individual rights differ regarding presumptions of the legitimacy of state power. Advocates of limited government hold that the authority of government is confined to a limited sphere, thus any exercise of power that transcends that sphere is illegitimate. In contrast, modern theories of individual rights hold that government authority is more or less ubiquitous except for limited areas of personal autonomy carved out by individual rights. In limited government models, there is a presumption against the legitimacy of government action—the government must prove that any exercise of authority is within its limited powers. In individual rights conceptions, government authority is presumed legitimate unless it can be shown to violate a specific individual right.

¹⁰⁷ There is an interesting analogue to the difference between these two ideas in the American constitutional debates. James Madison opposed adoption of the Bill of Rights, not because he was an enemy of the idea of individual rights, but because he recognized that a shift in emphasis from limited government to individual rights would lead to an expansion of government power. Madison intended the Ninth and Tenth Amendments to insure that the adoption of the Bill of Rights would not shift the burden to opponents of government power. He feared that those who wished to expand government power would argue that the only limits on government are shaped by the individual rights protected in the Bill of Rights. He recognized that the "internal" limits of the various federal powers are far more restrictive of federal power, than are the "external" limits imposed by various rights. See Charles J. Cooper, *Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons*, in *THE BILL OF RIGHTS* 419, 422-27 (Eugene W. Hickok, Jr. ed., 1991).

¹⁰⁸ Leonard Read began to use the term "libertarian" in the 1950s, to distinguish his views from those of increasingly egalitarian forms of modern liberalism. David Boaz, *Introduction to THE LIBERTARIAN READER*, at xiii (David Boaz ed., 1997). Today libertarian and classical liberal thought often are conflated, perhaps because each falls further to the "right" on the political spectrum than contemporary liberal thought. Although there is a good deal of agreement between the two schools of thought, libertarianism is still distinct from classical liberalism. For example, libertarianism is far more individualistic than classical liberalism. See Alan Ryan, *Liberalism*, in *A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY* 291, 293-94 (Robert E. Goodin & Philip Pettit eds., 1995). Another difference is that classical liberals are not opposed to "morals legislation," i.e., using state police

state" libertarians, such as the young Robert Nozick, who believe that the only role for government is to protect personal and property rights.¹⁰⁹ Next along the spectrum are theories encompassing the views of most "neo-conservative" economic thinkers, which hold that government power should be used not only to protect rights, but to remedy collective action problems left unresolved by the free market.¹¹⁰ Further still along the continuum we find the softer libertarianism of John Stuart Mill, who held that there exists a sphere of individual autonomy, marked off by individual actions that do not directly harm others, that should remain beyond the coercive reach of state and society.¹¹¹ Finally, closest to the liberal mainstream are those forms of classical liberal thought that assume, or defend, a broader conception of the

power to protect moral order. In contrast, libertarians (and modern (progressive) liberals) oppose morals legislation. Locke argues that "freedom . . . is not . . . a liberty for every one to do what he lists." JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 17 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690); see also Dworkin, *supra* note 2, at 181-204 (arguing that conservative liberals favor regulation of morals but not the economy, whereas progressive liberals favor the opposite); DAVID A.J. RICHARDS, *SEX, DRUGS, DEATH, AND THE LAW passim* (1982) (arguing that a commitment to freedom requires respecting the personal choices of individuals in all these areas).

¹⁰⁹ See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 26 (1974) (describing the "night-watchman state of classical liberal theory" as a minimal state "limited to the functions of protecting all its citizens against violence, theft, and fraud, and to the enforcement of contracts"). Nozick later abandoned this position. See ROBERT NOZICK, *THE EXAMINED LIFE* 286-87 (1989) ("The libertarian position I once propounded now seems to me seriously inadequate . . .").

¹¹⁰ See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 25-32 (1962); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 367-86 (4th ed. 1992).

¹¹¹ Mill wrote that

the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.

JOHN STUART MILL, *ON LIBERTY* 9 (Elizabeth Rapaport ed., Hackett Publ'g Co., 1978) (1859). Mill's conception of the role of government is more expansive than that of modern libertarians. Mill argued, for example, that the state had a role in regulating conditions of the working man in a manner that would have offended the *Lochner* Justices. Additionally, and perhaps most importantly, he argued for a radically different conception of trade. Rather than viewing all trade as a part of the realm of the private, a function of freedom of contract between buyer and seller, Mill recognized the broader public effect of trade-related activities. Thus, though Mill argued that the government should usually leave trade free from regulation, it was not because trade falls within the realm of the liberty of the individual as such. Rather, free trade met broader utilitarian goals. Where utility requires, however, government can intervene. See *id.* at 93-96.

police power of the state—specifically, one that encompasses the power to enact “morals legislation.”¹¹²

Although robust conceptions of negative liberty have always exerted a powerful symbolic influence upon our politics and constitutional case law, American constitutional history bears little evidence of a sustained commitment to any systematic conception of negative liberty. Beginning with the U.S. Supreme Court's antebellum period, there were sporadic judicial attempts to limit legislative power, both at the state and federal level. These early cases, however, usually concerned boundary conflicts between state and federal power, and between the three branches of government, rather than the protection of individual liberty as such.¹¹³ When the Court did address questions of individual rights, there was little it *could* do as against the states, because the Bill of Rights did not apply to the states until well after the ratification of the Fourteenth Amendment in 1868,¹¹⁴ and little it *did* do as against federal power. In fact, from 1803, when the Court decided *Marbury v. Madison*, until *Dred Scott v. Sandford*, in 1856—over

¹¹² See THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 1223-1348 (8th ed. 1927). Cooley's treatise was the most influential source on constitutional law at the end of the nineteenth century). The judges during the *Lochner* era would have imbibed these ideas as students and practitioners before coming to the Court.

In *Lochner v. New York*, the case that came to represent the acme of American constitutional libertarianism, the Court nevertheless assumed that states have a broader police power than today's libertarians would recognize. See 198 U.S. 45, 53 (1905). The *Lochner* Court conceded that these “police powers”—Cooley's term—“relate to safety, health, morals and the general welfare of the public.” *Id.* Whereas Mill defended the right of the individual to be free of government interference in such personal decisions as drug use, prostitution, or gambling, the *Lochner* Court would certainly have supported government intervention in these areas. See *id.*

¹¹³ See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427-37 (1819) (holding that, in a conflict between a state and the federal government, the state may not tax federal property); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 352-62 (1816) (holding that, in conflicts between state and federal courts, the Supremacy Clause of the Constitution requires not only that federal law be supreme over state law, but also that federal interpretations of federal law supercede state interpretations); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174-80 (1803) (holding that, in conflicts between the Supreme Court and Congress, the Court may strike congressional acts that improperly expand the jurisdiction of the Court).

None of these cases was about individual rights. Ironically, the *Marbury* Court concluded that Congress lacked the power to extend the Court's own jurisdiction to protect vested legal rights beyond constitutionally imposed limits. See 5 U.S. at 179-80.

¹¹⁴ *Barron v. Baltimore* held that the Bill of Rights was never intended to apply as against the states. 32 U.S. (7 Pet.) 243, 247-51 (1833). The incorporation of these various rights against the states took place on a piecemeal basis, through the Due Process Clause of the Fourteenth Amendment. See TRIBE, *supra* note 42, at 772-74.

half a century—the Court did not invalidate a single federal act.¹¹⁵ *Dred Scott* represents the only instance before the Civil War in which the Court invoked a provision of the Bill of Rights to strike down a federal law on constitutional grounds.¹¹⁶ The case was the first to use the doctrine that would later be called “substantive due process,” holding that slave holders had a property right in their slaves protected by the Fifth Amendment’s Due Process Clause.¹¹⁷ Yet it is more than ironic that the first recognition of a negative right against the federal government involved the denial of the most basic rights to liberty for an entire group of people.

During the antebellum period, constitutional challenges to state laws were more frequent, even though there were limited means of attack from a federal constitutional standpoint.¹¹⁸ During this period, arguments occasionally were predicated upon general notions of natural justice without any specific textual support.¹¹⁹ Most prominently, Justice Samuel Chase’s opinion in *Calder v. Bull*, in 1798, claimed that “[a]n act of the legislature (for I cannot call it a law), contrary to the great first principles of the social compact” cannot stand.¹²⁰ Yet even

¹¹⁵ ROBERT H. BORK, *THE TEMPTING OF AMERICA* 28 (1990); TRIBE, *supra* note 42, at 24–29.

¹¹⁶ 60 U.S. (19 How.) 393, 449–52 (1856).

¹¹⁷ *Dred Scott* was the first of three incarnations of substantive due process; the second and third were the *Lochner* era “economic due process” and the privacy era “personal due process.” See BORK, *supra* note 115, at 32 (criticizing the *Dred Scott* decision and the oxymoronic notion of substantive due process). The doctrine has been criticized by moderates and liberals. See ELY, *supra* note 59, at 14–21 (concluding that the clause was only intended to ensure fair procedures). Constitutional historians have argued that due process was initially viewed as a procedural, rather than substantive, guarantee. See Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 370–74 (1911) (claiming that the Due Process Clause was originally intended to ensure that the state follow certain procedures before depriving an individual of life, liberty, or property).

¹¹⁸ See CORWIN, *supra* note 10, at 58–115 (recounting the extra-textual challenges to laws based upon notions of “natural justice,” vested rights, or republican conceptions of government); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 230–257 (1985) (surveying the protection of property from state law up to about 1850); ALFRED H. KELLY ET AL., *THE AMERICAN CONSTITUTION* 178–99 (1991) (discussing the prevalence of vested rights and Contracts Clause claims in the Marshall court).

¹¹⁹ A number of recent commentators have argued that the Framers intended that judges enforce notions of natural rights and justice, regardless of specific textual basis. See, e.g., Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 706–17 (1975); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 854–65 (1978); Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1167–76 (1987).

¹²⁰ 3 U.S. (3 Dall.) 386, 388 (1798). The case involved a law that had the effect of rewriting provisions of a will. The Court rejected both a Contracts Clause challenge and a challenge predicated upon natural rights. The colloquy between Justice Samuel Chase and

here, Justice Chase voted with the Court to uphold the law in question.¹²¹ More frequently, the Court invoked the Contracts Clause of the U.S. Constitution, one of the few rights provisions that applied to the states in this era, to strike down state laws that invalidated pre-existing contracts.¹²² Even this clause was limited in scope, and the number of decisions predicated upon it is relatively small.¹²³ Of course, litigants could attack state laws under the provisions of the state constitution, but state constitutional protection of fundamental rights was varied and often held out no more hope than a challenge under the Federal Constitution.¹²⁴

The Civil War and the emancipation of African-Americans led to a more individualistic conception of personal freedom, one that is reflected in the fundamental constitutional inversion brought about by the Fourteenth Amendment.¹²⁵ Where republican principles dur-

Justice James Iredell, who argued for a strict constructionist view of the role of judges, has, nevertheless, become noteworthy for airing the theoretical differences between these two opposed positions.

¹²¹ *Id.* at 394.

¹²² U.S. CONST. art. I, § 10, cl. 1 provides that "No state shall . . . pass any Bill . . . impairing the Obligation of Contracts . . ." See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138-39 (1810) (holding that a State could not constitutionally rescind land grants to subsequent good faith purchasers). This is perhaps the best-known case in which a state law was invalidated on Contracts Clause grounds. Toward the end of the nineteenth century, the eminent English legal historian Henry Sumner Maine proclaimed the Contracts Clause to be "the bulwark of American individualism against democratic impatience and Socialistic fantasy." SIR HENRY SUMNER MAINE, *POPULAR GOVERNMENT* 243 (Liberty Classics 1976) (1885). One author has argued that the Contracts Clause was the basis for the invalidation of more state laws during the nineteenth century than all other constitutional provisions combined, with the exception of the Commerce Clause. BENJAMIN FLETCHER WRIGHT, JR., *THE CONTRACT CLAUSE OF THE CONSTITUTION*, at xiii (1938).

¹²³ The reason for this is that the U.S. Supreme Court decided that the provision applied only to laws passed subsequent to a contract, but that laws could prospectively affect contract obligations. See *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 269-70 (1827) (upholding a state bankruptcy law passed before a contract was made that purported to prevent a party from seeking the shelter of bankruptcy); see also *KELLY ET AL.*, *supra* note 118, at 186-90 (describing early application of the Contracts Clause); *TRIBE*, *supra* note 42, at 613-19 (same).

¹²⁴ See *CORWIN*, *supra* note 10, at 58-115; *KERMIT L. HALL*, *THE MAGIC MIRROR* 103-05 (1989); *WILLIAM E. NELSON*, *AMERICANIZATION OF THE COMMON LAW* 89-116 (1975).

¹²⁵ The principal inversion is reflected in that the federal government, traditionally seen as more distant from the individual than state government, was increasingly relied on to protect the individual from state government. Federal authority, both judicial and legislative, expanded to accomplish this new task. But this expansion required a rejection of the central tenet of libertarian thought—that government was the chief limit on freedom. A more subtle shift in thought followed—that freedom had less to do with limited government than with the protection of the individual. Thus, the Fourteenth Amendment shifted our emphasis to a more progressive conception of freedom that equated freedom

ing the antebellum period linked freedom to a limited federal government and to the close association of the individual with his own state, the post-Fourteenth Amendment understanding reversed all this. At this point the transition from the "limited government" model to the "individual rights" model of negative freedom began to take root in American conceptions of liberty. Nevertheless, personal freedom was still conceived along the older lines—largely as the economic rights of contract and property.¹²⁶ But these rights would take on a meaning less connected to purely political or economic activity than they had under the earlier understanding.

After the U.S. Supreme Court's failure in the *Slaughter-House Cases*, in 1872, to give the Privileges and Immunities Clause of the Fourteenth Amendment its intended application as the fount of the new liberty,¹²⁷ judges found a substitute in the Due Process Clause.¹²⁸ The constitutional embodiment of "economic due process," central to the *Lochner* era, made its first appearance in Justice Joseph

with individual flourishing, rather than with limited government. See WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT* 151–200 (1988) (discussing judicial consequences of the political inversion brought about by the Fourteenth Amendment); William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 525–47 (1974).

¹²⁶ Bruce Ackerman argues that the postwar emphasis upon individual rights of contract and property was the result of a deeper understanding of freedom initiated by the Thirteenth, Fourteenth, and Fifteenth Amendments:

Given Reconstruction, it was perfectly appropriate for courts to insist that the nation was now committed to the guarantee of fundamental rights in a deeper way. . . . The Emancipation Amendment, for example, was understood, first and foremost, in legal terms that relied on the language of property and contract. . . . But if freedom of contract and the right to own private property distinguished the black slave from the black freedman, did they not also serve more generally to distinguish slaves from freedmen of all races?

BRUCE ACKERMAN, *WE THE PEOPLE* 100 (1991).

This argument is similar to Orlando Patterson's thesis that social conceptions of freedom have always developed as a response to slavery—to the fear of slavery, or to its imposition. See ORLANDO PATTERSON, *FREEDOM*, at xiii (1991).

¹²⁷ See 83 U.S. (16 Wall.) 36, 77–80 (1872). The decision rendered the Privileges and Immunities Clause of the Fourteenth Amendment, ratified just five years earlier, a virtual dead letter. The Clause provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . ." U.S. CONST. amend. XIV, § 1. Just as a State was prohibited from preferring its own citizens to those of other states by the Privileges and Immunities Clause of Article IV, the Fourteenth Amendment was intended to prohibit a State from similarly discriminating among its citizens. See *TRIBE*, *supra* note 42, at 548–53.

¹²⁸ Due process would become synonymous with the right of the individual to hold property, to make contracts, and to alienate one's labor for a wage. See CORWIN, *supra* note 10, at 116–68; HALL, *supra* note 124, at 226–46.

Bradley's dissent in the *Slaughter-House Cases*.¹²⁹ In 1889, the Court struck down on due process grounds a state law that delegated the authority of establishing railroad rates to a commission.¹³⁰ Within a few years, the vaunted "freedom of contract" of the economic libertarian had become a part of constitutional doctrine.¹³¹ *Lochner v. New York*, decided in 1905, echoed Justice Bradley, and Adam Smith before him, when it proclaimed that "[t]he general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment"¹³² In striking down a state law that limited bakers to sixty hours of work per week, and to ten hours of work per day, the Court stated that "[t]he right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right."¹³³

The Court's conception of freedom of contract, though couched in terms of economic rights, is circumscribed by a Hobbesian notion of constraint. Despite progressives' claims that workers were constrained by social and economic circumstances to accept low-paying jobs that required long hours of work, often in dangerous conditions, the Court found that the "requirement" that bakers work longer hours was not imposed by "physical force," and so was not a constraint.¹³⁴ Workers' freedom is not limited by the social and economic conditions generated by an impersonal market, even if these conditions made life difficult.¹³⁵ Thus, the classical liberal conception of constraint pre-

¹²⁹ See *Slaughter-House Cases*, 83 U.S. at 119 (Bradley, J., dissenting). Bradley argued that the Privileges and Immunities Clause of the Fourteenth Amendment protects the "fundamental . . . right to follow such profession or employment as each one may choose." *Id.* (Bradley, J., dissenting). In his dissent, Justice Stephen Field quotes Adam Smith's *Wealth of Nations* at length in a footnote: "The property which every man has in his own labor . . . is the original foundation of all other property, so it is the most sacred and inviolable." *Id.* at 110 (Field, J., dissenting).

¹³⁰ See *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U.S. 418, 458 (1889).

¹³¹ See *Allgeyer v. Louisiana*, 165 U.S. 578, 593 (1897) (striking down a state law that would prohibit citizens from purchasing insurance from companies not registered to do business in state, on ground that it interfered with citizens' freedom of contract).

¹³² 198 U.S. at 53.

¹³³ *Id.*

¹³⁴ See *id.* at 52.

¹³⁵ This position was attacked by progressive reformer E.L. Godkin, who insisted,

What I agree to do in order to escape from starvation, or to save my wife and children from starvation, or through ignorance of my ability to do anything else, I agree to do under compulsion, just as much as if I agreed to do it with a pistol at my head.

SANDEL, *supra* note 10, at 189-90 (quoting E.L. Godkin, *The Labor Crisis*, 105 N. AM. REV. 177 (1867)).

served the old Hobbesian tension that permitted its defenders to maintain that, whereas the threat of a fine enforced against an employer was a "constraint" within the meaning of the Due Process Clause, social conditions that required an employee to accept dangerous work at low pay, motivated by the need to keep his family alive, was not.¹³⁶

Although the *Lochner* era (roughly 1897 until 1937) often is touted by its defenders and excoriated by its critics as a period where libertarian ideals dominated constitutional decision making, the Court's economic libertarianism was actually sporadic, limited, and inconsistent. Although the Court struck down a maximum hour law in *Lochner*, it upheld a similar law for factory workers twelve years later.¹³⁷ Although it struck down some minimum wage laws and laws prohibiting "yellow dog" contracts (contracts imposed by employers on employees requiring that employees not join a union), other aspects of the employer-employee relationship, such as safety conditions, remained within the power of state regulation.¹³⁸ Whereas laws that required state certification to enter certain professions were occasionally struck down—two notable cases involved ice dealers and pharmacists¹³⁹—state laws requiring licensure for other professions were never in question. In sum, the doctrine of freedom of contract was never interpreted so broadly that it served to shield the bargaining process between workers and employers from any form of state regulation. The fate of a particular law often appears to have depended not so much on whether it regulated some aspect of the employment contract, as do a myriad of

¹³⁶ Hobbes argued that laws constrain, but that acts motivated by fear (or perhaps economic exigency) are not constrained. See HOBBS, *supra* note 12, at 262–63. General economic conditions cannot "constrain" if constraint must always involve the intentional act of a personal agent, as many libertarians and others maintain. See HAYEK, *supra* note 4, at 12. Accordingly, the owner of the bakery in *Lochner* was "constrained" by the threat of a fine if that fine violated his right to contract, but the worker was not similarly constrained because his situation was the result of general economic conditions.

¹³⁷ *Lochner*, 198 U.S. at 64; see *Bunting v. Oregon*, 243 U.S. 426, 434–36 (1917) (overruling *Lochner* by upholding law limiting work day for both sexes to thirteen hours, and guaranteeing overtime pay after ten hours); see also *Muller v. Oregon*, 208 U.S. 412, 421–23 (1908) (upholding a maximum hour law for women on paternalistic grounds that women needed to be protected from harsh working conditions).

¹³⁸ See *Adair v. United States*, 208 U.S. 160, 180 (1908) (finding federal legislation prohibiting discharge of employee for union membership violates the Commerce Clause); *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (finding state legislation prohibiting yellow-dog contracts violates the Due Process Clause of the Fourteenth Amendment). *Coppage* also held that the state objective of equalizing bargaining power between employer and employee was an impermissible use of the democratic process. 236 U.S. at 14–16.

