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LIBERTY: THE CONCEPT AND ITS CONSTITUTIONAL CONTEXT

TIMOTHY P. TERRELL*

In the heady higher legal atmosphere of constitutional law, the concept of liberty remains enigmatic. While countless scholars have found within the language and structure of the Constitution a range of fundamental political themes involving some aspect of liberty,1 liberty itself, as a separate and sustaining value, does not seem to be one of those themes. Yet the Preamble recites “securing the Blessings of Liberty”2 as one of the primary goals of the Constitution. Moreover, with regard to the only two appearances of “liberty” in the text of that document—the Due Process Clauses of the Fifth and Fourteenth Amendments3—the Supreme Court has been remarkably inconsistent in its articulation of the substance and importance of this concept in our political structure. The often-cited dicta of Meyer v. Nebraska4 painted liberty with a very broad substantive brush:

Without doubt, it [liberty] denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.5

To this list Meyer added the more particular right to teach or

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1. One example is Professor Laurence Tribe who identifies such constitutional themes as “separated and divided powers,” “governmental regularity,” and “preferred rights,” among others. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 15, 474, 565 (1978).
2. U.S. CONST. preamble.
4. 262 U.S. 390 (1923).
5. Id. at 399.
be taught a foreign language in the public schools. In contrast, the more recent reasoning of Paul v. Davis suggests that liberty has no independent substance whatsoever, being instead a concept derived entirely from existing positive legal sources, whatever and however narrow they may be.

This essay directly confronts some aspects of this confusion by making the concept of liberty itself the central concern. I shall examine liberty from both philosophical and legal perspectives, the former in a brief definitional analysis of the concept as a whole, the latter examining liberty as one of the core, foundational elements of the American Constitution. Because the subject of liberty is so broad, complex, and controversial, however, my comments are necessarily incomplete. I do not pretend to have exhausted in this short paper the full range of issues, positions, and resolutions that this topic easily generates, nor do I intend to catalogue in text or footnotes the overwhelming mass of erudite comment on this subject. Rather, as the central paper presented to a symposium of scholars, this essay intends to provoke further critical discussion of both the theoretical range and descriptive detail of my analysis.

I have organized my effort around three broad themes. First, I attempt to anchor the analysis in a detailed understanding of the meaning of the term "liberty" itself, a task that surprisingly few commentators have seriously under-
taken. This requires development of the remarkable array of states of affairs that can be, and have been in various writings, subsumed within this concept. Second, this philosophical exercise enables me to discuss from some fresh perspectives the legal and constitutional context within which the term liberty has acquired special meaning. Finally, elaboration of the philosophical and legal foundations of liberty permits me to make some concluding comments concerning the modern political context within which the concept of liberty should be understood.


Concerning Mortimer Adler's efforts, Giovanni Sartori had the following cogent general criticism, with which I agree:

Mortimer J. Adler's work . . . is a precious mine of information . . . I disagree, however, both with the classification and the method, which he calls "dialectical." The concepts of each author are treated in a historical vacuum, independently of the circumstances and motives that prompted them. Thus in Adler's presentation one misses both the fact that different theses were held for the same reason, and that many differences are due to the fact that the same thing is being said under different circumstances.

G. Sartori, Democratic Theory 314 n.2 (1962). In the terminology developed in this essay, Adler's effort is unsatisfactory because it attempts to isolate normative essences, rather than descriptive essences, from his many sources, a task both different from and more difficult than the one mounted here, and also one subject to precisely the criticisms Sartori raises.

The Nomos volume is a somewhat specialized collection of articles focusing to one degree or another on John Stuart Mill's famous essay On Liberty, this because the volume had originally been planned as a centennial observation of the publication of Mill's essay. Several of the articles, however, are of more general interest, and in fact bear directly on the type of analysis attempted in the present paper. In this regard, see Oppenheim, Freedom — An Empirical Interpretation, Nomos at 274; Somerville, Toward a Consistent Definition of Freedom and Its Relation to Value, id. at 289; and Deutsch, Strategies of Freedom: The Widening of Choices and the Change of Goals, id. at 301.

Another work that deserves special mention, both because its initial focus is on the effort to define the concept of liberty, and because the author is somewhat critical of the style of linguistic analysis I employ in this paper, is B. Leoni, Freedom and the Law (1961).
I. THE ELEMENTS OF LIBERTY

A particularly challenging task in this investigation of liberty is to establish a general analytical foundation for subsequent constitutional discussions. The difficulty, of course, is not that so much has been written about this concept. Rather, this vast body of literature elucidates the true problem concerning the fundamental importance and daunting ambiguity of the term. Indeed, this substantive uncertainty might be viewed as so severe and endemic as to make the concept one to be condemned and avoided rather than studied and clarified.10 I reject this extreme position, and there-


The most basic problem with Westen’s reasoning is that all relational terms suffer from the difficult dichotomy of description and justification upon which he has focused, including the most basic of legal classics like “contract,” “tort,” “crime,” even “law.” Each of these terms depends in the final analysis on some normative conclusion that certain facts concerning agreement or injury or whatever are relevant while others are not, or that some facts are more important than others. Despite this inevitable theoretical reference, one can nevertheless examine the “facts” of the actual usage of these terms over time to help identify that underlying normative foundation, or at least to conclude that some theories fit the “data” somewhat better than others. Of course, one could also argue that some of this data is simply wrongheaded and therefore to be discounted—this would indicate even more forcefully the primacy of theory over definition. But this dominance is not absolute, for any theory that rejects “too much” of the data is always greeted with a healthy skepticism. In other words, justification and description inevitably work together to produce the substance of any term used in a legal context.

This fact is revealed in Westen’s own analysis. While he condemns the term “equality” for its inherent normative ambiguity, Westen is always careful to reassure his readers and critics that he yet retains his liberal cre-
fore attempt to distill from the literature some of the essential elements of liberty. I endeavor to establish the essence of what it is that people are arguing about when they disagree about the requirements of "liberty."  

He asserts that while "equality" makes no sense to him, he nevertheless believes in rules prohibiting discrimination based on race, etc. See, e.g., Equality in Law, supra at 663. What he never satisfactorily discloses is why he believes in such things. It must be because he believes the world would be a better or happier place if such rules were in place. But in what respects? Clearly there is some normative foundation—some theoretical driving force—to Westen's support of particular policies, but he refuses to label that moral sense a belief in some innate human "equality" because the term is too vague. One must wonder, then, whether under his exacting sense of language there is any word or set of words he could use to justify his otherwise rather isolated conclusions. If there is some organizing principle behind his thoughts, and I have no doubt that there is, then he is in many ways committing the same sins of normative vagueness that he associates with "equality." This methodological backsliding is not the product of ignorance; rather, it is due to the fact that this conjunction of definition and theory is at the heart of the nature of the way we use language, particularly in relational contexts such as the law where human actions are being assessed and guided.

Thus, the better response to the substantive difficulties caused by, and inherent in, the definition-theory dichotomy is not despair and language purification through elimination, but rather more exacting study of the nature of terminological equivocation. "Liberty" will be a good test case. It, like several other terms, including "equality," "fairness," and "security," is one of the stirring foundational concepts of that legal Olympus we all seek—"justice." It is by its very nature, then, heavily normative, but there is considerable analytic clarity to be gained by at least attempting to distill from the vast data bank of scholarly and judicial comment some essential descriptive features that characterize the proper use of the term. This point is reiterated in different form in notes 14 and 19, infra.

11. I have been careful to this point, and shall be careful throughout this essay, to avoid use of the term "freedom" rather than "liberty." Although I have done so in order to minimize unnecessary confusion, focusing on only one of these terms raises the inevitable question of whether there is any meaningful distinction between liberty and freedom. For purposes of this essay, the two shall be treated as synonymous, as most writers seem to assume.

However, there are some suggestions of a distinction between the two that should at least be noted. W. Reese makes the following general observation:

The term [liberty], like freedom has two senses: one is the metaphysical capacity to make decisions freely; the other is the social fact of having a certain amount of elbow-room within society . . . . In English, although both terms are used in both of these senses, the tendency is to use the term "freedom" to refer to the metaphysical situation of choice, and the term "liberty" to refer to the area of non-constraint granted man (or which should be granted him) within society.
A. Description and Justification

The concept of liberty can be better understood in the first instance simply by improving the structure of the investigation itself. Toward that end, one proposition that is central to all aspects of my analysis is that the term "liberty," like other words that state broad principles, is a summary term connoting a complex interaction among numerous constituent elements. The key to understanding the concept of liberty, then, is the comprehension of these elements. I thus argue that liberty is comprised of several sustaining, generic features that make historical and cross-cultural comparisons possible, although hardly free from controversy.

The technique I employ to begin to develop some sense of the substance of the term "liberty" is one that is often used by scholars but seldom recognized and analyzed. I rely

W. Reese, Dictionary of Philosophy and Religion: Eastern & Western Thoughts 305 (1980). In addition, one might be able to distinguish between liberty and freedom on the basis of the "nonharm" criterion that I will posit as part of my definition. See pp. 554-560, infra. That is, one might argue that while the term "liberty" does not include the option to harm others with your actions, "freedom" does. Thus, liberty perhaps inherently takes on a normative element that the broader concept of freedom does not. I do not consider this point to be critical to later discussions, however, and I therefore do not pursue it seriously, although I will return to it briefly in the development of the nonharm criterion.

12. These "sub-atomic particles," if you will, are elements that can vary in degree, just as the number of protons, neutrons, and electrons that comprise various atoms will differ. But this analogy to physics ultimately fails and thereby reveals one of the important conclusions I shall develop: While distinct arrangements of sub-atomic particles yield atoms of quite distinct physical properties, and hence atoms that are given different names, changing the "amount" of one or more of the variables that comprise liberty will, within certain limits, still produce a social product that can be labeled "liberty."

upon the very basic philosophical proposition that there is a significant, although not necessarily absolute, distinction between the description of what a term means and the justification behind the use of that meaning.\textsuperscript{14} In the specific context of the term "liberty," initially, I attempt to differentiate between the various states of affairs that have been identified as associated with the proper use of this word as a part of our language, and the reasons that justify or explain from a moral or merely prudential perspective the characterization of these "facts" in this fashion.

The usefulness of this distinction between description and justification as a methodology depends on first establishing a workable descriptive definition of the term in question. Although there is considerable debate about the actual technique or series of events by which a term in our language gains a generally accepted meaning,\textsuperscript{15} I bypass much of this

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The separation of this descriptive exercise from normative assessment is remarkably problematic, however, as I noted earlier in connection with the recent work by Peter Westen. See note 10, supra. Another good example is the term "speech." Investigation of language usage could demonstrate that not every sound coming from a human's mouth will be called speech, but these conclusions, which really concern the location of the boundary and the internal ranking of members of the "speech" set, could just as easily be based on a normative judgment. For example, whether wearing an armband should be classified as within the set of activities given the label "speech" (see Tinker v. Des Moines Independent School Dist., 393 U.S. 503 (1969)) may be decided rather differently from descriptive and justificatory points of view. Purely definitionally or linguistically, one might be hard-pressed to conclude that such an action had enough in common with the ordinary sense of speaking to be given the same label, and indeed that is one reason why those in favor of a broad application of the First Amendment refer more often to a "freedom of expression." See, e.g., T. Emerson, The System of Freedom of Expression (1970). But this reflects, of course, normative theory at work: There is some "good reason" that suggests that the normal, perhaps rather narrow set of cases comprising the definition of "speech" should be expanded to include this new entrant. Here the reason is to give this activity of wearing an armband the protection of the First Amendment, which in turn is based on a deeper reason endemic to that part of the Constitution.

