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A Third Theory of Liberty: The Evolution of Our Conception of Freedom in American Constitutional Thought

by JOHN LAWRENCE HILL*

Our contemporaries are ever a prey to two conflicting passions: they feel the need of guidance, and they long to stay free. Unable to wipe out these two contradictory instincts, they try to satisfy them both together. -Alexis de Tocqueville

Liberty is the central animating value of the American constitutional order. No concept has exercised so complete a hold on the normative imagination of a people as has the ideal of freedom in the American political consciousness. Yet the meaning of liberty as it has been understood by various schools of political thought remains a tangled thicket of overlapping and sometimes contradictory notions.

* John Lawrence Hill is a Professor of Law at St. Thomas University, and Visiting Professor at Western New England College, School of Law for the school year, 2002-03. He holds both a J.D. (1988) and a Ph.D. in Philosophy (1989) from Georgetown University. Professor Hill is completing a book, THE MEANING OF LIBERTY IN AMERICAN POLITICAL AND LEGAL THOUGHT, which seeks to bridge the gap between philosophical and legal conceptions in developing a theory of liberty.


2. Disputation concerning the meaning of liberty is almost endless. Hayek, for example, distinguished between a number of different meanings of the term, all of which he contends, are adulterations of the original concept. He defines liberty as “independence of the arbitrary will of another.” FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 12 (1960). He distinguishes this from a number of competitors, including political freedom or the right of collective self-determination, inner or subjective freedom, as with the concept of freedom of the will, liberty as the ability to do what one wants (which we will describe as a form of positive liberty), and liberty as power or wealth. Id. at 13-19. Similarly, Tim Gray examined seven distinct conceptions of liberty, which overlap but expand upon those mentioned above. TIM GRAY, FREEDOM (1991). These concepts are freedom as absence of constraints, freedom as availability of choices, freedom as effective power, freedom as social status, freedom as self-
When Franklin Delano Roosevelt proclaimed that there were four basic freedoms, which included not only freedom of speech and worship, but “freedom from want, everywhere in the world” and “freedom from fear, anywhere in the world,” it is difficult to conceive that he had the same thing in mind as Thomas Jefferson, when he said that “the tree of liberty must be refreshed from time to time with the blood of patriots and tyrants.” And neither of these sounds particularly like the libertarian’s conception of freedom as the protection of property rights, freedom of contract and the free market or, for that matter, the civic republican ideal of liberty as collective self-government.

In modern political thought, our conceptions of liberty have been framed by a bipolar dichotomy between two supposedly opposed conceptions of freedom, the “positive” and the “negative” dimensions of freedom. The dichotomy has roots deep in our history and in determination, freedom as doing what one wants and freedom as self-mastery. Id. Cutting across many of these definitions is the distinction between negative and positive liberty, but the distinction between negative and positive liberty has itself been amenable to considerable variation. See Isaiah Berlin, Two Concepts of Liberty, FOUR ESSAYS ON LIBERTY (1969) (for the classic discussion of the distinction.) See generally infra section I for a review and consideration of these concepts.

3. This is from his famous “four freedoms” speech in 1941.
7. Berlin, supra note 2, at 118-31. There has been a great deal of commentary on Berlin’s essay and his distinction between negative and positive liberty. Perhaps the most influential is that of Gerald MacCallum. See Gerald C. MacCallum, Negative and Positive Freedom, 76 Phil. Rev. 312 (1967), reprinted in Liberty (David Miller ed., 1991). MacCallum argues that the distinction is illusory, and that all statements about freedom take the form, x is free from y to do or to have or to be z. Thus, negative liberals tend to focus on the “y” variable, which designates the constraint hindering a particular act, while positive libertarians focus on the “z” factor, the goal variable. Both positive and negative liberals tend to overlook the more comprehensive nature of our conceptions of liberty. See also John Gray, On Negative and Positive Liberty, Conceptions of Liberty: in Political Philosophy (J. Gray & C. Pelczynski eds., 1984) (criticizing MacCallum’s triadic formula). The works mentioned here all deal with abstract or formal conceptions of liberty, and are one step removed from more substantive political philosophy. The
abstract philosophical theory. The distinction crept into political awareness early in the liberal era. In 1819, the Frenchman, Benjamin Constant, published what would become his famous essay on the distinction between the liberty of the ancients and the liberty of the moderns. His thought crystallized classical liberal thought and influenced such subsequent social and legal philosophers as Alexis de Tocqueville, John Stuart Mill, Isaiah Berlin and Friedrich Hayek, among many others. Constant's distinction between ancient and modern liberty can be roughly captured as that between self-government or direct, participatory democracy, on one hand, and some form of modern negative liberalism, on the other. The liberty of the moderns, he maintained, includes freedom from arbitrary arrest and maltreatment at the hands of the authorities, the right to choose one's own profession, the rights of free speech and assembly, the right to marry one's choice of partners and the right to religious freedom, among others. In contrast, the liberty of the ancients work of these analytic philosophers has set about clarifying the conceptual meaning of liberty. Nevertheless, there lies a considerable distance between having an abstract conception of liberty and defending a political system that embodies this conception. Put simply, there are those who define liberty negatively, even if they are not true liberals at all. Thomas Hobbes best exemplifies this. He vouchsafed a negative definition of liberty but was no liberal. Thomas Hobbes, Leviathan (C.B. MacPherson ed., 1969) (1651).

8. Friedrich Hayek claimed that the negative/positive distinction derives from Hegel and was later picked up by T.H. Green. Hayek, supra note 2, at 425 n. 26. In fact, the distinction derives from Kant. This is found in the Introduction to Part I of Kant's The Metaphysics of Morals. Immanuel Kant, Ethical Philosophy 12, 26 (James W. Ellington trans., 1983) (The Metaphysics of Morals in edited form). Kant conceived of negative and positive liberty both in an internal sense, as qualities of the free will, and in an external sense, as a function of the actor's relation to the world.


10. See de Tocqueville, supra note 1.


13. Hayek, supra note 2; see also Friedrich A. Hayek, The Road to Serfdom (1994) (1944) (for a detailed attack on socialism, the welfare state and modern progressive liberalism from the standpoint of the classical negative liberalism of Hayek).

14. The distinction between the liberty of the ancients and that of the moderns is sometimes cast by philosophers as a distinction between positive and negative liberty. See Berlin, supra note 2 (defending a negative conception of liberty more consistent with the presuppositions of liberalism). Charles Taylor has called negative liberty "an opportunity concept" and positive liberty "an exercise concept." Charles Taylor, What's Wrong with Negative Liberty, in 2 Phil. and the Hum. Sci.: Phil. Papers 211-29 (1985).

15. Constant, supra note 9, at 310-11. These, of course, are many of the same rights provided for in our own Bill of Rights, along with the Fourteenth Amendment, either
consisted in exercising collectively, but directly, several parts of the complete sovereignty; in deliberating, in the public square, over war and peace; in forming alliances with foreign governments; in voting laws; in pronouncing judgments; in examining the accounts, the acts, the stewardship of the magistrates, in calling them to appear to the assembled people; in accusing and absolving them.\(^\text{16}\)

Constant concluded that among the ancients, the individual, who was almost always “sovereign in public affairs, was a slave in all his private relations.”\(^\text{17}\) In obvious contrast, the modern possesses a range of private liberties that would have been unthinkable for the ancients but is “sovereign in public life only in appearance.”\(^\text{18}\)

In the broadest sense, the liberty of the ancients is associated with a positive conception of liberty; it is the freedom to take part actively in democratic self-government. In contrast, the liberty of the moderns has been deemed a negative conception of liberty in that it equates liberty with freedom from various forms of external constraint, the freedom to live and do as one wishes within the private domain.\(^\text{19}\) The purpose of this Article is to demonstrate the extent to

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16. CONSTANT, supra note 9, at 311.
17. Among the ancients, virtually every facet of personal life was regulated by law, including religion, custom, marriage, even the appropriate time for coitus. Id. at 314.
18. Id.
19. Berlin, supra note 2 (for the distinction between negative and positive liberty). Berlin describes negative liberty in the following way:

I am normally said to be free to the degree to which no man or body of men interferes with my activity. Political liberty in this sense is simply the area in 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. at 122. Nevertheless, freedom from constraint does not guarantee that the individual will have the physical, social or economic ability to achieve the object of his action, but
which both the positive and negative ideals of liberty have failed to capture the true meaning of liberty as it has evolved in American constitutional thought. Contemporary conceptions of liberty place emphasis neither on some positive right to direct participatory democracy nor a purely negative conception of liberty as enshrined in the night watchman state of libertarian theory. What has replaced these ideals is something far more complex - and distinctly American.

This Article will argue that post-revolutionary American politics fostered the philosophical crystallization of an altogether new concept of liberty, one that began to transcend the positive/negative distinctions that even later philosophers and political thinkers would draw. It will contend that the Founding Fathers and, in particular, James Madison and Thomas Jefferson, drew together the diverse strands of a number of distinct, if often overlapping traditions, in creating a theory of liberty which ties the values associated with individual self-determination to a conception of liberty as social balance. More specifically, liberty requires the counter-balancing of all forms of social power, yet this attempt to create an equilibrium of social power does not simply check power, as in negative theories of liberty, but serves to create a social foundation for the affirmative expression and influence of groups, and through them, persons. While personal liberty is equated with the self-determination of the individual, our ideas concerning self-determination are in need of revision. In particular, social pluralism and the decentralization of social power are considerably more essential to the central liberal value of self-determination than the liberal tradition has recognized. One implication of this is that the currently fashionable debate between liberals and communitarians is misplaced and misconceives the relationship between autonomy and community.

only that he has the opportunity to do so in the sense that he is not prevented by the intentional acts of human agents from doing so. Thus, Berlin insists that, "[m]ere incapacity to attain a goal is not lack of political freedom." Id. See also Michael Bayles, The Concept of Coercion, COERCION 16, 16-29 (J. Roland Pennock & John W. Chapman eds., 1972) (for a systematic elaboration of coercion from the negative standpoint). Thomas Hobbes developed the first modern explication of this negative ideal. HOBBES, supra note 7.

20. The article seeks to demonstrate that protecting a diverse and partially de-centralized political structure is actually conducive to self-determination. Thus, the Article seeks to give a quasi-libertarian justification for communitarian values. See infra section II.C. (discussing the significance of de-centralized social and political power to self-determination.)

21. In this respect, John Stuart Mill saw most clearly the relationship between a plural culture with decentralized and insulated subcultures, and individual autonomy. MILL, supra note 11. Not only do distinct subcultures represent experiments in living which
This Article will argue that the canonical sources for this ideal is James Madison's conception of liberty, particularly as manifest in the Federalist Papers, numbers 10 and 51.\textsuperscript{22} Under modern progressive liberal influences, Madison's ideas have been given increasingly broader scope, even as progressives began to question the applicability of these ideas in the economic sphere.\textsuperscript{23}

Certain strands of contemporary communitarianism also seek to recapture the Madisonian ideal of freedom in the social sphere.\textsuperscript{24} Where Madison's thought served as a commentary on the structure of government, modern influences have extended the model to private centers of power.

Part One of this Article traces the breakdown of the negative and positive ideals of liberty essential to classical liberal and republican thought, respectively. Part Two introduces the Madisonian ideal of liberty as a distinct conception transcending negative and positive notions of liberty, and then discusses the extension of this ideal to private or non-governmental spheres of social power, particularly the economy. Part Three examines the development of what will be termed the "homeostatic ideal of liberty" in recent constitutional developments. Section III.A. demonstrates how and why the homeostatic conception of freedom has led to a reconsideration of the liberal distinction between public and private power. Section III.B examines the modern emphasis on others can follow, or not, according to the success of each, but alternate sub-cultures permit the exploration of different modes of being, different identities. Mill viewed this as a means to matching one's authentic identity with one's social environment, of finding a "fit" between individual and society with the microcosm of any of a plethora of distinct subcultures.

22. THE FEDERALIST Nos. 10, 51 (James Madison) (Fletcher Wright ed., 1961); see also infra section II.A.

23. In particular, progressives continue to question the idea that the mere neutrality of the state is sufficient to ensure diversity. In some cases, affirmative government intervention may be necessary to continue to guarantee social and political diversity. In this respect, progressives are pitted against both libertarian and communitarian conceptions of politics. Government intervention and centralized power are viewed as necessary ingredients of the modern liberal ideal. Moreover, since progressives tend to hold that private power, particularly economic power, is itself a prevailing problem that must be countered by government, they contend for greater intervention by government here as well. See JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS (1927) (for the classic discussion of these issues from a progressive standpoint); T.H. Green, Liberal Legislation and Freedom of Contract, in LIBERTY (David Miller ed., 1991) (for one of the earliest progressive critiques of the doctrine of freedom of contract).

privacy as a mediating value between the intimate domain of personal identity and the sphere of public power. Sections III.C., D. and E. examine the central conflict of modern liberalism. This is the precarious balance between a commitment to social pluralism, which is itself necessary to the homeostatic ideal, and the recent emphasis on equality, central to more contemporary forms of progressivism. This part of the Article discusses the ways in which a commitment to individual self-determination is the central animating value of constitutional liberalism, and argues that social pluralism is essential to this value. The homeostatic ideal of liberty charts a middle course between classical liberalism’s embrace of negative liberty and the progressive’s dubious defense of centralized power in the name of individual rights. The value of self-determination, properly understood, requires considerably more than both the absence of government and the omnipresence of the state; it requires a reinvigorated commitment to creating conditions of diversity and balance among intermediate social groups.

I. The Breakdown of Negative and Positive Conceptions of Liberty

A. Negative Liberty: From Classical to Progressive Liberalism

The classical liberal model of liberty in its purest form dominated nineteenth century constitutional and common law jurisprudential thought. The classical liberal influence is evident in frequent appeals, most often by courts during the period, to notions of natural rights and natural justice, and to the idea that there exist inherent moral limits on the power of the legislature. Because many of the challenges to legislative supremacy during this period were directed at state laws, and because the Bill of Rights did not apply to the states until after the adoption of the Fourteenth Amendment in 1868, challengers often successfully appealed to various clauses of state constitutions. Nevertheless, at the federal level, first the Contracts

25. Notions of natural law and natural justice are usually central to these government-limiting arguments. See Calder v. Bull, 3 U.S. 386 (1798) (Chase, J., concurring) (arguing that there exist limits to legislative authority imposed by “the great first principles of the social compact”). See generally EDWARD S. CORWIN, LIBERTY AGAINST GOVERNMENT (1948) (for the classic treatment of the rise and fall of the negative conception of liberty in constitutional law).

26. See Barron v. Mayor, 32 U.S. 243 (1833) (holding that the Bill of Rights was never originally intended to reach state laws).

27. See JACK N. RAKOVE, ORIGINAL MEANINGS 306-50 (1996) (discussing the
clause of Article I, section 10, and later the Due Process Clause were most commonly relied upon to set aside state and federal laws deemed to violate fundamental principles of limited government and natural justice. It was during the Lochner era, which roughly spanned the years 1897 to 1937, that libertarian theory reached its zenith in constitutional law. The Supreme Court struck down a series of laws, including maximum hour and minimum wage laws, laws restricting entry into a profession and a variety of laws deemed to have redistributive consequences.

If we could distill the central elements of the negative liberal tradition, as embodied in the foregoing developments, they would include the following: First, liberty itself was conceived as the absence of constraint and, more particularly, the absence of government regulation. Negative liberals followed Bentham in maintaining that “every law is an infraction of liberty.” Second, as a consequence,
rights were inevitably viewed as pre-political in character: They represented the sphere of activity which the individual reserved to himself upon entering the social contract. Third, following from the first two core commitments of classical liberalism, rights had to be conceived as negative in character; in other words, the individual did not have rights to affirmative government assistance but rather, had the right to be let alone in achieving for himself, or in voluntary combination with others, his legitimate ends. Fourth, the individual was himself viewed as autonomous - as capable of reasoning and freely choosing his own purposes and ends. As a result, negative liberals are highly skeptical of both redistributive and paternalistic state interests. Finally, together these commitments entail the acceptance of a strong distinction between public and private spheres of activity. The public realm is that of government regulation and is associated with the view that all laws necessarily are coercive. The private realm is the sphere of voluntary association that encompasses the rest of civil society: families, religious and political organizations, financial and employment relations - all of these were the sphere of consensual relations that provide both a bulwark against governmental tyranny and a realm of private satisfaction and pursuit.

The negative conception of liberty began to break down during the last few decades of the nineteenth century and has increasingly become known as the "conservative" branch of modern liberal theory. Indeed, the ambiguity of the terms "liberal" and "conservative" today bespeak the tenuous connection between modern and classical forms of liberalism. Under the withering attack of social progressives and legal realists, the various core elements of classical liberalism were replaced with a distinct notion of liberty. As an initial matter, progressives pointed out that negative

LEGISLATION (1789).