¹³⁹ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280 (1932); *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 114 (1928).

laws, but on whether the motive for the law was to redistribute wealth or power in some overt manner.¹⁴⁰

Moreover, the libertarian influence was strongest in the employment context. Not once during this period did the Court entertain the notion, so central to theoretical libertarianism, that states could not regulate private morals.¹⁴¹ And even when there were constitutional challenges to various forms of federal morals legislation, they were cast not as a necessary vindication of individual rights, but rather as a challenge to the limitations of the commerce power—and even these challenges failed.¹⁴² Nor were paternalistic laws, eschewed by libertarians because they substitute the states' judgment for that of the individual in matters where only individual interests are at stake,¹⁴³

¹⁴⁰ The *Lochner* Court made this explicit in asserting that states' interests were limited to those of the police power—protecting health, safety, and morals of the community. 198 U.S. at 53. The Court found that the "health" justification for the law (the protection of the public from illnesses caused by overworked bakers) was a pretext for an attempt to equalize bargaining power between employer and employee, an impermissible end. See *id.* at 61; see also *Coppage*, 236 U.S. at 17–18 ("[I]t is . . . impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. . . . [S]ince a state may not strike [these rights] down directly it is clear that it may not do so indirectly The police power is broad, and not easily defined, but it cannot be given the wide scope that is here asserted for it . . .").

¹⁴¹ For example, in *Mugler v. Kansas*, the Court upheld as a proper exercise of the State's police power a law prohibiting the use of personal property to make liquor. 123 U.S. 623, 661–62 (1887). Whereas earlier cases had upheld bans on the sale or distribution of alcohol, *Mugler* struck at the heart of the zone of privacy by holding that the State could reach even the act of fermenting liquor for one's own use. What is striking about the case is that the Court attempted to square its reasoning with some conception of a zone of privacy (though an incredibly impoverished one):

[W]hile . . . the State may control the tastes, appetites, habits, dress, food, and drink of the people, our system of government, based upon the individuality and intelligence of the citizen, does not claim to control him, except as to his conduct to others, leaving him the sole judge as to all that only affects himself.

Id. at 660. The language illustrates the malleability of ideas of zones of privacy and personal autonomy. By broadening the idea of what constitutes harm to others (for example, to include offense or emotional upset), or by asserting that personal activity may result in social consequences (for example, that drinking one's own liquor at home may result in the commission of some crime), virtually any personal activity can be subject to state regulation. Ultimately, the Court left it to the state to draw the line between self-regarding and other-regarding acts. See *id.* at 662–63.

¹⁴² See *Hoke v. United States*, 227 U.S. 308, 322–26 (1913) (upholding the Mann Act, which made it a federal crime to transport women across state lines for immoral purposes); *Lottery Case*, 188 U.S. 321, 363–64 (1903) (upholding law prohibiting interstate transport of lottery tickets).

¹⁴³ See MILL, *supra* note 111, at 12. Each individual "is the proper guardian of his own health, whether bodily or mental and spiritual. Mankind are greater gainers by suffering

ever seriously questioned. Laws prohibiting sodomy, adultery, fornication, polygamy, abortion, gambling, and the use of narcotics—many of which existed in a largely unbroken tradition from common-law times—were never invalidated during this period.¹⁴⁴

There was no protection, during the *Lochner* era, for other rights central to the libertarian ethic. With the exception of two cases in the 1920s recognizing the rights of parents to have their children taught a foreign language¹⁴⁵ and to send their children to private school,¹⁴⁶ there was little protection for personal, or non-economic, liberties. Freedom of expression fared no better. In fact, throughout the nineteenth century, there was little protection for freedom of speech.¹⁴⁷ This tradition of benign neglect ended in 1919 when, for the first time in its 130-year history, the Court entertained various challenges based upon the First Amendment's protection of freedom of speech—and rejected them.¹⁴⁸ The 1920s and 1930s may be the darkest period of constitutional history from the standpoint of the protection of free speech and association.¹⁴⁹ Those who raised First Amendment defenses to laws that made it a crime to advocate

each other to live as seems good to themselves than by compelling each to live as seems good to the rest." *Id.* Mill noted the highly accelerated tendency of modern societies to impose their conception of the proper way to live on others. *See id.* at 12–14. He concluded that "[t]he disposition of mankind . . . to impose their own opinions and inclinations as a rule of conduct on others is so energetically supported by some of the best and some of the worst feelings incident to human nature . . ." *Id.* at 13.

¹⁴⁴ Of course, it is difficult to separate the "moralistic" from the "paternalistic" motives for laws, as many laws appeal to both sentiments. For example, laws prohibiting gambling, drug use, prostitution, and abortion have both a moral and a paternalistic aspect, in that the conduct is discouraged in part to protect the participants themselves. Classical liberal ideology tends to be more motivated by moralistic than paternalistic concerns, but there were no constitutional barriers to paternalistic legislation at the time. Even by 1835, when Tocqueville published *Democracy in America*, he noted the tendency, later called soft despotism, of egalitarian democracy to produce "an immense protective power which is alone responsible for securing their enjoyment and watching over their fate . . . [and which] daily makes the exercise of free choice less useful and rarer [and] restricts the activity of free will within a narrower compass . . ." ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 692 (J.P. Mayer ed., George Lawrence trans., Perennial Classics 2000) (1835).

¹⁴⁵ *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (striking down state law prohibiting the teaching of any modern language other than English).

¹⁴⁶ *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (striking down state law requiring parents to send their children to public school).

¹⁴⁷ *See generally* DAVID M. RABRAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* (1997).

¹⁴⁸ *See Schenck v. United States*, 249 U.S. 47, 52 (1919) (upholding conviction under the federal Espionage Act of 1917 for distributing pacifist literature to draftees).

¹⁴⁹ *See* ZECHARIAH CHAFFEE, JR., *FREE SPEECH IN THE UNITED STATES* 108–40 (1941); Thomas A. Lawrence, *Eclipse of Liberty: Civil Liberties in the United States During the First World War*, 21 WAYNE L. REV. 33, 87–112 (1974).

pacifistic, anarchistic, or socialist causes,¹⁵⁰—or even to attend meetings hosted by groups that advocated such causes (even when the defendant had opposed the group's platform)¹⁵¹—were denied First Amendment protection. Whatever underlying philosophical principle justified the inconsistent protection of freedom of contract in the employment context, it did not extend to the related associational right of persons to come together for personal or political purposes.

If we were to ask now why the *Lochner* Justices displayed what appears, from a modern liberal or libertarian standpoint, to be such an inconsistent attitude toward personal zones of negative liberty, several overlapping answers present themselves. The cynical answer, of course, is that they were simply doing the bidding of the power elite, reflecting its interests by adopting a conception of freedom that was consistent with the demands of the propertied. Considering that the Court upheld most progressive legislation, however, the record does not support simple cynicism. Moreover, cynical answers in politics always overlook the fact that, except in exceptional circumstances, defenders of particular theories entertain them genuinely, whatever subsequent generations may think of their views. The better answer is that the *Lochner* Justices were not libertarian—they were “conservatives” in the modern sense of the word: they opposed government intervention in the economy even though they were willing to recognize a role for government in the personal sphere.¹⁵²

¹⁵⁰ See *Abrams v. United States*, 250 U.S. 616, 624 (1919) (upholding conviction for circulating leaflets opposing invasion of Soviet Russia after World War I); *Debs v. United States*, 249 U.S. 211, 216 (1919) (upholding conviction of Eugene Debs, Socialist Party leader, for a speech advocating socialism and opposing the war); *Frohwerk v. United States*, 249 U.S. 204, 210 (1919) (upholding conviction and ten-year imprisonment under the Espionage Act for publication of newspaper articles opposing U.S. entry into World War I); *Schenck*, 249 U.S. at 49. Justice Oliver Wendell Holmes, who had written the majority opinions in *Schenck*, *Frohwerk* and *Debs*, dissented in *Abrams*, arguing that “nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger [to the nation].” *Abrams*, 250 U.S. at 628 (Holmes, J., dissenting).

¹⁵¹ See *Whitney v. California*, 274 U.S. 357, 372 (1927) (upholding conviction under the California Criminal Syndicalism statute for attending a Communist Labor Party meeting). In *Whitney*, the appellant had sponsored a moderate platform to work for change through the existing political system, but that platform was defeated in favor of a more radical platform, and she remained at the convention. *Id.* at 365–66; see also *Gitlow v. People of New York*, 268 U.S. 652, 672 (1925) (upholding conviction of business manager of Communist Party newspaper).

¹⁵² In contrast, modern liberals oppose government intervention in the personal sphere, but welcome it in the economic world. See Dworkin, *supra* note 2, at 181–204 (providing a philosophical discussion of these differing tendencies); see also E.J. DIONNE, JR., *WHY AMERICANS HATE POLITICS* 259–82 (1991) (giving an interesting popular treatment

If we now ask the deeper question—why should “freedom” extend to a range of (economic) activities that so obviously affects others, but not encompass more personal (non-public) activities—the answer gets considerably more complicated. Any complete answer would have to include the tendency of classical liberals from Bentham on to freight their conceptions of liberty with such other values as material prosperity and social progress.¹⁵³ In addition, it would have to mention the lingering Calvinist preference for economic over more personal forms of self-assertion.¹⁵⁴ But accompanying and underlying these reasons is yet another: nineteenth- and twentieth-century free market liberals have always insisted that political freedom cannot exist independently of a broad zone of economic liberty—at least not in the long run.¹⁵⁵ The

of the rift between modern-day conservatives and libertarians); HAYEK, *supra* note 4, at 397–411 (presenting a classic self-defense of the economic libertarian).

¹⁵³ Liberty thus had a utilitarian appeal to nineteenth- and early twentieth-century classical liberals, and to modern neo-conservatives as well. Freedom, material prosperity, growth, and progress are all viewed as coefficient values. The idea of “efficiency” is simply an index of utility, measured by the capacity of an economic system to facilitate the distribution of commodities at the lowest possible cost.

There is a tenuous relationship, in later classical liberal thought, between conceptions of natural rights and utility as strands of liberal thought began to diverge from their Lockean and natural rights foundations. See ELIE HALEVY, *THE GROWTH OF PHILOSOPHICAL RADICALISM passim* (Mary Morris trans., Beacon Press 1955) (1929). Justifications for liberty were increasingly placed on utilitarian grounds, rather than on notions of natural rights. See L.T. HOBBHOUSE, *LIBERALISM passim* (Oxford Univ. Press 1964) (1911) (discussing the transformation from natural rights to utilitarian to progressive conceptions of freedom). Bentham’s dismissal of rights as “nonsense on stilts” presaged the eventual rift between libertarians and utilitarians. JEREMY BENTHAM, *ANARCHICAL FALLACIES, reprinted in 2 THE WORKS OF JEREMY BENTHAM* 489 (John Bowring ed., Russell & Russell, Inc. 1962) (1843). Modern libertarians generally accept that there is a kind of “teleological consequentialism” in their conceptions of rights, in that the protection of rights is broadly conducive to human happiness, but they reject strict utilitarian approaches to moral reasoning, which are obnoxious to any system of natural rights. See RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY* 23 (1998); TIBOR R. MACHAN, *INDIVIDUALS AND THEIR RIGHTS* 120–21 (1989). Perhaps the most important reason for this conflict is that utilitarianism permits the trading off of utility between individuals in a way that maximizes net utility, but requires the violation of rights. See generally J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* (1973).

¹⁵⁴ See MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 98–128 (Talcott Parsons trans., 1958) (1920).

¹⁵⁵ In fact, this is the central theme of the two most important libertarian works of the twentieth century. See FRIEDMAN, *supra* note 110, at 7–21; HAYEK, *supra* note 90, at 13, 88–100. Harrington held that the chief consequence of a wide distribution of property was the protection of political liberty. Compare JAMES HARRINGTON, *THE COMMONWEALTH OF OCEANA* (1656), *reprinted in THE COMMONWEALTH OF OCEANA AND A SYSTEM OF POLITICS* 1, 12–13, 33–38 (J.G.A. Pocock ed., 1992), with LOCKE, *supra* note 108, at 66 (arguing that the chief end of government is the protection of property). Modern libertarians accept both of these

old Harringtonian idea that political power had to be checked by property, and that the overawing political control of economic relations meant the end of any real political freedom is, most likely, what lay behind the intellectual motivations of the *Lochner* Justices.

Indeed, one can imagine a judge from this era asking the opposite question: How is it that we, who increasingly conceive of freedom as self-determination—the capacity to direct our lives in the direction we choose—are so willing to be taxed and regulated in the sphere of activity that will determine many of our opportunities and define so many of our lives' purposes? If the classical liberal commitment to negative liberty was ultimately halfhearted, emphasizing economic liberty at the expense of the personal, so too, they might point out, are our own conceptions of self-determination, which accent the personal at the expense of the economic dimensions of human life.

In an extended sense, the jurisprudence of each of the next three faces of freedom draws upon the negative ideal of freedom. To this extent, we have not completed our discussion of negative liberty. Yet, each of the three succeeding conceptions of freedom offers us something considerably more, and something undeniably less, than the simple antipathy between freedom and government interference.

III. THE PROGRESSIVE REFORMULATION OF LIBERTY

A. *The Progressive Idea of Freedom*

In an address to Congress in January 1944, President Franklin Roosevelt announced that "[w]e have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence."¹⁵⁶ Quoting from an English case of Blackstone's era, he declared that "necessitous men are not free men,"¹⁵⁷ adding that "[p]eople who are hungry and out of a job are the stuff of which dictatorships are made."¹⁵⁸ He went on to enumerate a list of new freedoms that should supplement those of the now "inadequate" Bill of Rights. These freedoms include "[t]he right to a useful and remunerative job," "[t]he right to earn enough to provide adequate food and clothing and

propositions: political and economic liberty are mutually reinforcing, but once economic liberty is lost, the loss of political liberty is not far behind.

¹⁵⁶ CORWIN, *supra* note 10, at 4 n.3.

¹⁵⁷ *Id.* (quoting *Vernon v. Bethell*, 2 Eden 100, 113, 28 Eng. Rep. 838, 839 (1762)). Justice Benjamin Curtis repeated the sentiment almost a century later. *Russell v. Southard*, 53 U.S. (12 How.) 139, 152 (1851).

¹⁵⁸ CORWIN, *supra* note 10, at 4 n.3.

recreation," "the right of every business man, large and small, to trade in an atmosphere free from unfair competition and domination," "[t]he right of every family to a decent home," "the right to adequate medical care and the opportunity to achieve and enjoy good health," "the right to adequate protection from the economic fears of old age, sickness, accident and unemployment," and "[t]he right to a good education."¹⁵⁹ In these few lines, we see the full flowering and political apotheosis of the progressive conception of freedom.¹⁶⁰

Four essential themes are central to the progressive conception of freedom. First, progressive conceptions draw upon all three positive conceptions of freedom discussed in Part I, though different variants often emphasize one or another of these. Second, the progressive is highly skeptical of the "ready-made" conception of a pre-social self sometimes associated with classical liberalism,¹⁶¹ arguing instead that human choices are largely or wholly the product of social forces. Third, whereas negative liberals contrast freedom with physical or legal constraint, the progressive views interpersonal domination and social dependence as the primary limits on both individual freedom and political liberty. Finally, underlying each of these other ideas, progressives offer a theory of freedom that is thoroughly brigaded with egalitarian ideals. This stands in marked contrast with the conviction, running

¹⁵⁹ *Id.*

¹⁶⁰ The "progressive" tradition is usually traced to the 1880s in England. American progressive thought began ten to twenty years after this. BECKER, *supra* note 9, at 148–51 (defending the intellectual premises of progressivism); HALL, *supra* note 124, at 267–85 (tracing the impact of progressive reform on the legal culture); SANDEL, *supra* note 10, at 201–49 (discussing the social history of progressivism).

Progressivism is usually conceived as a "middle way" between more radical forms of socialism on the left, promulgated by Marx and others from the 1840s, and the laissez-faire liberalism of the right. Progressives were thus attacked from both sides as representing an unprincipled *modus vivendi* between the two radically different systems of politics. Progressives often have stressed that theirs is not merely a "middle way." See JOHN DEWEY, *LIBERALISM AND SOCIAL ACTION* 48–49 (1935). Dewey claimed that liberalism emphasizes intelligent direction of social action, and that therefore the only alternatives are conservative "drift and casual improvisation, or the use of coercive force stimulated by unintelligent emotional and fanatical dogmatism." See *id.* at 50, 51; see also Dworkin, *supra* note 2, at 196 (concluding that the liberal "chooses a mixed economic system—either redistributive capitalism or limited socialism—not in order to compromise antagonistic ideals of efficiency and equality, but to achieve the best practical realization of the demands of equality itself"); BECKER, *supra* note 9, at 96–98 (recounting the attacks he endured from the left and the right).

¹⁶¹ See DEWEY, *supra* note 160, at 39 (describing the classical notion of a "ready-made" self).

through both classical republican and liberal thought, that freedom and equality of condition are mutually antagonistic values.¹⁶²

"Weak" versions of progressive thought, associated with welfare liberalism, accept the negative liberal's definition of freedom as the absence of constraint, but argue for a significantly broadened definition of constraint—one that includes social conditions, economic inequalities, and even personal incapacities.¹⁶³ Most versions of progressive thought even go further, by defending a conception of freedom that is positive in the sense that freedom means more than non-constraint (requiring, in some cases, the affirmative assistance of others), and also in the even stronger sense that freedom is connected to specific goals that place normative constraints on the appropriate ends of human action. Weak progressivism shares with other strands of

¹⁶² Eighteenth-century politicians and political thinkers agreed that values of liberty and material equality were in deep tension. When thinkers of the time praised equality, they were praising the equality inherent in Jefferson's natural aristocracy, the classical liberal's equality of opportunity. See WOOD, *supra* note 10, at 70-71 (stating that for most Americans, equality did not mean social leveling, but simply an "equality, which is adverse to every species of subordination besides that which arises from the differences of capacity, disposition, and virtue").

Disdain for substantive conceptions of equality can be seen in the work of Rousseau. JEAN-JACQUES ROUSSEAU, A DISCOURSE ON THE ORIGIN OF INEQUALITY (1755), reprinted in THE SOCIAL CONTRACT AND DISCOURSES, *supra* note 4, at 31, 110 ("Political distinctions necessarily produce civil distinctions."). Rousseau was the first to analyze the way in which society generated inequality, yet would likely find anathema Ronald Dworkin's claim that equality requires that individuals not benefit over others as a result of their inborn individual differences. Compare *id.* at 111 n.* ("Distributive justice would oppose this rigorous equality of the state of nature . . . [so that persons should] be distinguished and favored in proportion to the services they have actually rendered."), with Dworkin, *supra* note 2, at 199 ("The liberal . . . finds the market defective principally because it allows morally irrelevant differences, like differences in talent, to affect distribution, and he therefore considers that those who have less talent . . . have a right to some form of redistribution . . .").

¹⁶³ The progressive who adopts a weak version of positive freedom may be seeking to update the negative liberal tradition by adapting the basic impulse of liberalism—the freeing of individual energy from social constraint—to modern conditions. Liberal social conditions were seen as necessary to foster "the release of individual creative energy" necessary for growth and prosperity, as well as for freedom. See James Willard Hurst, *The Release of Energy*, in LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES (1956), reprinted in AMERICAN LAW AND THE CONSTITUTIONAL ORDER 109, 111 (Lawrence M. Friedman and Harry N. Scheiber eds., 1978); see also HOBHOUSE, *supra* note 153, at 73. ("[Society's progress] is natural only in this sense, that it is the expression of deep-seated forces of human nature which come to their own only by an infinitely slow and cumbersome process of mutual adjustment. . . . The heart of Liberalism is the understanding that progress is . . . a matter of . . . the liberation of living spiritual energy."). The broadened conception of constraint, which entails a wider role for state intervention, places the weak progressive on a collision course with classical liberal theory, but the progressive still can claim to be consistent with the spirit of the liberal tradition.

the liberal tradition the view that there are no internal or normative limits on what an individual may choose—that there is no inherent ordering of life's goals that makes some choices more worthy than others. In contrast, strong progressives defend a teleological conception of freedom that posits certain human ends as particularly important to the attainment of human potential in its fullest manifestation.¹⁶⁴

One of the first philosophers of progressive thought was the Englishman T.H. Green, whose writings date from the 1880s.¹⁶⁵ “[The] ideal of true freedom,” Green announced, “is the maximum of power for all members of human society alike to make the best of themselves.”¹⁶⁶ A half century later, John Dewey echoed this theme: “Liberty is that secure release and fulfillment of personal potentialities which take place only in rich and manifold association with others”¹⁶⁷ The contemporary progressive-communitarian Charles Taylor

¹⁶⁴ To use the phraseology of MacCallum's triadic formula, negative liberal theories of freedom have a narrow conception of constraint, MacCallum's *y* variable, and a wide conception of the *z*, or “goal,” variable. In contrast, weak progressives tend to expand the *y* variable to include other constraining conditions. Strong conceptions of positive freedom, and of progressive thought, place normative limits on the *z* variable. They rule out of bounds certain courses of activity that they deem irrational or immoral. In this way, positive ideas in general, and progressive ideas in particular, are distant descendants of a more rationalistic conception of freedom that flows from Plato, through Stoic thought to the Scholastics of the Middle Ages, to modern thinkers such as Hegel. The tradition is radically at odds with the predominantly British empiricist conception of freedom running from Hobbes to modern day positivists. See MacCallum, *supra* note 7, at 102.