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\item[15.] The philosophy of language has a rich and varied bibliography. In addition to the material cited in notes 13 and 14, supra, some of the more basic or well-known of the works in this area include: D. Cooper, Philosophy and the Nature of Language (1973); I. Hacking, Why Does Language Matter to Philosophy? (1975); J. Searle, Speech Acts (1969); The Philosophy of Language (J. Searle, ed., 1971); W. Quine, Word and Object (1960); N. Chomsky, Reflections on Language (1975); L.
controversy by simply adopting what seems to me the most persuasive depiction of this process, and indeed one that has been employed in scholarly discussion of the law: 16 to generate, the "central case" 17 or "focal meaning" 18 of the term through careful examination of the instances of actual use in a given society. This central or focal usage is the archetypical, but not necessarily the most frequently occurring, use of the term. It is the usage that everyone would agree is "proper." It is the meaning that captures all the essential elements of the term, some of which might be missing in other usages of the word. It is, in fact, the use of the term to which all other instances of invocation are compared. 19


16. See notes 13 and 14, supra.
19. Hence, on this rudimentary construct, there are three distinct activities that must be pursued in order to complete the definitional exercise: the central case must be established; the outer boundary must be identified; and some explication must be made of the organizational principle by which the many cases within the set array themselves such that some are "closer" to the focal core while others are further away.

While the principal task of the present section is to suggest a multi-faceted focal meaning of "liberty," its significance can best be appreciated if one understands in more detail these three aspects of the definitional exercise, and their relationship to one another. First, with regard to the central case, the elements identified as the essence of the concept of liberty will be, as noted earlier, distilled from a great deal of thoughtful comment published over a long period of time. But those features focused upon should be common to all these discussions. In order to do this, however, the listed features will of necessity be somewhat general in character. Thus, to make this development of a focal meaning useful one must make a compromise between a specificity that excludes too much and a generality that excludes too little. I shall attempt to describe in this paper, then, a central case whose elements themselves do not depend upon any particular normative foundation for their inclusion, although the full implication of those elements will certainly depend upon a significant theoretical debate. That is, while the central case will be as purely descriptive as possible, the outer boundary of the set and the internal arrangement of the members of the set will no doubt be a function of both description and normative assessment.

To understand why this is so brings us, then, to the separate definitional activities of setting the boundary and arranging the internal cases, which can be described in the following manner. Once the core case of "liberty" is established, all other instances of use of the term will be distinguished from this case by their lack, completely or to some degree, of one or more of the elements that comprise the central case. Thus, the focal meaning of
This process of comparison is the exercise that actually establishes the full definition of the term in question, for once the multitude of instances of use are examined a set of "proper" uses can be discerned. This set, if one imagines it to be a simple circle, has the focal meaning of the term at its center and a boundary surrounding that core at some dis-

liberty will be its "strongest" general meaning. As more and more elements are missing in any example, or the degree of the elements it retains diminishes, the further that instance will be from the central case. At some point, of course, the degree of connection between the central case and the example will be so tenuous that the relationship will be denied—in other words, the example will be seen as "outside" the "boundary" of the set. Furthermore, the "distance" of any particular case from the central case may not be simply a function of the number of missing core elements; it may instead be a function of the relative "importance" of the elements it may be lacking. For example, one might conclude that the "right to sell" an item is so critical to its designation as "property" that the absence of this feature is enough to make such an instance of ownership an extremely peripheral example of "property," if not outside the set altogether. A diagram depicting such a situation appears in Property, Due Process, supra n. 14, at 873 n.48.

One very important feature of the nature of words as linguistic symbols is revealed by the definitional process, and it explains why in some contexts a listener can be perplexed to hear two speakers expound upon the same subject and yet seem to have nothing in common with each other. The sole determinant for inclusion in or exclusion from the set of instances granted a particular label under the technique I have specified is the comparison of any example to the central case, not a comparison to any other member in the set. Thus, if the focal meaning of a given term were established using four fundamental elements—A, B, C, and D—one peripheral case within the set associated with that term might have features A and B while another has C and D. Consequently, any debate between exponents of these two views would be meaningful only with reference to, and hence with an understanding of the significance of, the central case. The conceptual difficulty may typify to some extent, for example, the debate to be examined in more detail later between those who believe liberty can only be achieved within the context of an unregulated market and those who find that situation to represent the antithesis of freedom.

For some readers, the attempted separation of descriptive from normative elements in our language analysis may seem to accomplish very little since the ultimate substance of any term will, as I have noted, depend to one degree or another on a normative assessment. This conclusion, however, like Peter Westen's, discussed in note 10 supra, gives up too much. For example, even a word as general as "good" can be given a helpful conceptual structure by simply examining its place and use in our actual linguistic practices, as R. M. Hare demonstrated in The Language of Morals (1952). While we may all disagree markedly over our conclusions as to what should be labeled as "good," we all do agree that the term means something positive, etc. What I have attempted in the first part of this essay, then, is to establish this agreed-upon conceptual core to the complicated topic of "liberty."
tance away, capturing within it the factual instances to which the term could be and is applied.  

B. The Focal Meaning of Liberty

Having considered many discussions of the concept of liberty, I submit the following as its focal definitional meaning, some portions of which I shall examine in more detail below:

The central, archetypical situation of "liberty" is an agent capable of a rational choice of thought or action among significantly distinct and meaningful alternatives none of which will cause foreseeable and proximate harm to the liberty of others, where neither the decision to choose nor the distinctiveness or meaningfulness of the range of options is directly and deliberately constrained or diminished by the actions of persons other than the agent.

This definition posits three primary features: a "choice" among "alternatives" where any "constraints" are non-human in origin. Since various sub-characteristics are also noted, the central case in fact includes nine total elements that should be investigated separately: (1) a choice (2) concerning either thought or action that is (3) rational and among alternatives that are (4) significantly distinct from each other, (5) individually meaningful, and (6) will cause no harm to the liberty of others that is (7) foreseeable and (8) proximate, where (9) any constraints on the act of choosing or the set of alternatives are not caused by the will of others. In order to keep this essay manageable and to place emphasis on the constitutional context of the concept of liberty, I examine further only elements (1), (4), (5), (6), and (9).

Moreover, this initial attempt at a comprehensive description of the concept of liberty only refers to a "situation" or factual circumstance in which an agent might be "at liberty." It lacks some crucial relational elements that will transform it into a true "moral" or "political" situation. Those elements are subsumed within the notion of a "right to" the sort of choice described above, a topic that is also given brief attention in Part II of this essay.

20. Property, Due Process, supra note 14, contains several diagrams depicting this idea. See id. at 866, 867, and 873 n. 48.
1. Choice

The element of choice is necessary to give the concept of liberty its essential moral flavor of individual free will. The existence of alternatives alone that might be selected randomly, for example, is not a situation of liberty; there must also be a conscious decision. This relates the definition to the category of liberty Mortimer Adler describes as "natural liberty," or the inherent endowment or ability of man as a conscious, rational animal, capable of action, to act on various desires or motives.

2. Distinct and Meaningful Alternatives

Just as an inability to choose among a set of options renders those options meaningless regarding the concept of liberty, so too an ability to choose among non-existent alternatives cannot be considered part of one's concept of liberty. But while we all might agree that absence of any choice among alternatives is not a circumstance of liberty, the existence of some level of selection among options, no matter how minimal, will begin the debate. Instead of engaging directly in the dispute over how much and what types of alternatives are "enough" for liberty to exist, however, I employ a definitional technique which starts from the other direction and first identifies the characteristics of those alternatives that typify an indisputable situation of liberty.

I have identified three such characteristics, two of which I discuss in this section and one which I discuss in the next. The two features examined here are those that are important from the point of view of the prospective agent. The central case of liberty about which there would be no dispute would be where the agent faces a choice among alternatives that are both (1) significantly different from one another and (2) each

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21. In the absence of this assumption, talk of "liberty" becomes either meaningless or very narrow in range, and not in accord, I believe, with the generally accepted sense of that word. For general discussions of the topic of free will and its opposite — various aspects of determinism — see, e.g., Summers, Legal Philosophy Today — An Introduction, in ESSAYS IN LEGAL PHILOSOPHY 1, 7 (R. Summers ed. 1968), and W. Reese, DICTIONARY OF PHILOSOPHY AND RELIGION 181 (1980).

See also Deutsch, Strategies of Freedom: The Widening of Choices and the Change of Goals, in Nomos, supra note 9 at 301-02 ("... we may then define freedom as the range of effective choices open to an actor, such as an individual or a group of persons.")

22. Adler, supra note 9, at 148-156.
of some consequence or importance to the agent. In the jargon I have adopted, the alternatives must be "distinct" and "meaningful." The requirement of significant difference eliminates from the central case any situation in which the agent has a choice between options that, while not identical, present him agent with what he considers to be a single course of action. For example, the sole choice of eating either apple A or apple B plucked from the same tree on the same day is not a central situation of liberty. But precisely how much difference there must be between choices in order create a "significant" distinction is of course a very difficult matter, and one that is usually resolved by implicit or explicit reference to some underlying theory rather than to pure definition.

The requirement of meaningfulness of the available alternatives eliminates from the central case of liberty choices that, while significantly different from each other, are not compatible with any short or long term goals of the agent. A very difficult notion that this latter feature of meaningfulness introduces to an analysis of liberty — but one that is not directly considered here to any significant degree — is the extent to which "importance to the agent" makes liberty an inherently individual concept. Lack of liberty could, in the final analysis, simply be in the mind of the agent. If so — if liberty is thus like art, for example — then we lose much of our ability to discuss the matter intelligibly, particularly from a social and political perspective. I have attempted to avoid this difficulty to a certain extent by giving this definitional element of meaningfulness some more definite content, grounded in various domains of life. See pp. 555-560. But this does not avoid the more basic point that eventually, in establishing the legal or constitutional content of liberty, for example, some reference will inevitably be made to some general, aggregate standard of "reasonableness" regarding individual claims of interference with the meaningfulness of one's choices.

For example, depending on the point one wants to make, or on one's personal tastes and sensibilities, any of the following could be considered "non-distinct" choices that remove the agent from the central case of liberty: the choice of working in any of three otherwise identical factories in a given town; the option to purchase either of two automobiles made by different manufacturers that are equivalent in all performance and structural characteristics and differ only in external cosmetic appearance; the alternative of listening to either Haydn's 97th or 98th symphonies. Even if one concludes that these are in fact non-distinct choices, this by itself does not mean, of course, that all these situations are necessarily outside the set labeled "liberty;" at this point it only means that these situations are not central examples. At least now, however, the debate concerning them is somewhat more focused.