34. See HAYEK, supra note 2, at 397-411, entitled Why I Am Not A Conservative (arguing that the term "liberalism" as it is now used is increasingly associated with socialist values and that adherence to the classical liberal model promotes change, progress and other true "liberal" values better than modern progressive ideals.)

35. See HAYEK, supra note 13, at xxxv-xxxvi (1944) (discussing the change in the meaning of the term "liberalism"); Ronald Dworkin, Liberalism, A MATTER OF PRINCIPLE (1985) (comparing modern conservatives and liberals); Edward Shils, The Antinomies of Liberalism, THE RELEVANCE OF LIBERALISM (1978) (for an excellent and elegant treatment of the change in meanings of "liberal" and "liberalism" from classical to "collectivist" versions).

liberty could not always be equivalent to non-interference by
government - even on the classical liberal's own definition. The
reason for this is that classical liberals required government
intervention to protect rights to property and personhood. In other
words, if negative liberty includes property and contract rights,
among others, and if such rights themselves required government
protection and enforcement, as they do, then negative liberty must at
least sometimes require intervention on the part of government. And
if the state should intervene to protect these rights, then why not
others such as the right, for example, of individuals not to be
constrained by employers in forming associations for purposes of
collective bargaining? Put simply, negative liberals were not able to
provide a non-controversial theory of civil (as opposed to political)
rights that could generate only the kinds of rights they preferred -
i.e., property and contract rights. Progressives argued that, implicitly,
even the negative liberal accepted the need for government
intervention to protect rights. The question was then shifted to a
distinct issue: Which rights should be protected by government or,
which activities should be protected as rights?

Thus, the second and third commitments of classical liberalism
were challenged as well. Rights were political in nature, according to
progressive and legal realist theory, in the sense that they were structured, interpreted and enforced through the legal system.38

37. Negative political rights represent freedom from government interference, while negative civil rights represent a right to be free from interference from all of society. Constitutional rights are negative political rights in that they protect the individual only from government interference in the exercise of the right. Constitutional protection of freedom of speech is a negative political right, but not a negative civil right, in that a corporation or other private entity need not observe the right. On the other hand, property and contract are civil rights in that the government not only must not interfere in their legitimate exercise, it must affirmatively intervene to assist the individual when such rights are threatened by a third party. Different thinkers sometimes use slightly varying terms to describe this distinction. Corwin, for example calls these “civil” and “juridical” rights. CORWIN, supra note 25, at 1-9. At some point, as we expand the number of negative civil rights, they will conflict with negative political rights, since the former require government intervention in ways that may interfere with the claims of negative political rights. It is for this reason that libertarian thinkers limit the number of negative civil rights to a very limited number, usually property, contract and associated rights. For example, there is no right to be free of private discrimination on libertarian accounts. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 108-18 (1962); BOAZ, supra note 5, at 228-33.

38. This conception of rights was a positivist, as opposed to a natural law, idea. Rights were political or legal creations; they were not the residue of personal freedom in the state of nature. For this reason, Oliver Wendell Holmes always maintained that rights were the conclusions of any syllogistic legal reasoning, and not merely the premises - i.e.,
Moreover, since few liberals accepted the idea that the social contract was a historical reality rather than a theoretical fiction, even the contract and property rights preferred by classical liberals could not be privileged as pre-political in the sense that actual persons once came together to safeguard these purportedly pre-existing rights. And if rights required government intervention both to create and to enforce them, then the positive right/negative right distinction was similarly on conceptual thin ice.

The distinction between negative and positive rights is represented by the difference between government neutrality, in the case of negative rights, and government assistance, in the case of positive rights. To take one recent example, Roe v. Wade created a negative right to abortion by prohibiting government from criminally sanctioning abortion, but it did not create a positive right to affirmative government assistance in paying for an abortion, as subsequent cases have established. Increasingly, progressive legislation insulated the individual from a wide array of limitations on social liberty that would not be ameliorated under the older negative model. Minimum wage and maximum hour laws, collective bargaining rights, civil rights legislation, workers' safety rules and a plethora of other reforms have blurred the line between the old positivist distinction between rights as liberties (rights in the pure negative sense) and rights as entitlements or privileges. If government could intervene to protect rights, it could intervene to create them and, in doing so, could affirmatively re-structure social relations in a manner designed to maximize the individual's social liberty.

they were the result of legal judgments, not a pre-existing presupposition of the legal system. OLIVER WENDELL HOLMES, THE PATH OF THE LAW (1897). This view was shared by those of his contemporaries and subsequent thinkers who became known as legal realists. See, e.g., James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 HARV. L. REV. 135 (1893); Morris R. Cohen, Property and Sovereignty, 13 CORNELL L. REV. 8 (1927); Felix S. Cohen, Transcendental Nonsense and the Functional Approach, 35 COLUM. L. REV. 809 (1935).


40. Id.; see also Harris v. McRae, 448 U.S. 297 (1980) (holding that there was no constitutional right to Medicaid payments for an abortion); Maher v. Roe, 432 U.S. 464 (1977) (upholding similar state law).


42. See Robert Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 POL. SCI. Q. 470 (1923) (arguing that regulation can maximize freedom by ordering
The fourth commitment of classical liberalism - the idea that persons are autonomous and capable of looking out for themselves in their social and economic relations - was the next to come under attack. Progressives were ambivalent regarding the idea of autonomy; they understood that an outright rejection of the ideal might be destructive of liberalism in any form. Yet they increasingly argued for the need for a wide array of paternalistic legislation to protect individuals from their own presumably non-autonomous choices. This ambivalence continues to the present day. Government intervention was thus increasingly justified in the name of liberty, but a liberty that progressively required that the government protect the individual from himself.

Finally, the fifth pillar of the classical liberal model was under siege. Even on the classical model, liberty was not purely political in nature: Civil rights are necessary as embodiments of our desire to protect various social liberties to the extent that persons must be protected from other individuals. Since progressives viewed not simply government but all social relations as potentially liberty-limiting - e.g., since the dramatically underpaid worker or the weaker party to the contract of adhesion were subject to very real restrictions on their liberty, at least as progressives understood the term—

society).

43. See Green, supra note 23. Written in the 1880s, Green's liberalism presaged progressivism and argued that the freedom of contract should be limited on paternalistic grounds.

44. DONALD VANDERVEER, PATERNALISTIC INTERVENTION: THE MORAL BOUNDS OF BENEVOLENCE (1986); THE NEW PATERNALISM: SUPERVISORY APPROACHES TO POVERTY (Lawrence Mead ed., 1997) (recounting the progressively more paternalistic approaches in welfare policy); Cass Sunstein, Legal Interference with Private Preferences, 53 U. CHI. L. REV. 1129 (1986) (arguing, inter alia, that the idea of personal autonomy cannot be dispensed with altogether, yet holding that many preferences that can be traced to social influences may not be autonomous); Anthony Kronman, Paternalism in Contract, 92 YALE L. REV. 763 (1983) (justifying some paternalistic limits to contract law in contexts where full autonomy of choice is questionable).

45. Paternalism literally requires that a person be restrained for his own good. In some cases, this good was itself conceived in terms of liberty. For example, though John Stuart Mill was notoriously opposed to paternalism, he argued that there might exist extreme cases, such as his example of a man being restrained from accidentally walking off a bridge. Mill argued that the man's liberty in this case could be restrained for the sake of the greater share of liberty he would enjoy having been saved from death. Progressives leapt upon this idea, arguing that many other personal decisions - e.g., to use heroin for the first time - could be regulated on grounds that they would diminish the individual's freedom to make other choices in the long term. Of course, this leads rather directly to a slippery slope where every such decision might be second-guessed in the name of liberty. See JOEL FEINBERG, HARM TO SELF (1986) (for in-depth philosophical examination of autonomy and paternalism).
government should intervene within the private domain to restructure social relations where they are destructive to personal liberty.

Those who took part in the two waves of modern progressivism in the twentieth century - the workers' movement that spanned the first three decades of the twentieth century and the civil rights movement of the 1950s and 60s - each viewed their ultimate goals not only in terms of the well-being or the equality of the individual, but in terms of general social liberty. Moreover, the legal realists argued that the public/private distinction itself was bogus because public force through law was used to preserve private power structures within the family, the business and elsewhere. The public and the private, the political and the social, were intimately intertwined, according to progressive accounts. For similar reasons, progressives rejected the distinction between social and political inequality which had been so essential to the reasoning of decisions such as Plessy v. Ferguson. explicitly rejected the idea that political (public) segregation and social (private) inequality were functionally independent of one another.

Underlying these developments, a still deeper philosophical transition in the American ideal of liberty was taking place. The idea, most basically, was that liberty is limited by the maldistribution of social power rather than by coercion as the concept was understood by classical liberals. Since progressives held that power exists "in all social spaces," as the postmodernist Michel Foucault would later say, the public/private distinction could not be relied upon as a model for protecting the liberty of the individual. As the classical liberal model began to break down, progressives searched for a new unifying conception of liberty. Some continued to conceive of liberty vaguely as a new kind of negative liberty - a liberty from various

46. Hale, supra note 42; CATHERINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989) (extending the critique to intimate relationships).

47. 163 U.S. 537 (1896). Throughout the majority Plessy opinion written by Justice Brown, the Court argues that the law can do nothing about social inequality - i.e., that, as long as the law treats all parties equally as a formal matter, it has done all that is required under the Equal Protection clause.

48. 347 U.S. 483 (1954). Chief Justice Warren's argument is that "[t]o separate [black children] from others of similar age and qualification solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way never likely to be undone." Id. at 494. Legal distinctions conduce to social distinctions and vice versa. The private effect of public regulations cannot be gainsaid.

49. Michel Foucault, quoted in POLITICS, PHILOSOPHY, CULTURE 168 (Lawrence D. Kritzman ed., 1988).
forms of social intrusion. These thinkers followed an essentially voluntaristic conception of liberty as autonomous choice transplanted into the new world of the large corporation and an impersonal bureaucracy. Freedom came to mean negative social liberty - freedom from various forms of meddling in a range of personal decisions. The rise of modern notions of privacy, both in tort law and in constitutional law, are thus connected to the older liberal tradition by the idea that the government must protect the individual not only from government itself, but from other forms of social intrusion.

The disintegration of the concept of negative liberty resulted from conceiving freedom increasingly as a social, rather than merely a political ideal. Consequently, the number of liberties were expanded so that the role of government in protecting the individual from the rest of society was dramatically enlarged. At the same time, more egalitarian ideals influenced our ideas concerning the potentially liberty-limiting effects of power. Power was viewed as destructive of negative social liberty even where it was not accompanied by coercion or violence. This resulted in more frequent collisions between the expanding number of competing rights. For example, modern public accommodations statutes, which prohibit discrimination on the basis of race in public places of business, may be viewed as resolving the clash between the businessman's purported negative right to do business with whomever he chooses—to turn away the business of the African-American customer, for example—and the customer's claimed negative right to do business with whomever he chooses and not to be denied service on the basis of his skin color. In similar fashion, collective bargaining issues juxtapose the claimed negative

50. John Stuart Mill was arguably the single most important liberal thinker in the nineteenth and twentieth centuries, whose philosophy straddles the classical liberal and the modern progressive ideals. While Mill sometimes appears to be a classical liberal because of his adherence to a negative conception of political liberty, his negative liberalism was significantly mitigated by two additional themes in the body of his writing. First, while political liberty was negative, Mill followed Kant, rather than Hobbes, in holding that personal liberty was a matter of positive liberty; i.e., it represents a capacity to exercise one's choice, rather than simply having a formal opportunity to do so. Second, Mill made the move from a conception of negative liberty that included social, as well as political, interference. Thus, Millian liberalism paved the way for the progressives, even as he appeared to stand on classical liberal principles. MILL, supra note 11.

51. See infra notes 148-51 and accompanying text.


right of the business owner to fire those who engage in union activity against the asserted negative rights of workers to associate for purposes of labor organization. Under the old classical liberal model, each of these conflicts would be resolved in favor of the business owner because, in the absence of violence or direct coercion, the government should not intervene. Yet, once negative liberty came to embrace social as well as political interference, workers might claim a "negative" right to associate — as against the interference of employers — while minorities could claim that a denial of service was an abuse of the social power. In sum, the problem of balancing rights led to the wholesale breakdown of the negative model as it was understood by classical liberals. In place of the negative ideal, modern liberalism has arrived at a very different idea of liberty altogether.54

The next section explores the idea of "positive liberty"55 as collective self-government, an ideal of liberty closely associated historically with the civic republican tradition.

B. Positive Liberty as Self-Government in American Constitutional Law

In the deepest sense, there has never been a tradition of pure positive liberty, conceived as genuine participatory democratic self-government, in American legal history. Indeed, the reality of self-government in this sense was lost to history even before the Macedonians overran the ancient Greek city-states.56 Positive liberty,

54. Modern liberalism, both more egalitarian and re-distributive in character, conceives of liberty as a qualitatively more "positive" value — i.e., positive in the sense that liberty is more than the mere absence of constraint, embracing the idea that freedom means capacity to achieve what one wants, with the state's assistance in some cases. JOHN RAWLS, A THEORY OF JUSTICE (1971); Dworkin, supra note 35.

55. There are actually three senses in which the term "positive liberty" is used by lawyers and philosophers. In addition to the two senses discussed here, positive liberty sometimes is used by moral philosophers to designate a state of will or character similar to individual autonomy. Positive liberty in this sense is neither an entitlement concept nor a juridical right, such as the right to take part in democratic self-government. Rather, it represents the capacity of the individual to govern himself and to achieve his reasoned goals. Positive liberty in this sense is distinguished from Kant's idea of heteronomous behavior, where the individual acts volitionally, but not rationally. IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSIC OF MORALS (1997). See also ALAN GERWERTH, REASON AND MORALITY (1978) (for a modern defense of the ideal). Charles Taylor, What's Wrong with Negative Liberty and Kant's Theory of Freedom in his Philosophical Papers. While this third sense of the term is important in philosophical and political thought, it has only indirect import to constitutional theory.

in this purest sense of the ideal, is Constant's liberty of the ancients; it is the right of the citizen to take part fully in every manner of public activity - to have a role in the legislative, executive and judicial aspects of government. It is, as a contemporary republican thinker has put it, participatory politics at its most "immediate."\(^{57}\)

While a great deal of recent scholarship has argued that there existed a strong civic republican element in the founding of the American republic,\(^ {58}\) American republicanism never seriously sought to resurrect a system of participatory democracy on the Greek model, even at the level of the states. While American republicans during the revolutionary period were fond of quoting Cicero, Tacitus, Seneca and other republican thinkers of classical antiquity, even these Roman thinkers had given up the idea of full, direct political participation in favor of representative models of government under the Roman constitution.\(^ {59}\) Thus, when American republicans set about the very practical activity of framing a model of government, they were influenced not by the Greeks or Romans, but by such English republican thinkers of the seventeenth century as James Harrington, Algernon Sidney, John Milton and others.\(^ {60}\) This modern brand of republican thought replaced the idea of direct political participation with notions of mixed government, rotation in representation, and an essentially liberal defense of property rights as essential to free government. While vestiges of direct participation in government appeared in the American system of government, they were exceptions. The most salient example is that of the right to a jury trial which, on republican accounts, is not intended primarily to give the criminal defendant protection from the state, but to give jurors a role in government and to make prosecutions conform to

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\(^{59}\) CICERO, THE REPUBLIC AND THE LAWS (Niall Rudd trans., 1998). Indeed, Cicero extolled the aristocratic nature of the Roman constitution and argued that the decline and drift into dictatorship began with the democratic reforms associated with the Gracchi in the second-century BCE.

\(^{60}\) See Z.S. FINK, THE CLASSICAL REPUBLICANS (1945); J.G.A. POCOCK, THE MACHEIEVELLIAN MOMENT (1975) (arguing that late Florentine and Venetian republicanism greatly influenced the seventeenth century English republican thinkers who, in turn, influenced American thought).
popular mores. Positive liberty never meant full participation in politics in American legal history.

In Federalist 39, James Madison signaled the transition in American republican thought. A republic did not require full positive liberty in its pristine sense. Rather, a republic was simply:

a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is essential to such government that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it... It is sufficient for such a government that the persons administering it be appointed, either directly or indirectly by the people.

On modern republican accounts, the idea of direct participation has given way to that of representation by the people's officers and, with it, the republican commitment to positive liberty has been transformed into the modern idea of popular sovereignty. People are positively free in this degraded sense of the term if they have a role in selecting public representatives who are to carry out the public will.