¹⁶⁵ Green's brand of liberalism departs in significant ways from the philosophical assumptions of earlier liberalism. See Green, *supra* note 37, at 21. Whereas much nineteenth-century liberalism is closely linked to the positivism and utilitarianism defended by Bentham and Mill, Green and other early progressives were idealists influenced most deeply by Hegel. See ALAN PATIEN, *HEGEL'S IDEA OF FREEDOM* 16–27, 104, 139, 151–52 (1999) (discussing both Hegel's metaphysical ideal of freedom and its application to a philosophy of rights). If the heart of the positivist tradition is value skepticism and the disjunction between law and morality, then the idealist's rejection of positivism led them to a normative and affirmative idea of freedom that connected freedom to a theory of self-realization. Politically, it also committed liberal idealists to a more interventionist state. See HOBHOUSE, *supra* note 153, at 63–66 (discussing the “organic” conception of liberty defended by idealists such as Green and others); *id.* at 74–87 (examining and defending their rejection of the social atomism of earlier liberals).

¹⁶⁶ Green, *supra* note 37, at 22–23. Green states that freedom is “a positive power or capacity of doing or enjoying something worth doing or enjoying.” *Id.* at 21. This “positive power” implies both the internal capacity to seek and to achieve such ends, and the support of external institutions to assist the individual in this pursuit.

¹⁶⁷ JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 150 (1954). In self-fulfillment or self-realization, progressives find the central value of the liberal tradition. The underlying value fostered by liberty or political liberalism is the release of human energies, the achievement of individuality, the deepest fulfillment of the person. See HOBHOUSE, *supra* note 153, at 73.

follows in this tradition, writing that "the meaningful sense of 'free'" involves "being able to act on one's important purposes."¹⁶⁸ Self-fulfillment, self-realization, and the attainment of each individual's fullest potential are ideas central to the strong progressive liberal tradition—ideas drawn from the republican "holistic" or "top-down" conception of political liberty.¹⁶⁹

Nevertheless, there is a deep and brooding ambiguity inherent in these ideas of self-fulfillment and achievement of "one's important purposes"—an ambiguity that splits the liberal tradition and, with it, progressive theory. Is the potential that each individual must fulfill one that he or she chooses for himself or herself, and for which he or she is the final arbiter, or are these "purposes" and "potentialities" objectively given?¹⁷⁰ If each individual is his or her own judge about life's proper goals, then what about the individual who chooses the life of addiction, debauchery, or self-debasement?¹⁷¹ Conversely, as Berlin

¹⁶⁸ Taylor, *supra* note 5, at 227.

¹⁶⁹ Whereas weak progressivism requires a program of affirmative entitlements, strong progressivism links freedom to the individual *capacity* to choose appropriate ends, and to choose them for their propensity to foster the human good. The strong progressive ideal of freedom draws upon the holistic ideal of political liberty central to the classical republican tradition: freedom is an attribute of the entire person—to be "free" is to be a free man or woman, an equal member of a self-governing political community, and thus, personal autonomy flows from the right to take part in government. As Quentin Skinner puts it, the first assumption in this "neo-Roman" conception of freedom is that individual freedom is "embedded within an account of what it means for a civil association to be free." SKINNER *supra* note 43, at 23; see also PETTIT, *supra* note 31, at 121–51 (arguing for a conception of resilient negative liberty deeply influenced by the republican idea that individual liberty depends upon collective liberty).

In contrast, modern liberalism defines freedom atomistically—as an attribute not of the civil association as a whole, or even of the person, but only of particular acts. See BENN & WEINSTEIN, *supra* note 94, at 201–11. For the liberal, "free" persons and "free" societies are constructions built up out of the aggregate number of free acts. See CARTER, *supra* note 2, at 23–31 (defending the idea of "overall freedom"). For the positive liberal, in contrast, the freedom of a particular act is intimately linked to wider considerations of political justice and of one's place in a free polity.

¹⁷⁰ In other words, are there specific moral goals toward which human action should be aimed, or an inborn potential toward which we gravitate? Teleological conceptions of human potential, such as those of Green and Taylor, run counter to more sociological interpretations of human behavior that hold that there is no "human nature," innate human purpose, or *telos*. Green and Taylor share an "essentialist" conception of human nature, viewing the "highest purposes" of human behavior as limited, and individuals "wrong" in choosing their ends as not truly "free" or autonomous. See Taylor, *supra* note 5, at 228 ("[C]an we not say of the man with a highly distorted view of his fundamental purpose . . . that he may not be significantly freer when we lift even the internal barriers to his doing what is in line with this purpose . . . ?").

¹⁷¹ Weak progressives reject any teleological conception of human nature: there are no "internal" limitations on what a person may choose to do with his life, only the "external"

and others have pointed out, the opposite view is still more precarious: if the determination of life's purposes is left to others who may second guess what each of us chooses, then "freedom" is defined by reference to someone else's conception of the good.¹⁷² Strong progressives, including Green, Dewey, and Taylor, had to come to terms with this deeply troubling qualification upon their ideas of freedom, and its anti-liberal consequences.¹⁷³

Although the "weak progressive" does not share this problem, because he or she rejects the strong progressive's teleological conception of freedom,¹⁷⁴ even the weak progressive's ideal of freedom is strongly redistributive.¹⁷⁵ In contrast to the view, held by neo-Hobbesian thinkers on both the left and right, that the quanta of freedom in society can never be altered but only transferred from one person to another,¹⁷⁶ progressives argue that total social freedom can

limits imposed by the recognition of others' rights. Like Hobbes, they assert that freedom has more to do with the voluntariness of actions than with the rationality or goodness of these acts. See HOBBS, *supra* note 12, at 127-28. For libertarians and weak progressives, normative considerations enter into our definition of freedom only to set limits to individual behavior for the purpose of protecting others. This makes each individual the final arbiter of what it means to be "self-fulfilled" or "self-realized."

¹⁷² BERLIN, *supra* note 1, at 181 ("This demonstrates (if demonstration of so obvious a truth is needed) that conceptions of freedom directly derive from views of what constitutes a self, a person, a man. Enough manipulation of the definition of man, and freedom can be made to mean whatever the manipulator wishes. Recent history has made it only too clear that the issue is not merely academic.")

¹⁷³ Some progressives have been forthcoming about the degree of constraint necessary to achieve a more equal distribution of positive freedom. See ROUSSEAU, *supra* note 4, at 195 (arguing that those who fail to observe the general will shall be compelled to do so, and thus "will be forced to be free"); Green, *supra* note 37, at 22 ("[T]o submit is the first step in true freedom."); cf. BERLIN, *supra* note 1, at 208 ("The liberals of the first half of the nineteenth century correctly foresaw that liberty in this 'positive' sense could easily destroy too many of the 'negative' liberties that they held sacred. They pointed out that the sovereignty of the people could easily destroy that of individuals.")

¹⁷⁴ For the weak progressive and the negative liberal, freedom means the absence of constraints to pursue any legally open course of action that the individual may choose. Nevertheless, the weak progressive's concept of freedom is still "positive" in that he or she has a much broader conception of constraint (including social and economic conditions, and internal incapacities), and in that he or she defends affirmative entitlements as a means to guaranteeing the achievement of freedom.

¹⁷⁵ Progressives hope that if conditions are equalized, overall freedom will be increased. Proving this theory requires that freedom be measured in some manner. Some scholars have attempted to create a mathematical index of the measure of freedom in particular societies. See CARTER, *supra* note 2, at 86-92, 269-73 (describing these efforts). But see Dworkin, *supra* note 2, at 189 (arguing that liberty is not quantifiable); Onora O'Neill, *The Most Extensive Liberty*, 80 *PROC. ARISTOTELIAN SOC'Y* 45, 47-52 (1980) (same).

¹⁷⁶ See STEINER, *supra* note 2, at 52 (defending what he calls "the law of the conservation of liberty," i.e., that the total share of freedom in society can never be increased or de-

be expanded by adjusting (or equalizing) societal conditions to promote greater freedom of choice among individuals.¹⁷⁷ Progressives generally acknowledge the need for a system of laws to redistribute social and economic constraints—not only to achieve the necessary equalization of conditions, but also for paternalistic purposes. Promoting human choice means not only creating opportunities for the average individual, but also closing off certain options—those that are deemed destructive of human freedom in the long run. Green suggested that the goal of progressive legislation should be to “maintain the conditions without which a free exercise of the human faculties is impossible.”¹⁷⁸ Following Mill, the goal of human freedom is seen as the refinement of our choice-making capacities. Unlike Mill, however, this refinement requires the active intervention of authorities to promote the appropriate external social conditions within which choices can be made. Green and other progressives argue that individual choices may be limited when they are, in the long run, destructive of the individual’s own freedom or well-being. The extreme example is that of the individual who enters a contract for self-enslavement.¹⁷⁹ From this paradigm instance, however, progressives argue that many choices destructive to the individual’s health or well-being may be limited on paternalistic grounds.¹⁸⁰

creased). *But see* Chandran Kukathas, *Liberty*, in *A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY*, *supra* note 108, at 534, 539 (criticizing Steiner’s views).

Robert Hale, one of the most profound thinkers of the legal realist school, pointed out that a transfer of power from the owners of capital to the workers, or to government, “neither add[s] to nor subtract[s] from the constraint which is exercised.” Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State* (1923), reprinted in *AMERICAN LEGAL REALISM* 101, 108 (William W. Fisher III et al. eds., 1993). He nevertheless defended these changes as a means of democratizing power.

¹⁷⁷ See Green, *supra* note 37, at 21–22 (“When we measure the progress of a society by its growth in freedom, we measure it by the increasing development and exercise on the whole of those powers of contributing to social good with which we believe the members of the society to be endowed; in short, by the greater power on the part of the citizens as a body to make the most and best of themselves.”).

¹⁷⁸ *Id.* at 25.

¹⁷⁹ See MILL, *supra* note 111, at 101 (arguing that contracts involving substantial indentured servitude should be voided on grounds that they eliminate the individual’s future options and choices).

¹⁸⁰ See, e.g., JOEL FEINBERG, *HARM TO SELF* 24–25 (1986) (discussing the justifications for and against paternalism); Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 *YALE L.J.* 763, 780–86 (1983) (defending paternalistic limits in contract law by distinguishing between disappointment and regret, with only the latter justifying paternalism). If paternalistic intervention is justified on grounds that it increases the individual’s future liberty, there appears no stopping point to interference. Can we prevent the individual from smoking because he or she will then be free to make more choices during the increased life expect-

The progressive's mistrust of the individual's capacity to define his or her own purposes, along with the resulting defense of a paternalistic conception of the state, are reinforced by the modern conception of individual personality as a social construct.¹⁸¹ As such, our choices are viewed characteristically as the products of social forces, rather than as an exercise of genuine individual autonomy. In the extreme versions of this view, no choices are truly authentic, and government intervention is justified not only to prevent the individual from making bad choices,¹⁸² but, more radically, to "construct" individuals to make better choices and thereby to be better citizens.¹⁸³

We have come now to what is the single deepest source of tension in modern liberal theory. The strong progressive's penchant for defending a paternalistic conception of the state, and for speaking in terms of "false consciousness," "adaptive preferences," and the like,¹⁸⁴

tancy he can now expect to enjoy? Does the principle require outright compulsion—for example, forcing someone to exercise in order to extend their own life? See Gerald Dworkin, *Paternalism*, in *MORALITY AND THE LAW* (Richard A. Wasserstrom ed., 1971), reprinted in *PHILOSOPHY OF LAW* 230, 231 (Joel Feinberg & Hyman Gross eds., 1980).

¹⁸¹ See PHILIP CUSHMAN, *CONSTRUCTING THE SELF, CONSTRUCTING AMERICA* 26–33 (1995) (arguing that different social conditions generate different forms of neurosis and psychosis, and that "mental illness" is not a static concept across cultures); Ian Hacking, *Making Up People*, in *RECONSTRUCTING INDIVIDUALISM* 222, 222–36 (Thomas C. Heller et al. eds., 1986) (arguing that our sense of self is constituted by our social labeling of behavior); J.B. Schneewind, *The Use of Autonomy in Ethical Theory*, in *RECONSTRUCTING INDIVIDUALISM*, *supra*, at 64, 64–75 (deconstructing the idea of individual autonomy).

¹⁸² See Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1173 (1986) (defending paternalism on these grounds, but acknowledging that this view of the individual "raises the spectre of tyranny").

¹⁸³ Modern progressives have merged these themes with classical republican ideas. Michael Sandel sees the purpose of republican government as the making of individual citizens who are capable of self-government, as the republican conceives it. MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 175–83 (1982). The search for a "public philosophy" thus becomes the quest to determine both principles of government and models for human individuality. SANDEL, *supra* note 10, at 24. But see Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 894–97 (1993) (criticizing republican theory for its potentially individual-annihilating conception of politics).

¹⁸⁴ Modern feminists have adopted Marx's idea of "false consciousness." See CATHERINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 103–04 (1989). The proletarian defense of the right to property is paralleled by women's defense of a male-dominated social structure. Similarly, social scientists and philosophers have used the term "adaptive preferences" to describe the tendency of individuals to discount the attractiveness of things they have little hope of achieving while overvaluing those things that they have, but which objectively may not be of much value. See JON ELSTER, *ULYSSES AND THE SIRENS* 150–53, 157–58 (1979). Cass Sunstein has employed this terminology extensively in his writings. See Sunstein, *supra* note 182, at 1146–51 (describing a number of species of adaptive preferences).

stems from skepticism regarding the status not only of individual choices, but of the reality or authenticity of the "self" that lies behind these choices.¹⁸⁵ Because liberalism has always been justified in terms of the rights of individuals to make basic choices about their own lives, and because this right to make choices for ourselves is predicated upon our *capacity* for free choice,¹⁸⁶ left unchecked, the progressive's skepticism of individual choice is subversive of liberalism *tout court*.¹⁸⁷ A "liberalism" without individual choice is not liberalism in any sense of the idea.

In seeking a middle way between the Scylla of radical subjective individualism (for example, that no one may second guess the life choices of the drunkard or the prostitute) and the Charybdis of authoritarianism, progressives have had to reconcile freedom with paternalism, personal autonomy with the belief that personalities are socially constructed. Some have stated frankly that the "autonomy" of decisions must be judged by their ethical consequences—that if the choice is "bad" in the eye of the beholder, it is suspect.¹⁸⁸ This, of course, is no theory of autonomy at all. It concedes a realm of "free choice" as long as the individual is making the "right" choices. This position is indistinguishable from authoritarianism.

Another approach follows the old republican themes of domination and dependence, concluding that only some individual choices are suspect: those that resulted from personal dependence and, what

These notions subvert conceptions of individual choice predicated upon the autonomy of the chooser.

¹⁸⁵ Two strains of liberal thought, one originating with Kant and the other with the romantic tradition, justify the right of the individual to make choices on the autonomy or authenticity, respectively, of these choices as manifestations of the "real" self. See John Lawrence Hill, *Mill, Freud, and Skinner: The Concept of the Self and the Moral Psychology of Liberty*, 26 SETON HALL L. REV. 92 *passim* (1995) (comparing three conceptions of human personality and evaluating their implications for the liberal ethic of choice); see also John Lawrence Hill, *Law and the Concept of the Core Self: Toward a Reconciliation of Naturalism and Humanism*, 80 MARQ. L. REV. 289 (1997) [*hereinafter* Hill, *Law and the Self*] (discussing the philosophical and psychological traditions of the self and its implications for rights, commodification, and equality).

¹⁸⁶ During the seventeenth and eighteenth centuries, a "right" was not thought of as simply a kind of "claim" on others, as we think of it today, but instead as an *active moral quality of the person*. One had a claim on others to forebear from certain kinds of injurious acts, or to provide assistance, in virtue of this moral quality, which was itself linked to a person's capacity for free will. This notion of a right was central to Grotius's ideal of rights, and influenced much of the rationalist political tradition of that era.

¹⁸⁷ See Hill, *Law and the Self*, *supra* note 185, at 373–90 (arguing that liberalism without a coherent conception of a choosing self is unthinkable).

¹⁸⁸ See Sunstein, *supra* note 182, at 1158–66; see also MACKINNON, *supra* note 184, at 106–25 (suggesting that the idea of women's "consent" is a male constructed fiction).

amounts to the same thing for many progressives, political subordination.¹⁸⁹ Because "dominion over things is also *imperium* over our fellow human beings,"¹⁹⁰ choices that are made under conditions of social or economic subjugation are inherently suspect.¹⁹¹ Thus, the progressive argues, personal subordination is defused and autonomy restored by ensuring some measure of material equality.¹⁹² In sum, equality, or a system of positive entitlements that ensures a measure of equality, is necessary to self-realization or personal autonomy. Carl Becker summed up this central political impulse of progressivism:

The essential problem of liberal democracy, therefore, is to preserve that measure of freedom of thought and of political action without which democratic government cannot exist, and at the same time to bring about, by the social regulation of economic enterprise, that measure of equality of possessions and of opportunity without which it is no more than an empty form.¹⁹³

The concern for equality unites all of the subsidiary themes of progressivism. Minimally, progressives hold that freedom requires a strong measure of material equality.¹⁹⁴ Some go further and actually

¹⁸⁹ For progressives, feminists, and others influenced by civic republican ideals, there is an intimate connection between personal subordination and political disenfranchisement—the personal is political. See MacKinnon, *supra* note 184, at 126–54 (analyzing sexuality under conditions of subordination).

¹⁹⁰ Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927), reprinted in AMERICAN LEGAL REALISM, *supra* note 176, at 109, 113.

¹⁹¹ For example, feminists have sought to limit women's choices to enter into surrogate contracts, arguing that reproductive choices reflect women's self-image, which itself is formed under conditions of patriarchy and dominance. In sum, they argue that women choose what they are told to choose because of a lifelong process by which certain opportunities are opened and others denied, reinforcing women's validation of personal identity through reproduction and child raising. See NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING* *passim* (1978); MARTHA FIELD, *SURROGATE MOTHERHOOD* 25–32, 72, 81–82 (1990) (arguing that surrogate contracts should be voidable for these reasons).

¹⁹² In this respect, the goals of the egalitarian and of the positive libertarian are the same. The equalization of bargaining power between employer and employee removes constraints to effective choice. Michael Sandel uses the term "voluntarism" to describe the philosophy of the early progressives that the proper goal of a liberal society is to create conditions for effective choice. See SANDEL, *supra* note 10, at 189–97.

¹⁹³ BECKER, *supra* note 9, at 112.

¹⁹⁴ Hobhouse proclaimed that "liberty without equality is a name of noble sound and squalid result." HOBHOUSE, *supra* note 153, at 48. More recently, John Rawls argued that there is an important distinction between freedom and the value of freedom—freedom without equality of resources and opportunity simply does not have much value. See RAWLS, *supra* note 37, at 204.

equate freedom with equality. Ronald Dworkin typifies this more extreme tendency: "What does it mean for the government to treat its citizens as equals? That is, I think, the same question as the question of what it means for the government to treat all its citizens as free" ¹⁹⁵ The "liberal," as Dworkin defines him, is someone who holds that government must treat each citizen with "equal concern and respect." ¹⁹⁶ Although an ambiguous aspiration on its face, it ultimately justifies traditional liberal mainstays such as freedom of expression and religion, ¹⁹⁷ and also more progressive ideals, including aggressive redistribution of wealth, ¹⁹⁸ affirmative action, ¹⁹⁹ and a proscription on most forms of morals legislation. ²⁰⁰ Because liberty is defined in reference to oppression, and oppression is a function of social constraints, liberty is necessarily related to social inequality. Thus, John Dewey wrote that:

The direct impact of liberty always has to do with some class or group that is suffering in a special way from some form of constraint exercised by the distribution of powers that exists in contemporary society. Should a classless society ever come into being the formal *concept* of liberty would lose its significance, because the *fact* for which it stands would have become an integral part of the established relations of human beings to one another. ²⁰¹

¹⁹⁵ Dworkin, *supra* note 2, at 191.