This point has been made by different authors in many different ways. Karl Deutsch, for example, defined freedom as "the range of effective choices open to an actor." Deutsch, Strategies of Freedom: The Widening of
The simplest example is the choice given the victim by a robber demanding "your money or your life." Neither option would in other circumstances be considered viable or interesting to the agent, and the fact that there is a choice here between significantly different alternatives does not place this within the set of situations under the rubric of liberty. Nor would the simple choice between jumping to one's death off a bridge or not doing so be one characteristic of liberty. A set of alternatives is at the central case of liberty when it is within the reasonable contemplation of the prospective agent to pursue at least two of its members.

Choices and the Change of Goals, in Nomos, supra note 9 at 302. So defined, freedom had four primary elements: "[t]he absence of restraint," "[t]he presence of opportunity," "[t]he capacity to act," and "[t]he awareness of the reality without — including both unrestrainedness and opportunity — and of the actor's own capacity." Id.

Alan Gewirth refers to the distinction between short- and long-term considerations as the difference between "occurrent" and "dispositional" impacts. For example, in his discussion of the duty to rescue, Gewirth notes that

[both the harm impending to the recipient and the agent's ability to ward off this harm may be regarded either as occurrent or as dispositional. If they are regarded as occurrent, consideration is given only to the directly impending harm and to what can be directly done to avoid it. But if they are regarded as dispositional, consideration is given to the longer-range causes and background conditions that do or may bring about the directly impending harm and to the longer-range action required to remove these causes and conditions.

A. Gewirth, Reason and Morality 230 (1978). The dichotomy of occurrent and dispositional is introduced in id. at 32.

Concerning the general notion of a "life-plan," many philosophers have made reference to and use of it in a wide variety of contexts, and it is not necessary here to defend any particular discussion of it. For one such example, see, e.g., R. Nozick, Anarchy, State and Utopia 50 (1974):

What is the moral importance of [the] . . . ability to form a picture of one's whole life (or at least of significant chunks of it) and to act in terms of some overall conception of the life one wished to lead?

I conjecture that the answer is connected with that elusive and difficult notion: the meaning of life. A person's shaping his living in accordance with some overall plan is his way of giving meaning to his life; only a being with the capacity to so shape his life can have or strive for meaningful life.

Other authors relate such ideas to a general "theory of the good." See, e.g., J. Rawls, A Theory of Justice 395-452 (1971).

26. Except perhaps to a person considering suicide, such a choice between a viable option—not jumping—and a nonviable one—jumping—is not really a choice at all since only one alternative is, in our jargon, "meaningful."
The element of meaningfulness is perhaps the most complex factor in the matrix I have established. The idea that meaningfulness can simply be defined in terms of an agent's general "life-plan" is not only vague but dissatisfying. Given our goal of establishing the true central case of liberty, that case regarding which everyone would agree that the agent enjoys a sort of "complete" freedom, more needs to be said concerning the content of meaningfulness. I propose a description of that content, although in the context of this essay it is only a rather rough approximation.

I assume that there are four basic domains within which one's life as a whole is conducted: 27

27. On the idea of "domains of life," see, e.g., J. HOCHSCHILD, WHAT'S FAIR? AMERICAN BELIEFS ABOUT DISTRIBUTIVE JUSTICE (1981) and M. WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983). The former identifies three primary domains of life—the social, the economic, and the political—and examines the differing senses of distributive justice that obtain in each, ranging from rather strict equality of persons to marked differentiation among persons. In contrast, the latter identifies three primary distributive principals—free exchange, desert, and need—and examines their application in a series of more or less discrete realms of life, ranging from, for example, "membership" in the political community, the attainment of political office, and pursuit of personal affection and divine grace.

The idea of dividing life into various "domains" for purposes of understanding the full range of the potential application of the concept of liberty was also expressed in two different, but useful, ways in two articles in the Nomos volume, supra note 9. John Somerville put it in the form of a linguistic issue:

When trying to define a term which we are already using in a wide variety of contexts, it is of course necessary first of all to seek a definition which will express some complex of features common to all the acknowledged referents, and to nothing else. In the case of freedom, the first desideratum is to find, if possible, a peculiar common denominator basic to such different types of freedom as political, economic, moral, physical, religious, and the like. Their differences are important, but their presumptive common ground is just as, if not more, important. For example, what makes political freedom political is a certain governmental context not shared with all types of freedom; but what makes political freedom freedom is necessarily a common core which is shared with all types of freedom. Otherwise, we should have to employ separate nouns, rather than one noun and separate adjectives.

Somerville, Toward a Consistent Definition of Freedom and its Relation to Value, in Nomos, supra note 9 at 289-290. Frank Knight, on the other hand, stated it in sociological terms:

Society is a vastly complex congeries of groups, with the family as the minimum effective unit, made up largely of dependents; and the same is largely true of political society as well. . . . For what is called "individualism" a more descriptive term would be "familism," but many other groups of a more or less primary or face-to-
(1) the moral or aesthetic, in which one’s personal vision of virtue, wisdom, and character is pursued;

(2) the social or communal, in which one establishes more immediate interpersonal relationships;

(3) the political, in which one participates in or at least has some share in governmental sovereignty; and

(4) the economic, in which one competes for scarce consumable resources.  

There are choices in each of these domains, and consequently a sense of liberty in each of them. The most extreme form of meaningfulness in the array of alternative choices faced by anyone would therefore be a situation in which the agent had meaningful choices in each of these areas. The central case of liberty, in turn, would require this full sense of meaningfulness.

In addition, I noted earlier that meaningfulness can be defined in terms of both short and long-range plans concerning the conduct of one’s life. For example, there is a difference between deciding whether to engage in the debate concerning some social issue and choosing between two political candidates in a democratic election, or between deciding whether to read books in order to gain information and the option to choose between two particular books on some subject. I summarize this additional variable in the concept of meaningfulness as the difference between “general” and “specific” alternatives. As an element of meaningfulness, it is relevant to each of the domains of life identified above. Therefore, the central case of liberty demands not only a set of choices within each domain, but somewhat separate sets of face nature must be taken into account.

... [W]hat is practically in question is much less the freedom of individuals, in any literal sense, than freedom of groups and freedom of individuals to form groups and act as groups. As pointed out above, the minimum effective unit in a continuing society is the family, and that is only one in a vague and shifting congeries of groups up to the sovereign state, which itself is but one of many groups in the world.  

Knight, Some Notes on Political Freedom and on a Famous Essay, in Nomos, supra note 9 at 115, 117. In this same volume, Felix Oppenheim made the same point in a slightly different form. See Oppenheim, Freedom — An Empirical Interpretation, in Nomos, supra note 9 at 276.

28. These areas are clearly not antonymous or mutually exclusive, but their degree of inevitable overlap is not so great that they cannot be separately identified for purposes of the analysis of liberty.
both general and specific alternatives within these areas. In this way, liberty becomes a very rich concept indeed.

With the double requirement that alternatives be both distinct and meaningful, the absolute number of available options seems unimportant to the definition of liberty. A choice between two distinct and meaningful alternatives is just as "central" an example of liberty on my account as a choice among a hundred such options. Only when the vastness of the array of alternatives has some impact on the "distinction" an agent can discern among choices would the number of alternatives itself have any bearing.

3. Nonharmful Alternatives

The central case of liberty further requires that "alternatives" not cause harm to others. This feature, however, is significant from the point of view of others, rather than the agent. The requirement is at once straightforward but quite complex, mundane yet of crucial importance. It is complex because the task of determining which effects are to be labeled "harmful" is anything but simple. It is nevertheless crucial because this general "nonharm" feature distinguishes the concept of "liberty" from that of "license."

To address the latter point first, I acknowledge the highly controversial nature of the differentiation of liberty and license. This dichotomy may appear to introduce a normative proposition into my attempt at a purely descriptive analysis of liberty. That is, I now seem to be suggesting that liberty, properly understood, means the freedom to do as one ought, and not as one desires, a proposition involving "self-
perfection” rather than “self-realization.” This idea, however, has been attacked by many writers, including Jeremy Bentham, Robert Hale, and Freidrich von Hayek, and I

When self-realization authors, such as Hobbes, Bentham, Mill, and Russell, say that every law curtails freedom, the freedom they are talking about is altogether different from that which such self-perfection authors as Boucher, Rousseau, Kant, and Hegel have in mind when they say that law, far from being an infringement of liberty, is its foundation. The latter deny that there is any truly human freedom in doing as one pleases.

See also J. Locke, Of Civil Government: Second Essay, Ch. VI, §57.

The end of law is, not to abolish or restrain, but to preserve and enlarge freedom. . . . [For all] beings capable of laws, where there is no law there is no freedom.

John Somerville has expanded on Locke’s reasoning:
There is, of course, no such thing as a country, a press, or a man simply free—free in general. Free in general would mean free from everything, the total absence of all manner of constraint. No country, press, or man could, or would want to, exist in such a condition, even if it were momentarily possible. What is universally desired is the removal of just those constraints that happen to be considered bad, artificial, or unhealthy, and which must be specified in order that we may understand one another, since there are great differences about such evaluations. But remove all constraints, and whatever you are dealing with—country, press, man, or anything else—vanishes into thin air physically, and is reduced to zero morally, since necessary roots, relationships, and conditioning influences are cut away.

Somerville, Toward a Consistent Definition of Freedom, in Nomos, supra note 9 at 296.

Felix Oppenheim’s more general, and more jaundiced, observations on this controversy are also useful:
Making kidnappers unfree to engage in their activities is a necessary condition for preserving the freedom of movement of their potential victims. The latter group is, of course, much larger than the former, and this may be the reason for the claim that such governmental measures enhance liberty in general. More likely this statement is to be interpreted as a disguised value judgment to the effect that freedom of movement is worth preserving at the expense of the freedom of those who intend to destroy it. There is no such thing as liberty in general; there are only specific actions or types of actions which one person or group is either free or unfree to perform with respect to another.

Oppenheim, Freedom — An Empirical Interpretation, in Nomos, supra note 9 at 282.

32. J. Bentham, Theory of Legislation 94-95 (C. Ogden, ed. 1950): “Is not the liberty to do evil liberty? If not, what is it? . . . Do we not say that it is necessary to take away liberty from idiots and bad men, because they abuse it?”

hope to avoid this particular dispute altogether. In maintaining my focus on description, I can include this distinction between liberty and license in my definition only if I believe that the archtypical use of the term "liberty" in our language and culture automatically excludes certain types of actions widely considered reprehensible or unjustified.

I submit that license is not in fact an aspect of the full meaning of liberty for two reasons. First, I make the educated guess that empirical research on the substance of the term liberty used in ordinary discourse would reveal that people do not understand the "good" of individual liberty to include the "bad" action of hitting someone over the head. My second reason is more conceptual but helps explain this hypothetical empirical result. If the full definition or substance of a term consists of a set of factual instances that have been granted the label in question, and if that set is formed by a series of comparisons of cases to a central, archtypical case of that term, then it seems highly unlikely that these comparisons of actual cases would be made to a nonexistent central case. Rather, the comparisons would be to an identifiable, real example. That is only possible in the case of "liberty" if harmful actions that connote the extravagance of "license" are excluded from its focal meaning.

34. F. HAYEK, THE ROAD TO SERFDOM 73 (1944): "[E]very law restricts individual freedom to some extent by altering the means which people may use in the pursuit of their aims."