This right of representation in American government has steadily become more inclusive throughout history even as it has grown thinner as a substantive matter. The Constitution itself nowhere mentions the right to vote and the Constitutional Convention left to the several states the decision as to who would have the right to vote. Of course, most states reserved the right to white male property owners. This obviously gave this more homogeneous group a greater share of power, particularly in state elections. By the 1840s, however, most states had extended the franchise to non-property holders. The ratification of the Fifteenth Amendment in 1870 gave

61. See infra notes 138-43 and accompanying text, for a discussion of both the republican and the power-diluting conception of the jury.
63. Id.
64. This is positive liberty in a "degraded" sense from the perspective of republicans who value the direct participation or input of the individual. Thus, in The Social Contract, Rousseau emphatically contended that "the moment a people allows itself to be represented, it is no longer free; it no longer exists." JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND THE DISCOURSES 265 (G.D.H. Cole trans., 1973) (1762).
67. Twelve of the original thirteen states adopted property requirements for voting.
the vote to black males, while the Nineteenth Amendment, ratified in 1920, extended the vote to women. In 1913, the Seventeenth Amendment made the election of United States senators a matter of popular vote. (Senators had previously been elected by the representatives from the various states.) A second, though less dramatic, wave of expansion came in the 1960s and 70s, when the Twenty-Fourth Amendment prohibited the use of poll taxes in federal elections, and a Supreme Court case extended this to state elections two years later. The elimination of the poll tax represents the death knell to limitations on the right to vote predicated upon indigence; with it died the last vestiges of the same rationale used to justify the property requirement early in our history. Finally, in 1971, the Twenty-Sixth Amendment gave the vote to eighteen year-olds.

Underlying the extension of the franchise to a diversity of groups was the notion that, for democracy adequately to gauge the public will, all affected groups must be able to register their social interests as an "input" in the process. Direct participation of the few, as a republican ideal, has been replaced in the American constitutional order by the indirect but inclusive representation of all. Liberty, even among modern republicans, is primarily social, rather than political, in nature. Where the ancient idea of participation in government required, as Hannah Arendt put it, the \textit{vita activa}, an active life in political participation, the modern ideal of broad civic inclusion is intended as a means to protect the interests of every class. "Under no circumstances," says Arendt of the ancient ideal of positive liberty, could politics be only a means to protect society - a society of

(Pennsylvania never imposed the requirement.) All other states admitted to the union did not bar voters on the basis of property ownership. Of the twelve states that did impose the requirement, Delaware was the first to eliminate its property requirement in 1792. Virginia and North Carolina were the last to eliminate it in 1850 and 1854, respectively.


69. See JOHN HART ELY, DEMOCRACY AND DISTRUST (1981).
70. Indeed, mainstream liberals, modern republicans and those interested in the voting rights of minorities all assume that the democratic process is "skewed" where certain interests are not adequately represented as an "input" in the political process. \textit{Id.} at 73-88 (defending a "representation-reinforcing" conception of the constitution); LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994) (race-conscious districting and other measures necessary to promote full civic inclusion of minorities); Cass Sunstein, "Beyond the Republican Revival, 97 YALE L.J. 1539, 1552-58 (1988) (arguing that political equality requires the full representation of all, the reduction in influences brought about by wealth and full citizenship to all).
the faithful, as in the Middle Ages, or a society of the property-
owners, as in Locke, or a society relentlessly engaged in a
process of acquisition, as in Hobbes, or a society of producers,
as in Marx, or a society of jobholders, as in our own society, or a
society of laborers, as in socialist and communist countries. In
all of these cases . . . [f]reedom is located in the realm of the
social . . . . What all Greek philosophers, no matter how opposed
to polis life, took for granted is that freedom is exclusively
located in the political realm . . . .

In marked contrast, the modern republican ideal, as a leading
defender has put it, ultimately concerns “deliberation in the service of
social justice” requiring “full civic inclusion.” In this respect, among
others, modern republican and liberal ideals are considerably closer
to one another than is sometimes thought.

Even as this expansion in voting rights was taking place,
however, the relative domain over which it operated was decreasing.
The power of the vote was diminished due principally to three
sweeping constitutional developments that have marked the
twentieth century. Most important among these is the decline of
federalism itself. The old republican and antifederalist idea that the
states provided citizens with a forum for political expression, and
even the old liberal idea that the states would serve as “laboratories”
in which to test diverse programs and policies, faded under the crush
of centralization that dramatically accelerated with the New Deal. If,
as Justice Scalia has argued, federalism provides “more choice” than
that which is possible under a uniform national standard, then

71. ARENDT, supra note 56, at 31.
72. Sunstein, supra note 70, at 1550-51.
73. Most modern republican ideas partake of the individualistic assumptions
characteristic of modern liberalism. In this respect, contemporary republican thought
follows modern political thought generally in its rejection of what we might call
“ontological collectivism,” the idea that the state or society has a reality greater than that
of the sum of individuals. Compare Aristotle’s claim that “the state is by nature prior to
the individual” in that the individual is merely a part of a much greater whole, with
modern republican sentiments that, as Jefferson said, “the rights of the whole can be no
more than the sum of the rights of individuals.” DAVID N. MAYER, THE
CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 76 (1994). Where the public good
is more than the sum of individual interests on more collectivist conceptions of
republicanism, this is not the case for most modern defenders of republicanism.
74. HERBERT STORING, WHAT THE ANTIFEDERALISTS WERE FOR (1986); THE
75. See New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) (Brandeis, J., dissenting)
(linking federalism to experimentation in policy-making and chastising conservative
justices for using the Lochner economic due process right: to stay experimentation at the
state level). In this case, it was the progressives who sought to advance the right of states
as against the rights generated by the old negative liberalism.
centralization can only be greeted with a sense of profound loss by those with republican sensibilities. (It is ironic, then, that some who call themselves "civic republicans" today are champions of nationalism and centralization.\textsuperscript{76}) The decline of federalism and the rise of political and economic nationalism represent the most significant factors in the dilution of positive liberty—even in the very extended sense in which citizens of any representative democracy may be said to possess it.

Second, the rise of the administrative state served to insulate from electoral pressures what in effect became a fourth branch of government.\textsuperscript{77} Increasingly, decisions of a quasi-legislative nature were made by unelected bureaucrats in a diversity of minute areas affecting every area of life including, among many others, worker's safety, consumer affairs, banking, the environment, energy, taxes, immigration, highway safety and health.

Policy-making has become, as Theodore Lowi has remarked, the function of a three-way bargaining process between unelected administrators, a few interested politicians and representatives of the affected industries.\textsuperscript{78} While the growth of the administrative state is typically viewed as a tradeoff of indirect political control by the citizenry in return for expertise, efficiency and coverage (i.e., that Congress lacks the knowledge, the resources and the time to be able to meet the growing need for administrative management of the diverse areas of modern industrial life), there can be no doubt that the administrative state represents virtually the opposite end of the philosophical spectrum from that of the \textit{polis}, from the standpoint of a commitment to positive liberty.

Finally, the expanded role of the judiciary, particularly in constitutional jurisprudence, represents the third significant way in which the power of the vote has been diminished, particularly with respect to state laws. Indeed, over the course of the latter two-thirds of the twentieth century, from the end of the Lochner era on, patterns of judicial deference and those of judicial intervention have both ironically undermined positive liberty in American political life. Judicial deference to federal authority, as evidenced by the expansion of the commerce power, has cut against the autonomy of the states,

\textsuperscript{76} Cass Sunstein comes first to mind. \textit{See} Sunstein, \textit{supra} note 70.


\textsuperscript{78} THEODORE LOWI, \textit{THE END OF LIBERALISM} (1978).
leaving little beyond the reach of federal power. At the same time, judicial intervention, on constitutional grounds, in various areas of state law, represents a significant incursion into the values of positive liberty as embodied in the rights of citizens of the various states to make law reflecting their distinctive attitudes and mores. While we applaud at least some of the latter developments - e.g., the protection of racial minorities from discrimination that took place under color of state law - we must understand that we do so in the name of another ideal of liberty. The dark side of any positive liberty of a majority of citizens to make laws is precisely the “tyranny of the majority” about which Tocqueville and other liberals warned.

To the extent that we understand judicial intervention to be necessary to liberty, we do so in the name of a unique conception of liberty quite distinct from that of either the positive ideal, either in its pure participatory form or in its modern degraded sense, or negative liberty.

II. The Madisonian Moment: Origins of the Homeostatic Ideal of Liberty

A third conception of freedom, one that transcends the dichotomy between negative and positive liberty, lies at the heart of the American concept of liberty. James Madison was the first to begin to elaborate the ideal in inchoate form, though subsequent developments have extended his conception of liberty to spheres of activity distinct from those which Madison himself contemplated. In contrast to negative and positive definitions of liberty in which freedom is conceived primarily as personal or social, on one hand, and political, on the other, this concept of liberty straddles the public and private realms: liberty is a personal, social and political ideal, though it will be achieved in different realms by diverse means. What is centrally important to this conception is that, in contrast to negative definitions of liberty, personal liberty is dependent upon the existence of certain affirmative social and political conditions. Liberty requires more than the mere absence of coercive authority. Moreover, in contrast to positive definitions, the American ideal of liberty


80. DE TOCQUEVILLE, supra note 1, at 250-53.

81. See infra section II.C. for an overview of these developments.
embraces considerably more (and considerably less) than the right to participate in government in some direct fashion. This third theory of liberty requires self-determination of the person, but the conception of self-determination will entail the need for specific social conditions necessary to its realization.

To begin at the most abstract level, let us simply sketch the elements of this theory, which we will call the “homeostatic” conception of liberty. Where conceptions of liberty that presuppose a distinction between negative and positive ideals are held, democracy and rights will always appear in fundamental tension with one another. As we have seen, democracy is usually viewed as a form of positive liberty in which the individual takes part in the collective regulation of the social and political world, while liberal rights are viewed as negative limits on the democratic principle. In contrast, the homeostatic ideal views democracy and rights as serving an identical purpose. Ultimately, the purpose is to preserve what we might call a “dynamic stability” in the structure of society. This is not, however, stability for stability's sake alone. Rather, there is a normative ideal that lies at the heart of this conception of stability - an ideal adumbrated, but left partially open, by Madison. The stability sought by defenders of the homeostatic model is one that is just, that is conducive to the public good and preservative of private right, and that represents a proper balancing of interests within society. Exactly what this balance should be is ambiguous on Madison's model, though we will see that Madison left a number of distinct indications of the proper balance. More recent developments have given us a more determinate principle for measuring this social balance.

Moreover, in any given political or social context, there must exist a diversity of interests which offset and counter-balance one another. In the political sphere, this diversity of interest is created by the constitutional structure of government itself and, more specifically, by the system of checks and balances, and by federalism. In the social sphere, the diversity is represented by the plurality of interest groups which seek to influence government and, in a more general way, by the diversity of sub-cultures within civil society generally. In each sphere, this diversity of interests serves in various ways to preserve liberty. In the liberal tradition, four distinct species of argument have been made that serve to link diversity to liberty and to social progress.

First, in both the political and social realms, a diversity of interests serves to counter-balance one another to prevent too great a concentration of power in the hands of any one particular set of
interests, a possibility that would be destructive of diversity and liberty itself. In sum, diversity prevents tyranny, the unjust and arbitrary exercise of monopolized power. This conception of the relationship between liberty, diversity and power has passed into the liberal tradition via English Whig thought from its original source: republican philosophy.

Second, diversity functions in the social context to offer a large measure of choice to individuals. As we will argue later, personal self-determination requires not simply the absence of constraint on the negative model, but a diversity of realistic options in order for the individual to have a genuine choice. This aspect of diversity is of more recent vintage in the liberal tradition; negative liberals have disagreed regarding whether diversity is essential to any true ideal of negative liberty.

82. James Madison's Federalist 10 and 51 have a parallel theme in this respect. Federalist 10 concerns the balancing of social power by groups as they seek to affect government, and 51 deals explicitly with checks and balances in government. THE FEDERALIST Nos. 10, 51, supra note 22. See also MONTESQUIEU, THE SPIRIT OF THE LAWS 155 (Anne M. Cohler et al. trans., 1989) (“So that one cannot abuse power, power must check power by the arrangement of things.”)

83. The need to dilute power was a regular theme in English republican thought of the seventeenth century. Perhaps the greatest exponent of this view was James Harrington. JAMES HARRINGTON, THE COMMONWEALTH OF OCEANA AND A SYSTEM OF POLITICS (J.C.A. Pocock ed., 2001). The central aspect of Harrington's thought, in this respect, was the idea that “dominion follows property,” and that a wide distribution of property serves as a check upon tyranny. This focus on the relationship between property (or, more generally, economic power) and political power is one of a number of central themes that link English republicanism with later libertarian thought and with Madisonian liberal-republicanism.

The idea that power must be diluted is of even more ancient vintage in the republican tradition. Older republican thought holds that there must be a rough balance between the democratic, aristocratic and monarchical principles (and interests) in societies. Without this balance, the theory holds, societies tend to cycle through degenerate forms of each of the three types of government. In Plato's Republic, this idea of the breakdown of forms of government plays a central role in his attempt to construct the ideal state. Subsequent republican thought offers the theory of the mixed state as a response to the problem of cyclical degeneration of the state. It's champion was the Roman historian, Polybius, who wrote toward the end of the republican era in Rome. While the mixed constitution was supposed to preserve society, rather than liberty - i.e., Polybius probably did not think of the mixed state, as we do today, as a form of counter-balancing powers - it was a short step from the old republican to the newer liberal idea that counter-balanced power decentralizes power. See FINK, supra note 60 at 1-10, for a discussion of the idea of the mixed constitution in Roman republican thinking. The development of our own conceptions of counter-balanced power runs from this ancient idea through Harrington to more recent thinkers.

84. This issue has divided negative liberals. Isaiah Berlin, the modern defender of a negative conception of liberty argues, nevertheless, that earlier negative liberals were wrong in believing that mere absence of constraint was sufficient for liberty. In addition,
Third, diversity serves to de-centralize power with a distinct end in mind: to serve the human need to live actively and expressively. De-centralized government permits more persons to take part in ordering their world, as civic republicans remind us. Civic republicans and others hold that this expression of the \textit{vita activa} itself results in a subtle transformation of the human personality; where people take part in government, they feel a sense of responsibility for the affairs of state and for others generally. They have more than merely a personal stake in society. Indeed, human beings develop a sense of connectedness primarily by having and taking responsibility for others, and by having a share in the communal or collective aspects of our existence. In this respect, communitarian liberals such as de Tocqueville and modern civic republicans are correct to see a deep connection between social and political participation in self-government and the development of a network of connectedness among persons. It should be added, however, that this realization of the \textit{vita activa} can take place in different contexts, and is not expressly limited to the political domain in the narrow sense.

Finally, diversity has been linked to the pursuit of progress, truth, happiness and liberty because of its capacity to generate social comparisons. John Stuart Mill used the metaphor of natural selection to describe the function of social diversity. He argued that diversity permits us to compare different religions, lifestyles, social responses, etc. to determine which are better, more true or more efficient in achieving particular social and individual goals. This conception of diversity underlies the “marketplace of ideas” rationale for freedom of speech advanced by Oliver Wendell Holmes' and Brandeis' idea.

Berlin argues, there must be a reasonable range of alternative options that make choice meaningful. Berlin, \textit{supra} note 2, at 130. \textit{Compare} HAYEK, \textit{supra} note 2, at 13 (whether a person is free or not “does not depend upon the range of choice”).

85. See BENJAMIN BARBER, STRONG DEMOCRACY (1988) (for the modern elaboration of this ancient republican theme); \textit{see also} ARENDT, \textit{supra} note 56, at 7-21 (describing the \textit{vita activa}).


87. MILL, \textit{supra} note 11, at 53-72. Interestingly, Mill published \textit{On Liberty} the same year that Darwin's \textit{Origin of the Species} appeared, in 1859. The notion that society should operate in a manner similar to the evolutionary idea of chance variation and natural selection was apparently in the air at the time. In Mill's thought, diversity secured that chance variation required in the state of nature. Human goals - survival, progress, wealth, happiness, etc. – “selected” the more successful of the diverse experiments in life.