¹⁹⁶ *Id.* at 198.

¹⁹⁷ *See id.* at 335-72.

¹⁹⁸ *See id.* at 192-96 (arguing that liberals will prefer "redistributive capitalism or limited socialism"). John Dewey wrote: "The only form of enduring social organization that is now possible is one in which the new forces of productivity are cooperatively controlled and used in the interest of the effective liberty and the cultural development of the individuals that constitute society." DEWEY, *supra* note 160, at 54.

¹⁹⁹ Ronald Dworkin, *Bakke's Case: Are Quotas Unfair?*, in N.Y. REV. BOOKS, Nov. 10, 1977, reprinted in A MATTER OF PRINCIPLE, *supra* note 2, at 293, 293-315 (justifying racial quotas in the name of equality, and making moral distinctions between racial discrimination and benign racial classifications).

²⁰⁰ *See id.* at 193-94.

²⁰¹ DEWEY, *supra* note 160, at 48 ("[L]iberty is always relative to forces that at a given time and place are increasingly felt to be oppressive. Liberty in the concrete signifies release from the impact of *particular* oppressive forces; emancipation from something once taken as a normal part of human life but now experienced as bondage.").

Progressive commentator Robin West echoed this theme. *See* ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM 135 (1994) (noting that the history of the Fourteenth Amendment's Due Process Clause supports the idea that freedom should be understood as "liberationist," rather than "libertarian," including the "liberation from hunger, from slavery, from poverty, from sexual abuse, from patriarchy, and from racism itself. 'Liberty,' on this

Although we cannot hope to critique fully the progressive theory of freedom here, one overarching concern is noteworthy. The problem can be framed in a number of ways—for example, that the quest for equality may eclipse liberty fully, that the emphasis upon the state's role in preventing private forms of dependence threatens to consume privacy and family autonomy, that little remains of the area of negative freedom of the individual. Nevertheless, these all boil down to a fundamental question: Is there any sphere of individual choice that lies beyond the reach of the state or society? At best, progressives offer an "organic" conception of individuality that views each of us as an interdependent part of a greater whole. But at worst, they dismiss as "fictional" the essential aspects of the core person central to earlier forms of liberal thought.

What remains, in progressive thought, of the person? Given their post-structuralist conception of personality, progressives often dismiss such concepts as individual responsibility, personal merit, and active individual self-ownership.²⁰² Perhaps the most striking example of this attitude is the suggestion by some progressives that individuals have no right to reap the benefits of their own natural talents and virtues. Ronald Dworkin states that "[i]t is obviously obnoxious to the liberal conception, for example, that someone should have more of what the community as a whole has to distribute because he or his father had superior skill or luck."²⁰³ He concludes that "those who have less talent, as the market judges talent, have a right to some form of redistribution in the name of justice."²⁰⁴

view, requires liberty from bondage, whether that bondage be the result of state oppression, state meddling or private action.").

²⁰² By "active individual self-ownership," I mean a view that each individual has power over his own life and circumstances, and can remake himself independently of prevailing social images. To be fair, many progressives value the image of the creative self—John Dewey wrote that he thinks we need more "rugged individualists," not fewer. Nevertheless, the progressive is dubious of the power of the individual over his own world, or even his own character. See Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711, 1721 (1995) (suggesting that "[i]n]erit is what the victors impose"); Richard Delgado, "Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?, 3 LAW & INEQ. 9, 9-90 (1985) (arguing against traditional conceptions of responsibility and for a criminal law defense for victims of social inequality).

²⁰³ Dworkin, *supra* note 2, at 195.

²⁰⁴ *Id.* at 199. At the inception of the progressive era, T.H. Green wrote that "we rightly refuse to recognise the highest development on the part of an exceptional individual or exceptional class, as an advance toward the true freedom of man, if it is founded on a refusal of the same opportunity to other men." Green, *supra* note 37, at 22. Thus, what began as a call to tear down barriers to equal opportunity has become a demand for the redistribution of the differences that distinguish us as individuals.

Needless to say, one cannot imagine a more anti-Lockean sentiment. But this is not simply a call for economic redistribution. Rather, the vision of such extreme progressives stands as a rebuke to traditional notions of individual self-ownership. After all, if even such personal capacities as talents, virtues, and dispositions are not immune from the process of social expropriation, is there any aspect of the individual that remains sacrosanct, thus placed beyond the reach of the social?

B. *Progressive Constitutionalism*

The progressive period of modern constitutional law is usually dated from 1937, a year significant for several reasons. First, in 1937 President Roosevelt attempted to "pack" the U.S. Supreme Court with an additional six Justices (for a total of fifteen), who would presumably uphold the New Deal legislation. The plan was rejected by the Senate, but not before Justice Owen Roberts's famous "switch in time that saved nine."²⁰⁵ Roberts's "switch" took place in *West Coast Hotel Co. v. Parrish*, important in its own right for rejecting a *Lochner*-style due process attack on a minimum wage law.²⁰⁶ *Parrish* thus signaled the end of the *Lochner* era.²⁰⁷ The same year, the Court also decided *NLRB v. Jones & Laughlin Steel Corp.*, upholding extensive federal legislation that granted workers the right to organize a union and established a board to oversee labor negotiations.²⁰⁸ The case is significant not simply for the substance of the law it upheld, but because it accepted a broad interpretation of the Commerce Clause that would usher in an era of federal oversight and control of the economy.²⁰⁹ These deci-

²⁰⁵ Roberts, who in his previous seven years on the Court usually had voted with the *Lochner* conservatives to defeat a number of progressive federal programs, sometimes by a five to four margin, switched sides in the middle of the Court-packing controversy. BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* 45-46 (1998). See generally William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347.

²⁰⁶ See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937). The law upheld was indistinguishable from one the Court struck down a year earlier by a five-to-four majority that included Roberts. See *id.* at 386-87; *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 603-07 (1936).

²⁰⁷ *Parrish* explicitly overruled *Adkins v. Children's Hospital*, 261 U.S. 525 (1923). *Parrish*, 300 U.S. at 400; see also *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187 (1941) ("The course of decisions in this Court since [*Adair v. United States* and *Coppage v. Kansas*] have completely sapped those cases of their authority.").

²⁰⁸ 301 U.S. 1, 29-30 (1937).

²⁰⁹ See *id.*; G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 225-33 (2000) (describing the stunning ramifications of this expansion of the commerce power).

sions reflected the progressives' redistributive conception of liberty, heralding Roosevelt's era of "new freedom," by ensuring that the federal government would have a central role in restructuring economic relations within society.

The consequences of the switch in judicial philosophies were profound. Perhaps the single most important implication of the New Deal philosophy was that to guarantee personal freedom, all economic activity, no matter how insubstantial or "personal," had to come within the control of federal power. The case that most stands out in this respect is *Wickard v. Filburn*, decided by the Court in 1942.²¹⁰ Breathtaking in its implications, *Wickard* is to economic legislation what *Mugler v. Kansas*, decided by the Court in 1887, is to morals legislation—it represents the antithesis of any conception of "economic privacy."²¹¹ *Wickard* did not involve the regulation of a large industry, nor even an attempt to manage the local effects of a small business.²¹² Rather, it upheld a fine imposed against a farmer under the Agricultural Adjustment Act for the production of wheat for use at home that exceeded the federally mandated production limits.²¹³ The *Wickard* Court concluded that any productive activity, even within the home, had economic consequences to the economy as a whole if the aggregate effects of such activities were considered across a similar class of actors.²¹⁴ Virtually any private activity, economic or otherwise, is reachable following similar reasoning so as to justify government regulation.²¹⁵ These developments appeared to confirm the libertar-

²¹⁰ 317 U.S. 111 (1942).

²¹¹ See *Mugler v. Kansas*, 123 U.S. 623, 660-61 (1887).

²¹² See 317 U.S. at 114-16. In earlier cases, the Court had held that Congress could not regulate the production of coal or the sale of poultry. *Carter v. Carter Coal Co.*, 298 U.S. 238, 297, 300-04 (1936) (declaring mining precedes commerce, and thus is not "commerce" within the meaning of the Commerce Clause); *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 543-50 (1935) (holding the intrastate purchase and resale of poultry to neighboring businesses cannot be regulated under the commerce power). In contrast, the law upheld in *Wickard* even regulated "intra-household" activities. See 317 U.S. at 128.

²¹³ *Wickard*, 317 U.S. at 115-17. The implications are particularly far reaching given that it was the federal government, and not simply a state, whose reach extended into the household of the farmer who sought to grow more wheat to make bread. Of course, from a libertarian standpoint, any government interference, state or federal, would be anathema.

²¹⁴ See *id.* at 127-29.

²¹⁵ This is because virtually every private activity can be found to have some economic effects. Indeed, this reasoning in *Wickard* threatens the distinction between economic and personal liberties, a central tenet of progressive thought. Imagine the aggregate effects of decisions to utilize contraception, or to have abortions. Assuming that the birth rate would have an effect on interstate commerce, these "private" choices of individuals could be aggregated to justify government regulation.

ian warning that social and political freedom is not compatible with a significant degree of social and economic planning.²¹⁶

The demise of *Lochner*-style due process rights signaled a general shift in judicial attitudes away from intervention in favor of recognition of legislative supremacy. As a result, judges faced the problem of reconciling this deference with the traditional American commitment to a countermajoritarian conception of rights: what was left of the idea that rights exist to serve as checks upon, and limits to, the democratic process? A constitutional philosophy emerged to respond to this question, with its basic tenets announced in 1938, in a famous footnote in *United States v. Carolene Products Co.*²¹⁷ The *Carolene Products* footnote offered an intuitively simple solution, suggesting that democratic outcomes could be limited only for the sake of democracy itself.²¹⁸ Countermajoritarian rights serve to ensure that political outcomes are genuine expressions of the democratic process, reflecting all classes and interests. Rights do not limit, but rather perfect, the political process.

The two constitutional values that serve most to reinforce democracy, each beloved by progressives in their own right as measures of positive freedom, are access to the political process and equality.²¹⁹ Courts should intervene to protect these values, in order to protect democracy itself. Thus, the subsequent course for the 1950s and 1960s was set; in these decades, Court decisions would expand the franchise,²²⁰ eliminate discrimination against discrete and insular minorities in the political process²²¹ and in society generally,²²² and give far

²¹⁶ See generally HAYER, *supra* note 90.

²¹⁷ 304 U.S. 144, 152 n.4 (1938).

²¹⁸ See *id.* Seidman argues that the *Carolene Products* footnote emerged from the attempt to balance, on one hand, "value skepticism" and "legislative supremacy" and, on the other, judicial intervention and equality. Louis Michael Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006, 1034 (1987); see also SANDEL, *supra* note 10, at 47-50 (discussing the footnote).

²¹⁹ The footnote provides, in part, that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" should be subject to "more exacting judicial scrutiny." *Carolene Products*, 304 U.S. at 152 n.4. See ELY, *supra* note 59, at 75-104 (constructing a general "process-based" conception of constitutional rights along the lines set forth in the footnote).

²²⁰ See *supra* notes 54-65 and accompanying text (discussing the expansion of voting rights).

²²¹ See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641, 658 (1966) (upholding provision in Voting Rights Act of 1965 that prohibits "English only" literacy tests); *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966) (upholding other provisions of the Voting Rights Act of 1965).

²²² See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964) (upholding application of Civil Rights Act of 1964 to neighborhood restaurant); *Heart of Atlanta Motel v. United*

greater protection to those substantive rights required as a condition of democracy—particularly, freedom of speech.²²³

This emphasis upon political access and social equality dovetailed with another central tenet of progressive thought: the inter-relationship between social equality and political power. Where classical liberals defended a strict separation of the public and the private, and held that government should remain neutral as among private interests, progressives argued forcefully that political power both shapes and reflects social relations and conditions.²²⁴ Guaranteeing wider political access thus reinforces social equality, as those groups that traditionally had been disenfranchised could use the law to better their social conditions. Furthermore, a guarantee of greater social equality would give the previously disenfranchised the economic and social capital to exert greater political influence.

The softening of the earlier line between the social and the political is central to the underlying rationale of *Brown v. Board of Education*, decided by the Court in 1954, often considered the most important decision of the twentieth century.²²⁵ In 1896, in *Plessy v. Ferguson*, which *Brown* overruled, the Court upheld a state regulation that required whites and blacks to sit in separate railroad cars.²²⁶ The *Plessy* Court asserted that “the underlying fallac[ies] of the plaintiff’s argument [consist] in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority,” and in the assumption that “social prejudices may be overcome by legislation.”²²⁷ The Court thus reasoned that there was no political inequality, because whites were as limited as blacks in that neither could sit in the others’ cabin. Moreover, any social inequality was simply the result of personal

States, 379 U.S. 241, 261 (1964) (upholding application of Civil Rights Act of 1964 to motel located near interstate highway); see also *Morgan*, 384 U.S. at 651 (proclaiming section 5 of the Fourteenth Amendment “is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment”).

²²³ See *ELV*, *supra* note 59, at 105–34 (applying his “representation reinforcing theory” to the constitutional protection of free speech).

²²⁴ There was a significant overlap between progressive and legal realist theory in this respect. Whereas progressives attacked the social injustice inherent in the ways that social status conditions political power, realists attacked the legal formalism that supported the public-private distinction. See *Hale*, *supra* note 176, at 101–08; *Cohen*, *supra* note 190, at 112–14.

²²⁵ See 347 U.S. 483, 490–95 (1954).

²²⁶ *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896), overruled by *Brown*, 347 U.S. at 494–95.

²²⁷ *Id.* at 551. The Court concluded that “[i]f one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.” *Id.* at 552.

attitudes, perhaps on the part of blacks themselves.²²⁸ The Court reasoned that the Fourteenth Amendment "could not have been intended to . . . enforce social, as distinguished from political equality."²²⁹

It was exactly these premises that *Brown* rejected. The *Brown* Court noted findings by one of the lower courts that "[s]egregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law A sense of inferiority affects the motivation of a child to learn."²³⁰ Here we see all of the essential elements of the progressive paradigm: law structures social attitudes and these attitudes are internalized by the individual, resulting, in this case, in a liberty-limiting incapacity. Of course, these effects can be restructured by reshaping the law itself—in a way that promotes social equality.

Overall, however, progressive attempts to connect the political with the social in order to create a broader range of negative and positive individual rights have met with limited success. On one hand, the "state action doctrine," which embodies the negative liberal principle that the Constitution does not reach private activity,²³¹ has been softened in a number of ways over the past century, particularly on issues of equality.²³² As a result, courts are able to protect individual rights from interference in areas once thought to be private and beyond the reach of the Constitution.²³³ On the other hand, the Court has rejected progressive attempts to constitutionalize certain social

²²⁸ See *id.* at 551 (asserting any "badge of inferiority . . . is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it").

²²⁹ *Id.* at 544.

²³⁰ *Brown*, 347 U.S. at 494.

²³¹ See *The Civil Rights Cases*, 109 U.S. 3, 17 (1883) ("[C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority . . ."). The only provision of the Constitution that reaches private activity directly is the Thirteenth Amendment. See *id.* at 34 (Harlan, J., dissenting). Thus, only where the state supports or encourages the rights-violating conduct of private individuals, or acts directly to violate a right, does the Constitution apply.

²³² For example, the Court has held that, where private property serves a public function, or where the state directly or indirectly subsidizes a private facility, the owners of the property are subject to constitutional constraints on behavior that violates the rights of others. See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 726 (1961) (holding owners of private restaurant within public parking garage subject to Equal Protection Clause); *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (declaring owners of a "company town" cannot constitutionally deny visitors their free speech rights).

²³³ But see *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 202-03 (1989) (observing failure to intervene by state social services personnel does not constitute state action under the Fourteenth Amendment).

and economic interests by connecting them to political rights. One of the most intriguing and audacious examples of such an attempted expansion of rights can be seen in Justice Thurgood Marshall's dissenting opinion, in 1973, in *San Antonio Independent School District v. Rodriguez*.²³⁴ *Rodriguez* involved a challenge to a state financing scheme for primary and secondary schools, in which educational funding for particular districts was determined in part by the amount of property taxes collected in that district. The plan had the obvious effect of allocating more money per student to schools in wealthier districts.²³⁵ Challengers of the scheme, who were ultimately unsuccessful, argued that a fundamental interest in education warranted the equal distribution of funds across districts. In dissent, Justice Marshall attacked the formalistic distinction between "fundamental interests," protected under the strict scrutiny standard, and other rights afforded less protection,²³⁶ arguing that certain social and economic goods are essential to good citizenship and to the effective exercise of political rights. Rather than protect only those rights specifically enumerated in the Constitution:

The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.²³⁷

Justice Marshall's "nexus" approach would have drawn a wide variety of social and economic goods—food, shelter, education, health care—into the "constitutional net," by connecting them to political values protected as constitutional rights.²³⁸

²³⁴ 411 U.S. 1, 70 (1973) (Marshall, J., dissenting).

²³⁵ See *id.* at 11–13.

²³⁶ In essence, Marshall was attacking the Court's reliance on what he considered to be a formalistic distinction between rights and non-rights. See *id.* at 98 (Marshall, J., dissenting) (criticizing "the Court's rigidified approach to equal protection analysis").

²³⁷ *Id.* at 102–03 (Marshall, J., dissenting).

²³⁸ The majority pointed out the untenability of such expansion of constitutional protection as a kind of *reductio ad absurdum* of the appellees and Marshall's argument. See *id.* at 37 ("[T]he logical limitations on appellees' nexus theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of food and shelter? Empirical examination might well buttress an assumption that

Although the Court recognized the mutual inter-penetration of social and political conditions and thus extended the guarantee of equality in some contexts, it was never a wholeheartedly "progressive" Court, even during its most "liberal" period in the late 1960s. Most importantly, it rejected progressive attempts to constitutionalize a spate of positive welfare rights. After some initial concessions in the late 1960s—striking down state residency requirements for receipt of welfare benefits²³⁹ and non-emergency medical benefits at public hospitals,²⁴⁰ and striking down a law that cut off welfare payments to cohabitating mothers²⁴¹—in 1970 the Court decided that it would not use any form of heightened scrutiny to evaluate the adequacy of welfare payments.²⁴² These cases indicate that, although a state must distribute welfare benefits in an even-handed manner if it adopts a benefits program, there is no fundamental right to welfare itself.²⁴³ In sum, these developments signal a commitment to equality, rather than to positive entitlements as such.

Roughly a decade later, as if to fortify the traditional line between negative and positive rights, the Court rejected challenges to state and federal Medicaid programs that limited payments for abortion services. In 1980, in *Harris v. McRae*, the Court clarified that a negative right to be free from government interference in the abortion decision does not accord a woman "a constitutional entitlement to the financial resources to avail herself of the full range of protected

the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process, and that they derive the least enjoyment from the benefits of the First Amendment.").

Commentators have defended such a broad conception of welfare rights by linking them to the political process. See Michelman, *supra* note 32, at 677 (arguing that effective participation in politics requires "health and vigor, presentable attire, [and] shelter not only from the elements but from the physical and psychological onslaught of social debilitation").

²³⁹ *Shapiro v. Thomson*, 394 U.S. 618, 638 (1969) (holding that one-year residency requirement infringed upon "fundamental right of interstate movement").

²⁴⁰ *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 269–70 (1974).

²⁴¹ *King v. Smith*, 392 U.S. 309, 334 (1968).

²⁴² See *Dandridge v. Williams*, 397 U.S. 471, 486–87 (1970).

²⁴³ Although "the Court in *Dandridge* did not directly address the claim that welfare is a 'fundamental' interest" that would require strict scrutiny review, the Court implicitly found that it was not such an interest by reviewing the challenged statute under the less-stringent "rational basis" test. GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 887 (2d ed. 1991). Subsequently, the Court has generally deferred to state legislatures on a range of issues involving adequacy of payment and qualifications for receipt of welfare benefits. See, e.g., *Jefferson v. Hackney*, 406 U.S. 535, 549 (1972) (upholding program authorizing percentage-based reduction of welfare payments).

choices.”²⁴⁴ The *Harris* Court accepted a broader conception of constraint that encompasses social and economic conditions, consistent with more moderate forms of liberalism, but rejected the contention that individuals have a positive right to assistance in overcoming these conditions. Justice Potter Stewart stated that “although government may not place obstacles in the path of a woman’s exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category.”²⁴⁵

By the 1980s, this line of reasoning became a hallmark of the Court’s jurisprudence, reflecting its self-perception as a centrist liberal institution.

IV. SELF-INDIVIDUATING LIBERALISM

A. *The Self in Liberal Thought*

The most “individualistic” strand of modern liberal thought is described here as “self-individuating liberalism”—individualistic in the sense that it directly links freedom to the discovery, development, and expression of each individual’s unique self. If the ultimate aspiration of modern political theory since the Enlightenment is the progressive liberation of the individual from all manners of social oppression to allow the full expression of individual human potential, then the most recent phase of American liberalism clearly reflects this heady ideal.