John Rawls also seems to use the term liberty in this sort of expansive fashion. The first principle in his scheme of justice is that "each person is to have an equal right to the most extensive basic liberties compatible with a similar liberty for others." J. RAWLS, A THEORY OF JUSTICE 60 (1971). This reference to "compatibility" would be unnecessary if Rawls were using the term liberty with the nonharm proviso that I have included.

Felix Oppenheim reached a similar conclusion, and noted some potential implications of excluding license from the realm of liberty:

[It would mean], of course, that you are free provided you do, or are being made to do, what some one believes you ought to do. So freedom becomes identified with desirable restraints imposed on the individual by government, or the moral law, or his own conscience. No wonder that freedom has been used as a watchword by liberals and antiliberals alike. "It is in the great name of liberty that every vanity seeks its vengeance and its sustenance."

Oppenheim, Freedom — An Empirical Interpretation, in NOMOS, supra note 9 at 287 (quoting H. Taine, II LES ORIGINALS DE LA FRANCE CONTEMPORAINE 119 (1877)).

35. This way of stating the point acknowledges the inevitable role that normative assessment plays in the development of the actual substance of any term, but it is not inconsistent with the present descriptive exercise.

36. This same point is made in Property, Due Process, supra note 16,
Note, however, that this argument only concerns the central case of liberty. That is, I do not suggest that those scholars who have argued that liberty includes harmful actions have misused the term. Rather, I contend that they are referring to a peripheral case of liberty without recognizing it as such. Justice Oliver Wendell Holmes provided a good example of the linguistic confusion on this point, and its potential practical impact. Note the narrow manner in which he once defined liberty when he sought to make liberty coexist with the ability of government to regulate conduct:

Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.\textsuperscript{37}

Justice Holmes made the opposite mistake from the scholars who insist that harmful acts are an unavoidable aspect of liberty. While they misperceive the non-central character of harmful acts, Justice Holmes attempted to make the central case of liberty the only legitimate use of that term. But of course he need not have gone this far. Including harmful acts within the domain of liberty does not insulate them from government impact; it simply means that our "liberty" to commit harmful acts can be curtailed only through the "due process" of law, as required by the Fifth and Fourteenth Amendments to the Constitution. We will turn our attention to these matters, however, in a subsequent section.

Nevertheless, the nature of the "peripheralness" of harmful acts, that is, the nature of the relationship between liberty and license, is obviously determined by what "harm" means in this context. One extreme position could be that an action that causes any harm is an example of license. This could mean that such an action has nothing to do with liberty, and that therefore it can be regulated without producing any reduction in the "liberty" a person enjoys. This is an

\textsuperscript{37} Chicago, B. & O. R. Co. v. McQuire, 219 U.S. 549, 567 (1911).
important point, but one I approach indirectly in the present context by first establishing the central case of liberty. As I noted, it is not necessary to determine the precise amounts or types of interference or "harm" that will move a situation out of the liberty set altogether. Rather, I need to determine more narrowly the nature of "nonharm" that will characterize the central case of liberty, and conversely, the nature of "harm" that will move us away from that case. I have done that relatively simply, if somewhat tautologically, by reference in my definition to impact on the liberty of others. Thus, "harm" is understood as impact on the choice-acts, sets of alternatives, and types of constraints associated with the actions of others. In this broad sense, a vast array of types of physical damage, mental distress, loss of resources, and loss of personal relationships could be considered a "harm." The existence of such a potential harm, however, does not mean that a set of actions would automatically be outside the "liberty" set. Instead, the presence of harm (or the absence of nonharm) removes the specific instance being examined from the central case of liberty.

My definitional model at least allows us to conclude that the extreme position mentioned earlier, associating all degrees and types of harm with license rather than liberty, is untenable. Note that neither of the other two fundamental characteristics of alternatives at the central case of liberty which I have mentioned, seem to operate on an "all-or-nothing" basis. "Distinctiveness" and "meaningfulness" appear to be matters of degree from the perspective of the agent. This facilitates a logical conclusion about the concept of harm. If the concept of harm is associated with impacts on others' liberty, and if this liberty is composed, in part, of alternatives that are variably distinctive and meaningful, then the concept of harm to such liberty must also be viewed by these others as variable. This conclusion is of course consistent with the

38. There is no damaging circularity here, however. Robert Nozick, for example, set up his system of rights in ANARCHY, STATE AND UTOPIA (1974) with the proviso that one could not harm the rights of others, but he could do so because he specified (in a general sort of way) what rights people in fact possessed. Id. at 10. Similarly, I can define harm in terms of harm to liberty because I have made the attempt to specify the content of that term — i.e., choices with certain characteristics. Thus, the reference to "harm to the liberty of others" in my definition is simply a shorthand reference to interference with these choices.

39. Both the importance and the mutable nature of the "nonharm" requirement for the focal meaning of liberty can be demonstrated by ex-
general view of the variable nature of the concept of liberty itself, a variability, however, that is anchored and structured around a central or focal case.

Even within this central case of liberty, moreover, the exercise of freedom certainly seems capable of inflicting "harms" on others. A rousing speech concerning a government's failures may topple it, clearly causing harm to its officials. The knowledge that some perform certain religious practices or hold certain religious beliefs may cause others mental anguish. Yet these sorts of impacts are not "harms" that move the freedoms of speech and religion out of the focal meaning of liberty and into the realm of license because ample as well. Consider those freedoms in our political system that seem most readily associated with the idea of liberty—say, freedom of speech or freedom of religion. These come to mind so quickly, of course, because they are usually thought to be rather "absolute" in character. Indeed, scholars have noted that the "absolute" nature of these freedoms seem to relate to their "costlessness" in the sense that they consume no scarce resources—one's freedom to speak one's mind does not prevent someone else from doing likewise or anything else for that matter. It comes as no surprise, therefore, that these liberties are thought to be "absolute" only in this limited context, and not when they do begin to impose external costs. But while not absolute in some contexts—that is, despite the presence of regulations, sometimes severe—many still find no anomaly in referring to these as situations of "liberty." Thus, as a matter of descriptive fact, the element of "nonharm" in the definition of "liberty" clearly seems to be a variable one.

Moreover, the connection between the "absoluteness" and "costlessness" of a right may be overemphasized. Instead, these freedoms can be viewed as generally cost-effective:

The human rights about which there is consensus in the advanced democratic societies may be maintained at little or no cost, and often even make a society richer. In the United States today, free speech, quite apart from its more familiar advantages, probably also saves the government money, since it would take quite a few extra policemen, jailers, and court officials to silence a people with the habit of speaking their minds. Free speech may make it harder for a president to get reelected, but it may reduce taxes. The contribution that free speech makes to intellectual advance, scientific research, and technological progress also has to be added to the balance. Similarly, the constitutional prohibitions against arbitrary seizure of property also make a society more prosperous. Who, for example, would want to invest in the capital goods that increase productivity if this property could be taken away at the whim of an official?

Olson, A Less Ideological Way of Deciding How Much Should Be Given to the Poor, 112 DAEDALUS, Fall 1983, at 217, 220.

40. Ronald Dworkin explains this result on the basis of the difference between "personal" and "external" preferences, the latter concerning what we would like to see others doing. R. DWORKIN, TAKING RIGHTS
the type of "harm," and not just its degree, seems critical to the concept of liberty. Hence, some kinds of adverse impact are not relevant to the liberty/license dichotomy. The key to this difference in type of harm appears to be rooted in the definitional elements of liberty I have previously developed. Since I have defined "harm" as impacts on others' liberty, then an action that does not affect the distinctiveness or the meaningfulness of the options available to someone else does not harm this person, for the person remains at the central case of liberty. We can therefore differentiate among types of impacts, designating some as true "harms" and others as largely irrelevant to a discussion of liberty.\footnote{1 Since "nonharm" is crucial to the central case of liberty, we can further conclude that an action that ends the harmful

\textit{Seriously} 275 (1978). Under Dworkin's theory of rights, majoritarian decisions are prohibited "that seem, antecedently, likely to have been reached by virtue of the external components of the preferences democracy reveals." \textit{Id.} at 277. Dworkin's distinction between personal and external preferences was recently criticized in Ely, \textit{Professor Dworkin's External/Personal Preference Distinction}, 1983 Duke L. J. 959.

\textit{41.} The former group would include those actions that materially reduce the distinctiveness or meaningfulness of the array of options available to others, while the latter group would consist of actions that, if they had any impact on others at all, do more than simply reduce the number of possible alternatives in an already satisfactory array.

This lack of relationship between liberty and the number of options also produces a conclusion that is the mirror image of the discussion above. There can be no question that if a person is required to do or not do some action simply on the ground that it will increase the number of options available to others, this person's liberty has been "reduced" in the sense that, \textit{ceteris paribus}, he has moved from a circumstance at the focal meaning of liberty to a non-central situation that may or may not be within the set.

This suggests a possible explanation for some of our ambivalence as a society toward welfare programs. We do not seem to contest very often or vociferously the basic idea that those in extreme need should be assisted - the "safety net" concept. But we have great concern over both how much assistance to give in these situations and what sorts of circumstances should trigger the assistance process. In other words, someone interested in basing welfare programs on a "rights" theory associated with the concept of liberty developed in this paper could very well reach the same conclusion that an economist interested in efficiency would reach. The latter would oppose assistance that went so far as to diminish significantly incentives for productive enterprise, while the former would oppose assistance that went beyond that necessary to establish a "distinct" and "meaningful" set of alternative choices concerning the recipient's life. If meaningfulness is given the more restrictive definition I have posited — where the number of choices is not itself directly relevant — then the assistance program could be seen as reestablishing a "proper" sense of liberty for such individuals by providing them with only rather small amounts of aid.
actions of others does not interfere with their liberty. That is, instances such as self-defense and the overthrowing of a despotic regime interrupt the license, rather than the liberty, of those wrongdoers. Likewise, the central case of liberty would permit the agent to end the wrongful interferences with his liberties by others. Thus, to the extent the agent is unable to regain his liberty, his lack of freedom is compounded. Moreover, even if the agent does not presently suffer any direct interferences with his liberty, the existence of constraints that would hamper his ability to end interferences in the future is also a current reduction in liberty, in the sense that the agent is not now at the central case of liberty. Indeed, one might wonder if he is in the set at all.

4. Nonhuman Constraints

"Constraints" on our ability to make choices or on the set of alternatives from which we may choose represents the final element in the complex definitional matrix I have developed for liberty. This element obviously overlaps with the last one involving "nonharm," for I indeed defined harm in terms of interferences or constraints on another's liberty. The "nonharm" element, however, is required for the central case from the point of view of others; the "nonconstraint" feature is required from the point of view of the agent. This additional definitional characteristic distinguishes the concept of liberty from those of "ability" and "desire" or "taste". In a recent article, David Miller provided a convenient example of the difference among these terms:

Suppose that I enjoy taking walks along the bank of a certain river, and consider the following three possibilities:

1. The local authority which administers the river bank erects fences around it and employs a warden to keep peo-
ple off. When this happens I shall say that I am no longer free to take my walk.

2. Brambles grow and block the path so that I can’t walk on the bank without tearing my clothes. In this event, I shall say although I am still free to walk there, I am no longer able to do so.