88. \textit{Id.} at 15-52. This influenced Holmes' defense of freedom of speech, which in turn
that the states should act as social laboratories, experimenting with
different policy responses to common problems.89

In all of these different respects, diversity preserves the political,
social and personal liberty of the individual. Nevertheless, this raises
a question about the role of government vis a vis social diversity. If
diversity is important to liberty then should the government have a
role in engineering and preserving diversity? The third aspect of the
homeostatic model of liberty concerns this relationship between
government and civil society. Most basically, government has the role
and function of maintaining the political and social balance of power
between the competing diversity of interests. We will see that, in
many cases, this requires the maintenance of a position of strict
neutrality among the diverse and often competing sub-cultures,
interest groups, religions, political parties, etc. Indeed, this principled
neutrality represents one of the pillars of twentieth century liberal
thought.90

Yet, as this article argues later, strict neutrality may not be
appropriate to preserve liberty under certain social conditions.
Neutrality may not be optimal to the preservation of liberty, for
example, where one interest group threatens to accumulate sufficient
social or political power to destroy the conditions necessary for
diversity itself. In limited cases, the function of government must be
to move beyond strict neutrality in the interest of restoring the
balance necessary to liberty. This third element of the homeostatic
ideal is the one that is most troubling to classical liberals and their
fellow travelers. Of course, this third aspect raises a number of
difficult issues. Most importantly, what constitutes an appropriate
balance and when is it appropriate to intervene? Moreover, since the
diminution in diversity may sometimes reflect the natural
development of the conditions of civil society or changing patterns in
individual preferences, in some contexts, government efforts to
preserve diversity may be counter-productive, or even destructive of
liberty. Determining when the preservation of diversity is necessary
to a particular aspect of society and when it is not will be essential to
maintaining social balance. These are issues that will be considered in

89. See New State Ice Co. v. Liebmann, 285 U.S. 262, 309-11 (Brandeis, J.,
dissenting).

90. ROBERT DAHL, DEMOCRACY AND ITS CRITICS (1989); Herbert Wechsler,
Part Three.

A. The Madisonian Conception of Liberty

The foundation of Madison's conception of liberty, and his theory for its preservation, is presented in the Federalist Papers, most particularly, those two documents that have attracted the greatest share of attention on the part of scholars, lawyers and citizens, Federalist numbers 10 and 51. In Federalist 51, he makes clear that his theory is to cover not simply government itself, but the private domain as well, at least to the extent that private interests affect government:

This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other - that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.

In the Madisonian conception of liberty, democracy, checks and balances and rights all serve the function of diluting the possible concentration of power for unjust purposes that are destructive to liberty.

Madison's conception of democracy is distinct from that of the pure positive value of participatory democracy central to certain strands of republicanism. Where republican ideals after early Greek conceptions view democracy as a means to achieving a human telos, the full flowering of man's nature as a political animal, the Madisonian conception of democracy has two different functions. First, popular government is necessary as an expression of popular sovereignty but, secondly, it distributes power across groups and among the citizenry in a manner that serves to check the influence of minority factions. Thus, "[i]n the extended republic of the United

91. THE FEDERALIST No. 51, supra note 22, at 356.
92. Id.
93. Republican thought followed and presaged the Aristotelian idea that politics was a means to achieving the human telos, or our innate human purpose or potential. ARISTOTLE, Politics, THE COLLECTED WORKS OF ARISTOTLE (Richard McKeown ed., 1941). See also ARENDT, supra note 56 (discussing the vita activa); Quentin Skinner, The Paradoxes of Political Liberty, LIBERTY 190-94 (David Miller ed., 1991) (discussing the republican conception of human excellence and its relation to liberty).
States, and among the great variety of interests, parties and sects which it embraces, a coalition of the majority of the whole society could seldom take place on any other principles than those of justice and the general good." This same idea is central to Federalist 10, which examines the problem of faction at some length. Madison's conception of faction is normative and functional. A faction is defined as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." Where a faction represents a minority of the general population, democracy provides the necessary protection against its influence. It ensures that the government has as its end the protection of individual rights and the preservation of the general interest of society. It is this guarantee of private right and public interest that characterizes, in general terms, the social balance that is necessary to liberty in Madison's conception.

When, on the other hand, a faction represents a majority of the populace, democracy itself, at least in its pure popular form, provides little remedy to the factious destruction of liberty. In Federalist 51, Madison observes that there are two responses to this problem. The first is the response of one brand of republicanism; its implications are distinctly anti-liberal: this is accomplished "by creating a will in the community independent of the majority - that is, of the society itself." Madison has in mind here Rousseau's idea of the General Will, a will that is somehow distinct from a combination of the wills of every individual. According to Rousseau,

There is often a great deal of difference between the will of all and the General Will; the latter considers only the common interest, while the former takes private interest into account, and is no more than a sum of particular wills, but take away from these same wills the pluses and minuses that cancel one another, and the General Will remains as the sum of differences.

In other words, the public interest is somehow distinct from all private interests combined; it is a kind of transcendent public good. American republicanism never took this potentially totalitarian ideal
seriously. Thomas Jefferson, who in some respects was even more sympathetic to classical republican values than Madison, dismissed this idea of the transcendent will and the overarching social interest by arguing that "the rights of the whole can be no more than the sum of the rights of individuals."99

Thus, for Madison, while democracy could function defectively, from the standpoint of the preservation of individual rights and the aggregate good, the solution was not to abstract a general will distinct from the interests of all individuals in the community. He believed that this is "at best, but a precarious security" and, that it is genuinely destructive of liberty.100 It requires making all interests uniform and equal, thereby undermining "the protection of these faculties [the diverse faculties of men] that is the first object of government."101 The second and preferred method for preventing the tyranny of the majority, Madison argues is that, "[w]hilst all authority in [government] 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 of interested combinations of the majority."102 In other words, the problem of factions will counteract itself as diverse interests will be able to combine only on policies that are generally just and share not just popular support, but something approaching a functional consensus.

But why, we might ask, should this be so? If a majority within a small republic can assert itself in contravention of the rights of others and to the detriment of the public interest, then why should a majority from a larger combination of factions be any less likely to do the same? Why should we assume, for example, that these diverse interests will cancel one another out with respect to their selfish aims, rather than with regard to their more noble purposes? Why is a combination of three more likely to oppress one than a group of one hundred to trod on the rights of forty? Similarly, what prevents a mediocre consensus from taking place—one that is neither particularly good nor evil, but a kind of "lowest common denominator" of interest? And how does a diversity of interest guarantee a better result than where relatively homogeneous interests

99. MAYER, supra note 73, at 76 (quoting Jefferson in a letter to the economist, Jean Baptiste).
100. THE FEDERALIST NO. 51, supra note 22, at 358.
101. THE FEDERALIST NO. 10, supra note 22, at 131.
102. THE FEDERALIST NO. 51, supra note 22, at 358.
prevail?
The answer, it shall be suggested here, may lie in the mathematical idea that we will call the “principle of aggregated moderation.” As human responses (preferences, choices, activities) are aggregated in larger numbers, the average results tend to conform increasingly to a statistical norm that approximates either a median point among all responses or a general human norm. A rough analogy can be found in repeating a coin toss several times. The greater the number of tosses, the greater the probability that the aggregated results approximates the abstract average - that heads and tails should land fifty percent of the time each. We know that Madison was greatly influenced at a young age by the Aristotelian philosophy of his Princeton teacher, James Witherspoon, with its emphasis upon the Golden Mean as an indication of the rightness of an act. Madison later read Hume’s Idea of a Perfect Commonwealth, which provided the modern rebuttal to Aristotle’s defense of small republics and argued that large republics could withstand factionalism better than small republics precisely because of their capacity to counter-balance interests. Madison overlaid his Aristotelianism with his Humean sensibilities. A larger republic, with a diversity of interests, was the better means for achieving the political Golden Mean that represented a proper balance of interests. For Madison, democracy was not a political device for aggregating preferences, as it would be for later utilitarians, but for selecting the appropriate ends of government through a process that facilitates aggregated moderation.

This same principle of supplying “by opposite and rival interests, the defect of better motives,” is at work in the system of government itself. The various checks and balances between Congress and the

103. Charles Saunders Pierce is supposed to have picked the term “pragmaticism,” saying that it was ugly enough to be memorable. In a similar vein, the “principle of aggregated moderation” is, the author believes, pompous enough that it will stick. At any rate the principle is the political equivalent of the scientific idea that natural occurrences adhere to a statistical norm over an increasingly large number of such events. Democracy serves the same function by aggregating responses over a large and representative portion of the population.


105. David Hume, The Idea of a Perfect Commonwealth, POLITICAL WRITINGS. See Douglas Adair, That Politics May Be Reduced to a Perfect Science: David Hume, James Madison and the Tenth Federalist, FAME AND THE FOUNDING FATHERS: ESSAYS BY DOUGLAS ADAIR (Trevor Colburn ed., 1974) (arguing that Madison was more greatly influenced by Hume than had previously been recognized).
President, between both political branches and the courts, and between the two Houses of Congress itself serve to ensure both that rival interests are counterbalanced so that “the interest of the man may be connected with the constitutional rights of the place.” Moreover, federalism entails a counter-balancing of power between state and federal governments so that “a double security arises in the rights of the people. The different governments will control each other at the same time that each will be controlled by itself.”

In more abstract form, Madison may have conceived that this principle of moderation is achieved through checks and balances and through federalism by aggregating the inputs by officers of the various branches of government and state and federal representatives.

While Federalist 10 and 51 apply this same conception of liberty, respectively, to the role of interest groups outside of government as they affect government, and to government itself, Madison understood that this idea was important outside of government in limited areas of the social sphere as well. While such reasoning was not yet used in the context of economic relations, precisely because economic power did not pose the problem it would represent a century later, religious sects at the time often did possess great social power. This was particularly the case where a given sect held a monopoly of political power due to establishment of religion by state authorities. Madison’s ideas concerning the relationship between religious diversity and the concentration of social power are of great relevance here because of their implications for economic and other forms of concentrated power in our own time. Madison’s Memorial and Remonstrance, written in opposition to a proposed Virginia bill which would have taxed residents of the state to support the state’s established religion, and other writings on religion, apply the same reasoning that underlies the philosophy of checks and balances to the plurality of sects.

In comments made to the Virginia ratifying convention in 1788, Madison makes the first of the three arguments for diversity with respect to religion. Religious freedom is protected by having a diversity of religious sects, thereby preventing majority domination of religion:

This freedom [of religious expression] arises from that multiplicity of sects, which pervades America, and which is the

106. THE FEDERALIST NO. 51, supra note 22, at 357.

best and only security for religious liberty in any society. For when there is such a variety of sects, there cannot be a majority of any one sect to oppress and persecute the rest. . . . The United States abound in such a variety of sects, that it is a strong security against religious persecution, and it is sufficient to authorize a conclusion that no one sect will ever be able to outnumber or depress the rest. 108

A plurality of sects has the same ultimate effect in matters of religious liberty that the extended republic's embrace of a multiplicity of factions has for political liberty; each prevents tyranny by foreclosing the concentration of social power.

Second, and perhaps even more directly, religious diversity is obviously necessary to reflect the divergent convictions of all persons. The right to the free exercise of religion is inalienable "because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men." 109 Diversity in the religious context is necessary not to create a greater number of options for its own sake—in contrast to a distinctly modern rationale which vouchsafes diversity on grounds that the quality of any choice is partially a function of the number of available options—but to protect the dignity of religious commitments that have already been made by those with various beliefs. State support of one sect "degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority." 110 Diversity thus preserves liberty and equality of citizenship by according equal dignity to all beliefs.

Further, eighty years before Mill's defense of freedom of thought and expression on the grounds that a diversity of ideas would foster the pursuit of truth, 111 Madison made the same argument in the context of religious expression, arguing that state support of one sect is "adverse to the diffusion of the light of Christianity." 112 He insisted that tolerance for a diversity of religions was conducive to the pursuit of religious truth: "Instead of leveling, as far as possible, every obstacle to the victorious progress of truth, the Bill [to support one sect by tax], with an ignoble and unchristian timidity, would circumscribe it, with a wall of defense against the encroachments of

108. Id. at 306; see also James Madison, Comments made in Virginia Convention, June 12, 1788, in id.
109. Madison, supra note 107, at 300.
110. Id. at 303.
111. MILL, supra note 11.
112. Madison, supra note 107.
error." 113 In sum, diversity engenders competition and comparison in the name of religious truth. The clash of religious doctrines would serve to dialectically arrive at the truth in the same manner by which the aggregated responses of those with diverse interests would serve to select the appropriate political ends of society.

Finally, Madison does not link religious diversity anywhere to the fourth species of argument; the civic republican idea that diversity requires decentralized power which, in turn, promotes individual participation. This is due to the fact that Madison was not as concerned with the participatory values of decentralized power as were Jefferson and others of more extreme republican sympathies. In this respect, as we have observed already, Madison's republican ideal was thoroughly modern, and dramatically de-emphasized positive liberty in its pure participatory form. Nevertheless, in the framework of government that Madison took a leading role in creating, these values are realized. Diversity engenders the republican values of participation, expression and political and social engagement by decentralizing power centers within society through the fostering of a plurality of interest groups, secondary associations and subcultures. Certainly this understanding was the central motivating force behind American federalism and underlies the commitment, in liberal communitarian thought from de Tocqueville to the present, to the value of widely distributed localized power. This is true not only in the political context, but in social contexts as well. Wherever centralized power predominates within certain social contexts, bureaucracy and individual alienation are not far to follow, though they take different forms in distinct social settings. The modern republican recognition that a decentralized ownership of small business conduces to the values of civic and economic responsibility among participants in the economy, 114 the recent communitarian argument that self-policing gives community members a sense of commitment through a share of responsibility for their neighborhoods, 115 and the contemporary notion that workers who are made shareholders in their employer-company make a more personal commitment to their jobs 116 are all ideas cut from the same civic

113. Id. at 304.
114. Sandel, supra note 6, at ch. 7 (discussing the republican ideal of small business ownership as a means of economic and political independence).
116. Barber, supra note 85.
republican cloth. In each case, diversity and decentralization serve the purpose of promoting positive liberty in its only possible modern visage.

In the end, however, diversity was not simply a means to preserving liberty, in Madison’s thought, it was partially constitutive of liberty. Indeed, what is most frequently overlooked and yet so uniquely modern in Madison’s thought is his commitment to individualism, conceived as diversity of personal character, talents and inclinations. For Madison, it was not the protection of property that was the chief end of government, as it was for Locke, but “the diversity in the faculties of men, from which the rights of property originate . . . [that] is the first object of government.” 117 Individuality conduces to diversity and diversity to individuality: “From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.” 118 Long before J. S. Mill, Isaiah Berlin and the distinguished line of later liberal thinkers began to emphasize the relationship between individuality, social diversity and personal liberty, it was central to James Madison’s theory of liberty.

B. The Function of Rights in the Constitutional Thought of the Framers

Madison’s view of rights, and that of many of his contemporaries, also transcended the liberal/republican dichotomization popular among some scholars today. Rights were neither merely the absolute libertarian checks upon government as conceived by later liberals, nor the simple means to a form of republican participatory government. They were partially both, and they were simultaneously more than this. From the beginning of American constitutional history, there has developed a third and distinctly American theory of the function of rights: In many contexts, rights serve not merely as checks upon government in the sense that they function as negative limits, cordoning off certain spheres of activity from government interference, but as affirmative devices for encouraging the development of countervailing spheres of power. As such, they redistribute political and social power in a manner that engenders reactive forces against government power by fostering oppositional

117. THE FEDERALIST NO. 10, supra note 22, at 130-31. Compare LOCKE, supra note 33 (“The great and chief end” of government is “the preservation of . . . property.”).
118. THE FEDERALIST NO. 10, supra note 22, at 130.
interests outside of it. In sum, rights should be conceived in the same Madisonian terms that characterize the checks and balances within government. This section briefly discusses three such rights - the right to freedom of the press, the right to property and the right to trial by jury.

Negative liberals typically view the function of rights in one or both of two related ways. First, rights serve as substantive guarantees against government encroachment so that certain forms of human activity will be protected for its own sake. We protect certain rights simply because doing so is intrinsic to human flourishing, or necessary to the recognition of human dignity or self-determination.\textsuperscript{119} In sum, one function of human rights is to preserve the individual's liberty to engage in the activities protected by the right. The second function of rights, in contrast, is primarily procedural or instrumental. Rights function in this fashion not to protect a certain activity, but to disable government from acting in ways that are generally destructive of liberty, even if the activity itself is not protected for its own inherent value. For example, Jefferson had developed a sophisticated theory of rights in which he maintained that there were in fact two kinds of rights, the inalienable “natural rights” of the individual, which are to be protected by government in virtue of their inherent value, and what he called “fences against wrong” - rights that serve to preserve free government.\textsuperscript{120} Jefferson held that the former were natural rights in the full sense that they could be said to exist independently of institutional recognition; he conceived of these as derivative of the “higher law” that should guide positive law. The latter, instrumental safeguards were human constructions the purpose of which was to preserve liberty generally. Revealingly, Jefferson counted the free exercise of religion among the first, natural species of right, while viewing freedom of the press as an instance of the second, instrumental variety.\textsuperscript{121}

In contrast to the modern liberal construction of the right to a free press, which conceives it primarily as a protection for the


\textsuperscript{120} Mayer, supra note 73, at 157.