Self-individuating liberalism implies that there is a core individual self that exists prior to, and independently of, social influences, and that must be discovered, developed, and expressed. This conception of the self is distinct from the hazier notions that characterized classical liberal thought.²⁴⁶ The classical liberal conception of the

²⁴⁴ 448 U.S. 297, 316 (1980); see also *Maier v. Roe*, 432 U.S. 464, 469 (1977) (“The Constitution imposes no obligation on the states to pay the pregnancy-related medical expenses of indigent women . . .”).

²⁴⁵ *Harris*, 448 U.S. at 316.

²⁴⁶ The “self” of classical liberal thought takes two forms. The more philosophical idea, traceable to Kant, is an entirely abstract, formless conception of the self. Kant’s core noumenal self is the abstract choosing subject, prior to, and independent of, all empirical characteristics. For Kant, what is essential to our self-identity, the abstract rational will, is not what makes each of us unique and particular as individuals. Thus, for Kant, the core aspects of our identity are common to all rational beings. See generally IMMANUEL KANT, *CRITIQUE OF PURE REASON* (F. Max Muller trans., The MacMillan Co. 2d ed. 1934) (1781). Communitarians have criticized this view because it detaches self-identity from communal attachments and beliefs that, according to communitarians, are central to personal identity. See SANDEL, *supra* note 183, at 175 (critiquing Rawls’s idea of identity, which itself follows this Kantian tradition).

self—as an entity that exists essentially intact prior to social influences—was necessary in social contract theory to legitimize the individual's original consent to enter the social compact, and was essential to justify free market liberalism.²⁴⁷ The classical liberal self existed as the secular expression of the immortal soul; it was unique to the person, and associated in theological and political thought with the human capacities of reason and free will.²⁴⁸ Classical liberals viewed the self as pre-social, but not as *contra*-social, as the self would become in self-individuating liberalism. For Kant, for example, although man might be antisocial by disposition, he was nevertheless drawn to society by the quest not just for material security but for social distinction—ultimately, this quest led to self-improvement.²⁴⁹ For the classical liberal, social influences served to refine the self, whereas for later defenders of self-individuating liberalism, these same influences were potentially self-annihilating.

In its conception of individual selfhood, self-individuating liberalism is still further removed from progressive thought, which holds that our identities are formed largely, if not wholly, by social forces.

The second conception of the self derives from religious tradition, and is secularized in Locke, Burke, and the early liberal tradition. See CHARLES TAYLOR, *SOURCES OF THE SELF* 49 (1989); Hill, *Law and the Self*, *supra* note 185, at 294–329 (outlining the legal conception of the core self and its development throughout intellectual history).

²⁴⁷ In liberal theory, the individual possesses an identity and moral worth *as an individual* that exist independent of his or her relationship with, and his or her instrumental value to, society generally. In classical liberal theory, the individual is morally and epistemologically prior to his or her social relationships. The existence of this individual is necessary in social compact theories, for the already-formed individual enters society; this self is necessary to free-market economic conceptions as well. For example, intervention in the market to shape preferences is rejected because an individual's choices are one's own. Preference shaping is regarded as a form of psychological violence analogous to brainwashing by liberals who hold some conception of the core self.

²⁴⁸ See Hill, *Law and the Self*, *supra* note 185, at 322–29 (discussing rationality and will as attributes of the self); see also Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959, 959, 968–69 (1992).

²⁴⁹ Kant referred to this as the “unsocial sociability of men.” Immanuel Kant, *Idea for a Universal History with a Cosmopolitan Purpose*, BERLINISCH MONATSSCHRIFT, NOV. 11, 1784, at 385, reprinted in *POLITICAL WRITINGS* 41, 44 (H.B. Nisbet trans., Hans Reiss ed., 1991). He writes that

[m]an has an inclination to *live in society*, since he feels in this state more like a man, that is, he feels able to develop his natural capacities. But he also has a great tendency to *live as an individual*, to isolate himself, since he also encounters in himself the unsocial characteristic of wanting to direct everything in accordance with his own ideas.

Id. Thus, the drive for power and status drives him to live with others “whom he cannot bear, yet cannot bear to leave.” *Id.*

For those who defend some conception of a unique core self, the progressive's view that the self is simply a product of the social sphere represents the deepest kind of error: confusing the inner world of the individual with the external influences that seek to overwhelm it. Modern liberalism reflects a basic ambivalence between these two opposed conceptions of freedom and personal identity. Modern liberals often are torn between the quest for an authentic self and the progressive's admonition that the self is like an onion—we may peel away and analyze the layers of social influence, one by one, but there is nothing at the center.²⁵⁰

A great deal is at stake here for liberal political theory. If there is something like an authentic self, then we can view freedom as the capacity of the self to reflect and express its deepest impulses. Liberty in its internal sense is then equivalent to the capacity of each individual to discover and develop what he is most deeply and authentically. Freedom in the external, social, and political sense is maximized by the creation of social conditions that permit each individual to reflect, develop, and express this core individuality.²⁵¹ Conversely, if there is no core self representing an internal Archimedean point, no frame of ref-

²⁵⁰ This ambivalence is reflected particularly in feminist thought. Defending authenticity as the only conceivable basis for freedom, Ruth Colker argues as follows:

I believe that we have an authentic self because assuming that we do *not* have an authentic self makes no sense to me. For example, through our feminist work, we try to peel away social influences that limit our authenticity or freedom. If we are successful in our attempts to peel away those influences, what would be left? It only makes sense for me to assume that what would be left would be our authentic selves.

Ruth Colker, *Feminism, Sexuality, and Self: A Preliminary Inquiry into the Politics of Authenticity*, 68 B.U. L. REV. 217, 220 (1988) (reviewing CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987)).

Other feminists hold that personalities are socially constructed all the way to the core. MACKINNON, *supra* note 184, at 40.

²⁵¹ Writing in 1911, L.T. Hobhouse summarized the spirit of the liberal tradition in terms reminiscent of a faith that freedom and progress can be measured from a certain Archimedean standpoint, which is the emergence of choices that conform with our deepest sense of self, our deepest needs:

The progress of society like that of the individual depends, then, ultimately on choice. . . . [Society's progress] is natural only in this sense, that it is the expression of deep-seated forces of human nature which come to their own only by an infinitely slow and cumbersome process of mutual adjustment. . . . The heart of Liberalism is the understanding that progress is . . . a matter of . . . the liberation of living spiritual energy.

HOBHOUSE, *supra* note 153, at 72–73. Further, “[l]iberalism is the belief that society can safely be founded on this self-directing power of personality . . .” *Id.* at 66.

erence by which to measure the authenticity of individual choices, then what is there to distinguish authentic choice from "pre-programmed" socially conditioned desires? Indeed, if personality is socially constructed, what principled objections remain to proposals for "shaping preferences" or conditioning human choices—at least to the extent that such conditioning is motivated by benevolent concerns?²⁵²

The self of this third strand of liberalism is the last bastion of individuality in modern political theory. It is all that stands in contemporary liberal theory between freedom, as it has generally been understood since the seventeenth century, and the self-appropriating tendencies of an increasingly centralized, rationalized, and equalized sociopolitical system.

B. *The Development of the Tradition*

The evolution of our ideas of the self is a fascinating story, with origins in Stoic and Christian thought, from which modern ideas of rationality, free will, and responsibility for self took shape.²⁵³ Beginning in the eighteenth century, however, two oft-opposed strands of thought, one originating in Kant and the other in Rousseau, began to develop side by side, with both authors self-consciously drawing their political theory from a certain conception of individuality. Whereas Kant's ideas eventually led to the liberal association of freedom with *personhood*, Rousseau's connected freedom and *selfhood*.²⁵⁴ The rationalist tradition

²⁵² In the benevolent totalitarianism of Huxley's *Brave New World*, everyone is programmed to want what their role in society requires. Although the society described is not overtly "coercive," and all are ultimately cared for by the social apparatus, we recoil at this vision by virtue of our intuition that something deeper is encroached upon in such a scheme. See generally ALDOUS HUXLEY, *BRAVE NEW WORLD* (1932). For a serious proposal for a behaviorist utopia society, see generally B.F. SKINNER, *WALDEN TWO* (1948).

²⁵³ See generally TAYLOR, *supra* note 246 (providing the best recent treatment of the intellectual history of our ideas of the self); Hill, *Law and the Self*, *supra* note 185 (describing philosophical foundations and legal consequences of a conception of the self).

²⁵⁴ See George Kateb, *The Value of Association*, in *FREEDOM OF ASSOCIATION* 35, 48 (Amy Gutmann ed., 1998) (drawing the distinction between personhood, which is "impersonal," and selfhood, which is unique to the person). Personhood justifies prioritizing the right over the good; it reflects a dignity interest of the person to be treated as a rational human being, equal with all others. Selfhood, in contrast, is particular, giving each person his or her unique self-identity, his or her unique attachments and commitments. Liberal theory based on theories of personhood views personal autonomy as the highest individual value. See RAWLS, *supra* note 37, at 252–56, 513–20. In contrast, theories based upon selfhood view the capacity to reflect the self's unique attachments and preferences, rather than those inculcated by social preferences, as the premier virtue of authenticity. See ISAIAH BERLIN, *THE ROOTS OF ROMANTICISM* 21–45 (Henry Hardy ed., 1999) (describing the de-

reflected in Kant's theories justified freedom by reference to our capacity, as (potentially) autonomous beings, to make rational choices and to carry them out. The internal aspect of freedom was found in the concept of autonomy, and the external aspect in our right to individual self-determination.²⁵⁵ This noble conception of human personality has deeply influenced the liberal tradition, but it has been criticized as well. Detractors have portrayed this concept of the person as merely a detached choicemaker, an empty consumer of commodities and experience, a ghost-like subject whose existence is entirely antecedent to any empirical identity.²⁵⁶

Rousseau's views, which influenced the romantic tradition of late eighteenth- and early nineteenth-century Europe, were largely a response to Kant's conception of the person.²⁵⁷ Whereas Kant's ideal of autonomy emphasized the universal capacity for human reason and the ascetic propensity of the rational will to resist or overcome non-rational (emotive) motivations,²⁵⁸ romantics and other successor tradi-

velopment of these rival traditions); CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* 55–80 (1991).

²⁵⁵ See KANT, *supra* note 18, at 41; Kant, *supra* note 249, at 45 (arguing that the realization of the "greatest freedom" requires "a continual antagonism among [society's] members, but also the most precise specification and preservation of the limits of this freedom in order that it can co-exist with the freedom of others"); see also Immanuel Kant, *On the Common Saying: 'This May Be True in Theory, But It Does Not Apply in Practice'*, *BERLINISCH MONATSSCHRIFT*, Sept. 1793, at 201, reprinted in *POLITICAL WRITINGS*, *supra* note 249, at 73, 73–87 (discussing the political implications of his moral theory).

²⁵⁶ Kant's idea of the core self, which he referred to as the "transcendental apperception of unity," is beyond any empirical description. It is formless and without quality. Psychology may study the empirical "me," made up of my personality and characteristics, but the self, the "I," lies behind this. It is the empty rational will. See generally KANT, *supra* note 246. But see SANDEL, *supra* note 183, at 7–11, 13; Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1897–98 (1987) (discussing the Kantian self and its "dark side," the tendency to conceive of all external things as commodifiable). One author, comparing Kant's thought with certain Eastern philosophical ideals, concluded that Kant "knew perfectly well the utter futility of any attempt to explore the nature of such a quality-less soul," and called the Pure Ego of Kant a "dim barren abstraction []." KOOVOR T. BEHANAN, *YOGA: A SCIENTIFIC EVALUATION* 59 (1937).

²⁵⁷ See generally ROUSSEAU, *supra* note 162; JEAN-JACQUES ROUSSEAU, *EMILE* (Allan Bloom trans., Basic Books 1979) (1762); see also BERLIN, *supra* note 254, at 21–45 (discussing the romantic movement and its opposition to the enlightenment); BERTRAND RUSSELL, *A HISTORY OF WESTERN PHILOSOPHY* 675–84 (1972) (describing development of romantic movement).

²⁵⁸ For Kant, the exercise of autonomy required that reason, rather than emotions, serve as the source of motivation for actions. See BERLIN, *supra* note 254, at 68 ("Kant hated romanticism. He detested every form of extravagance, fantasy . . . exaggeration, mysticism, vagueness, confusion. Nevertheless, he is justly regarded as one of the fathers of romanticism—in which there is a certain irony.").

tions viewed *authenticity* as the apex of personal liberty.²⁵⁹ Authenticity is the condition of acting from innate and uniquely personal sources of motivation; it is to act from the "true self," rather than to follow external social influences.²⁶⁰ The quest for authenticity therefore requires the rejection of social conformity in every form. This core idea of a unique and authentic self through which the individual finds freedom, self-expression, happiness, and even health, influenced American transcendentalism of the mid-nineteenth century (particularly the works of Emerson),²⁶¹ certain forms of existentialism,²⁶² and the "psychological humanism" of such twentieth-century social thinkers as Erich Fromm and Abraham Maslow.²⁶³ Perhaps most importantly, romanticism influenced the liberalism of John Stuart Mill.²⁶⁴

The romantic tradition revolted most pointedly against the rationalism of Kant and against the modern age generally. In many re-

²⁵⁹ See RUSSELL, *supra* note 257, at 677-78; TAYLOR, *supra* note 254, at 25-29.

²⁶⁰ Charles Taylor argues that the idea of authenticity derives from an older idea that humans have an inherent knowledge of the difference between right and wrong, and are not simply socialized into an understanding of moral categories. Authenticity "displaces the moral accent" and emphasizes the idea that to be ourselves, we must listen to that "inner voice." Authenticity implies that we are beings with "inner depths" that must be plumbed to discover who we are on the most fundamental level. The emphasis on authenticity represents a "massive subjective turn of modern culture." TAYLOR, *supra* note 254, at 26.

²⁶¹ See *infra* notes 268-284 and accompanying text (discussing Emerson and the parallels with Mill's thought).

²⁶² The existentialists also emphasized the importance of living authentically and analyzed the ways in which we seek to escape our authenticity in everyday behavior. See JOHN-PAUL SARTRE, *BEING AND NOTHINGNESS* 47-70 (Hazel E. Barnes trans., 1956) (discussing "bad faith," i.e., the putting on of inauthentic patterns of self-expression).

²⁶³ The modern idea that psychological health requires that one be oneself rather than attempt to imitate or to be "someone else," was central to the psychological humanism of Abraham Maslow. Maslow defended a theory of self-actualization which held that individuals could realize themselves fully by being true to their "inner nature." See ABRAHAM H. MASLOW, *TOWARD A PSYCHOLOGY OF BEING* 4 (2d ed. 1968) (proposing that as our inner nature "is permitted to guide our life, we grow healthy, fruitful, and happy. . . . If this essential core of the person is denied or suppressed, he gets sick sometimes in obvious ways, sometimes in subtle ways, sometimes immediately, sometimes later."). Although true psychological health requires that we be able to express our identities, these selves need to be protected. See *id.* ("This inner nature is not strong and overpowering and unmistakable It is weak and delicate and subtle and easily overcome by habit, cultural pressure, and wrong attitudes toward it."); see also ERIK H. ERIKSON, *DIMENSIONS OF A NEW IDENTITY* 99-112 (1974) (examining the roots of the contemporary individual's "identity crisis"); ERICH FROMM, *ESCAPE FROM FREEDOM* 141-79 (1942) (examining Nazism and communism as collective efforts to escape individual freedom by the individual's submerging himself in a group).

²⁶⁴ See *infra* notes 272-284 and accompanying text (discussing Mill's conception of liberty).

spects, romanticism was an antidote to the Enlightenment.²⁶⁵ Romanticism valued the emotional and discounted reason, emphasizing aesthetic over ethical concerns, experience over logic, spontaneity and creative energy over system and order, the natural over the artificial and the particular over the general.²⁶⁶ In its various guises, romantic thought rebelled against modern society and the stultifying conformity it wrought. Left-wing romantics heralded the possibilities of radical self-creation. In contrast, conservative romantics, particularly in Germany and England, defended tradition and culture from cosmopolitanism, valuing the communal virtues of the Volk over the universalist conceptions of human rights that follow from Kant's views.²⁶⁷ Romantics on both the left and right regarded industrialization and the conformity and bureaucratization it breeds with utter contempt, but for slightly different reasons. Conservative romantics feared that conditions of industrialization would disrupt organic cultural traditions and fracture communal ties. Left-wing romantics viewed these same conditions as a threat to individuality and as the source of soul-withering conformity. In this vein, Emerson proclaimed that "[t]he centuries are conspirators against the sanity and authority of the soul,"²⁶⁸ and Mill lamented that "society has now fairly got the better of individuality."²⁶⁹

Two core beliefs derived from this combined tradition influenced the self-individuating strand of the liberal tradition: first, the absolute uniqueness and inviolability of the self, along with the authority with

²⁶⁵ The Romantic movement was deeply anti-rationalist. See TAYLOR, *supra* note 246, at 393–418. Describing one early romantic, Berlin writes that "the whole of the Enlightenment doctrine appeared to him to kill that which was living in human beings." BERLIN, *supra* note 254, at 43.

²⁶⁶ Bertrand Russell quipped that the romantic was "moved to tears by the sight of a single destitute peasant family, but would be cold to well-thought-out schemes for ameliorating the lot of peasants as a class." RUSSELL, *supra* note 257, at 676.

²⁶⁷ The German social thinker Johann Gottfried Herder is most closely associated with this right-wing romantic tradition. See BERLIN, *supra* note 254, at 57–67 (discussing Herder's influence and ideas). This tradition influenced the conservative and communitarian English romantics of the nineteenth century, such as Carlyle, Coleridge, and Wordsworth. Some have found in these ideas the seeds of modern populism—and even of fascism. See ISAIAH BERLIN, *The Romantic Revolution: A Crisis in the History of Modern Thought*, in *THE SENSE OF REALITY* 168, 168–93 (Henry Hardy ed., 1996); Isaiah Berlin, *The Apotheosis of the Romantic Will: The Revolt Against the Myth of an Ideal World*, 27 *LETTERE ITALIANE* 44 (1975), *reprinted in* *THE CROOKED TIMBER OF HUMANITY* 207, 207–37 (Henry Hardy ed., 1990).

²⁶⁸ RALPH WALDO EMERSON, *Self-Reliance*, in *ESSAYS, FIRST SERIES* (1841), *reprinted in* *SELECTED ESSAYS, LECTURES, AND POEMS*, at 148, 159 (Robert D. Richardson, Jr. ed., Bantam Books 1990).

²⁶⁹ MILL, *supra* note 111, at 58.

which it informs our choices; and, second, the deep tension that it viewed to exist between the individual *qua* individual, and society. Perhaps the two greatest philosophical defenses of this conception of the individual and its implications for liberalism are Emerson's *Self-Reliance* and chapter III of Mill's *On Liberty*, entitled, "Of Individuality, as one of the Elements of Well-Being."²⁷⁰

Near the beginning of *Self-Reliance*, Emerson defends the absolute moral authority of our deepest impulses, in words that defined the transcendentalist conception of individuality:

To believe your own thought, to believe that what is true for you in your private heart is true for all men,—that is genius. Speak your latent conviction, and it shall be the universal sense; for the inmost in due time becomes the outmost, and our first thought is rendered back to us by the trumpets of the Last Judgment.²⁷¹

In a similar vein, Mill argued that true freedom requires each individual to interpret experience firsthand, for himself, noting the conclusions of tradition, but not being bound by them:

[I]t is the privilege and proper condition of a human being . . . to use and interpret experience in his own way. It is for him to find out what part of recorded experience is properly applicable to his own circumstances and character. The traditions and customs of other people are, to a certain extent, evidence of what their experience has taught *them* . . . [but] their experience may be too narrow, or they may have not interpreted it rightly.²⁷²

The cultivation of this individuality is our first duty,²⁷³ and, for Mill in particular, the pursuit of individuality is the same as the quest for self-development.²⁷⁴ Mill connects self-development to the

²⁷⁰ EMERSON, *supra* note 268, at 148–71; MILL, *supra* note 111, at 53–71.

²⁷¹ EMERSON, *supra* note 268, at 148.

²⁷² MILL, *supra* note 111, at 55.

²⁷³ See *id.* at 56 ("Among the works of man which human life is rightly employed in perfecting and beautifying, the first in importance surely is man himself.").