3. The river becomes littered with offensive debris. Under these circumstances I shall say that, although I am both free and able to walk, I no longer wish to do so.48

While my emphasis on a human cause to the constraint on liberty, however, places my definition within the first of Miller’s categories, this categorization hardly makes the “constraints” element clear or uncontroversial.46 The element of “nonconstraint” is obviously variable, and more specifically, variable both as to “directness” of intention to constrain and “size” or degree of the constraint. Concerning the directions of constraint, the key is the “causal history,”47 as Miller calls it, of the action that imposes the constraint: the awareness by the person that his action is imposing a constraint; the foreseeability or probability that the constraint will result from the action; and the number of factual causal links between the action of this other person and the imposition of the constraint.48 Where the relationship between the outside action


46. Quite the contrary, the limitation to human constraints makes this feature inherently normative, as Miller notes, since it requires some assessment of human accountability. Miller, supra note 45 at 69. On the other hand, it would be possible at this point to make this assessment rather more objective than subjective by simply declaring that interferences with liberty that count as “true” constraints will be only direct and deliberate obstructions of the actions of another, much as Isiah Berlin does with his extreme form of “negative liberty.” I. BERLIN, FOUR ESSAYS ON LIBERTY 122 (1969). See also Taylor, What’s Wrong With Negative Liberty in THE IDEA OF FREEDOM 175 (A. Ryan ed. 1979). I, along with Miller (supra note 45, at 72), reject this position, however, on the basis that it would make the central case of liberty far too narrow, and it would accomplish this by an implicit appeal to some normative agenda, not by reference to the manner in which the term is in fact used.

47. Miller, supra note 45, at 70.

48. See id. at 71-75. See also MacCormick, On Legal Decisions and Their Consequences: From Dewey to Dworkin, 58 N.Y.U. L. REV. 239 (1983), for an intriguing discussion of the various kinds of consequences that can flow from an act. MacCormick distinguishes between the immediate “results” of an action—e.g., squeezing a trigger and making a gun fire—and its “conse-
and the later constraint is too tenuous, the situation falls within the second or third category in Miller's list. These categories describe constraints that are "natural obstacles" to one's movements, and are irrelevant to the concept of "liberty." Agents that are indirectly and unintentionally constrained in their choices by the actions of others can therefore still be considered at the central case of liberty.

Concerning the degree of constraint, the possibilities range broadly, from impossibility (chains and locks) to excessive monetary expense (inability to purchase) to moral pressure (a sense of obligation to perform or refrain from performing some action) to mere inconvenience. At this point, however, a very difficult and controversial question arises: while the existence of any of these degrees of constraint will move the situation away from the central case of liberty, is the entire continuum relevant to the concept of liberty? Generally, current literature seems stuck between two extreme positions on this point, both of which are descriptively troublesome.

One position advocates cutting off this continuum at some point and making only some of these levels of constraint relevant to the concept of liberty. For instance, theorists as diverse as John Rawls and Robert Nozick reject

49. Rawls makes an explicit distinction between liberty and what he calls the "worth of liberty," Rawls, supra note 34, at 204, the former being limited to the generally "costless" basic political liberties while the latter is a concession to the fact that we live in a world of scarce resources — that is, while we may all share the liberty to live in Switzerland, for example, the actual "value" of this liberty to the vast majority of us is quite low because we cannot afford to do so. Id. In Rawls' scheme of justice, only the basic political liberties are of critical preeminent importance, for they are to be enjoyed equally, id. at 60, while on the other hand, the worth of liberty is to be "maximized" from the perspective of the least advantaged in society. Rawls concludes:

Thus liberty and the worth of liberty are distinguished as follows: liberty is represented by the complete system of the liberties of equal citizenship, while the worth of liberty to persons and groups is proportional to their capacity to advance their ends within the framework the system defines. Freedom as equal liberty is the same for all; the question of compensating for lesser than equal liberty does not arise. But the worth of liberty is not the same for
the idea that inconvenience or expense can ever rise to the level of a denial of liberty, in its proper sense. The other position advocates an opposite extreme by permitting nearly any degree of interference with one's desired actions to raise issues of denial of liberty. This perspective is perhaps best exemplified by the United Nations' Universal Declaration of Human Rights, which can be divided into two general categories: 'civil and political' liberties, and 'economic, social, and cultural' liberties. The former category contains freedoms comfortable to Western ears, as our use of the term liberty has so often been associated with political contexts. The latter category, however, is highly controversial and even includes a "right to rest and leisure, including... peri-

everyone. Some have greater authority and wealth, and therefore greater means to achieve their aims. The lesser worth of liberty is, however, compensated for, since the capacity of the less fortunate members of society to achieve their aims would be even less were they not to accept the existing inequalities whenever the difference principle is satisfied. But compensating for the lesser worth of freedom is not to be confused with making good an unequal liberty. Taking the two principles together, the basic structure is to be arranged to maximize the worth to the least advantaged of the complete scheme of equal liberty shared by all. This defines the end of social justice.

Thus, the content of the term "liberty" — insofar as various degrees of "constraint" are considered relevant to it — has here been restricted by a prior normative conclusion within Rawls' theory of justice, not by careful attention to the concept itself.

50. R. Nozick, Anarchy, State, and Utopia 149-231 (1974) (on "distributive justice"). For example, regarding the possibility of a "right to life," Nozick responds that such a right would "at most... be a right to have or strive for whatever one needs to live, provided that having it does not violate anyone else's rights." Id. at 179.

51. See, e.g., H. Laski, Liberty in the Modern State (Rev. ed. 1948):

[Men] are free when the rules under which they live leave them without a sense of frustration, in realms they deem significant... They are unfree whenever the rules to which they have to conform compel them to conduct they dislike and resent.

... Insecurity is the essential antithesis of freedom.

Id. at 33, 39. See also Russell, Freedom and Government, in Freedom—Its Meaning 249, 251 (R. Anshen ed. 1940) ("Freedom in general may be defined as the absence of obstacles to the realization of desires.")


53. Id. at art. 3-21.

54. Id. at art. 22-29.1.
odic holidays with pay." The attempted connection of these two groups of possible liberties has often been criticized as attempting to link two entirely distinct subjects. As Gerald Sirkin states, "freedom is confused with utopia." From this perspective, freedom is said to mean "freedom from risks; freedom from worry; freedom from hardships, illness, responsibility, and all other unpleasant facts of human life."

Thus, proponents of the Declaration advocate a very large portion of the range of possible types and degrees of constraints on action as relevant to the term "liberty," while opponents of the Declaration advocate a much narrower portion of such constraints as relevant. Yet neither side bases its argument on definition; instead, the focus here is on theory. Each includes or excludes various kinds or levels of constraint because of some larger sense of justice that dictates the content of liberty. In a sense, then, both sides concern "utopia." As David Miller summarizes them, one views liberty from a capitalist perspective while the other does so from a socialist perspective, or perhaps a bit less pejoratively, one rests in an assumption of individual autonomy while the other assumes the legitimacy of demands of the community. Each, however, views the other as arbitrary in its use of the term "liberty."

The debate concerning which constraints are relevant to the concept of liberty has failed to seriously consider the actual elements of liberty to which these constraints would be pertinent. If the debate were to focus initially on the descriptive detail of the term, some degree of common ground and necessary connection between these two rather disparate approaches could be identified. Descriptively, there is no obvious technique by which the full range of possible constraints on thought and action can be segmented, such that one seg-

55. Id. at art. 24. See also art. 25.1:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.


57. Id. See also M. CRANSTON, WHAT ARE HUMAN RIGHTS? Ch. VIII (1973).

58. Miller, supra note 45, at 67, 81-85. A similar point is made in Somervillle, Toward a Consistent Definition of Freedom, in Nomos, supra note 9 at 300.
ment would be relevant to the term liberty while another would not. Instead, all types and degrees of constraint are potentially relevant to the concept of liberty, depending on the circumstance. Those "circumstances," however, arise directly from the definitional elements of the distinctiveness and meaningfulness of alternatives available to the individual agent. That is, a constraint on an agent’s range of choices, whether imposed by threat of physical harm, high monetary cost, or moral suasion, amounts to an interference with the liberty of that agent if the constraint has an impact on the distinctiveness or meaningfulness of the remaining options. Thus, to the person with malfunctioning kidneys who faces a choice between surgery and death, the fact that the surgery is made unavailable by either high cost or political favoritism to others makes that constraint a reduction in her liberty. On the other hand, a constraint that removes one among a significant array of alternative actions available to the agent would not, by itself, constitute an infringement of the agent’s liberty. Thus, the choices that an agent faces can be restricted by a broad range of moral arguments that he accepts or by the prohibitive costs of various alternatives, without moving the agent from the central case of liberty. It also follows that a large number of constraints imposed by government might have no material impact by themselves on the distinctiveness or meaningfulness of the options available to the agent, and therefore not reduce the liberty of the agent. I shall further develop this difficult and controversial point in a subsequent section.

Finally, in addition to focusing on constraints imposed by humans, as opposed to those imposed by the circumstances or the tastes of the agent, my definition of liberty also specifies that the person causing the constraint be someone other than the agent himself. If an individual’s liberty has been impinged, if his range of options has been diminished in some significant respect, then that reduction must not be attributable to past choices by the agent. In other words, the exercise of one’s own liberty can never, by itself, be said to infringe one’s liberty.

This concept, however, may present a tracing problem. Once an agent selects a particular action, he will find himself in a new state of affairs calling for new decisions. These new

59. This particular sort of medical dilemma is the special focus of G. CALABRESI AND P. BOBBITT, TRAGIC CHOICES (1978).

60. See infra pp. 587-593.
circumstances may introduce new considerations and slightly varied options that are the result of the actions of persons other than the agent. As this process is repeated, it becomes extremely difficult to trace the agent's present set of diminished alternatives to his "initial" decision that began the chain of events.\(^{61}\) This notion of historical pedigree is another variable in the liberty matrix that works in a very complicated fashion.

Since our definition of liberty does not include constraints caused by the agent himself, an agent who finds himself presently constrained by his own past deeds is still otherwise at the central case of liberty. At the opposite extreme, an agent presently constrained only by the actions of other persons has clearly suffered a loss of liberty, provided the other elements of the definition are met (for example, the nonharm criterion). This leaves a vast middle ground where present constraints are the product of both the agent's past decisions and the actions of others. Determining whether any particular instance falls inside or outside the liberty set, and if inside, how far, will then depend on the relative weight assigned to each of these factors and their ratio. In the best of circumstances, such a task would be formidable indeed, for the assignment of weights and the assessment of the relationship between these factors may well be more a matter of normative judgment than of scientific method.\(^{62}\)

II. LIBERTY AND LAW

Dividing the concept of liberty into its separate constituent elements now makes possible a more exacting and more profitable examination of the meaning and importance of lib-

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61. See e.g., MacCormick, supra note 48, at 248:
If we believe in human agency at all, we must believe in a difference between my causing a state of affairs S and my causing a prior state of affairs in which another agent has some opportunity, temptation, ground or means to bring about S. That other agent causes S, and I don't cause it even though he would not have done so but for the opportunity, temptation, ground, means or whatever furnished by me. Opportunities may be necessary for thefts, but exceptional cases of compulsive behavior apart, they do not necessitate people to steal. I don't cause the theft of my briefcase by leaving it in an unlocked car; and that is true even though my loss of it by theft in such a case may be my own fault.