\textsuperscript{121} Id. (citing Letter to Noah Webster, Dec. 4, 1790).
individual's right to express herself openly and without repression—
a private right of the speaker to speak—the "structural" function of
the free speech right described here views individual expression as an
affirmative act that has political consequences. And in
contradistinction to the republican ideal, which views the right to a
free press as a means to facilitating an informed and vigilant
citizenry—a right of the citizen to hear and to exchange views - this
third conception connects protection of the rights of speech and press
with the capacity of diverse groups to generate countervailing
messages that confront "official" or public accounts with a contrary
point of view. The more fundamental purpose of this freedom is to
offset government power with respect to the channels of influence in
which political power is secured and by which government power
exerts formative and regulative control over the lives of individuals.

In 1975, Justice Stewart argued that the Framers gave the press
this special protection over and above that which is accorded speech,
and that the press clause should be viewed as akin to a structural
provision of the Constitution. (The First Amendment does
distinguish speech and press, indicating that they are distinct rights).
As Stewart argued:

The Free Press clause extends protection to an institution....
[In] setting up the three branches of the Federal Government,
the Framers deliberately created an internally competitive
system. [The] primary purpose of the constitutional guarantee
of a free press was to create a fourth institution outside the
government as an additional check on the three official

122. See David A.J. Richards, Free Speech and Obscenity Law: Toward a Moral
"autonomy" function, i.e., to permit open expression of the individual). For a classic
example of this in operation, see Cohen v. California, 403 U.S. 15 (1971) (jacket bearing
the words, "Fuck the Draft" protected speech even though the same opinion could be
expressed in more neutral terms).

123. This conception of free speech was developed during the twentieth century in
ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT
(1948).

124. This is not simply a "truth-finding" function of speech, though the conception
defended here certainly contributes to the pursuit of truth through clashing viewpoints. In
addition, however, the existence of alternative channels of information encourages active
development of diverse and often countervailing opinions as a prod to individual
development and to facilitate more active participation in the development of ideas and
opinions.


126. The First Amendment prohibits any law "abridging the freedom of speech, or of
the press." U.S. CONST. amend. I.
branches.\(^\text{127}\)

Expression serves a wholly distinct purpose by offsetting government power. In its capacity to investigate, to disclose and to editorialize, the press serves this essential liberty-preserving function. This counteractive function is not limited to public power and the First Amendment’s protection of the right of freedom of the press has been extended over the entire domain of social and economic affairs precisely because we recognize that the exercise of power and influence are not limited to the public realm.

This distrust of power, and the perceived need to offset it, was also important to the Framers’ conception of property rights.\(^\text{128}\) Property rights were usually conceived as both the necessary means to, and the ultimate ends of, government. They both preserved liberty and were liberty. For classical liberals, government exists primarily to preserve property.

As John Locke emphatically concluded, "[t]he great and chief end . . . of men’s uniting into common-wealths, and putting themselves under government, is the preservation of their property."\(^\text{129}\) Nevertheless, the English republicans writing a generation before Locke would have reversed the order of priority. For James Harrington, whose thought greatly influenced Jefferson and others among the Framers, the right to property was not primarily the object of free government, but rather, a necessary condition for free government.\(^\text{130}\) Where free government preserves property on liberal accounts, property preserves free government on republican theories. (Indeed, ironically, in this respect English republican thought is closer in spirit to contemporary libertarian thinking than it is to that of

\(^{127}\) Stewart, supra note 125, at 633-34.

\(^{128}\) The Framers were greatly influenced by Harrington’s admonition that liberty required a wide dispersal of property. HARRINGTON, supra note 83. Even conservatives like John Adams recognized the importance of property rights in this respect. Property gave the individual independence from others and, for this reason, property was in Algernon Sydney’s words, “an appendage of liberty.” JOHN PHILLIP REID, THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION 72 (1988). It also existed as a more general economic buffer against political power so that, the more property that existed outside of the hands of government, the more government could be resisted.

\(^{129}\) LOCKE, supra note 33, ¶ 124 (emphasis added). Recall that, for Locke, as for Madison a century later, the term “property” included not simply one’s material possessions, but all of one’s rights. Thus, while today we might say that we have a liberty interest in our property, Locke would have said that we have a property interest in our liberty.

\(^{130}\) HARRINGTON, supra note 83; see also FINK, supra note 60, at ch. III (discussing Harrington’s theory of government).
either the modern progressive liberal or to the contemporary republican). 131

The republican theory of property rights is intimately connected to the problem of the concentration of power. As Harrington claimed, "power follows property." 132 The republican conviction that a wide distribution of property is the surest defense against a concentration of power was shared, with varying degrees of enthusiasm, by Madison, Jefferson and others of the revolutionary generation, though all but the most radical were opposed to leveling schemes or modern forms of redistribution. 133 This idea played a role in the initial reservation of the franchise, in most states, to property owners. 134 The fear that those without property would be coopted by their economic superiors, that the poor would sell their votes to the wealthy, played as much a role in reserving the right to vote to freeholders as did the fear that "an excess of democracy" would result in the dilution of the rights of the propertied. 135

The Whiggish ideal of property as a counter-balance to government power was closer to Antifederalist and republican, than to Federalist sensibilities. In this respect, as in many others, the Federalists truly were the proto-liberals, favoring property as the purpose for, rather than the means to, free government. While the liberal conception of property has prevailed ideologically in the political imagination of modern America, the tension between the republican and liberal ideas was centrally important to the debates among the founding brothers of the new government. This tension

131. See HAYEK, THE ROAD TO SERFDOM, supra note 13, at 115 ("What our generation has forgotten is that the system of private property is the most important guarantee of freedom, not only for those who own property, but scarcely less for those who do not.").

132. HARRINGTON, supra note 83, at 11-12.

133. MAYER, supra note 73, at 76-80 (discussing Jefferson's distinction between natural rights and "adventitious" rights, or utilitarian rights which society invests in individuals to promote progress, and his view that property rights fall into the former category); Letter from James Madison to National Gazette (Mar. 29, 1792) (in THE COMPLETE MADISON 268) (Saul K. Padover ed., 1953) ("A just security to property is not afforded to that species of government under which unequal taxes oppress one species of property, and reward another."). In Federalist 10 Madison similarly warns of the "rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project." THE FEDERALIST NO. 10, supra note 22, at 136.

134. NOTES TO THE FEDERAL CONSTITUTION, at 401-06.

135. Blackstone argued that an indigent person could not be trusted with the vote. This argument was accepted by Adams, Hamilton and certain other of the Federalists, but was rejected by Madison and Jefferson. MORTON WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION 261-65 (1978).
surfaced in grand fashion in the controversy concerning proposed Federalist policies, spear-headed by Alexander Hamilton, to fund the federal debt by the sale of securities to investors. Underlying Hamilton’s economic arguments concerning the need to establish a monetary supply was the still deeper motivation that fostering investments in the new nation would, as Michael Sandel observes, “build support for the new national government by giving a wealthy and influential class of investors a financial stake in it.” This was, however, exactly what others, particularly republicans with Harringtonian apprehensions, feared. The prospect that there would be a concentration of power and a cross-pollination of influence among the wealthy and the politically powerful spurred the worst fears by those who believed that the control and influence that come with property should remain outside of government. In sum, while the Federalist vision sought to use property to protect government and government to protect property, the Whiggish conception of property as a counter-check on government was jettisoned in Federalist fiscal policy. Subsequent conceptions of property have followed the road of Locke, rather than Harrington, but the influence of property as a counterweight to government remains a legacy in our tradition that might some day be revivified.

Finally, there remains the issue concerning the significance of the right to trial by jury in early American legal thought. In contrast to contemporary liberal ideals that view the right to a trial by a jury of one’s peers as a procedural safeguard protecting the criminal defendant, the republican ideal viewed it as an opportunity for citizens to participate in government. As de Tocqueville noted after his travels in America during the 1830s:

The jury is ... above all a political institution. ... To use a jury to suppress crimes is to introduce an eminently republican element into the government. ... The jury may be an aristocratic or a democratic institution, according to the class from which the jurors are selected, but there is always a republican character in it, inasmuch as it puts the real control of affairs into the hands of the ruled, or some of them, rather than into the hands of the rulers. ... For that reason the man who is judge in criminal trial is the real master of society.

Trial by jury was one of six rights for which Jefferson sought

137. SANDEL, supra note 6, at 134.
138. DE TOCQUEVILLE, supra note 1, at 272.
incorporation in the Bill of Rights. He valued jury service for its propensity to involve normal citizens in the day-to-day operations of government. John Adams, who adhered strenuously to the older republican philosophy of mixed government, believed that juries "introduced into the executive branch of the constitution... a mixture of popular power." Indeed, in our nation's early history, juries did considerably more than act as fact-finders, as they do today; they played a role in making substantive law in a range of areas. This function began to change by the early nineteenth century with the increased specialization and instrumentalism of the law.

Nevertheless, even during the revolutionary period, the citizen's participation on the jury was not intended simply to give otherwise private citizens the experience of taking part in government, either for its intrinsic value or for its vaunted effect of sharpening the public judgment of the individual. Though these were certainly important consequences of the jury system, underlying both was the notion that the right to participate on the jury had a power-dispersing effect; the power of judgment was taken out of the hands of public officials and given to citizens. As Bernard Bailyn has observed, the jury was intended not simply to create a balance or to give popular voice, but to exert pressure "against the executive from outside, by an independent judiciary."

Is this conception of the jury liberal or republican in nature? The answer, put simply, is that it is both, and yet something more. Offsetting the power of the magistrate with the power of the public undeniably functions to limit government power, as negative liberals deem essential. At the same time, however, participation on the jury affords private citizens an occasional opportunity to take part in the experiment of self-government. Transcending this liberal/republican dichotomy of conceptions of freedom, however, is a more holistic ideal of liberty. The enterprise of limiting government and the imperative to decentralize power are both part and parcel of a deeper ideal of freedom, an idea that holds that the franchise on power must be distributed widely among those over whom that power is to be exercised, and that the counter-balancing of power with power is

139. Mayer, supra note 73, at 262.
140. Bailyn, supra note 58, at 74.
142. Id. at 172-74.
143. Bailyn, supra note 58, at 74.
essential to the preservation of liberty.

C. Subsequent Development of the Homeostatic Conception of Liberty

This section of the Article will briefly sketch the evolution of the homeostatic conception of liberty in nineteenth and twentieth century legal history and social thought. This will be a general discussion, and will elaborate the overall trend of modern liberal thought from the decline of the classical liberal model to the present. In Part III, we take up a more detailed consideration of the homeostatic model from the standpoint of recent constitutional developments.

Central to the homeostatic conception of liberty is the idea that freedom requires a kind of social balance between diverse, often competing, social interests. Madison could only conceive of this balance as equivalent to the furtherance of “justice and the general good,” a state of affairs in which the “rights of other citizens” and “the permanent and aggregate interests of the community” each have their due. The criteria, of course, are extraordinarily vague, particularly since it was not clear what balance should prevail between public and private interests. Nevertheless, subsequent developments in the liberal tradition and in the American legal order have served to provide a somewhat more determinate conception of social balance. With the rejection of the idea that there exists an overall social good that transcends the interests of the individuals who make up a community or a society, the idea of social balance could not be conceived globally, in general terms, as a product of some overall social measure. Instead, it could only be defined in particular contexts and, more specifically, from the standpoint of the individual with respect to a certain social relation. Equality of power came to be recognized as a necessary ingredient of individual liberty. The emerging litmus test for whether a rough social balance exists in a given social context could be gauged by the individual’s capacity for self-determination—for genuine freedom of choice—in that social context. While even the concept of self-determination is shot through with normative implications and requires that certain kinds

144. THE FEDERALIST 10, supra note 22, at 130.
145. See supra notes 73-75 and accompanying text (discussing the ontological collectivism that characterizes some forms of republican thought).
146. In England, the progressive reaction to earlier forms of liberalism can be traced to the 1870s and 1880s. One of the first among this line was T.H. Green, a liberal reformer who embraced the more “organic” conception of the state. Green, supra note 23. These ideas were adopted by the progressives that came to be known as the legal realists in America. See Roscoe Pound, Liberty of Contract, 18 YALE L.J. 470 (1909).
of social judgments be made, it provides a more determinate focus for a theory of freedom than did its less specific precursors.

By the time of the progressive reaction to the negative liberalism of the nineteenth century, beginning about the 1880s in England and around the turn of the century in America, this distinct ideal of liberty as self-determination began to emerge. It accepted the essentially negative liberal premise that liberty is to be equated with free choice in a range of matters, including personal relationships, employment and economic relations and religious choice, among others, but differed from the earlier liberalism with respect to the idea that non-regulation was the best way to achieve this freedom of choice. True liberty required, very simply, the partial equalization of power where changing economic relations had deprived workers and consumers of the freedom of choice characteristic of the face-to-face bargaining typical of pre-industrial contexts. This dearth of social freedom was often put in the old liberal language of "coercion" and "compulsion," but these ideas came to mean considerably more than non-interference by the state. As a progressive labor activist of the time put it: "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."

Central to the progressive instinct was the conviction that, in economic matters, the relationship between the individual and the corporation had changed dramatically, such that conditions of Madisonian pluralism no longer prevailed, if they ever had. Yet the reason for this could be cast in Madisonian terms: The problem was that the economic interests among those owning productive property were not sufficiently diverse to offset each other, particularly with respect to the employer-employee relationship. Given this conception of liberty, government intervention in a plethora of social

147. Recall that, on many negative liberal accounts, liberty is an empirical value: it is a measure of non-constraint in a host of social contexts. This positivistic conception of liberty flows from Hobbes to modern day positivists. See Ian Carter, A Measure of Freedom (1999) (for the most rigorous recent attempt to construct a value free theory of freedom). See Felix Oppenheim, Dimensions of Freedom (1961) (for the classic positivist statement on liberty).

148. See Hobhouse, supra note 36, at 63-73 (discussing the progressive reaction to the classical model); Green, supra note 23 (for an early example of this in England).

149. Sandel, supra note 6, at 189-90. Sandel has argued that this reconceptualization of earlier liberal ideas should be understood as a progressive brand of voluntarism which emphasizes autonomous individual choice in conditions of rough economic equality. Id. at 188.
and economic spheres could be justified as liberty-enhancing. In some cases, such as that of collective bargaining, the state could justify its effort to equalize conditions on the grounds that, with such limitations on traditional principles of freedom of contract, state intervention would assist workers in protecting their own autonomy. In other cases, including maximum hour and minimum wage laws, the law itself would serve to impose substantive limits on contract to offset conditions of inequality in the bargaining process. By the time of the *Lochner* era, hundreds of state and federal laws had been passed in the effort to reallocate power, usually in the context of the labor relationship. The *Lochner* era itself represents the period of high tension in constitutional history, when judges who embraced the old classical conception of freedom increasingly faced laws passed in the spirit of a distinct conception of liberty.

One important consequence of the progressive ideal of liberty was that rights did not need to be conceived as pre-political checks on the democratic process. Rights could be generated by affirmative legislation itself. In this manner, democracy did not have to be conceived as existing in tension with rights, but could be a means to advance the cause of rights. This, however, had a second consequence: It tended to break down the old positivist distinction between (pre-political) rights and (post-political) privileges. Bentham’s adamant conviction that “every law is an infraction of liberty” was replaced with the idea that positive law might be used to maximize liberty by strategically altering power relations within the domain of civil society. This, in turn, had a deeper impact upon our conception of constitutional government generally. Acceptance of the progressive conception of liberty meant that courts could no longer be viewed as the sole guardians of liberty. Indeed, the protection and furtherance of liberty became an increasingly legislative function. In the deepest sense, this undermined, to a much greater extent than is often recognized, the idea that the constitution is primarily concerned with structuring and protecting liberty, i.e.,

152. Alstyne, *supra* note 41.
153. Ronald Dworkin gives the example of the use of traffic regulations. While these interfere with the negative liberty of drivers by requiring them to stop at the light, it maximizes overall liberty by creating an orderly flow of traffic and by preventing accidents. RONALD DWORIN, TAKING RIGHTS SERIOUSLY 299 (1977).
that the courts preserve liberty against the encroachments of the legislature.