²⁷⁴ See *id.* at 61 ("[I]ndividuality is the same thing with development, and . . . it is only the cultivation of individuality which produces, or can produce, well-developed human beings . . ."). This emphasis on individual development and the tendency to equate uniqueness with development spawned the romantic "cult of genius," by which a measure of one's genius was his difference from other men. Cf. LESLIE PAUL THIELE, FRIEDRICH

refinement of our choice-making capacity. He was among the first to suggest that choices are not merely passive "preferences," but represent an active quality through which persons define and develop themselves. Twentieth-century psychiatrist Bruno Bettelheim once said that a strong ego is not the cause of committed choices, but is the result.²⁷⁵ In this, he echoed Mill, who maintained that:

The human faculties of perception, judgment, discriminative feeling, mental activity, and even moral preference are exercised only in making a choice. He who does anything because it is the custom makes no choice. He gains no practice either in discerning or in desiring what is best. The mental and moral, like the muscular, powers are improved only by being used.²⁷⁶

Both Emerson and Mill conceived of self-development not as putting on social layers, but as growth from the inside out, consistent with who each individual is at his core. In this spirit, Emerson proclaimed, "[i]nsist on yourself; never imitate. Your own gift you can present every moment with the cumulative force of a whole life's cultivation; but of the adopted talent of another you have only an extemporaneous half-possession Every great man is a unique."²⁷⁷ Similarly, in chapter III of *On Liberty*, Mill wrote that "[h]uman nature is not a machine to be built after a model, and set to do exactly the work prescribed for it, but a tree, which requires to grow and develop itself on all sides, according to the tendency of the inward forces which make it a living thing."²⁷⁸ Mill demonstrated an awareness of the ways in which society shapes the individual, but held, nevertheless, that there is a unique set of impulses that are the individual's own, and which may be distinguished from those social influences that can potentially overwhelm the self:

A person whose desires and impulses are his own—are the expression of his own nature, as it has been developed and modified by his own culture—is said to have a character.

NIETZSCHE AND THE POLITICS OF THE SOUL 28–48 (1990) (analyzing Nietzsche's view of individuality).

²⁷⁵ ROLLO MAY, *LOVE AND WILL* 199 (1969).

²⁷⁶ MILL, *supra* note 111, at 56.

²⁷⁷ EMERSON, *supra* note 268, at 168.

²⁷⁸ MILL, *supra* note 111, at 56–57.

One whose desires and impulses are not his own has no character, no more than a steam engine has a character.²⁷⁹

The conception of freedom developed by Emerson and Mill, among others, and inherited by later traditions, straddles the distinction between positive and negative freedom. Emerson and Mill were both drawn to essentially libertarian conclusions: they defended a free market and an extensive zone of personal privacy,²⁸⁰ they were wary of the creeping egalitarianism of the age,²⁸¹ and they, like Kant, saw paternalism as the mark of the decline of individuality.²⁸² Yet their internal conception of freedom is also positive in an important way. Freedom requires more than the negative liberal's non-restraint; it requires that each individual act from the deepest wellsprings of individuality. Moreover, the idea of self-development involves a kind of self-mastery, in the sense that one must overcome the internal inertia that stands in the way of self-becoming.²⁸³ Thus, negative social liberty

²⁷⁹ *Id.* at 57.

²⁸⁰ Emerson wrote that "the less government we have the better,—the fewer laws, and the less confided power. The antidote to this abuse of formal Government is, the influence of private character, the growth of the Individual" RALPH WALDO EMERSON, *Politics, in ESSAYS, SECOND SERIES* (1844), reprinted in *SELECTED ESSAYS, LECTURES, AND POEMS*, *supra* note 268, at 248, 257; see also MILL, *supra* note 111, at 94–96 (defending the free market, within certain limits).

²⁸¹ Emerson openly praised "the Spartan principle of calling that which is just, equal; not that which is equal, just." EMERSON, *supra* note 280, at 251 (internal quotation omitted). Mill saw the equality of the mass culture as an even greater threat to individuality than oppression. See MILL, *supra* note 111, at 67. He despaired that "[t]he greatness of England is now all collective; individually small." *Id.* Indeed, Mill, like Tocqueville before him, found the greatest vice of democracy to be the way in which it equalizes differences in personal inclination and capacity. See *id.* at 58; TOCQUEVILLE, *supra* note 144, at 572–603, 667–702.

²⁸² Mill argued that the state has no right to limit the freedom of a competent adult simply for his or her own good, but only to prevent harm to others. See MILL, *supra* note 111, at 9 ("That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."). Emerson also rejected paternalism, and concluded that we are "timorous, desponding whinperers" who are "afraid of truth, afraid of fortune, afraid of death, and afraid of each other." EMERSON, *supra* note 268, at 164.

²⁸³ One commentator argues that Mill's conception of freedom is "positive" in four senses: (1) it requires a kind of self-mastery; (2) it requires not only the absence of external constraints, but the presence of internal powers; (3) self-development is not a value-free concept, and (4) impediments to freedom may be internal, as in weakness of the will. G.W. Smith, *J.S. Mill on Freedom*, in *CONCEPTIONS OF LIBERTY IN POLITICAL PHILOSOPHY*, *supra* note 7, at 182, 190, excerpted in *Social Liberty and Free Agency: Some Ambiguities in Mill's Conception of Freedom*, in *J.S. MILL ON LIBERTY IN FOCUS* 239, 247–48 (John Gray & G.W. Smith eds., 1991).

was a necessary condition to the more basic, positive freedom of self-unfoldment. Kant, Emerson, and Mill all agreed that the best way to promote self-individuation was to follow the negative liberal path of non-interference in the life of the individual, rather than to enlist the affirmative assistance of the state.

Nevertheless, although Mill did not embrace widespread state intervention, later (progressive) thinkers found in his thought the justification for a wider role for the state. Perhaps the deepest ambiguity in the legacy of Mill's liberalism is his attitude to society and, in particular, to the way social influences are destructive of individual freedom. It is difficult to square Mill's libertarianism with his conviction that social influences, rather than political constraint, are destructive of individual liberty. Paradoxically, Mill's libertarianism leads to the progressive response to the problem of individual freedom.²⁸⁴ If the individual must be protected not simply from coercive government intervention, but from a wide variety of social obstacles to freedom, then certainly a greater degree of government involvement will be necessary to foster individual freedom. To the extent that this involvement requires more constraint on individual action, it leads to the diminishment of the sphere of personal freedom.

Self-individuating liberalism thus belies a dual, ambivalent character. It is libertarian in spirit, to a point, but there is always a softer side that sometimes seeks refuge in paternalistic solutions—a side that holds that the individual occasionally must be protected from the vicissitudes of social life and from the consequences of his own decisions.

C. The Constitutional Embodiment: Privacy, Autonomy, and Expression

Three political values dominate the discourse of self-individuating liberalism, and each has an important function in the discovery, development, and expression of the self. Privacy provides the self shelter from the storm; it gives the nascent self the breathing space to develop, and the developed self a personal realm to exist as it is, free from the

²⁸⁴ For this reason, many libertarians look upon Mill's work with ambivalence. For example, the conservative economist and social thinker Thomas Sowell argues that Mill's thinking is utopian, but that he was always restrained by more conservative "provisos"—the means by which to achieve these utopian ends. Mill utilized libertarian means to achieve more utopian ends. He was, in certain respects, the godfather of modern progressive thought, even as he sought to defend a soft libertarian conception of the state. See THOMAS SOWELL, *A CONFLICT OF VISIONS* 108–12 (1987).

prying eyes and corrosive influences of society.²⁸⁵ Autonomy, or self-determination, is the condition by which the individual is able to direct his own life; it is valued both as an expression of individual choice—we value self-determination intrinsically, as the *sine qua non* of living freely—and for its active capacity to foster self-development. Finally, self-expression is, as one commentator has put it, “not the whole of freedom, but its soul.”²⁸⁶ Broadly defined, self-expression is the active capacity of the individual to project one’s self into the social and political worlds. It is thus the complement to privacy. Through self-expression, in all of its myriad facets, the personal truly becomes the political.

The protection of privacy as a constitutional value began in 1965, with *Griswold v. Connecticut*,²⁸⁷ yet the tradition of privacy in American legal history goes back to the common law.²⁸⁸ In tort law, recognition

²⁸⁵ Modern privacy “function[s] to shelter the intimate,” and is thus the “opposite not of the political sphere but of the social.” ARENDT, *THE HUMAN CONDITION*, *supra* note 3, at 38. Arendt underscores the irony of associating the concept of privacy, of shelter and the asocial, with true freedom, which she conceives as an active willingness to begin noble projects and to carry them through “in the sight of other men.” *See id.* at 50–58, 175–81.

²⁸⁶ Kateb, *supra* note 254, at 53.

²⁸⁷ *See* 381 U.S. 479, 485 (1965).

²⁸⁸ For example, Blackstone states the following:

For the end and intent of such laws being only to regulate the behaviour of mankind, as they are members of society, and stand in various relations to each other, they have consequently no concern with any other but social or relative duties. Let a man therefore be ever so abandoned in his principles, or vitious in his practice, provided he keeps his wickedness to himself, and he does not offend against the rules of public decency, he is out of the reach of human laws. But if he makes his vices public, though they be such as seem principally to affect himself, (as drunkenness, or the like) they then become, by the bad example they set, of pernicious effects to society; and therefore it is then the business of human laws to correct them. Here the circumstance of publication is what alters the nature of the case.

1 BLACKSTONE, *supra* note 44, at *124. The idea of the private presages the later distinction between self-regarding and other-regarding behavior to the extent that it is concerned with “social or relative duties,” but it is also a concept dependent upon the place of the occurrence.

Blackstone’s conception of privacy was closely bound up with property rights, rather than with a more generalized right of autonomy. Yet the older idea of privacy, inherent in the common-law protection of the personal domain, suggests a concern with personal sovereignty and self-determination. The home was a place where state or society had a strictly limited role. *See* David Flaherty, *Law and the Enforcement of Morals in Early America*, in *LAW AND AMERICAN HISTORY* 203 (Donald Fleming & Bernard Bailyn eds., 1971), excerpted in *AMERICAN LAW AND THE CONSTITUTIONAL ORDER*, *supra* note 163, at 53, 61 (discussing one typical case from New England in 1714 when a town official dispersed a public crowd

for violation of privacy interests dates from late nineteenth century, after Samuel Warren and Louis Brandeis published a famous article on the subject in the *Harvard Law Review*.²⁸⁹ Many years later, as a U.S. Supreme Court Justice, Brandeis would invoke "the right to be let alone" in one of the most famous dissents in Court history.²⁹⁰ But by the time the concept of privacy was recognized in *Griswold* as a general constitutional principle, it had such a general common meaning that the notion of privacy as a protectable right was criticized as vague.²⁹¹ Three ideas, each reflected in the reasoning of the *Griswold* decision, interpenetrated the idea of privacy. First, its oldest connotation was associated with private *places*—with the protection, in particular, of activities that took place in the home.²⁹² A second idea involved the protection of certain forms of personal association. In *Griswold* the protected association was the marital relationship, but the idea subsequently expanded to cover other intimate relationships.²⁹³ Finally, privacy was broadly defined in some cases as akin to a right of personal autonomy within a Millian zone of non-interference.²⁹⁴

The right to privacy received its most libertarian interpretation in Justice William Douglas's concurring opinion, in 1973, in *Roe v. Wade*.²⁹⁵ Douglas seemed to have Mill's three classes of freedoms²⁹⁶ in

that was drinking after the Sabbath had begun, but did not intervene when they moved to an individual's home).

²⁸⁹ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

²⁹⁰ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

²⁹¹ See, e.g., Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1424–25 (1974) (suggesting that a better term for the value the Court was protecting in *Griswold* and *Roe v. Wade* was "autonomy"); Comment, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 CAL. L. REV. 1447, 1448 (1976) (arguing that "privacy" protects three distinct values, not one).

²⁹² See *Griswold*, 381 U.S. at 485–86 (holding that "notions of privacy" protect the "sacred precincts of the marital bedroom" from searches for contraceptives).

²⁹³ *Id.* at 486 (describing marriage as "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred"); cf. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (holding that the privacy right "is the right of the individual, married or single, to be free from unwarranted governmental intrusion").

²⁹⁴ See Henkin, *supra* note 291, at 1424–25 (suggesting that this was the Court's interpretation); Comment, *supra* note 291, at 1447 (discussing cases in which privacy is interpreted as a form of personal autonomy).

²⁹⁵ 410 U.S. 113, 167 (1973) (Douglas, J., concurring in both *Roe* and *Doe v. Bolton*, 410 U.S. 179, 209–21 (1973)).

²⁹⁶ These were "first, the inward domain of consciousness, demanding liberty of conscience in the most comprehensive sense," second, the "liberty of tastes and pursuits, of framing the plan of our life to suit our own character, of doing as we like . . . so long as what we do does not harm [others]," and; third, the "liberty . . . of combination among

mind when he announced that the liberty protected by the Fourteenth Amendment included "[f]irst . . . the autonomous control over the development and expression of one's intellect, interests, tastes and personal-ity."²⁹⁷ He stated that "[t]hese are rights protected by the First Amendment and, in my view, they are absolute . . ."²⁹⁸ Second, privacy included the "freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children."²⁹⁹ He stated that although these interests are not absolute, infringement of these interests must withstand strict scrutiny.³⁰⁰ Finally, a third set of freedoms included "the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf."³⁰¹ This interest in bodily integrity also required protection under the rigorous strict scrutiny standard.³⁰²

Throughout the 1970s and 1980s, a series of cases explained and expanded the privacy right. The Court distanced itself from its earlier reliance on privacy as a necessary aspect of the marital relationship and embraced increasingly individualistic interpretations.³⁰³ In 1992, in *Planned Parenthood v. Casey*, the Court gave its most explicit recognition of the link between liberty and self-definition:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.³⁰⁴

individuals; freedom to unite for any purpose not involving harm to others." MILL, *supra* note 111, at 11-12.

²⁹⁷ *Bolton*, 410 U.S. at 211 (Douglas, J., concurring).

²⁹⁸ *Id.* (Douglas, J., concurring).

²⁹⁹ *Id.* (Douglas, J., concurring).

³⁰⁰ *See id.* (Douglas, J., concurring).

³⁰¹ *Id.* at 213 (Douglas, J., concurring).

³⁰² *See Bolton*, 410 U.S. at 213 (Douglas, J., concurring).

³⁰³ *See Eisenstadt*, 405 U.S. at 453.

³⁰⁴ 505 U.S. 833, 851 (1992). The passage draws both from the Kantian tradition, with its call for autonomy, and the tradition of self-individuation influenced by romanticism. It invokes the idea of privacy as a shield not only against state infringement of certain acts, but to protect the developing self from external influences upon self-definition wrought by state involvement in such intimate matters.

Though the contours of the privacy right have sometimes been constrained by conservative interpretations,³⁰⁵ new life was breathed into it this past summer, in 2003, in *Lawrence v. Texas*, which recognized a liberty interest in the right of all individuals, regardless of sexual orientation, to be free of state limitations on the manner of sexual expression.³⁰⁶ Justice Anthony Kennedy's majority opinion articulates a notion of freedom that is reminiscent of John Stuart Mill.³⁰⁷

If privacy and autonomy interests represent the negative half of the idea of freedom, in that these interests give the individual the breathing space to develop and to determine his or her own life, then the positive half of the idea of freedom is found in the right of self-expression. From the 1960s onward, free expression became the dominant constitutional value of the Bill of Rights.³⁰⁸ Whereas more traditional ideas of freedom of expression conceptualized it primarily as a *political* value, important for its instrumental significance in furthering debate on public issues but limited to rational discourse, more recent conceptions reject this limitation.³⁰⁹ The right of free expression is increasingly linked to more personal values; indeed, it is a right of *self-expression* grounded not on the need for public discourse—on the right of the public to hear—but on the right of the speaker to speak.

The Kantian and romantic strains often are intermingled in modern interpretations of this right. The Kantian tradition views the right to freedom of speech as a reflection of our capacity for autonomy and as a measure of self-respect.³¹⁰ The right is grounded in our rational

³⁰⁵ See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (holding that there is no constitutional right of the individual to assisted suicide); *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (upholding Georgia sodomy law as applied to homosexuals), *overruled by* *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003).

³⁰⁶ 123 S. Ct. at 2484 (overruling *Bowers*, and striking down law prohibiting homosexual sodomy).

³⁰⁷ See Jeffrey Rosen, *Kennedy Curse*, NEW REPUBLIC, July 21, 2003, at 15.

³⁰⁸ Justice William Brennan has said that the First Amendment is the most important of all constitutional provisions. NAT HENTOFF, *SPEAKING FREELY* 138 (1997) (recounting a conversation Hentoff had with Brennan in which Brennan said that the First Amendment "gives us this society. The other provisions of the Constitution merely embellish it.").

³⁰⁹ See ALEXANDER MEIKLEJOHN, *FREE SPEECH* 24–26, 88–89 (1948). But see Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26–28 (1971) (arguing that Meiklejohn, who would protect nonpolitical forms of speech, goes too far).

³¹⁰ As David Richards put it,

The value placed on [speech and association] derives from the notion of self-respect that comes from a mature person's full and untrammelled exercise of capacities central to human rationality. Thus, the significance of free expres-

nature, and in recognition of our inherent dignity as human beings. In speaking, we manifest our humanness; our right to take part in public discourse is the first measure of our civic inclusion.³¹¹ Those influenced by romantic ideals have adopted a more openly emotive conception of this right. The right is seen as a right to disclose the self in a plethora of diverse ways and in a variety of contexts. "One is one's expression," as a political thinker has put it.³¹² Through expression, the self finds its deepest realization not simply by discussing ideas, but by reflecting the full spectrum of one's personality outwardly into the world. As such, self-expression is an act of self-disclosure requiring social and political courage.³¹³ Each of these intertwined traditions concludes that expression is not merely instrumental to other purposes—including the preservation of democracy—but that it has intrinsic significance in its reflection of our choice making and self-defining nature.

One of the most significant aspects of the right to self-expression, as interpreted in self-individuating conceptions of freedom and by the romantic influences behind it, is the fusion of form and content, of the *emotive* and the *substantive* aspects of speech. A telling example of this occurred in *Cohen v. California*, in 1971.³¹⁴ A central tenet of the tradition inspired by the romantic conception of human personality is the conviction that communication does not operate simply on the rational faculties; rather, communication is, or should be, emotive in character. In *Cohen*, the Court overturned a conviction for disturbing

sion rests on the central human capacity to create and express symbolic systems

. . . .

The value of free expression . . . rests on its deep relation to self-respect arising from autonomous self-determination without which the life of the spirit is meager and slavish.

David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974); see also Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 213-222 (1972) (defending a "Millian Principle" for freedom of expression based on our autonomous capacity as human beings).

³¹¹ See ARENDT, *THE HUMAN CONDITION*, *supra* note 3, at 176 ("Through [speech and action] men distinguish themselves instead of being merely distinct With word and deed we insert ourselves into the human world, and this insertion is like a second birth").

³¹² See Kateb, *supra* note 254, at 53 ("Freedom of expression is not, then, properly conceptualized as a means or instrument for persons who exercise it Whatever goals we attain by expression are, I think, conceptually secondary. The primary notion is that . . . one is one's expression, one lives to express, one lives by expressing. One does not merely use speech, one is one's speech, one's life is mostly speech.").

³¹³ ARENDT, *THE HUMAN CONDITION*, *supra* note 3, at 186.

³¹⁴ See 403 U.S. 15, 26 (1971).

the peace against a man who wore a jacket with the expression "Fuck the Draft" written on it into the Los Angeles County courthouse.³¹⁵ The Court addressed the state's contention that Paul Cohen could have expressed himself fully with less vituperative language, and so could have exercised his free speech rights without offending others:

[W]e cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message ³¹⁶

The Court further stated that it "cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."³¹⁷ In sum, there is no rigid separation between the content and the form of speech.

Similarly, various other activities have received First Amendment protection by virtue of their expressive content, including the distribution of sexually explicit films and books³¹⁸ and the limited use of language once outlawed as profane.³¹⁹ Nevertheless, despite arguments by classical libertarians and other conservatives that commercial speech and speech in the context of political fund-raising should receive the same protection as personal speech, the modern Court has accorded

³¹⁵ In *Cohen*, the appellant had been convicted of "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person, by . . . offensive conduct." *Id.* at 16 n.1 (quoting CAL. PENAL CODE § 415).

³¹⁶ *Id.* at 25-26.

³¹⁷ *Id.* at 26.

³¹⁸ The First Amendment does not protect "obscene" material. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973). But not all films that depict sexual conduct are obscene; thus some films depicting sexual conduct are still entitled to First Amendment protection. See *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) (overturning conviction for exhibition of the movie *Carnal Knowledge*).