62. See notes 12-20, supra.
erty within the institution of law, and more particularly within constitutional law. Again, the proper method is to take discrete successive steps. I begin by developing the relationship of liberty to the equally complex philosophical notion of "rights." From that basis, the connection of the concepts of liberty and property is more easily discernible. The discussion then leads naturally to an examination of the textual appearance of the term liberty within the Constitution, specifically, the Due Process Clauses of the Fifth and Fourteenth Amendments.

A. Liberty and Rights

In developing the focal meaning of liberty I have limited the discussion to those circumstances in which an agent could be said to be "at liberty." I have avoided as much as possible reference to "rights," although the concept of liberty naturally implies some connection with this special type of claim. I have made this separation in order to focus more distinctly on the concept of a "right" and to demonstrate the new elements it introduces into an analysis of liberty.

The key additional factor that the subject of rights has in...

63. The concept of a right is multifaceted in much the same way liberty is, and we can demonstrate this by stating the general form of a right in terms of several variables (borrowing in part from A. Gewirth, Reason and Morality 65 (1978): "A has a type-Z right, of stringency-S, to X against B in context C by virtue of Y." The seven elements of a right are therefore these:

1. the subject or holder of the right—our agent "A";
2. the modality or form of the right—"type Z"; for example, "legal" or "moral" or "prudential";
3. the stringency or strength of the right—"S"—which includes conceptual characteristics such as "absolute," "prima facie," and "inalienable";
4. the object of the right—"X"—which can be in the nature of an action (to do X) or access to something more tangible (to have X), and which can be either general or specific;
5. the respondent to the right—"B"—who can be an individual or any collectivity of persons, and who thereby has a corresponding "duty" not to interfere with the right, and who can have this duty either directly by owning something to A or indirectly (or derivatively) by guaranteeing to A the enjoyment of some right;
6. the domain of life in which the right is asserted—"context C"; i.e., "social" right, "political" right, "economic" right; and
7. the justifying reason or normative foundation for the right—"Y."

The concepts of liberty and rights can be related in two seemingly different ways. One is the common reference to a "right to liberty" (see, e.g., R. Dworkin, Taking Rights Seriously 266 (1978)) where liberty is simply inserted as the object of the right in element (4). That leaves open, however,
introduces into an analysis of liberty is the fact of institutional involvement in the formation, implementation, and protection of sets of choices indicative of liberty. The institution usually associated with these "rights-functions" is, of course, the state, which, through its law-making authority, can create "legal" rights in the positivist\textsuperscript{64} sense. Other institutions, however, can generate, protect, and delimit ranges of choice within their own spheres of influence, including the marketplace, religious organizations, the family, and so on. Some of these options may also be protected by the state and therefore called "legal" rights, but the concept of liberty is not inherently limited to this topic alone. One cannot understand or appreciate this particular portion of the concept of liberty in isolation. One can place these legal rights to various options in proper context by returning to the definitional technique I have been employing.

The central case of a "right to liberty," or the set of rights at the core of liberty, would be a situation in which the elements characteristic of the central case of liberty are given the greatest possible degree of protection that the resources of the state could offer. In other words, the central case of a "right to liberty" exists where the counter-incentives to those who might ignore their duties and interfere with one's liberty are at a maximum. The most obvious example of such counter-incentives or "costs" are the penalties of the criminal law, the most extreme being the death penalty. Thus, the true central case of "legal" liberty would be a choice-set with all the characteristics described earlier and which is protected by the death penalty. We then move from the central case of liberty by decreasing the amount of protection given any set of choices, moving through varying levels of criminal penalty and then into varying types and levels of civil damages one might recover. At some point the courts will not enforce our

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\textsuperscript{64} "Legal positivism" is a phrase fraught with ambiguity, but it connotes at minimum the idea that the term "law" is reserved for those forms of social control that are evidenced in "positive" or observable sources. See generally Hart, Legal Positivism, in 4 \textit{Encyclopedia of Philosophy} 418-20 (1967). Another more controversial description of the basic tenets of positivism appears in R. Dworkin, \textit{Taking Rights Seriously} 17 (1978). See also J. Raz, \textit{The Authority of Law} 37-77 (1979).
rights-claims, and the notion that we have a "legal" right will fade. If, however, some residual level of counter-incentive to the would-be interferor remains, such as the fear of ostracism or scorn by others in one's community, family, or profession, there may be some conventional "moral" sense of a right to the choices involved. Again, the level of protection necessary for any of these peripheral situations to remain in the "liberty" set is difficult to specify.

The analysis of requisite levels of protection reveals an interesting relationship. The most extreme counter-incentive to interfere with others' liberty, the death penalty, is generally limited to situations of the most extreme deprivation of choice-sets, intentional murder, where no choices of any kind remain available to the victim. At the other end of the spectrum, actual interference with our choices is condoned in very particular situations involving very specific options, such as the choice to drive on a particular side of the road. This suggests a relationship between the level of protection afforded choices and the generality of the unencumbered choices that the agent seeks to make: The more general the right claimed, the more protection afforded it. For example, the right of free speech is seen as inviolable, while the right to speak at a particular place at a particular time is subject to much regulation. Each "general" right, however, will ultimately consist of a set of more discrete, specific claims of right. Thus, the more these specific rights are circumscribed, the more one can question the actual existence of the foundational general rights, and in turn the existence of liberty itself in its deepest sense.

B. Liberty and Property

As a transitional step between the descriptive analysis of

65. H.L.A. Hart, for example, has noted that one distinction between law and morality is the "characteristic form of . . . pressure which is exerted in . . . support" of moral rules. H.L.A. HART, THE CONCEPT OF LAW 175 (1961).


67. This observation also relates to the earlier discussion in note 41, supra, of the level of externality associated with the exercise of liberty. While few external "costs" are associated with general rights, extensive costs are often recognized regarding specific activities.
liberty and a consideration of liberty as a political issue in its constitutional context, the relationship between liberty and property should be examined briefly. To do so, the full definitional detail of the social institution of property need not be developed, as that has been done elsewhere. I shall simply draw upon that work to note some general but important linkages between these two fundamental legal concepts.

Property rights are rights of ownership, and the concept of ownership requires two primary features: (1) rights of control (2) over identifiable "things." The first feature confirms the inevitable overlap between property and liberty, for both consist of sets of rights. Property rights, however, are a unique sub-set of rights because of the second feature: they all share the characteristic of being associated with ownable objects of some sort, whether tangible or intangible. Liberties, on the other hand, are rights not necessarily associated with particular items or specific past events. In their general form, they are free-floating claims to non-interference. For example, the right to sell one's home is a property right, while the right to sell in general, the right to become a participant in private market transactions, is an aspect of our liberty. Of course, the debate concerning the nature of this "thingness" feature of property, and hence the controversy surrounding the nature and location of the precise dividing line between property and liberty interests, is difficult to resolve. Nevertheless, property rights are inevitably derivative

68. See Property, Due Process, supra note 14, at 868-874 and material cited therein.

69. Id. at 869-870. This is in fact a very summary description of these elements. The "rights of control" associated with the central case of ownership also includes limitations on these rights (id.), just as the central case of liberty has inherent limitations on the agent's range of alternatives. Similarly, the requirement for "identifiable things" is a common shorthand reference to the more fundamental conceptual requirement for "specificity" in the claim of ownership. See infra note 70.

Two additional features not directly relevant to our present inquiry are (1) the existence of special limitations on a property owner's rights concerning certain individuals in certain circumstances—e.g., easements, and (2) a "social context" dimension, or specific reference to the era or culture in which the concept is being examined. See id. at 870-873.

70. The variety of things to which claims of ownership can be made are listed in id. at 870 n. 34 (quoting Honore, Ownership, in Oxford Essays in Jurisprudence 107, 132 (A. Guest ed. 1961)).

71. A very interesting current debate concerning precisely this issue, although it is not labeled in this fashion, is one involving the inheritability of a deceased celebrity's "right of publicity." The question, in essence, is whether this right is a property interest, for if it is, then it should
in character, depending upon the prior existence of more general rights concerning choice sets themselves, or liberties. Correspondingly, these liberties need not be "owned" in order to be viable: they can and do exist independently of, and even in the absence of, any particular scheme of private property.  

C. Liberty and Due Process

The substance of both "liberty" and "property" in the context of the Due Process Clauses of the Fifth and Fourteenth Amendments has been a subject of continuing controversy. Rather than attempt to review and assess the full range of this constitutional debate, I will concentrate on a recent topic involving the relationship of individuals to the state that has prompted a number of articles, including an

have the full panoply of ownership-related rights associated with it, including the right to pass the interest on to one's heirs. One basic problem with this reasoning, however, is the issue of whether the celebrity's fame is actually a "thing" that the celebrity "owned" that he could pass on to others. The courts have not been unanimous on this point. See, e.g., Factors Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 (2d Cir. 1978); Memphis Development Foundation v. Factors Etc., Inc., 578 F.2d 1381 (6th Cir. 1978); Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc., 250 Ga. 135, 296 S.E.2d 697 (1982); and Lugosi v. Universal Pictures, 25 Cal.3d 813, 160 Cal. Rptr. 329, 603 P.2d 425 (1979).

72. This conceptual separation of property and liberty also seems to be at the root of an important legal distinction often associated with them. One consistent characteristic of interests labeled "liberties" is not only their personal nature, but also a corresponding lack of a critical "property" element: alienability, or the right to sell the interest. However, some liberties appear to be alienable, or at least contractually waivable, in many situations, and the true distinction between interests that are sellable and those that are not, regardless of their conceptual label as property or liberty, may be based upon the analysis of inalienable interests presented in Calabresi & Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089, 1106-1115 (1972). The authors argued that rules prohibiting market exchanges are based primarily on the incommensurability of some of the values considered to be at stake in the transaction. Such may well be the case regarding the sale of our freedoms, particularly those that are general and basic.

73. See Property, Due Process, supra note 14, at 864 n. 15.

74. I noted earlier one potential item of trouble that is in fact more a product of linguistic misconception than anything else—the "liberty-license" dichotomy.

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oft-cited one by Professor Henry Monaghan upon which I can conveniently focus.

Monaghan criticized the (then) newest mutation in a series of Supreme Court cases which had narrowed the meanings of both “liberty” and “property” through a single consistent theme: no constitutional deprivation of these interests would be found unless the government action infringed some interest that had been previously created, protected, or recognized by the government. That theme, according to Monaghan, seemed to drain the concepts of liberty and property of any independent constitutional substance, and to leave them to the mercy of the states.

In a previous article, I have challenged this criticism of the Court’s reasoning, at least insofar as property interests are concerned. Professor Monaghan’s pessimism could be largely alleviated, I argued, by recognizing a deep theory of the Due Process Clause itself: that it is a device for restoring equilibrium to the relationship between the individual and the state. The power of the state to interfere in the life of the individual is countered by the individual’s right to demand procedural regularity by the state. But what process is “due” will therefore be a matter of circumstance: The Constitution will require those particular procedures that will restore and maintain a protective balance against overly intrusive or arbitrary state action.