The heightened role of the legislature in structuring social liberty has important consequences for the classical liberal reliance on the public/private distinction as well. If liberty as self-determination can be hindered by the exercise of power, and if power exists in the private as well as the public realms, then the old idea that rights should apply only against the government loses its significance. An important aspect of the legal-realist critique of libertarian conceptions of freedom involved a broadside attack upon the public-private dichotomy. Realists argued that public power creates and structures private power and that private relations were largely a function of legal rules, rights and entitlements. Accordingly, the state could change and restructure these same private relations in a way to enhance individual self-determination in social and economic, as well as purely political, contexts.

Progressives were primarily concerned with social balance along what we might describe as a vertical social axis - i.e., they sought to equalize power between the individual and institutions, corporations and other larger social groups. There was little in the early progressive agenda, as such, however, that concerned balance along a horizontal social axis - i.e., balance among these large institutions and groups. Progressives rarely considered the idea that diversity and social balance were more than individual goals, that a diversity and balance among groups was necessary to individual liberty. Nor were most progressives concerned with the participatory and expressive implications of diversity. Nevertheless, in one context, at least, progressives concerned themselves with the problem of the concentration of power—in this case, economic power—and its implications for diversity. Antitrust legislation was based appropriately on an application, within the domain of economic power, of ideas similar to those Madison deployed in the political context a century earlier. The concentration of economic power in

154. By the 1920s, the legal realist movement was involved in the intellectual assault on the assumptions underlying the older form of liberalism. Thinkers such as Robert Hale, Morris Cohen and Jerome Frank assailed notions of negative rights and the public/private dichotomy. See Hale, supra note 42, at 108.; Cohen, supra note 38; ADOLF A. BEARLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

155. SANDEL, supra note 6, at 197-200. Brandeis was an exception. See id. at 211-17 (discussing the "de-centralized" version of progressivism and its commitment to a republican ideal).
one corporation dominating a particular area of the market posed the same threat to liberty of choice as did the concentration of political power. By ensuring that the market remains competitive among diverse corporations, these laws ensure that there exists a wide range of product choices, continuing innovation and improvement, and lower consumer prices - all important to liberal values of efficiency and liberty. Moreover, most important from a republican standpoint, the break-up of monopolies preserves the economic viability and independence of small business owners. (The idea that economic self-sufficiency is necessary to living a life of social and political independence, and that wage labor is a kind of economic slavery, can be traced to the republicanism of Cicero.) As monopolies were conceived as the economic equivalent of political tyranny in that each involves a centralized concentration of power, diversification and dispersion of power were the solution.

As might be expected, anti-monopolistic legislation met with concerted resistance among justices on the Supreme Court who adhered to the classical conception of liberty. Because of their lack of recognition of the dangers of economic power, their obeisance to traditional notions of absolute property rights and their fear of increased federal power in the economy, some of the same justices who took part in striking down anti-monopolistic legislation on Commerce Clause grounds in the E.C. Knight case in 1895 formed the majority in the first two significant “freedom of contract” cases. These were Allgeyer v. Louisiana in 1897 and Lochner v. New York in 1905.

Some progressives and later, communitarians, began to recognize the importance of social, as well as economic diversity. The value of
diversity as an important antidote to cultural stagnation and individual freedom, was first systematically connected to the liberal tradition by John Stuart Mill, in his essay *On Liberty.* Diversity is intimately tied to individuality, but in this case, the causal order is reversed. A diversity of individuals makes for a diverse society:

It is not by wearing down into uniformity that which is individual in themselves, but by cultivating it and calling it forth, within the limits imposed by the rights and interests of others, that human beings become a noble and beautiful object of contemplation, and as the works partake the character of those who do them, by the same process human life also becomes rich, diversified and animating. There is a greater fullness of life about his own existence, and when there is more life in the units, there is more in the mass which is composed of them.

Mill claimed that the "despotism of custom" must be overcome, in the name of liberty and progress, by a "plurality of paths" which lead, ultimately, to the "many-sided development" characteristic of modern culture. Liberty, progress and individual happiness each required that individuals be free to live their lives "according to their inmost nature." Diversity was ultimately an individual value, while diversity in ways of life was a by-product - though an important by-product - of this same value.

Nevertheless, in the subsequent development of our ideals of social diversity - particularly diversity among sub-cultures and relatively autonomous groups within society - it has not been mainstream liberalism, primarily, but a blend of liberal and communitarian ideas that have nurtured the languishing tradition of social diversity at the level of groups. As we shall see, perhaps the most profound tension within contemporary liberal theory is the conflict between that species of liberalism that protects groups, and the more modern variant, which emphasizes individual rights. One commentator has called this the conflict between the notion that there should exist "diversity between" groups and the idea that holds that "diversity within" groups is preferable. This tension is made all

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164. *Id.*
166. *Id.* at 138.
the more poignant by the likelihood that each species of liberty is itself dependent upon the other. Part III returns to this problem.

III. The Homeostatic Conception of Liberty in Modern Constitutional Law

The homeostatic conception of the relationship between liberty, power and diversity is powerfully evident in recent constitutional developments. Part III briefly explores four important themes that evince a transition from a classical liberal conception of the relationship among state, society and the individual to that of the homeostatic ideal: First, it examines the partial reconceptualization of the public/private distinction in modern constitutional law. Second, it discusses the relationship between the liberal ethic of privacy and personal identity. Third, it will examine the right of association as a structural right that serves to counter balance competing centers of social power. Finally, it looks at the conflict between the right of association, on one hand, and the individual rights of equality and autonomy.

A. Rethinking the Meaning of the Public/Private Distinction

The state action doctrine in constitutional law is the constitutional corollary of the classical liberal idea that negative rights can only be violated by government, rather than by private actors. In virtue of the more recent understanding that the state does not possess a monopoly on power, and that non-governmental institutions and organizations often wield a similar or greater degree of power over the lives of individuals than did the state at various times in the past, it is appropriate that individual rights should be protected against concentrations of social power in contexts where the individual is faced with private power in its Leviathan-like implications. Accordingly, we should expect that the state action doctrine will not always limit the application of constitutional rights - i.e., that these rights may sometimes be applied as against private

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169. See, e.g., The Civil Rights Cases, 109 U.S. 3 (1883) (holding that the Fourteenth Amendment does not authorize the federal government to protect the rights of individuals from purported invasion by other private parties). As a recent case has stated, The Civil Rights Cases draw a fundamental line between "deprivation by the state . . . and private conduct." Jackson v. Metro. Edison Co., 419 U.S. 345, 349 (1974).
parties.

Only one provision in the entire Constitution, the Thirteenth Amendment, was intended to protect rights from violations by private parties. The Thirteenth Amendment outlaws slavery and involuntary servitude within the United States and, in doing so, specifically subjects private conduct to constitutional limitations. Nevertheless, more recent cases have protected various constitutional rights against infringement by private parties in various other situations. One context in which this has occurred is in cases where private parties fulfill a "public function." In *Marsh v. Alabama*, perhaps the most famous of these cases, the Court held that a private, company-owned town could not forbid a person from distributing religious literature on the streets of the town. The company sought to have Marsh prosecuted under a state law for trespassing. Marsh appealed his conviction on free speech and religion grounds, arguing that the town had violated these constitutionally protected rights. The State argued that these rights applied only against government actors and not against a privately owned town. The Court dismissed the State's (and the company's) argument that they were enforcing a private property right, concluding that the "corporation's property interests [do not] settle the question." Rather, the company town fulfilled all of the basic functions of a public town and, in Justice Black's opinion, was acting as the functional equivalent of a city.

The *Marsh* principle has been applied in a variety of other contexts where private conduct assumes a public function. For example, membership in a political party has been deemed "public" where it is necessary to take part in a primary, as the Court ruled in *Smith v. Allwright*. In this case, it was not the Party's property rights, but rather its associational rights that formed the basis of the group's claims. What is centrally important for our purposes here is the holding that those who had been disenfranchised were permitted to bring a claim against the party under the Fifteenth Amendment because of the close connection between the Democratic Party and

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170. The *Civil Rights Cases* recognized that the Thirteenth Amendment was "primary and direct in its character; for the Amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." 109 U.S. at 19.
171. 326 U.S. 501 (1946)
172. *Id.* at 505.
the State. 174

More recently, in *Amalgamated Food Employees Union v. Logan Valley Plaza*, 175 shopping centers were held to fulfill the same public function as the company town in *Marsh*. The Court held that owners of a shopping center could not prevent the peaceful labor picketing of a supermarket within the shopping center. Thus, First Amendment freedom of expression was protected against the private owners of the shopping center. A subsequent case, however, limited the scope of this ruling dramatically. In *Lloyd Corp. v. Tanner*, 176 the Court undercut the *Logan Valley* ruling in upholding the denial of access to a shopping center by peaceful Vietnam war protesters. The Court distinguished *Logan Valley* by observing that the subject of the picketing in the earlier case directly involved a supermarket within the shopping center while, in *Lloyd*, protesters sought access to the shopping center for expressive purposes unrelated to the shopping center itself. In other words, the Court required a justificatory nexus between the content of the speech and the application of constitutional principles to non-state actors.

In some cases, the Court's reasoning that a particular exercise of power is "public" in the state action context is predicated upon a finding that the state has delegated authority to the private party, 177 or that it has judicially ratified or enforced private action, 178 or that it has licensed or subsidized private conduct. 179 Indeed, *Marsh* is sometimes

174. See also *Terry v. Adams*, 345 U.S. 461 (1953) (extending the application of this ruling to the Democratic Jaybirds, an influential organization that had no formal legal connection to the state, but whose recommendations were highly influential in the selection of party candidates).

175. 391 U.S. 308 (1968).


177. See *Flagg Bros. v. Brooks*, 436 U.S. 149, 168-79 (1978) (Stevens, J., dissenting) (arguing that tenant was entitled to due process before the sale of her private property by landlord in virtue of the state's authorization, under its version of the U.C.C., of "self-help" by the landlord). Central to the controversy between the majority and dissent was whether the state had delegated its power or merely recognized a common law right of the landlord.


179. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (subjecting restaurant located within a building subsidized by the state to Equal Protection attack for racial discrimination); *Pub. Utils. Comm'n v. Pollak*, 343 U.S. 451 (1952) (private transportation corporation that operates subject to state licensing and regulation is subject to due process restrictions); *but see Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (holding that the provision of a liquor license to a Moose lodge was not sufficient to subject the lodge to an Equal Protection attack for discriminating against blacks).
read in this limited way, as an instance of delegation of state power.\textsuperscript{180} When interpreted in this fashion, it is possible to resist the conclusion that the Court has recognized the need for protection of constitutional rights against private interference. Yet the deepest import of \textit{Marsh} is that the purported "private" use of property may become "public" for constitutional purposes when the use of property assumes some or many of the functional characteristics of a public forum. As Justice Black emphatically stated:

[T]he corporation's property interests [do not] settle the question ... [Property rights do] not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.\textsuperscript{181}

The \textit{Logan Valley} case is even more explicit in this respect, since there was no argument that the state had subsidized or had delegated its power to the shopping center.\textsuperscript{182}

The homeostatic conception of the distinction between public and private is distinguished from the earlier model of classical liberalism not only by its rejection of the equivalence of public power with the state, but in reconceiving rights as effectuating a kind of social balance that is measured from the perspective of individual self-determination. In weighing and evaluating public power (both in its political and socioeconomic forms) and contrasting it with private rights, there are four distinct factors that appear to play an important role in this balancing process.

First, the Court must evaluate the \textit{nature} of the right that is the predicate for a particular constitutional claim. For example, it must consider what function the right is supposed to have within the social system and, more specifically, how it functions to further individual self-determination. As we will see in the next section, while all rights are important in preserving liberty as self-determination, some rights protect the individual directly by shielding him from power along

\textsuperscript{180} To some extent, the decision may be read to "stand for the proposition that there are limits on the extent to which the state may escape constitutional restraints by 'delegating' to private parties functions traditionally performed by the state." \textit{STONE ET AL., CONSTITUTIONAL LAW} 1748 (3d ed. 1996).


\textsuperscript{182} It might be argued that the state has provided support through zoning or other routine administrative regulations, but this does not reach the level of state support needed to qualify as affirmative state involvement or encouragement of the activity. See \textit{Moose Lodge No. 7}, 407 U.S. 163 (state provisions of liquor license not sufficient to subject private group to constitutional attack).
what we have called the vertical social axis. Other rights function more indirectly, by preserving social diversity along the horizontal axis. In some cases, the use of private power will be less tolerable when it affects the individual directly than when it threatens to upset, at least to some degree, the social balance between competing social institutions.

Second, the level of protection accorded certain rights is often assessed in light of the accumulation of social power by the right-holder. In other words, parties that have attained a certain level of social power may be accorded less protection in special circumstances. As particular uses have a greater affect on others around them, these uses may become "public" for certain purposes.

Third, since one function of rights is to preserve and ensure individual self-determination, the Court often appears to evaluate rights from what we might call the standpoint of the "locus of personal identity." In other words, if we view various human activities as lying along a radius emanating outward from the most intimate expressions of the self to those relatively less connected to our innermost personal identity, the Court appears to protect more stringently those rights connected to choices and actions that fall more closely to the center of our concept of selfhood. In this respect, the "privacy" of an action will be a function of its proximity to the locus of personal identity. Section III.C. will examine further the need to evaluate actions for their effects from the standpoint of the locus of personal identity.

Finally, the Court must consider the extent to which prevailing social conditions make the exercise of a right possible or meaningful. In some cases, this may require in part an assessment of whether social conditions exist that permit alternative means of expression of the right.

The determination that a particular use or activity is public is a function of one or more of these four factors. In Marsh, the first three factors played an important role in the Court's reasoning. As indicated earlier, the second factor is predominant because the town possessed many of the indicia of public sovereignty on a small scale. It possessed the best of both worlds, public and private, in that it enforced a system of law-like rules by which the town was governed, yet it also determined the rent paid by workers housed in the town, ran company stores from which employees purchased necessities and, of course, actually employed the workers. Thus, the company had a large degree of private economic power over the lives of workers and their families, even as it exercised some of the prerogatives of public
power. In various important ways, the town had more power than either public authorities or private property owners.

Nevertheless, the first and third factors were important as well. The right to the free exercise of religion, and to freedom of speech in matters of religion, involve rights most closely connected to the values of individualism. Consider, for example, that the town would most certainly not have been held to the standard of a state actor with respect to the Establishment Clause: If the company had erected an Episcopal Church in the center of town, the Court would not have determined that there had been a constitutional violation notwithstanding the social power exercised by the company (The Establishment Clause, as we will argue below, is a structural provision not as directly connected to the value of self-determination as the Free Exercise and Speech clauses). This indicates that the nature of the rights involved in Marsh—the freedom of religion and of expression—and their close nexus to personal self-determination, were also vitally important.

In Logan Valley, the first, third and fourth factors were predominant, though a consideration of the second may have played a role as well. Because the speech involved concerned the labor practices by a supermarket located within the shopping center, there was a close connection between the subject of the speech and the lives of the workers who peacefully picketed the store. Moreover, as we shall see in the next section, because an important function of the right of free expression is to "talk back" to the institution that is the subject of the speech, it was important that the demonstration take place in the vicinity of the market. Finally, the lack of available and meaningful alternative channels of expression - i.e., the fact that, in modern society, shopping malls serve as the functional equivalent of the commons or town square - required access to these places generally. The first and third factors are also arguably less weighty in the Lloyd case, where protestors were not "talking back" directly to those who were the object of their speech. While the Court undervalued, in the author's opinion, the importance of the fourth factor in reaching its decision in Lloyd, the distinction between the Logan Valley and Lloyd decisions can be explained by reference to the differences between these factors.

Finally, this approach to rights and their relationship to the public/private distinction assist us in clearing up other constitutional anomalies in the state action area. For example, in Shelly v.
Kraemer, the Court held that a private, racially discriminatory restrictive covenant became "public," and subject to constitutional attack on Equal Protection grounds, upon enforcement by the state courts. Critics responded that this would subject potentially every manner of private activity to constitutional attack in the event of court enforcement. For example, Robert Bork described a hypothetical situation in which a homeowner ejects a guest for his political views. If the guest were to sue and a court were to uphold the property owner's right to eject the guest, Shelley would appear to require that this ruling itself be subject to attack under the First Amendment. In other words, private guests would have to be accorded First Amendment protection against the speech-limiting effects of the political preferences of homeowners. This case is clearly distinguishable from Shelley, however, because of the greater intimacy of the homeowner's rights in the sanctity of his own home vis a vis that of the parties to the restrictive covenant in Shelley, and the almost unlimited availability of alternative means of expression on a small scale open to the ejected guest.