³¹⁹ See *Cohen*, 403 U.S. at 26; *FCC v. Pacifica Found.*, 438 U.S. 726, 729, 748-50 (1978) (upholding the authority of FCC to regulate speech that is "indecent but not obscene" (George Carlin's "Filthy Words" monologue), but indicating that the holding is narrow, only applying to broadcast media because of their "uniquely pervasive presence" and accessibility by children).

these forms of speech less protection under the First Amendment.³²⁰ The most plausible explanation for this inconsistency is that the Court is increasingly moved by a conception of expression that values the authentic expression of the self—not expression as money or expression for money, but personal expression for its own sake, through which one's self-identity is reflected and confirmed in the world.

Although this represents an increase in freedom in one sense, there is reason to be concerned with the course liberty has taken. The more liberty is "introverted," connected to some conception of self-development or self-individuation, the more tenuous is its connection to the political and social ground upon which freedom depends. The two major developments outlined in this Section demonstrate the increasing withdrawal by the individual from the public and political domains. Connecting freedom to privacy suggests that personal activities will be protected so long as they do not touch upon, and are shielded from, the public.³²¹ From the classical liberal ideal of freedom as non-constraint, which leaves an open field for individual initiative, its distant descendant privacy envisions a freedom emasculated, domesticated, and circumscribed within the walls of its own protective limits. Ironically, the broadening of the freedom of expression has tended to diffuse it. As expression is channeled in other directions—to the pursuit of the aesthetic, the hedonic, or even the erotic—the expressive energies of society arguably are scattered in a thousand different directions. In the language of positive liberty discussed earlier,³²² the development of the modern right to self-expression has accentuated the "exercise" aspect at the expense of the "achievement" ideal. In the process, the self is increasingly free to express itself in a myriad of ways that have more to do with the self, and less to do with any real connection to the political, the social, or, as with the reduced protection for commercial speech, the economic. The final Part examines at greater length this

³²⁰ *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (stating that the Court has "afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values"); *Buckley v. Valeo*, 424 U.S. 1, 143 (1976) (upholding limits on campaign contributions, but striking down limits on campaign expenditures).

³²¹ A good example of this is the different treatment accorded intimate versus non-intimate associations. See *Roberts v. United States Jaycees*, 468 U.S. 609, 635-36 (1984) (O'Connor, J., concurring in part and concurring in the judgment) (suggesting that associations are subject to more rigorous constitutional scrutiny when they enter the commercial sphere).

³²² See *supra* Part I.

concern that freedom has been overly "introverted," and that it has lost its social ground.

V. FREEDOM AS COMMUNITY WITHIN DIVERSITY: THE HOMEOSTATIC-COMMUNITARIAN CONCEPTION OF FREEDOM

From the 1950s onward, social thinkers across the political spectrum have developed a distinct critique of liberalism as it has evolved through the nineteenth and twentieth centuries. The "communitarian"³²³ and "civic republican" critiques of liberalism defy easy classification on the traditional left-right political axis³²⁴ and, notwithstanding their differences, share essential similarities of political perspective. Most importantly, both insist that modern liberalism has undervalued the importance of the common good to the individual, and has served to disconnect the individual from his or her social world in a number of ways—leaving him or her rootless, alienated, and without a sense of public responsibility, but with an exaggerated sense of entitlement.³²⁵ Civic republicans raise another concern, arguing that not only

³²³ The communitarian tradition is sometimes traced to Tocqueville's observations on American culture, particularly his emphasis upon the importance of associational life. TOCQUEVILLE, *supra* note 144, at 189–95, 513–28. Perhaps the first important modern writer who sounded communitarian themes was Robert Nisbet, whose 1953 book remains a classic of conservative communitarianism. See generally ROBERT NISBET, *A QUEST FOR COMMUNITY* (ICS Press 1990) (1953). Yet the word "communitarian" was coined only later by Amitai Etzioni, who often is regarded as the founder of the modern communitarian movement. See generally AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY* (1993).

³²⁴ Traditional communitarians emphasize the importance of authority and social hierarchy, which are certainly more "conservative" themes. See ROBERT NISBET, *TWILIGHT OF AUTHORITY* 238–39 (1975). Similarly, many recent communitarians distance themselves from the quest for substantive equality and the demand for social entitlements characteristic of progressive thought. Communitarians' defense of the two-parent family and of the need for a liberal form of "morals education" is also consistent with recent conservatism. See William Galston, *A Liberal-Democratic Case for the Two-Parent Family*, *RESPONSIVE COMMUNITY*, Winter 1990–1991, reprinted in *THE ESSENTIAL COMMUNITARIAN READER* 145, 145–55 (Amitai Etzioni ed., 1998). Nevertheless, their quest for greater political access and participation, their concern with the alienation of the individual wrought by modern bureaucracy, their distrust of special interests in politics, and their call to create more parks and public spaces and to rebuild inner cities are certainly more "liberal" themes. See *infra* notes 364–376 and accompanying text. Communitarian theory tests the old "left-right" distinction in fundamental ways.

³²⁵ Communitarians and defenders of recent republican theory share three essential critiques of liberalism. First, they both criticize the alienation wrought by modern conditions of hyper-individualism, traditionally a concern both of conservative communitarians and the New Left. See ROBERT N. BELLAH ET AL., *HABITS OF THE HEART* 3–26, 55–84 (1996); NISBET, *supra* note 323, at 3–22 (presenting the more conservative version). Second, both are concerned with the tendency to exaggerate "rights" talk, which, they argue, undermines social cooperation by giving each individual an absolute claim that refuses to admit of compromise.

is something lost by viewing freedom in wholly introspective terms, but also there is something dangerous about this attitude. If the liberal is content to forgo the benefits of a sense of communal membership, and turns his or her back on the social and the political in pursuit of the private, he or she does so at his or her own peril. Both liberals and republicans have maintained historically that private interests can not be pursued at the expense of attention to the political.³²⁶ What James Madison said two centuries ago is still defended today by many across the political spectrum: "The nation which reposes on the pillow of political confidence, will sooner or later end its political existence in a deadly lethargy."³²⁷

The "homeostatic-communitarian" conception of liberty, to be explored in this Part, offers a distinct conception of freedom grounded upon a more-decentralized and less-individualistic political ideal. Freedom, according to this view, inheres in the network of stable and reciprocal social relations among individuals that make up civil society. As such, it offers a *modus vivendi* between extreme forms of liberalism and extreme forms of republicanism.³²⁸

In the next Section, we explore the "macro" picture—the overall social and political structure most likely to ensure freedom, as the modern communitarian conceives it. The final Section of this Article discusses the elements of the communitarian ideal of freedom with greater specificity.³²⁹ In theory, communitarianism can be detached

See Mary Ann Glendon, "Absolute" Rights: Property and Privacy, RESPONSIVE COMMUNITY, Fall 1991, reprinted in THE ESSENTIAL COMMUNITARIAN READER, *supra* note 324, at 107, 107–14. Finally, they share a concern over the loss of civic participation and of the individual's lack of access to the channels of political change brought about by highly centralized government. See Dallin H. Oaks, *Rights and Responsibilities*, RESPONSIVE COMMUNITY, Winter 1990–1991, reprinted in THE ESSENTIAL COMMUNITARIAN READER, *supra* note 324, at 97, 97–105.

³²⁶ This was traditionally a republican theme. The republican's concept of "civic virtue," the public spiritedness of the citizen who takes an active interest in politics, has found its communitarian analogue in the communitarian's call for greater community involvement. Benjamin R. Barber, *A Mandate for Liberty: Requiring Education-Based Community Service*, RESPONSIVE COMMUNITY, Spring 1991, reprinted in THE ESSENTIAL COMMUNITARIAN READER, *supra* note 324, at 237, 237–45.

³²⁷ JAMES MADISON, Virginia Assembly, Jan. 23, 1799, in THE COMPLETE MADISON, *supra* note 48, at 340, 340.

³²⁸ Communitarianism is in a number of ways an "intermediate" philosophy between modern liberalism and republicanism. Communitarians locate freedom neither in the isolated individual nor in the collective politics of the state, but in the intermediate web of social relations that make up civil society. It is thus able to appeal to a moderate kind of individualism that finds the source of individual meaning not in the self, but in our shared relations with others, akin to Tocqueville's "self-interest properly understood." See TOCQUEVILLE, *supra* note 144, at 525–28.

³²⁹ See *infra* notes 354–376.

from the homeostatic ideal, but in modern pluralistic society, the former requires the latter: one cannot be a communitarian at the local level without holding some version of the homeostatic theory of social pluralism at the "macro" level.³³⁰

A. *The Political Ideal: Freedom Requires Diversity-in-Balance*

The roots of the homeostatic ideal emanate from one strand of classical republican theory, a sub-tradition more favorable to social pluralism and individualistic conceptions of freedom than are other strands of republican thought.³³¹ Elements of this idea are found in Aristotle,³³² and in the writings of the Roman historian and social thinker Polybius.³³³ Central to this tradition is the idea that freedom and social

³³⁰ Some might argue that these two ideas, the "homeostatic" and the communitarian, are not necessarily connected in modern political thought—that one may adopt communitarian principles without ever drawing upon a homeostatic conception of social balance that inheres between these communities. Others might argue that the "checks and balances" idea central to Madisonian republicanism can be detached from any communitarian conception of politics (the second argument has more plausibility than the first—the idea of checks and balances often is thought to play an essential role in modern negative liberal theory). I argue that modern communitarianism grows out of the same general tradition as Madisonian republicanism and functions as a modern corrective to its shortcomings. Modern republican theory faces a dilemma between adopting the republicanism of the *polis* versus the republicanism of a modern pluralistic society. The dilemma is characterized by the difficulty of retaining some meaningful conception of self-government in a large, pluralistic society. See THE FEDERALIST No. 10 (James Madison) (Benjamin Fletcher Wright ed., 1961) (describing how size and diversity operate as a check on "faction").

Twentieth-century republicanism has forsworn the republicanism of the *polis* in favor of a pluralistic conception of society. Communitarianism can be seen as a response to the lost values of republicanism in seeking to foster local self-government within a broader pluralistic society. Thus, I argue that one cannot be a communitarian in a large pluralistic society without adhering to some conception of diversity-in-balance by which the community is protected from the majoritarian and equalizing influences of modern society.

³³¹ Republican theory falls along a spectrum between relatively more "monistic" conceptions of society and those that are more pluralistic. The republic envisioned in Rousseau's *The Social Contract*, modeled after ancient Sparta, is the best modern example of monistic republicanism. Every effort is made in the constitution of Rousseau's state to meld the voices of the many into one General Will. See ROUSSEAU, *supra* note 4, at 203–04, 235–37. Associations outside the state are discouraged, there is no public debate for fear that some will be unduly swayed by the interests of others, and there are no limits to the power of the state over the life of the individual. *Id.* at 203–04. Indeed, Madison probably had Rousseau's conception of the republic in mind when he wrote that "[i]t could never be more truly said that . . . the first remedy . . . was worse than the disease." THE FEDERALIST No. 10 (James Madison), *supra* note 324, at 130.

³³² ARISTOTLE, *supra* note 14, at 1113–316.

³³³ See ZERA S. FINK, THE CLASSICAL REPUBLICANS 3–6 (1945) (describing Polybius as the originator of the idea that social classes and interests must be balanced against and blended with one another); POLYBIUS, BOOKS I, II & VI (Evelyn S. Shuckburgh trans.,

stability are best preserved not by ensuring a uniformity of condition among the citizens of a state, but by balancing, even exploiting, the clash of interests represented by different aspects of society. This idea of the "mixed state," in which different social classes vote on and control diverse agencies of government, was central to the political structure of the Roman republic.³³⁴ Through a tradition of republican thought that includes Machiavelli,³³⁵ Harrington,³³⁶ Montesquieu,³³⁷ and Hume,³³⁸ these ideas evolved and took modern form in such mechanisms as the separation of powers and the idea, central to Madison's *The Federalist No. 10*, that a larger republic is better suited to withstand the vicissitudes of political instability than a smaller one.³³⁹

Liberalism has influenced the development of this idea primarily by emphasizing the inevitability of social diversity, and its positively beneficial character as a condition of individual freedom. The liberal tradition inherited the idea, from English Whig thought of late seventeenth and eighteenth centuries and from earlier republican tradition, that diverse interests serve to counterbalance each other, preventing tyranny and the monopolistic concentration of power. The idea that a balanced diversity of interests serves to preserve liberty underlies both the horizontal division of powers between the three branches of government, and the vertical distribution of power between the federal government and the states. The Framers' idea, embodied in Madison's *The Federalist No. 51*, that the "policy of supplying, by opposite and rival interests, the defect of better motives," underlies our theory of checks and balances and the separation of powers within government.³⁴⁰ Madison draws upon the same principle, in the

1889), excerpted in GREEK HISTORIANS 441-501 (M.I. Finley ed., 1959). Polybius's idea of the "mixed state" would influence republican theory for nearly the next two millennia.

³³⁴ See POLYBIUS, BOOK VI, *supra* note 333, at 473-501; see also JOHN CROOK, LAW AND LIFE OF ROME 68-97 (1967) (describing the "machinery of law," and particularly the constitutional developments); MICHAEL GRANT, HISTORY OF ROME 67-83 (1978) (describing the legal machinations of the class struggle).

³³⁵ See generally NICCOLO MACHIAVELLI, THE DISCOURSES (Bernard Crick ed., Leslie J. Walker trans., Penguin Books 1970) (1531).

³³⁶ See generally HARRINGTON, *supra* note 155, at 72-135.

³³⁷ See MONTESQUIEU, *supra* note 47, at 11-15.

³³⁸ See generally DAVID HUME, *Idea of a Perfect Commonwealth*, in ESSAYS MORAL, POLITICAL, AND LITERARY 512, 512-29 (Eugene F. Miller ed., 1985).

³³⁹ See Douglass Adair, "That Politics May Be Reduced to a Science" David Hume, James Madison, and the Tenth Federalist, 20 HUNTINGTON LIBR. Q. 343 (1957), reprinted in FAME AND THE FOUNDING FATHERS 93, 98-106 (Trevor Colbourn ed., 1974) (arguing that Madison was deeply influenced by Hume's essay, *Idea of a Perfect Commonwealth*).

³⁴⁰ THE FEDERALIST NO. 51, at 356 (James Madison) (Benjamin Fletcher Wright ed., 1961).

same *The Federalist No. 51*, to justify federalism. The division of power between the national government and the states provides "double security [so that t]he different governments will control each other, at the same time that each will be controlled by itself."³⁴¹

Yet, as both *The Federalist Nos. 10* and *51* illustrate, checks and balances function not simply to control the ambitions of public actors, but to avoid one of the chief problems of social pluralism. Counter-balanced interests throughout society serve as a corrective to democracy by controlling the majoritarian tyranny that can endanger it. In *The Federalist No. 51*, Madison states that "[i]n the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good"³⁴² In *The Federalist No. 10*, Madison argues, in direct opposition to some forms of republican theory, that republican values are best fostered in a large, rather than in a small, nation state. He states:

The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the most easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens ³⁴³

The same idea appears, yet again, as an answer to strife and intolerance in the civil sphere. Madison's defense of religious diversity, made in the Virginia ratifying convention in 1788 and elsewhere, link diversity to freedom in a straightforward way: religious freedom "arises from that multiplicity of sects, which pervades America, and which is the best and only security for religious liberty in any soci-

³⁴¹ *Id.* at 357.

³⁴² *Id.* at 359; see also *id.* at 358 ("Whilst all authority in [the republic] will be derived from and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.").

³⁴³ *THE FEDERALIST NO. 10* (James Madison), *supra* note 324, at 135.

ety."³⁴⁴ Diversity thus promotes a counterbalance of power that prevents persecution, the social equivalent of political oppression. Similarly, the benefits of diversity have been used (by Madison and many others) as justification for a wide distribution of property,³⁴⁵ for the freedom of speech and of the press,³⁴⁶ and for the right to trial by jury,³⁴⁷ among other interests.³⁴⁸

If the homeostatic ideal envisions a balance among diverse groups and interests along the "horizontal" axis of social organization—groups offset groups, commercial interests balance commercial interests, and sects are set off against sects—a second communitarian component serves as a principle defining the "vertical" structure of social organization. This second component requires a great degree of political decentralization, which is the primary reason for federalism, for defining a sphere of local autonomy left to the states and their subdivisions.³⁴⁹ In contrast to the rough notion of decentralization characteristic of federalism, communitarians have reduced the idea of decentralization to a basic principle. *The Responsive Communitarian Platform*, written and signed by a number of leading communitarians, puts it succinctly: "Generally, no social task should be assigned

³⁴⁴ JAMES MADISON, In Virginia Convention, June 12, 1788, in *THE COMPLETE MADISON*, *supra* note 48, at 306, 306 (stating further that "where there is such a variety of sects, there cannot be a majority of any one sect to oppress and persecute the rest"); see also JAMES MADISON, *A Memorial and Remonstrance*, in *THE COMPLETE MADISON*, *supra* note 48, at 299, 299-306.

³⁴⁵ Madison was a defender of free trade but also considered a wide distribution of property to be a bulwark against the concentration of power. See James Madison, *NAT'L GAZETTE*, Mar. 29, 1792, reprinted in *THE COMPLETE MADISON*, *supra* note 48, at 267, 267-69.

³⁴⁶ See JAMES MADISON, Address to the General Assembly of Virginia, Jan. 23, 1799, in *THE COMPLETE MADISON*, *supra* note 48, at 295, 295. These sentiments fostered the adoption of the First Amendment's protection of free speech.

³⁴⁷ See BAILYN, *supra* note 10, at 74 (quoting John Adams as saying that the jury was essential to preserving English liberties by injecting into the "executive branch of the constitution . . . a mixture of popular power"). Similarly, Tocqueville called the jury an "eminently republican" institution, and declared that "it is the civil jury which really saved the liberties of England." TOCQUEVILLE, *supra* note 144, at 272, 274.

³⁴⁸ If this idea of diversifying and counterbalancing power was initially a "republican" idea, liberals have extended it to spheres of human activity outside of politics. Liberals believe that truth is best achieved through the free clash of opinions, criminal justice through the clash of prosecutor and defense, growth and prosperity through a system of free competition—and justice and liberty through the clash and counterbalancing of social interests.

³⁴⁹ See Amitai Etzioni, *Introduction to THE ESSENTIAL COMMUNITARIAN READER*, *supra* note 324, at ix, xiii-xiv ("Well-integrated national societies may be said to have communitarian elements. . . . [C]ontemporary communities tend to be new communities that are part of a pluralistic web of communities. . . . [Thus, i]t is best to think about communities as nested, each within a more encompassing one.").

to an institution that is larger than necessary to do the job."³⁵⁰ Communitarians favor a relatively decentralized sociopolitical structure in order to preserve communities, and with them, the sense of attachment, civic responsibility, and participation necessary to their conception of freedom and social order. Although the details sometimes remain unclear, communitarians are committed to reinvigorating federalism as a response to increased political centralization at the national level, to defending local politics against state intervention, and to protecting the autonomy of nonpolitical institutions—most importantly, the family—from all unnecessary forms of political intervention.³⁵¹

One of the more interesting issues raised by the homeostatic-communitarian ideal is the extent to which it requires a revision of our conception of the role and autonomy of associations in American political life. Many communitarians are wary of the implications of recent U.S. Supreme Court decisions that have limited the autonomy of associations in the quest for increasingly egalitarian social outcomes.³⁵² Modern communitarians defend a broad network of associations both as a way to give the individual a meaningful sense of participation, thereby fostering the virtues of positive freedom, and as a buffer against expansion of the political sphere, thereby protecting negative freedom. The role of associations in American political life has been a central tenet of communitarian ideals from the time of Tocqueville.³⁵³

B. *The Communitarian Idea of Freedom*

What is the homeostatic-communitarian ideal of freedom? Is it essentially a modified "negative" idea of freedom that emphasizes protection of the group, rather than the individual? Or is it a positive ideal? Or is it perhaps some combination of both?

The homeostatic-communitarian ideal of freedom is drawn from a combination of sources—liberal, republican, and Burkean—but it diverges in essential ways from each of these traditions. Communitarian

³⁵⁰ *The Responsive Communitarian Platform: Rights and Responsibilities*, in THE ESSENTIAL COMMUNITARIAN READER, *supra* note 324, at xxv, xxx.

³⁵¹ See BELLAH ET AL., *supra* note 325, at 250–71; AMITAI ETZIONI, *supra* note 323, at 44, 144–47; NISBET, *supra* note 323, at 221–47.

³⁵² See, e.g., William A. Galston, *The Legal and Political Implications of Moral Pluralism*, 57 MD. L. REV. 236, 242 (1998) (arguing that the Court should protect diversity "between" and not diversity "within" groups).