“Arbitrariness” itself is by the same token a matter of circumstance. According to the above theory, devices other than the Due Process Clause are available for maintaining this equilibrium, such as individual choice, one of the central elements being investigated in this essay. As a consequence, “legal” protection of the individual in his dealings with government is far less necessary where the individual may choose initially to avoid rather than encounter the state. In this situation, if the individual chooses to deal with government instead of some private alternative, government may impose as many procedural “holes” in the interests it makes available as

77. Monaghan, supra note 74, at 420-429.
78. Id. at 424-25.
80. Id. at 901-903.
81. Id. at 904-05.
the market will allow. On the other hand, where the individual does not have a choice, where the state is effectively a "monopolist" concerning some interest, the Due Process Clause is applicable and prevents the state from attempting to impose procedural limitations to its advantage.

This approach to the Due Process Clause, coupled with my previous definitional development of the concept of liberty, suggests that Professor Monaghan's analysis of the Court's handling of liberty is also too pessimistic. He initially expressed consternation over the expansion of the substance of liberty from its original meaning of "freedom from personal restraint." But I delay my concern with that particular point until the next section. For now, I accept, as he does, the broad sense in which the term liberty now seems to be understood by the courts.

Monaghan began his criticism of the gradual narrowing process to which "liberty" has been subjected over the last decade with Board of Regents v. Roth. Roth involved an assistant professor at a state university who was not rehired at the end of his one-year contract. He claimed the decision not to rehire him, having been reached without affording him notice or a prior hearing, was a deprivation of his liberty and property interests without due process of law. Although the

82. Id.
83. Id. at 905-911.
84. Monaghan, supra note 74, at 411-416.
85. At one point he concludes:
How can this extension [of the concept of liberty] be justified as a legitimate mode of constitutional interpretation? I do not know. But, like others, I must accept reality: this judicial expansion of "liberty" is now far too central a part of our constitutional order to admit of reassessment. Indeed, loosened from the fetters of original intent and fortified by judicial precedent, I readily accept [Board of Regents v. Roth's] proposition that "[i]n a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed."

Id. at 416, quoting Board of Regents v. Roth, 408 U.S. 564, 572 (1972).
86. 408 U.S. 564 (1972).
87. Wisconsin State University-Oshkosh hired David Roth for a fixed term of one academic year. Id. at 566. At the end of the fixed term, the university advised Roth that he would not be rehired for the next academic year. Id. Because Roth was not tenured, state law left the rehiring decision to the unfettered discretion of university officials. Id. at 567. Under Board of Regents rules, the university officials did not have to give Roth the reasons for their decision not to rehire him, or to provide him with the opportunity for an appeal or a review of the decision. Id. Thus, Roth received only a timely notice informing him that he would not be rehired without specifying the reasons. Roth then filed suit in federal court
property issue is not our direct concern here, the Court’s analysis of this point is relevant to my theory of the Due Process Clause, and hence to the concept of liberty. The Court decided the point on the basis of Professor Roth’s employment contract: it was only a one-year arrangement; consequently, the decision not to rehire him had not infringed any contractual and, therefore, property interest possessed by Professor Roth. Since no property interest was implicated, the question of what process he might be due never arose.

Professor Monaghan criticized this reasoning for conflating procedural and substantive issues, thereby permitting procedural limitations to escape judicial scrutiny because of a prior substantive decision on the nature of what constitutes a constitutional property interest. The “balance” or “monopolist” theory of the Due Process Clause which I developed above, however, suggests a rather different point of view. Professor Roth could by his own decision accept whatever limited forms of “property” that the government chose to offer, provided his choice was “meaningful” in the sense that government was not effectively in the position of a “monopolist.” Since government did not enjoy a monopolistic advantage over Professor Roth when he accepted the job, he had no basis for later complaint concerning the administrative details of that job.

A similar conclusion concerning an additional basis for Roth’s “liberty” claim is also prompted. He had argued that his reputation constituted a liberty interest, and that the university’s failure to rehire him had infringed that interest. The Supreme Court rejected this idea, despite the fact that it reiterated the notion that “[i]n a Constitution for a free people, there can be no doubt that the meaning of ‘liberty’ must be broad indeed.” The Court based its negative conclusion on the element of “choice” described above, although the Court did not articulate this point in quite the detail suggested by the analytic framework I have developed here. The Court stated more simply that “[i]t stretches the concept too far to suggest that a person is deprived of ‘liberty’ when he alleging that the decision violated his fourteenth amendment due process right because it gave no reasons and provided no opportunity for a hearing. Id. at 569. Roth also alleged that the decision was motivated by a number of unpopular statements he had made and therefore violated his first amendment rights. Id. at 568.

88. Id. at 578-79.
89. Monaghan, supra note 74, at 438.
90. 408 U.S. at 572.
simply is not rehired in one job but remains as free as before to seek another." Again, while Professor Monaghan criticized this result, I do not share his concern, for it seems to be quite consistent with the definitional element of "meaningfulness" within liberty. That is, where government is not in the position of a monopolist, it is reasonable to conclude that while the array of options faced by someone who is not rehired at the end of his contract is not as rich in number as it was before, the array nevertheless still contains enough options to be meaningful. Therefore, "liberty," properly understood, has not been infringed. Moreover, one could view the lack of government monopoly as meaning that Professor Roth placed himself in this predicament by his own previous choices, again suggesting that his liberty, properly understood, had not been diminished by the university's actions under the existing contract, but rather, by his own actions.

This final point may be an important factor in explaining another decision contemporary with Roth that also troubled Professor Monaghan. As he stated the issue:

*Hampton v. Mow Sun Wong*, following the Roth caveat, held the due process clause to be applicable to a civil service regulation barring aliens from access to a class of public employment. Unfortunately, the Court has not adequately explained why the discharge of a specific public employee does not activate the due process clause, while "a rule which deprives a discrete class of persons of an interest in liberty on a wholesale basis" does. One is tempted to say that the liberty protected by due process operates only at wholesale, not retail.

One need not be pushed to this conclusion at all, however. If the state university system involved in Roth had announced that no professors whose contracts were coming to an end at the close of the academic year were to be rehired, there would have been no more infringement of liberty than there had been in Roth itself. State actions aimed at aggregate or class interests are more properly addressed under the Equal Protection Clause, which Professor Monaghan discussed in a very nice summary analysis elsewhere in his article. Perhaps that would have been a better route for the Supreme Court

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91. *Id.* at 575.
93. *Id.* at 416-420.
to have taken in Mow Sun Wong. But insofar as the concept of liberty is concerned, one major difference between Mow Sun Wong and Roth is that in the former the claimant had never previously agreed to, or conducted himself in such a way as ultimately to come within the range of, the government restrictions on employment. The claimant’s status as an alien was not something associated with his previous choices. Rather, government simply removed an option from the aliens’ pre-existing choice-set.

Under a proper analysis, these constraints would infringe the liberty of this group only after additional elements had been considered. Most importantly, in the context of these cases, one must examine the definitional requirement that the restriction on choices impact the distinctiveness or meaningfulness of the remaining options available to the claimant. In Mow Sun Wong this would seem somewhat problematic, since many other employment options remained available to aliens despite the restrictions on public service employment. The Court’s decision thus suggests several possibilities. Perhaps the Court sensed a significant amount of impact on the “meaningfulness” of the aliens’ choices not because the restriction was imposed in an aggregate fashion, but because it was “general” rather than “specific” in character. Another possibility is that this general sort of restriction, coupled with its class-based character, simply ran afoul of a standard equal protection analysis, as mentioned earlier, which the Court mislabeled. The most likely possibility is that the decision reflected some normative theory underlying the Court’s sense of liberty, rather than any aspects of the exact definition of this concept. Perhaps the Court simply followed the suggestion of Ronald Dworkin that liberty be viewed as a subset of the more basic value of “equality,” or more accurately, “equal concern and respect,” and that the government’s treatment of this disenfranchised group seemed reprehensible on this basis. Whatever the key to unlocking Mow Sun Wong, it is clear that an understanding of the definitional detail of the concept of liberty, and of the distinction between its description and its normative justification, leave a great deal more to be said about the case than Professor Monaghan expressed in his article.

Such explanations are of little assistance, however, re-

94. See pp. 557-558, supra.
95. See p. 34, supra, and note 93, supra.
garding Paul v. Davis,97 decided four years after Roth and Mow Sun Wong. Paul involved an individual, as in Roth, and a nonconsensual interaction between that individual and the state, as in Mow Sun Wong. The claimant alleged a denial of liberty without due process when police sent a circular to local merchants containing his picture and a description of him as an "active shoplifter."98 He claimed that the defamation infringed his liberty interests and that it had been done in the absence of either prior notice or a hearing on the allegation.99 The Supreme Court, however, found that no constitutional liberty was involved. The most fundamental policy reason for its conclusion was the desire to keep tort litigation of this sort from flooding the federal courts.100 To avoid raising this state action to the level of a violation of the Constitution, the Court employed reasoning similar to that used in Roth. No liberty interest was infringed because the claimant could not show any interference with a specific constitutional guarantee, freedom of speech, or with some "more tangible" interest already created by state law.101 As an example of the latter, the Court distinguished Wisconsin v. Constantineau102 because the claimant in that case had not only been in some general sense "defamed" but had also lost the right to buy alcoholic beverages.103 Thus, Paul required a preexisting legal, public or state-related "choice" in order for the claimant to establish an infringement of liberty. The claimant, however, could show no such disability: "The plaintiff. . . . could vote, drive his vehicle, and buy liquor—all just as before the defamatory act."104

From the point of view of the concept of liberty there are several difficulties with this reasoning. Any comparison of Roth and Paul would involve a serious conceptual error, for the critical element in Roth was the individual's choice to deal with the state, and his acceptance of an interest that was limited. As Justice Rehnquist stated in another case, the individual took "the bitter with the sweet."105 Therefore, the individual's "liberty" interest in this context was also inherently

98. 424 U.S. at 695.
99. Id. at 697.
100. See Property, Due Process, supra note 14, at 884.
101. 424 U.S. at 709.
103. 400 U.S. at 434 n. 2.
104. Monaghan, supra note 74, at 425.
limited, since the individual's prior choice had placed him in a predicament where the state could act just as it did. Actionable "defamation," on the other hand would be much more difficult to demonstrate. In *Paul*, since a prior individual choice was *not* available to limit the sense of liberty involved, the Court developed an alternative to accomplish the same thing. It declared in effect that "liberty" in its constitutional context involves *only* those choices directly created, sanctioned, or related to the state. The fact that the claimant might lose his job, be kicked out of civic organizations or clubs, or be ostracized by members of his family, all of which create impacts on the "choices" available to the claimant across the spectrum of his life activities, would not seem to be relevant. From a definitional point of view, however, such a result is indefensible. Just as the concept of property in the context of the Constitution is not limited to state-related largess, the concept of liberty should also not be limited to state-related choices of actions. If liberty is truly a more general "right to develop" or "right to pursue one's own life-plan," then there can be no doubt that the state's action in *Paul* infringed it.