The four factors just discussed are interrelated in a variety of ways. In the following two sections, we embark on a general consideration of issues concerning the recognition and treatment of rights along two dimensions. Recall that in Part Two of the Article, liberty was described as a function of power relations along two distinct axes. The first, vertical axis represents the relationship between the individual and the particular political and social institutions—the state, corporations, private groups and associations, etc. - with which he interacts and through which he takes part in government, society and the economy. The second, horizontal axis represents the relationship among these various groups and organizations. Accordingly, rights have two general functions and should be understood to operate along both of these axes, respectively. The first function of rights comes closest to the negative liberal ideal, as evidenced both in classical and contemporary forms of liberalism. They protect the individual in the pursuit of a range of

183. 334 U.S. 1 (1948).
185. This may still not be enough to distinguish Bork's example from Shelley, however. The private home seller does not differ materially from the private home owner in Shelley, nor do the positions of the plaintiffs vary substantially. Thus, the criticism of Shelley - that it threatens to make "public" every exercise of private choice when ratified by the Court - is not easily refuted.
186. BORK, supra note 184 and accompanying text.
personal interests and activities from various forms of social and political invasion. In sum, these rights function along the vertical axis that defines the relationship between individual and group. The second function of rights serves a structural purpose. Rights are invoked in this sense to preserve a climate of social diversity along the horizontal axis of social power. These rights protect the individual indirectly; they do not serve as "shields" to social power but as empowering devices that permit the individual to invoke various protections in the name of preserving a counterbalance of social power.

The following section examines the vertical axis as it relates to the notion of self-determination, personal identity and social power. In sections III.C.-E., we take up a consideration of problems concerning the horizontal axis. This will involve a discussion of the role of rights in their structural function as a means of ensuring social pluralism or diversity.

B. Privacy, Self-Determination and the Locus of Personal Identity

This section begins with what is perhaps one of the most difficult problems to vex attempts to justify liberalism. This problem transects and yet, transcends, and attempts to distinguish the public and private spheres of activity. Why may a private homeowner stand on his property rights to eject the unwanted guest for expression of views he finds objectionable while the owner of the shopping center may not be permitted to do so under certain circumstances? Why, pursuant to their rights of privacy and association, are private parties free to discriminate on the basis of race in the choice of their marital partners while business and government are prohibited from using race in hiring and related decisions? Why are small family-operated businesses exempt from many of the statutory requirements incumbent upon larger firms?

The answer to these kinds of issues lies in the central importance, within the liberal tradition, of the idea that there should exist either protection for a core self\textsuperscript{187} or, somewhat less substantively, a "locus of personal identity" that represents the innermost aspects of every individual's self-conception. The closer we move to the center of the locus of personal identity, the more proximate the nexus to issues

involving individual self-determination. As the Court has stated in a
discussion concerning the protection afforded intimate relationships:

the constitutional shelter afforded such relationships reflects
the realization that individuals draw much of their emotional
enrichment from close ties with others. Protecting these
relationships from unwarranted state interference therefore
safeguards the ability independently to define one's identity
that is central to any concept of liberty.\textsuperscript{188}

Associational values are necessary to the individual's capacity to
define, even as they are equally important in giving the individual a
means of communication with those beyond the group.

The value of privacy has played a central role in modern liberal
ideals precisely because they reflect our intuitive ideas regarding a
continuum that runs from the most intimate aspects of our self-
conception to those undertakings that are less connected to personal
identity and the values of privacy. Indeed, we put such a high priority
on self-determination as a manifestation of one's personal identity
that we protect private choices even when they appear to conflict with
the public principles we recognize as morally binding in other
contexts (e.g., racially discriminatory romantic preferences). At the
other end of the spectrum, certain uses and activities that are in some
respects protected as private property or associations, but that fall
outside of this locus of personal identity, attain significance as public
in nature when they become "public" either in the sense that they
embody some of the vestiges of political sovereignty or represent a
given concentration of social power, or when, under prevailing social
conditions, they function as a channel or conduit of access to the
expression of rights having public significance.

The relationship between privacy and self-determination is a
complex one. It is noteworthy, for example, that many decisions of
the Supreme Court recognize a close relationship between privacy
and other rights which are, themselves, important to self-
determination. Indeed, sometimes these rights are nearly
indistinguishable from privacy issues. For example, in\textit{Wisconsin v.
Yoder}, the Court recognized the rights of Amish families to take their
children out of public schools after the eighth grade, two years before
the state-mandated minimum for the education of children, on
grounds of free exercise of religion and the privacy to raise one's
children as one deems fit.\textsuperscript{189} Privacy is sometimes closely connected

\begin{footnotesize}
\textsuperscript{189} 406 U.S. 205 (1972).
\end{footnotesize}
with associational interests, particularly in the context of claims involving "intimate association" or family interests, as in *Moore v. East Cleveland.* Similarly, privacy issues are deeply intertwined with the right to marry. Finally, *Skinner v. Oklahoma* struck down a state sterilization statute on grounds that it violated a right to procreate, but subsequent cases regard *Skinner* as a forerunner to the privacy right. Indeed, so much has the privacy idea infused contemporary conceptions of liberty, that recent substantive due process jurisprudence is virtually indistinguishable from a general right to privacy.

The deep connection between privacy, self-determination and the locus of personal identity is evident in privacy right protection of a range of intimate human activities including sexual intimacy within marriage, procreation, abortion, the right of families to live together and the right to marry, among others. The Court has also fallen short of full protection of this right, however, in a number of other cases. For example, in *Bowers v. Hardwick,* decided in 1986, the Court narrowly upheld a state law that criminalized unconventional sexual acts that were private and consensual. Four years later, the Court upheld a state’s efforts to prevent the removal of a patient in a permanent vegetative state from life support, though the Court did incidentally recognize the existence of such a right.

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190. See 431 U.S. 494 (1977) (striking a local ordinance that had the effect of preventing various members of an extended family from living together). While the majority treats this as a due process claim related to privacy, the dissent characterizes it as an associational claim. Cases involving the right of familial autonomy are presaged by two early cases, *Meyer v. Nebraska,* 262 U.S. 390 (1923) (striking a law prohibiting the teaching of foreign languages) and *Pierce v. Soc’y of Sisters,* 268 U.S. 510 (1925) (striking a law prohibiting students from attending private schools). These cases, too, use the Due Process clause to closely intertwine privacy-like interests with associational concerns.

191. See, e.g., *Zablocki v. Redhail,* 434 U.S. 374 (1978) (fundamental interest in marriage required striking a law that required that applicant for marriage license have no unpaid child support payments).


193. See ELLEN ALDERMAN & CAROLINE KENNEDY, THE RIGHT TO PRIVACY (1997) (comparing the various strands of our conceptions of privacy in tort law, constitutional law and other areas).


the Court held that there is no constitutional right of a terminally ill patient to enlist the services of a third party for purposes to bring about his death. These latter cases evince the extent to which even liberals have been reluctant to embrace a full-bodied conception of self-determination. For, if self-determination means anything, it should encompass the idea that individuals have plenary control over acts involving sexual intimacy and those that concern the most fundamental choices regarding when, and under what circumstances, to end one's own life. While the Supreme Court has never heard other such challenges, any coherent conception of the right of self-determination should also include choices involving collaborative reproduction, those involving bilaterally consensual sexual decisions, even where they may involve a commercial transaction, and the right to use specified mind-altering substances in the context of religious ceremonies.

These conclusions may seen radical to some, but they are certainly far less radical, in our own time, than was the contention, at the turn of the seventeenth century, that each individual should possess full religious liberty to worship the faith of his choice or, at the turn of the eighteenth century, that citizens possess a right openly to criticize their rulers or, at the turn of the nineteenth century, that government should guarantee full political equality to African Americans or, at the turn of the twentieth century, that there should exist an inalienable right to sexual intimacy, or even simply to use contraception. Modern or "progressive" liberals have often joined with conservatives in accepting broad limitations on individual liberty, though for quite distinct reasons. Where conservatives are typically motivated by moralistic concerns, liberals are moved by

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197. State supreme courts have held that the right to procreate does not include the right to use a surrogate mother contract. In re Baby M., 539 A.2d 810 (1988). See John Lawrence Hill, What Does It Mean To Be A Parent? The Claims of Biology as the Basis of Parental Rights, 66 N.Y.U. L. REV. 353 (1991) (arguing that such a right should be recognized.)

198. Employment Div., Dept. of Human Res. v. Smith, 494 U.S. 892 (1990) (the Court held that the use of peyote in a Native American religious ritual was not protected by the Free Exercise clause of the First Amendment. Certainly, if an exemption was not permitted in this case, the Court would not recognize a more general privacy right to use such substances that would apply to all.).
paternalistic purposes. In their understandable zeal to protect the liberty of the individual against the external encroachments of various social and political forces, modern liberals too often have sought to protect the individual from the claimed inner effects of social influence within the inner sanctum of his own psychic processes. In seeking to equalize, to some extent, the social power of the individual vis à vis the group, modern liberals too readily find the residue of group conditioning, rather than evidence of reasoned decision-making, in the choices of the individual. In sum, where modern conservatives do not trust the will of the agent, modern liberals put little stock in his reason.

Indeed, one of the most striking developments in the trajectory of liberal thought from its classical to its contemporary variants is the movement, from moralistic to paternalistic modes of justification, with respect to the increasing number of laws that limit private and consensual activity. Where, during the nineteenth and early twentieth centuries, laws prohibiting contraception, abortion, fornication, adultery, prostitution, polygamy, suicide, drug use, gambling and a variety of other activities were predicated upon a conception of harm to the community or to the moral tenor of the social order, today they are founded on an almost pious concern for the welfare of the participants themselves.

In sum, in contrast to the salutary efforts of progressives to equalize power relations between

199. Following John Stuart Mill, liberals often distinguish the motivation for various laws into three categories. Harm-based laws seek to prevent a direct harm to third parties. One person’s liberty is limited to protect another. Paternalistic laws seek to prevent harm to the participants in the proscribed activity. Their freedom is limited for their own welfare. Moralistic concerns are those that prohibit certain behavior because of the sentiment on the part of the community that a particular act is wrongful, even if an assignable harm to particular agents does not exist. See Feinberg, supra note 45 (discussing philosophical justification of paternalism); Lord Patrick Devlin, The Enforcement of Morals (1962) (for a classic conservative defense of morals legislation). See, e.g., Richard A. Wasserstrom, Morality and the Law (1971) (for various readings on the problem of legal moralism).

200. See, e.g., Sunstein, supra note 44.

201. It is striking that this attitude has influenced appellate litigation in these areas. For example, in Roe v. Wade, 410 U.S. 113 (1973), the state argued that there were two state interests - protecting the life of the fetus and protecting the health and life of the mother. The first is a harm-based justification (assuming the moral status of the fetus as a person) and the second is paternalistic. Attorneys for the State made a conscious decision not to present a third interest—the purported immorality of abortion or its adoption as a means “to discourage illicit sexual conduct.” Id. at 130. Similarly, where polygamy was condemned as a moral abomination a century ago, see Reynolds v. United States, 98 U.S. 145 (1878) (upholding bigamy conviction against Free Exercise attack), it is today attacked by conservatives, feminists and others as being exploitative of women.
social and economic institutions and individuals, the dark side of modern progressivism has been its willingness to limit individual liberty in the name of individual security or well-being. Writing in the 1830s, half a century before the rise of modern progressivism, de Tocqueville saw clearly the consequences of the drift toward centralization and paternalism. He wrote:

But if a despotism should be established among the democratic nations of our day, it . . . would be more widespread and milder; it would degrade men rather than torment them . . . . Such words as despotism and tyranny do not fit . . . . Over [these diminished men] stands an immense, protective power which is alone responsible for securing their enjoyment and watching over their fate. That power is absolute, thoughtful of detail, orderly, provident and gentle. It would resemble parental authority if, father-like, it tried to prepare its charges for a man's life, but on the contrary, it tries to keep them in perpetual childhood . . . . It gladly works for their happiness but wants to be the sole agent and judge of it . . . . Thus, it daily makes the exercise of free choice less useful and rare, restricts the activity of free will within a narrower compass and, little by little, robs each citizen of the proper use of his own faculties.202

de Tocqueville observed that this is achieved when government "covers the whole of social life with a network of petty, complicated rules that are both minute and uniform."203 This modern form of soft despotism has profound implications for our conception of self-determination in that it "does not break men's will, but softens, bends and guides it" until "each nation is no more than a flock of timid and hardworking animals with the government as its shepherd."204

To put the point from the perspective of a philosophical conception of individuality, if the central value of liberalism is the protection of individualism, in its modern and life-affirming sense, we must recognize, in a juridical sense, a loosely circumscribed sphere of personal identity from which choices and acts emanate. It is this sphere that we surround and protect with privacy-like rights and it is this sphere that we empower when we seek, in a variety of ways, to equalize the social footing of the individual vis a vis the group. Taken to its inevitable extreme, the tendency of modern liberal thought, under the influence of an exaggerated sense of the omnipotence of the social, explains away human choices and acts as manifestations of external influence until what we have traditionally understood as the

202. de TOCQUEVILLE, supra note 1, at 691-92.
203. Id. at 692.
204. Id.
locus of personal identity disappears into a point. In this event, nothing is left of the person in any substantive, morally or legally recognizable sense. Under paternalistic regimes, the self truly does become, as Jean-Paul Sartre characterized it, "a cold wind blowing from nowhere."\(^{205}\)

With nothing left of the idea of human individuality in its active sense - as the reflective originator of action—the central animating force of liberalism can no longer be sustained.

**C. Social Pluralism and the Right of Association as a Structural Right**

We now arrive at what is the central tension in modern liberal theory: Self-determination requires social diversity, and social diversity requires self-determination. Without a plural society, with its wonderful bounty of options, choices, and modes of individual self-manifestation, individual liberty remains an impoverished and unrealized ideal. At the same time, to the extent that the individual is not free to live and express his identity in his choices, actions and life pursuits, social diversity is hobbled by the limiting range of available modes of personal expression. The two ideals are symbiotic in their relationship. Indeed, the value of privacy tells only half the tale of individual autonomy or self-determination, and the passive half at that. The self must be protected from the great leveling force of social influences that threaten to submerge it, but an excessive emphasis on privacy obscures the other side of self-determination: the expressive and active side. As the poet Dante observed seven centuries ago:

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\text{[I]n every human action what is primarily intended by the doer, whether he acts from natural necessity or out of free will, is the disclosure of his own image. Hence it comes about that every doer, in so far as he does, takes delight in doing, since everything that is desires its own being, and since in action the being of the doer is somehow intensified, delight necessarily follows. Thus, nothing acts unless [by acting] it makes patent its latent self.}^{206}
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If privacy protects the nascent or developing self from potentially debilitating external influence, then its counterpart is the capacity to express oneself, to project one’s identity, in the external world.

In liberal societies, persons express themselves, among other ways, through involvement in groups. Indeed, liberal societies are

\(^{205}\) Jean-Paul Sartre, Being and Nothingness (Hazel E. Barnes trans., 1956).

\(^{206}\) Quoted in Arendt, supra note 56, at 175.
distinguished from totalitarian regimes, including some of the more severe forms of republicanism, by its embrace of a right of association that facilitates social pluralism. The right of association functions both to protect self-determination, by providing a social channel for meaningful individual expression, but also in the second way in which rights operate, as a structural safeguard against the state, and against other social groups. It is here that we return to the theme of Part One of the Article. The breakdown of negative and positive conceptions of liberty means not only that individual liberty is uniquely distinct from liberty as non-interference by government, on one hand, and the right to take part in self-government, on the other. The first, negative, ideal retains its symbolic value for Americans, but it rarely reflected legal reality, and the second, positive, ideal was never even possible in a large scale society - at least as it was traditionally championed by republicans. Nevertheless, it is in virtue of his connection with smaller groups and associations that the individual today can experience liberty in its positive aspect. As a member of a group, in making policy or in exercising personal judgment and discretion over a range of matters, he is closer to power, even though he exercises discretion over only a small sphere of activity. At the same time, overall social power is, as Madison said, "broken into so many parts, classes and interests of citizens, that the rights of individuals, or of the minority, will be in little danger of interested combinations of the majority."

The greater autonomy we accord such groups, the greater the sphere of self-government within the group. Moreover, the greater the number of groups, the more unique and distinct each group is likely to be, offering in turn, a greater range of possible choices to each individual. The greater the number of groups, the smaller they are likely to be, proportionally, offering the individual a relatively greater quantum of positive liberty, within the confines of each group, though over a relatively more circumscribed area of influence. Thus, associational interests advance both the values of negative and positive liberty. Finally, the greater the number of diverse groups, the less likely will the government need to intervene to reestablish a lost

207. See ROUSSEAU, supra note 64, at 204 (civil associations are to be discouraged, if not banned, in the republic, so that there shall be no mediation between individual and state).