³⁵³ See TOCQUEVILLE, *supra* note 144, at 509–24.

theory is usually conceived of as a liberalized version of one strand of republican theory, in that both theories emphasize the positive dimensions of freedom, particularly the right of participation and the virtues and responsibilities of citizenship. Nevertheless, homeostatic-communitarian theory largely diffuses this positive conception of freedom, displacing it from the political to the social sphere. Whereas liberty is primarily a political value in traditional republican accounts—a right to participate in the political process of the state—homeostatic-communitarians conceive of this positive freedom as a right to influence one's political, social, and personal environment through participation not only in the state, but also in the community, in secondary associations, at one's work, and in other extra-political spheres.³⁵⁴ This is positive freedom writ large upon our social world, which brings the idea closer to the liberal's conception of negative liberty.³⁵⁵

Less explicitly, but vitally important, the homeostatic-communitarian draws from republican theory a certain "middling" conception of the nature of freedom, which views freedom as an intermediate state between two pathological extremes. In classical republican theory, these two extremes are tyranny and anarchy, respectively: the lack of genuine self-government either because of domination by an interested class or elite, or because of excessive disorder. This middling idea of freedom was central to eighteenth-century conceptions of freedom that influenced the American Revolution.³⁵⁶ As Locke ar-

³⁵⁴ Perhaps the traditional republicanism of the *polis* viewed liberty as a political value because politics was direct, involving face-to-face discussion, debate, and dialogue. The intermediate social sphere was not as important in the small republic—certainly not as important as it is today in a large pluralistic society. Thus, it is only natural that the communitarian should respond to the conditions of modernity with a diffused, socialized conception of positive freedom. Compare ARENDT, *THE HUMAN CONDITION*, *supra* note 3, at 192–99 (describing the political as the only arena in which the individual could achieve a kind of individual substantiality that transcends time), with BARBER, *supra* note 26, at 163–212, and BELLAH ET AL., *supra* note 325, at 167–95 (describing the modern variant of "getting involved").

³⁵⁵ Positive freedom in the social sphere includes values that we normally associate with negative liberalism, especially rights to be free from interference with associational activity. Furthermore, positive freedom in the social sphere permits us to shape institutions in a way that is conducive to the negative liberal's idea of freedom as living as one wishes. The rights to take part in corporate self-governance or community policing, for example, appear as varieties of "positive" freedom because they entail a kind of sovereignty in these areas, a right to shape normative conditions. Yet, only through this "positive" right to set the normative conditions of one's world can one truly live a life of non-interference. In sum, positive freedom in the social sphere helps create conditions of resilient negative liberty. See PHILIP PETITT, *REPUBLICANISM* 50–51 (1997).

³⁵⁶ See REID, *supra* note 46, at 27–29, 32–37, 55–59.

gued, freedom is not the "liberty for everyone to do what he lists,"³⁵⁷ or merely an act of unconstrained volition,³⁵⁸ but rather action that comports with a law of nature, or with right reason, or with some conception of social or moral order.³⁵⁹ Freedom, for homeostatic-communitarians and republicans, is deeply normative, conditioned by considerations such as social order, stability, and justice, which serve to keep it "on track."³⁶⁰

This normative idea implicates another aspect of the homeostatic-communitarian ideal of freedom: it cannot be conceived in isolation from other values; it cannot be distilled or separated from other important social and moral norms—neither in practice, nor as a theoretical matter.³⁶¹ Freedom is embedded within social order, and order within freedom. Thus, the "tradition of ordered liberty" to which Justice Benjamin Cardozo appealed,³⁶² and that continues to attract homeostatic-communitarian defenders, is drawn from a tradition that dates to classical antiquity. Together, these attributes give freedom a more-conservative, less-individualistic cast that values the traditions

³⁵⁷ LOCKE, *supra* note 108, at 17 (emphasis omitted).

³⁵⁸ Communitarian ideals thus flow from that tradition which is at odds with Hobbes's empirical definition of freedom. The communitarian ideal embraces some version of the normative ideal of freedom. See *supra* Part IIA (discussing empirical and normative ideas of freedom).

³⁵⁹ Modern communitarians do not hold a traditional natural law conception of freedom, but rather link freedom with practical, rather than abstract, rationality. As a leading communitarian put it, politics and government cannot "be divorced from fundamental values." Philip Selznick, *Foundations of Communitarian Liberalism*, RESPONSIVE COMMUNITY, Fall 1994, reprinted in THE ESSENTIAL COMMUNITARIAN READER, *supra* note 324, at 3, 11. Attacking the libertarian idea of freedom, another communitarian argues that "libertarian doctrine decontextualizes human freedom, and hence loses sight of the way that it interacts with, and indeed is dependent upon, other human values." Thomas A. Spragens, Jr., *The Limitations of Libertarianism*, RESPONSIVE COMMUNITY, Winter 1991–1992, reprinted in THE ESSENTIAL COMMUNITARIAN READER, *supra* note 324, at 21, 23.

³⁶⁰ Spragens criticizes libertarians and other liberals for defining freedom "as nothing more than acquiescence to inclination." Spragens, *supra* note 359, at 23. He argues that instead, freedom should be understood as autonomy and the capacity for self-government. See *id.* at 27 (claiming the liberal agenda should not be "the apotheosis of self-indulgence but the creation of a society in which people can be self-governing"); see also Selznick, *supra* note 359, at 6–9 (making a similar critique). Libertarians also inspire the traditional republican fear of social decay—the result, in classical republican theory, of licentiousness. See *id.* at 10 ("The decay of a moral environment . . . can be crucial, not only for the community's identity and character . . . but also to the elementary conditions of social order."). The idea of moral balance is always present in communitarian thought. See, e.g., Amitai Etzioni, *A Moral Reawakening Without Puritanism*, RESPONSIVE COMMUNITY, Fall 1991, reprinted in THE ESSENTIAL COMMUNITARIAN READER, *supra* note 324, at 41, 41–45; Oaks, *supra* note 325, at 97–105.

³⁶¹ See Spragens, *supra* note 359, at 23.

³⁶² *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

and customs of a people, and that discounts conclusions drawn from theory or from disembodied rational schemes. As the leading homeostatic-communitarian Philip Selznick put it, in terms reminiscent of Burke and the modern conservative, "the tacit knowledge of custom is often wiser than a scheme based on explicit theorizing."³⁶³

Despite the similarities to republican political theory, however, the homeostatic-communitarian idea of freedom is a distinctly liberal conception of freedom. The reason for asserting this is that the homeostatic-communitarian idea of freedom is still "individualistic" in the most basic sense of the idea. The "top-down" republican idea of freedom holds that freedom is primarily an attribute of the state as a whole, and that individual freedom is derivative of this.³⁶⁴ In contrast, homeostatic-communitarians hold that freedom should be understood from the ground up—that free societies are made up of free individuals, even if this freedom is expressed in a network of communities that order society and shape individual identity.³⁶⁵ One implication of this is that homeostatic-communitarians defend individual rights, limited government, and secondary associations as bastions of freedom and social order, whereas republicans sometimes have been ambivalent, if not hostile, to each of these ideas.³⁶⁶

Consistent with its character as a *modus vivendi* between other conceptions of politics, the homeostatic-communitarian idea of freedom is distinct from both libertarian and progressive ideas of freedom. Many strands of negative liberalism emphasize liberty as freedom *from* outside forces and hold that political participation is, at best, a necessary evil. In contrast, the homeostatic-communitarian insists that the negative and positive aspects of freedom are never separable in practice: to have the freedom of living as one chooses, one must be able to exercise some influence on one's local world. Moreo-

³⁶³ Selznick, *supra* note 359, at 9; see MICHAEL OAKESHOTT, *RATIONALISM IN POLITICS passim* (1962); cf. EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE passim* (J.C.D. Clark ed., Stanford Univ. Press 2001) (1790).

³⁶⁴ See SKINNER, *supra* note 43, at 3–5, 59–99.

³⁶⁵ Thus, communitarians reject the Kantian conception of self-identity as distinct from one's social commitments, instead viewing identity as formed in association with others. See BELLAH ET AL., *supra* note 325, at 27–51; SANDEL, *supra* note 183, at 147–54. Communitarians are dubious of the notion that individuals may be remade from the top down, except to the extent that they are exposed to moral education, and taught the values of self-respect and respect for others. Although moral tradition and custom may inform the education of the person, attempts to construct individuals completely, as some extreme "progressives" might advocate, are regarded with deep suspicion by communitarians.

³⁶⁶ See ROUSSEAU, *supra* note 4, at 203–04 (criticizing "partial societies" that separate individuals from each other and from the state).

ver, homeostatic-communitarians hold that our identities are formed as the result of communal attachments, and that the social atomization wrought by extreme forms of negative liberalism splinters the identity, leaving the individual without a set of coherent commitments and self-identifications from which to act.³⁶⁷

Homeostatic-communitarians are also dubious of modern progressive liberalism, primarily because the centralization required to ensure the progressive conception of social and economic equality is seen as destructive to family, charities, local government, and civil society. Homeostatic-communitarians also tend to reject the more-substantive conception of equality defended by progressives, viewing it as destructive to real diversity and social order.³⁶⁸ Homeostatic-communitarians prefer instead a conception of moral equality that emphasizes our "shared identity," rather than the "celebration of difference [that leads to] misunderstanding and distrust."³⁶⁹

This rejection of identity politics reinforces the moderate homeostatic-communitarian conception of social pluralism—one that charts a middle path between the radical conception of social pluralism offered by Mill and followed by today's multiculturalists,³⁷⁰ and the more monistic conception of society defended by modern cosmopolitan liberalism.³⁷¹ Modern homeostatic-communitarians do not

³⁶⁷ Indeed, communitarians argue that true self-individuation requires community to allow the individual to develop the kinds of capacities, attributes, and virtues he wishes to develop. See BELLAH ET AL., *supra* note 325, at 142–63; NISBET, *supra* note 323, at 205–11.

³⁶⁸ Traditional conservative communitarians criticize modern conceptions of equality for being destructive of authority and social order. See NISBET, *supra* note 324, at 1–19. But even "liberal" contemporary communitarians argue that an overemphasis on equality destroys the institutional diversity necessary for a good society. See Selznick, *supra* note 359, at 5 (stating that "[t]he current zest for equality . . . lacks such an anchor; indeed it lacks a rudder as well. Popular liberalism has come to suppose that every kind of privilege, authority, coercion, classification, or segregation is an actual or potential affront to the subject's dignity as a person, and therefore to moral equality. Equality becomes a powerful but untamed abstraction . . .").

Similarly, William Galston argues that modern liberalism advances a theory of difference "within," which requires that every institution reflect the differences among persons within society, whereas a truly diverse society would protect differences "between," which would permit institutions more autonomy in selecting their members so as to create real diversity between groups. See Galston, *supra* note 352, at 242–43.

³⁶⁹ Selznick, *supra* note 359, at 5.

³⁷⁰ Mill's conception of society envisions semi-autonomous subcultures in which individuals may associate with other like-minded individuals. These subcultures are more or less peripheral to general society, depending upon the extent to which their visions of individuality conform with more popular ideals. See MILL, *supra* note 111, at 12, 73–91.

³⁷¹ I argue that modern cosmopolitan liberalism is socially monistic because, although at the level of the individual, cosmopolitan liberalism embraces diversity among persons, at

accept Mill's radical conception of diversity with its implication that all "self-regarding" behavior may take the form of a "life experiment," which may then form the basis of a community of like-thinking individuals. Nevertheless, they give measured assent to the idea that freedom is enhanced by conditions of moderate cultural pluralism.³⁷² Indeed, pluralistic differentiation among communities is a necessary expression of the differing ways of life embodied in these diverse communities, and gives deeper meaning to the participatory virtues offered by homeostatic-communitarian theory.³⁷³

the level of the group, it emphasizes uniformity. Genuine social pluralism entails genuine differences between groups, rather than between members within groups. See Galston, *supra* note 352, at 247-49. The modern liberal goal that each group reflect differences among the general population destroys social pluralism by ensuring that each group is just like every other group, differences *within* the group notwithstanding. *Wisconsin v. Yoder* illustrates the differences between genuine social pluralism and cosmopolitan liberalism. See 406 U.S. 205, 234-36, 245-46 (1972). In *Yoder*, the Court permitted the Amish to withdraw their children from school after eighth grade in violation of a state law requiring students to stay in school until the tenth grade. *Id.* at 234. In dissent, Justice William Douglas claimed that the affected children were deprived of their capacity to make effective choices about the course of their lives by not being exposed to the external world. *Id.* at 245-46 (Douglas, J., dissenting in part). This liberal cosmopolitan attitude reflects a conception of autonomy and equality that is in tension with the interest of heterogeneous groups—here, the Amish—in preserving their identities.

³⁷² See Jean Bethke Elshtain, *Democracy and the Politics of Difference*, RESPONSIVE COMMUNITY, Spring 1994, reprinted in THE ESSENTIAL COMMUNITARIAN READER, *supra* note 324, at 259, 259; Diane Ravitch, *Pluralism vs. Particularism in American Education*, RESPONSIVE COMMUNITY, Spring 1991, reprinted in THE ESSENTIAL COMMUNITARIAN READER, *supra* note 324, at 269, 272-73.

³⁷³ Communitarianism charts a "middle way" between the cultural particularism defended by the early romantics, and the more unitary conceptions of society that leave little room for cultural differentiation. See *The Responsive Communitarian Platform*, *supra* note 350, at xxxv ("Our communitarianism is not particularism."). Communitarians endorse neither the radical particularism of romantic and liberal movements that allow virtually every set of values to define a community, nor do they defend the old forms of particularism that tended toward ethnocentrism, localism, ignorance, and bigotry. See Selznick, *supra* note 359, at 6. Nevertheless, Selznick states that "[i]n contrast to cosmopolitan liberalism, we take seriously the claims of particularity." *Id.* I asked Selznick by what principle communitarians decide to defend some communities and not others—why defend the Amish, but not a subculture devoted to experimentation with drugs or a subculture of Nazis? He responded that communitarians defend "virtuous" cultures but not those that inculcate destructive or other vicious values. See *id.* at 11 (arguing that politics cannot be divorced from "fundamental values").

The Responsive Communitarian Platform states that, to be "responsive," a community must embody certain moral values, in particular, equality, justice, the existence of generalized standards applicable to all, and openness to, and capacity for responding to, the needs of its members. See *The Responsive Communitarian Platform*, *supra* note 350, at xxvii. Communities that meet its standards are deemed worthy of protection against homogenizing social forces.

For the homeostatic-communitarian, freedom depends neither upon the unconstrained will of the individual to do as he or she wishes, constrained only by the narrow compass of others' rights, nor on the inter-penetration of virtually every sphere of life by centralized political forces. Rather, as *The Responsive Communitarian Platform* puts it:

[I]ndividual liberty depends on the active maintenance of the institutions of civil society where citizens learn respect for others as well as self-respect; where we acquire a lively sense of our personal and civic responsibilities, along with an appreciation of our own rights and the right of others; where we develop the skills of self-government as well as the habit of governing ourselves, and learn to see others—not just self.³⁷⁴

The homeostatic-communitarian idea of freedom is a deeply “moral” ideal that places it in tension not only with “physicalist” conceptions that come down to us from Hobbes, but with any theory, whether of the negative liberal or the weak progressive, that equates freedom with the unconstrained volition of the individual. Likewise, homeostatic-communitarian freedom is equidistant from both the radical individualism of self-individuating liberalism and progressive conceptions, which tend to erode liberal conceptions of individuality by reducing the sphere of individual responsibility. In sum, the homeostatic-communitarian ideal pursues a middle way between the progressive's tendency to equate freedom with substantive equality, and the negative liberal's penchant for finding these values invariably opposed. “Members of the community have a responsibility, to the greatest extent possible, to provide for themselves and their families,” as well as “a responsibility for the material and moral well-being of others.”³⁷⁵ At the same time, however, homeostatic-communitarians still believe that:

For its part, the community is responsible for protecting each of us against catastrophe, natural or man-made; for ensuring the basic needs of all who genuinely cannot provide for themselves; for appropriately recognizing the distinctive contributions of individuals to the community; and for safeguarding a zone within which individuals may define their own lives through free exchange and choice.³⁷⁶

³⁷⁴ *Id.* at xxv.

³⁷⁵ *Id.* at xxxiv.

³⁷⁶ *Id.*

CONCLUSION

We now come to the central question posed in the Introduction: How have the contours of freedom changed over the last two centuries? And to what extent? In what sense are we more or less "free" today than we were, for example, in 1789?

Obviously, those of neo-Lockean sensibilities would argue emphatically that we are undoubtedly less free today, because legislation everywhere has narrowed the scope of individual initiative and freedom of choice. Advocates of progressive ideals, in contrast, would assert that, although we have not gone as far as they would like, we are nevertheless much freer today as a result of the same legislation lamented by the libertarian. For his part, the defender of positive freedom in the first sense, discussed in Part I, must be profoundly ambivalent. On one hand, the right to vote has been broadly expanded so that there is now near universal suffrage among our citizens. On the other hand, the relative effective power of the vote, and our connection to government generally, is radically diminished compared to that of a voter two centuries ago. We might say that the "exercise" value of the vote is now almost universally distributed, but its "achievement" value has been radically diminished. Greater numbers now have positive freedom, but *each* has less effective political power.

Similarly, the negative freedom associated with our personal decisions has broadened in one respect and narrowed in another. Individuals are protected to a much greater extent today in the zone of choice making most proximate to the self—the zone involving intimate and important life decisions. Moreover, protection for this limited zone of negative freedom has been "equalized" by the extension of rights to minorities, women, homosexuals, and others. The level of protection for this zone is also undeniably greater in the sense that people today are protected from a range of interferences that largely went uncurbed, at least by the sanction of law, until relatively recently. Consider as one example the body of law that has developed over the last twenty years as a response to sexual harassment in the workplace. Our freedom from interference is "deeper" and more inclusive today than it has been ever before.

Yet we cannot deny that the outward compass of negative freedom has been withdrawn considerably by these same developments. Almost any activity that touches, even tangentially, upon the interests of others is subject increasingly to government control, and not merely in regards to economic legislation. Consider the recent campaign to eliminate public smoking. The notion of "interference" has

mutated from an actual physical impediment to action, into any condition that potentially threatens the health or well-being of the individual—or that simply may happen to offend him. The “negative freedom” of the bystander not to breathe another’s smoke is preserved at the expense of the negative freedom of the smoker not to be interfered with in his enjoyment of a cigarette.

Perhaps the most unambiguous increase in our overall social freedom is in respect to the number of options—social, religious, economic, and personal—from which we are able to choose today. Despite all of the direct and indirect forms of constraint imposed by modern life in the big city, it is hard to deny (although some have)³⁷⁷ that today’s affluent resident of Manhattan is vastly more free, in the sense of having more choices, than a Kentucky backwoodsman in the year 1800. Nothing gives the lie to more austere forms of negative liberalism than our recognition that, in modern society, there is greater choice even with more constraints on human action.

If we had to sum all of these developments up, we would have to conclude that “freedom,” in its many facets, has been *democratized* and *domesticated* over the course of the last two centuries. It has been democratized in the sense that it has been equalized to a great extent by the extension of negative and positive rights to greater numbers of people, and by the consequent qualitative limitation of these same rights necessitated by their expansion. Freedom has been domesticated in the sense that, in its negative mode, it increasingly is imbued with a defensive, protective character associated with security, safety, and the elimination of risk. Even in its various positive modes, freedom does not mean the active liberty of the ancient Athenian, or the modern entrepreneur, or even the social reformer, who direct their activity in an outward fashion to influence their world in powerful ways. Rather, positive freedom today is exemplified largely by the symbolic liberty of voting, the inner quest for self-individuation, or the claim to social entitlements characteristic of positive rights.

Liberty, like any other normative concept, does not exist in isolation in the moral universe. It takes its meaning from its relative position in the constellation of values with which it is associated. As the relationships between these values change with time and place, so too do the meanings we give to each embedded concept. And so it is with freedom. Freedom, in the form commonly defended today, has lost its more turbulent and *active* connotation and, with it, its capacity simulta-

³⁷⁷ See STEINER, *supra* note 2, at 54.

neously to provoke disorder and to stir the human soul. On the left, freedom today has more to do with equality and security; on the right, with moral order and economic efficiency. In either case, freedom has little in common with what Arendt called the "*vita activa*," the active life. The "liberal" today, as the philosopher Richard Rorty has observed, seeks the abolition not of constraint, or even of tyranny, but of *cruelty*. The contemporary liberal's overarching aspiration is "to make human beings equal in respect to their liability to suffering."³⁷⁸

One only can wonder how Thomas Jefferson, who, in a profoundly different spirit, proclaimed that "the tree of liberty must be refreshed from time to time by the blood of patriots and tyrants," would have regarded this idea of freedom.

³⁷⁸ RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 88 (1989).