208. U.S. CONST. amend I: "Congress shall make no law... abridging... the right of the people peaceably to assemble."

209. THE FEDERALIST No. 51, supra note 22, at 358.
social balance that occurs when too much power is concentrated in one group or in one particular sector of society. The homeostatic conception of liberty—both as it applies to individual self-determination and to the rights of groups—thrives on diversity.

Thus, the right of association does not operate primarily on the vertical axis of social power—the dimension that relates the individual to larger groups—as do such rights as the privacy right, the right to the free exercise of religion or the right to freedom of expression. These function largely negatively, as we have seen, to protect the individual from unwanted social influence. In contrast, the right of association resembles the Establishment clause and a particular reading of the Press clause discussed earlier. All three of these clauses are structural in nature in that they serve to prevent the concentration of power in the State, rather than civil society, and do so by preventing both the capture of private interests by the State, and the capture of the State by private interests. In other words, structural rights protect social pluralism by preventing the state from adopting one group as its own, investing it with the indicia of state power and eliminating other competing groups. The Establishment clause does this in an obvious way, by proscribing state involvement in religion. The Press clause ensures that the state does not possess a monopoly on information and influence. And the right of association ensures social diversity from the “ground up” by ensuring that individuals have meaningful input into groups, and by guaranteeing the integrity of groups from state interference. Each of these rights preserves a proper distribution of power laterally, among groups, along what we have described as the horizontal axis of social power.

The right of association can be infringed and undermined in any

210. The Supreme Court has clearly distinguished two types of association, the intimate association that evokes notions of privacy, and that operates as a negative value protecting individuals from social interference, and expressive associations. See Roberts v. U.S. Jaycees, 468 U.S. 609, 617-18 (1904). The latter are protected under the First Amendment as a necessary accompaniment to the effective protection of freedom of speech. It is, thus, this second type of association that is described here as a structural safeguard.

211. See supra notes 124-26 and accompanying text (discussing this structural conception of the right to freedom of the press).

212. One important difference between the Establishment clause and the Press clause is that, while the former prohibits the state from any involvement with religion altogether, the Press clause does not prohibit the State from establishing a newspaper, for example. The reason for the difference, however, is the result of important historic problems with state involvement in religion, whereas the state has never been a threat to the diversity of news sources as such.
of a variety of ways. In addition to outright proscription of such groups, government can withhold privileges or affirmatively penalize individuals for their involvement in unpopular groups or expressions of similar opinion. The state can attempt to require disclosure of private membership lists or those of financial supporters. Finally, it can seek to interfere with the internal organization of groups, particularly by influencing its membership policies. In a sense, the latter method is the most subversive of such interferences, since it undermines group autonomy even while purporting to expand the membership of the group.

The protection of group rights through the right of association ensures all of the traditional values associated with social pluralism. It prevents the concentration of power in the state, both by breaking up combinations of interests and by fulfilling essential social functions, preventing expanded state involvement in various aspects of our lives. In both ways, it serves the negative value of limiting government. Moreover, social pluralism facilitates the expression of positive liberty by fostering individual involvement in the sphere of activities embraced by various groups. It further enriches individual choice by giving persons a diverse assortment of channels of social expression, and it serves the liberal impulse to innovation, experimentation and social progress by permitting social comparisons between different life experiments or modes of individual existence. Still, as we will see in the next section, even with all it has to offer, the legal protection of social pluralism is on the wane today, the victim of its inevitable conflict with the central value of progressive liberalism - equality.

D. Diversity versus Equality: The Problem of Getting In

The deepest conflict in contemporary liberalism is that of the conflict between individual and group rights or, more specifically,
between the values of equality and autonomy, on one hand, and those of association, on the other. In this and the last section of the Article, we will focus briefly on two such problems, respectively. We will refer to these as “the problem of getting in” and “the problem of getting out.” In some of the most significant decisions over the course of the past thirty years, and with profound implications for the future of liberalism, the Supreme Court has had to address these issues.

The problem of “getting in” involves cases where associations may wish to exclude individuals from group membership for a variety of reasons that are repugnant to our commitments to equality, including considerations of race, gender and sexual orientation. One of the most important of recent cases, in this respect, is Roberts v U.S. Jaycees. The Jaycees were a nonprofit organization dedicated to assisting young men, ages 18 to 35, in pursuing careers in business by providing them with informal business “connections” and other opportunities for becoming involved in the business community. Older men and women were permitted membership as associate members, but could not vote on association policies or hold office. Women members brought suit under a state civil rights statute which prohibited discrimination on the basis of gender. The Jaycees responded by asserting their associational rights under the First Amendment. Their argument, in essence, was that the state should have no role in determining the membership of a private association—i.e., that the group’s self-determination of membership was the quintessence of the right of association. The Court ruled that, although the statute infringed upon the group’s internal organization, the state interest in promoting gender equality met the requisites of strict scrutiny and upheld the law. A concurring opinion by Justice O’Connor went further and held that the Jaycees were not an expressive association at all for purposes of the First Amendment, and upheld the law on rational basis grounds.

Perhaps the central irony of the case is that the Jaycees had long admitted women as associate members. Women members had the benefit of the “goods and services” - the employment connections and the financial opportunities - which the Court claimed could only be advanced by the statute. Thus, the Court was “crying wolf” in insisting upon the removal of “barriers to economic advancement and

218. Id. at 623.
political and social integration,” since women members were denied only the privileges of holding office within the group and voting on association policies. The irony consists in the fact that, if the purpose of the association had been to advocate men’s causes in some way that would have required the total exclusion of women, the Court’s reasoning appears to indicate that they would have been protected. It was only because the group sought a reasonable middle-ground that they were subjected to constitutional attack. This approach has the affect of forcing groups into either one of two directions: they either accept the full embrace of state regulation by being recognized as a public accommodation, or they are driven to the fringe, where the relative severity of their “message” permits them to insulate themselves, even as their influence is minimized. Nazis may reject Zionists, and the Ku Klux Klan black applicants (who may believe they can reform the group internally), but any group seeking a modicum of social influence is driven in the direction of adopting moderate policies which, in virtue of this moderation, open them to the reach of the Roberts rationale—the claim that extending membership will not alter their (moderate) message. The Court has followed the Roberts ruling in a number of other cases involving gender discrimination, yet has declined to follow the rule in cases involving discrimination on the basis of sexual orientation.

The results often turn on the Court’s assessment as to whether requiring the group to accept the outsiders will alter its central message for expressive purposes. For example, in the recent Boy Scout case it held that requiring the admission of gay scoutmasters would alter the fundamental message and nature of the Scouts. Yet,

220. Id. at 626.

221. The Court stated that, “There is no basis in the record for concluding that the admission of women as full voting members will impede the organization’s ability to engage in these protected activities.” Id. at 627. Apparently, if inclusion of women would have had this effect, in the Court’s opinion, they would have had the shelter of the First Amendment.


224. 530 U.S. at 657-58.
surely only the group itself can determine what its nature, purpose and message is supposed to be. To permit the Court to decide for any group what its nature of message must be is to permit the government to define or redefine any group to which the principle applies in or out of existence as a self-governing entity. Moreover, the apparently inconsistent nature of the rulings provokes skepticism regarding the neutrality of the Court’s value commitments - i.e., that groups are free to reject gays and lesbians, but not women.

The *Roberts* decision reflects the extent to which the power of the modern state has expanded apace with contemporary conceptions of equality, while the power of groups has proportionally been diminished. Yet, it is the structural significance of the decision that is most troubling. From a structural standpoint, the decision undermines the autonomy of groups not only in the obvious way—by infringing upon the internal membership and policies of associations—but in a more profound, if indirect way as well. First, the decision operates as a “quick fix” for the claims of outsiders, thereby discouraging the formation of new and competing groups - i.e., groups that function to give women the same opportunities that the Jaycees gave men. The long-term effect of applying these kinds of public accommodations laws to private groups and association, even when they are as large as the Jaycees, is the reduction in the particularity of groups. Such laws break down associational boundaries by fostering “diversity within” groups, as opposed to “diversity between” them, as William Galston has observed.225 Accordingly, groups become larger, fewer in number with more generalized “messages.” They are driven to the “middle,” resulting in a yawning uniformity among and across groups on what we have described as the horizontal axis. True diversity, in its daring and audacious implications, is undermined.

This in turn effects the aggregative consequences of social pluralism, to the inversion of the Madisonian understanding of liberty. As the counter-balance of interests operates within, rather than across, groups, rendering their identity less and less distinct, there are fewer opportunities for groups to reflect the peculiar attachments of individuals. This serves to weaken the bond between individuals and groups. Further, as this process of dilution and centralization continues, as groups become larger and less focal, the prospect of meaningful participation - the experience of liberty in its

positive dimension - fades. And, finally, with the progressive dilution of group identity, each group comes to appear increasingly like the general population. Taken to its logical extreme, the process ultimately renders meaningless group membership itself, as a group consisting of a representative sample of the general population has no more and no less power vis a vis the state than does the general population in the absence of the group.

This, of course, is the extreme picture, the logical extreme, the end of a long road to which we have only provisionally committed ourselves. The Roberts decision takes only a small though important step in the wrong direction. In a broader sense, the Roberts decision and its progeny reflect other developments within our society that have diminished the significance of groups of all sizes and functions, from that of the family to various political and social organizations.226 The protection of groups should not be taken as an indication that equality is not valued, for equality is an important value in the homeostatic ideal of liberty, any more than the protection of controversial speech indicates disregard for the rights of those against whom the speaker inveighs. Rather, protection for the autonomy of groups evinces a skepticism of centralized power, a commitment to social pluralism and a hope that liberty in something like its positive aspect has not been lost to us forever.

E. Diversity versus Self-Determination: The Problem of Getting Out

In contrast to the problem of getting in, which typically involves a tension between equality and association, the “problem of getting out” involves the conflict between individual autonomy and group rights. Put simply and starkly, to what extent should a liberal society tolerate the abridgement of certain of the rights of group members in the name of social pluralism? 227

226. See NISBET, supra note 162 (sounding the alarm that increasing state involvement in civil society was not simply a symptom, but a cause, of the progressive dissolution of civil society).

227. Liberals have long argued about the potential conflict between liberty and pluralism, at least where social pluralism is predicated upon moral pluralism. Where social pluralism represents a state of affairs where different sub-cultures peacefully coexist within a more general liberal culture, moral pluralism is a philosophical doctrine that holds that diverse values cannot be compared. There are no distinct measures of morality. Different values may compete, and yet be defensible moral options. When liberalism is based upon moral pluralism, it is because liberal culture permits for a greater variety of expressions of diverse values. Liberal culture is a means, in this case, to fostering moral pluralism. If there exist worthwhile ways of life that are illiberal (e.g., that emphasize such values as fundamentalist religious orthodoxy, which privileges religious over liberal
Wisconsin v. Yoder\textsuperscript{228} represents the conflict at its most piquant. In Yoder, the Court recognized the right of Amish parents to take their children out of school after the eighth grade, rather than after the tenth, as mandated by state law. What is significant for our purposes here is that the case posed a conflict between the rights of the group to educate and insulate their children from secular influences - to inculcate in their children respect for the Amish way of life - and what we might describe as the children's right to develop autonomous selves. Central to the conflict was the intention of the Amish to prevent their children's exposure to the secular way of life—a way of life that they might prefer to the Amish way if they were to experience it. This was the focus of Justice Douglas' dissent. Justice Douglas argued that these children were being systematically deprived of the education necessary to make a choice between the secular and the Amish lifestyles, that they were being indoctrinated, rather than being permitted to make their own choice. Douglas feared that the children might be "forever barred from entry into the new and amazing world of diversity that we have today" and that their "entire life may be stunted and deformed."\textsuperscript{229}

The homeostatic conception of liberty places primary emphasis upon the value of self-determination. Of deepest importance to our concept of self-determination is the idea that, while the members of groups may relinquish certain civil rights within the context of group life - e.g., they may give up their property or take a vow of silence or permit group leaders to search their personal effects - there exist a set of rights which may never be relinquished to anyone in a liberal society. These are the rights that protect individuality and self-determination in their essential aspects. Such rights would include the following: First, persons retain the right of exit from the group. Second, they retain the rights of life and well-being. And, third, they may never be deprived of the right to develop the capacity for autonomous decision-making, itself necessary to self-determination.

Social pluralism is both an expression of, and a necessary means to, self-determination. Diversity flows from individuality and

\textsuperscript{228} 406 U.S. 205 (1972).
\textsuperscript{229} Id. at 245-46 (Douglas, J., dissenting).
individuality, in any meaningful sense, from the reflective choices of individuals. A group may not maintain its social position by brainwashing or otherwise seeking to limit the capacity for autonomous choice on the part of its members. Where the group seeks to limit the development of this same capacity for individual choice, pluralism must yield to liberty and the rights of association to those of autonomy. These are the limits to social pluralism because they are the requisites of liberalism, and they are the requisites of liberalism because they are necessary to the values of individuality and self-determination upon which liberalism is based.

While Yoder poses the potential conflict between these principles, it is not itself a difficult case. In virtue of the exposure these children had to the secular world, both as a result of their elementary education and because of the almost certain influence of the media and other influences of the outside world, their capacity to choose had not been impaired in this case. Indeed, in a sense the Amish children may have been accorded more choice than their secular contemporaries, who were never exposed to anything other than their own secular lifestyle. Justice Douglas’ pretensions to the value of autonomy in this case may have been little more than an unconscious bias in favor of the modern “world of diversity.” Ironically, however, a far richer conception of diversity prevailed.

IV. Conclusion

At a time when our conceptions of the nature of liberty have largely coalesced into the contemporary ideal of individual self-determination, there persist two dominant though divergent paths, each of which promises to lead us, collectively, to our goal. On the right are the modern descendants of classical liberalism, most prominently libertarians of various stripes and the devotees of law and economics. They follow in the footsteps of Hobbes and Bentham, and insist that state regulation represents the primary limit on liberty. For those holding this position, it is not the function of government to promote liberty, but only to preserve the liberty of individuals by protecting a limited number of civil rights, most particularly the rights to property and freedom of contract. For classical liberals, any conception of equality other than formal equality of opportunity must conflict with negative liberty.

230. See NOZICK, supra note 5 (for the modern libertarian defense of the limited state).
Moreover, social background conditions are viewed to be distinct from, and largely irrelevant to, the fairness of legal rules, which are to be judged on their own terms by reference to more abstract standards of neutrality and justice. For these negative liberals, government should refrain from involving itself in the sphere of the social to the greatest extent possible, consistent with the protection of personal and property rights.

On the left are progressives, social democrats and their fellow travelers who view the centralized state as the only ally of the ordinary individual today. They typically harbor deeply egalitarian sentiments that run in the direction of various substantive forms of social leveling; they tend to equate liberty with equality, and equality with equality of condition. Consequently, for this group, the state functions to promote liberty by closing the gap between formal equality of opportunity and equality of outcome or condition. For progressives, the social and the legal are inextricably intertwined. There is scarcely a social evil that cannot be cured with a little more government.

Between these two ideas stands a third theory of liberty. It is neither purely negative nor positive, in either sense of the term “positive” as it is used today. And it disavows the progressive penchant to satisfy “the two conflicting passions” for negative liberty and for the all-embracing protection of the tutelary powers of the state, as de Tocqueville put it in the opening quote. The homeostatic ideal is moved by the same distrust of concentrated power that animates classical liberalism, but shares with the progressive the recognition that this insight must be applied to the whole of society. Liberty as self-determination requires that a meaningful range of options and choices exist within the great sphere of civil society. To accomplish this, it is necessary to loosen state control over both the individual, with respect to our private choices, and with respect to the internal membership of groups, bearing in mind that it is only through groups that individuals may experience the positive values of collective self-determination while contributing to the liberal values associated with diversity.

Is this conception of freedom more libertarian or more communitarian than mainstream liberalism today? In a sense, it is

231. See Dworkin, supra note 35 (arguing for exactly this conception of liberty, which he calls “liberty as equal concern and respect”).
232. See supra note 40 (discussing the various senses of the term “positive liberty”).
233. DE TOCQUEVILLE, supra note 1, at 693.
both, and it is neither. The homeostatic conception of liberty seeks social diversity and balance in the name of individual self-determination.

The individual builds his community from the ground up by coming together with others who have made similar life commitments. But self-determination is not something the state can simply give to the individual. Not every form of social unfairness can be alleviated in the name of self-determination without undermining self-determination itself. In sum, there is a point where, consistent with the central liberal idea that the self is in some sense independent of social relations, the progressive re-structuring of society must end, and the individual must begin. The compromise, as Madison saw, consisted in creating the conditions of social diversity and counter-balance. The rest is up to the individual.