This conclusion, however, leads us back into the quandary the Court had been trying to avoid. With this expansive definition of liberty, all state action would seem to establish a federal cause of action. Yet this inference is premature. The only point established thus far is that the concept of liberty cannot be narrowed to reach this result the way the property interest in *Roth* had been legitimately limited. While liberty may have been infringed, the degree of that interference and its relationship to the requirement of due process have yet to be investigated. Thus, in *Paul*, rather than stopping prematurely at the issue of liberty, the Court should have considered the subsequent, but no less constitutionally critical, matter of the demands of due process. This raises an entire range of separate considerations primarily revolving around preventing potential abuses of governmental power, most of which are clearly beyond the scope of this essay. But in at least one important respect the concept of liberty I have painstakingly developed could be of great assistance in the analysis of this issue as well.

Further analysis of Supreme Court decisions could reveal that the "amount" of procedural protection demanded by

106. See Property, Due Process, supra note 14, at 896 n. 201.
107. *Id.* at 936-40.
the Constitution is related directly to the "distance" the state's action had moved the individual from the central case of liberty. 108 For example, assuming that in Paul the claimant had been at the central case before the state acted, the degree of process to which he would be entitled would be established by examining how serious the impact had been on the "meaningfulness" of his remaining choices. Indeed, the Supreme Court implicitly used this technique by carefully noting the wide range of "official" options that had not been disturbed by the distribution of the circular. 109 Thus, an alternative ground for the decision could have been that while the claimant's liberty may have been infringed, the impact was sufficiently small that due process did not demand a prior hearing. Perhaps all that would be necessary would be state causes of action in tort against the government. 110 Indeed, this reasoning more satisfactorily explains another decision contemporary with Paul that Professor Monaghan also finds disturbing for its use of the Paul rationale. In Meachum v. Fano 111 a state prisoner challenged the constitutionality of the procedures involved in his transfer from one state institution to a more restrictive one. There was no need for the Court to have been concerned, as it was, about the absence of an allegation that some specific constitutional right or state-created liberty interest had been violated. 112 Instead, the Court could have focused on the extremely peripheral sense of "liberty" that the prisoner enjoyed before the transfer, implicitly suggesting that the move from this circumstance to one somewhat further from the central case would require a correspondingly minimal degree of procedural protection to be constitutional. 113

108. This was the relationship between due process and the concept of property suggested in id. at 938-40.
109. 424 U.S. at 711-12.
110. This indeed was the Court's conclusion. Id. at 712.
112. Id. at 216, 228.
113. This is essentially the conclusion reached by Justice Stevens in dissent in Meachum. 427 U.S. at 229. However, this is in fact a larger and more significant point than the context of the present discussion otherwise indicates, for it relates to the point to be developed in the next section. Justice Stevens chided the majority for its positivist, and rather cavalier, attitude toward the concept of liberty. By focusing that concept on state-related or -guaranteed "rights," the majority had lost sight of the fundamental constitutional proposition that "all men [are] endowed by their Creator with liberty as one of the cardinal unalienable rights" and that "the Due Process Clause protects" those sorts of rights rather than the particu-
III. LIBERTY IN THE REGULATED STATE: THE CENTRALIZATION AND POLITICIZATION OF LIBERTY

This analysis of the modern constitutional meaning of the term liberty in the Due Process Clause returns us to some fundamental political and philosophical issues that must at least be faced, if not resolved, in this short essay. If a sense of balance between government and the individual is the key policy foundation of the Due Process Clause, then there is every reason to expect and endorse changes in the concept of liberty over time, rather than to have nagging doubts about them as Professor Monaghan expressed. For if government grows in power and pervasiveness, then liberty must also expand to meet the challenge and restore the mystical equilibrium. Moreover, if this general description of the relationship between liberty and governmental power is accurate, then one might intuit that over the span of our country’s history, the ratio of these two factors may have remained relatively constant.

This apparent maintenance of equipoise, however, is not necessarily benign. For example, it seems to have caused John Hart Ely to rewrite portions of American constitutional history. In Democracy and Distrust he asserts at one point that “[p]opular control and egalitarianism are surely both ancient American ideals.” He elaborates on them in the following representative passages. Concerning egalitarianism, he states:

When it came to describing the actual mechanics of republican government in the Constitution, however, this concern for equality got comparatively little explicit attention . . . because of an assumption of “pure” republican political and social theory . . . that “the people” were an essentially homogeneous group whose interests did not vary

lar rights or privileges conferred by special laws or regulations.” Id. at 230. The majority’s attitude, then, is simply another symptom of the centralization and politicization of the concept of liberty discussed in Part III of this essay, infra.

I should also note that for purposes of simplicity of discussion, the analysis of cases in the text is limited to those considered by Professor Monaghan in his article. There have, of course, been more decisions since Meachum, and two of the most important—Vitek v. Jones, 445 U.S. 480 (1980), and Jago v. Van Curen, 454 U.S. 14 (1981)—are discussed at length in Property, Due Process, supra note 14, at 934 n. 378.


115. Id. at 76.
And concerning popular control and its connection with the concept of liberty, he notes:

"Our Constitution has always been substantially concerned with preserving liberty . . . by a quite extensive set of procedural protections, and by . . . ensuring that . . . the decision process will be open to all on something approaching an equal basis . . . . The general strategy has therefore not been to root in the document a set of substantive rights entitled to permanent protection."

These observations are reasonable only if one ignores two critical historical facts: first, that the original Constitution strove to insulate federal officials from direct popular control; second, that liberty was preserved in that document not simply by procedural protections and a few substantive rights, but by substantive limitations on the range of activities available to the federal government. These two facts suggest some rather different conclusions concerning the notions of equality and sovereignty, and hence liberty, that may have underlay the Constitution at its origin.

The fact that the Constitution did not create a central government of vast and pervasive powers reflects an assumption of homogeneity in the American populace (the white populace, that is). The assumption of homogeneity did not involve general substantive interests, but a specific shared love of freedom from government interference. We were all to enjoy an “equality of liberty.” This was only possible, however, in the context of a central government that was primarily conceived with the broad and largely uncontroversial authority of a “night watchman,” rather than with the authority to impose fundamental social change. Such limited dominion over our options would not challenge the substantive interest of social heterogeneity that the Framers knew quite well characterized the American populace. Moreover, the Constitution left intact the system of state and local government where regional diversity was expected not only to survive but to thrive.

116. Id. at 79.
117. Id. at 100.
118. See text accompanying notes 120-123, infra.
119. The best recent article to make this point forcefully is Mayton, Seditious Libel and the Lost Guarantee of a Freedom of Expression, 84 COLUM. L. REV. 91 (1984).
Regarding the relative lack of popular control that characterized the original federal government, substantive egalitarianism was not of deep concern to the Framers. Instead, it seemed reasonable to have a severely restricted electorate select only one half of Congress by direct balloting, and the other half and the President by indirect methods, and the federal judiciary not at all. The powers of this government were thought sufficiently restricted that those with suffrage rights were primarily those most likely to be impacted significantly by its activities.

While Professor Ely's sense of the importance of process, enfranchisement, and representation may be historically questionable, it is nevertheless currently rather accurate. This is not necessarily a good sign, however, for he accepts rather uncritically the potential implications of an extremely broad-based and active electorate. The fact that a minority of eligible and registered voters in this country often chooses various officials at all levels of government could be something to be proud of, not decried, as Seymour Martin Lipset suggested almost a quarter century ago:

Although the kinds and causes of apathy and nonvoting vary for different historical periods and for different sections of the population, it is possible that nonvoting is now, at least in the Western democracies, a reflection of the stability of the system, a response to the decline of major social conflicts, and an increase in cross-pressures, particularly those affecting the working class.

Lipset could add, as he does later, that voting rates are low when a group perceives that "its interests are [not] strongly affected by government policies."

Thus, increased concern with enfranchisement and political representation which Professor Ely details is in fact a symptom of the release of government from its early constitutional fetters, a deeper and prior political phenomenon. With government now able to involve itself in all aspects of

120. U.S. Const. art. I, §2, cl. 1.
121. U.S. Const. art. I, §3, cl. 1 (Senators chosen by state legislatures).
122. U.S. Const. art. II, §1, cl. 3 (President chosen by Electors).
123. U.S. Const. art. II, §2, cl. 2 (Judges appointed by the President, with the advice and consent of the senate).
125. Id. at 186.
126. Ely, supra note 114, at 94-100.
our lives, our only protection lies in emphasizing a correspondingly broad range of individual rights that serve to “trump” intended majoritarian action.127 But even more ominously, the breadth of government activity means not only that it is a source of danger, but of advantage as well.128 Thus, the political process, the “legal” creation and protection of individual prerogatives, is now of the most vital concern129 and has replaced other social institutions, such as the market, our more immediate communities, our families, and even ourselves,130 as the first and last word on the substance

127. Ronald Dworkin is the most famous advocate of this idea of understanding rights as “trumping” utilitarian social policies. See, e.g., R. DWORKIN, TAKING RIGHTS SERIOUSLY 190 (1978):

The claim that citizens have a right to free speech must imply that it would be wrong for the Government to stop them from speaking, even when the Government believes that what they will say will cause more harm than good.

128. This is one of the points made by Charles Reich in his famous article The New Property, 73 YALE L.J. 733, 764-768 (1964).

129. Gerald Sirkin has a particularly pessimistic point of view on this point:

Still another change in the political process occurs because of changes in voter thinking and strategy. As government expands its activities, new vistas open up to voters. Demands for government interventions or special benefits, which were unthinkable under the rules of the individualistic game, now become thinkable. Each new government action whets the appetite for more. Those who bear the cost of government think less about ways to restrain government spending and more about ways to achieve partial recompense through some special benefits for themselves. The competition for a share of the loot speeds up the growth of government and weakens confidence in democracy as a workable method of government.

Under the strain of the expanding role of government, the democratic method will eventually break down. The transfer of power from politicians to the bureaucracy and the scramble for government benefits will contribute to the breakdown. If democracy should survive those stresses, it will eventually face a more severe test. In countries where government dominates the economy and is the principal source of privileges, rewards, and even livelihood, control of government is not something to be lightly risked. Free elections are not a menace to those in power when government is unimportant and not much is at stake. But when government becomes a vital concern of those in power, we can expect to see, as we have seen in so many failed democracies, a military takeover or a declaration of “emergency” with suspension of elections or the establishment of a one-party system by the suppression of opposition.

Sirkin, supra note 56, at 190.

130. Although Sirkin seems to focus on the individual, in the context
of the concept of liberty.

This, then, is a "new liberty" that complements the "new property" that Charles Reich identified in his famous article two decades ago. Just as Reich's property was government-related, consisting of various forms of largess such as licenses, subsidies, and welfare payments, so too our new liberty is a centralized and politicized concept. Again, one

of his article it is clear that he is concerned with the loss of the sense of community as well. See Sirkin, supra note 56 at 183-184. See also Lasch, The Bill of Rights and the Therapeutic State, in The Future of Our Liberties 195 (S. Halpern ed. 1982).

This dominance of the state in fact reinforces my earlier conclusion that liberty and license must be distinguished. That is, I noted in Part II that liberty as it is normally understood, certainly in legal contexts, is composed of a set of rights, and I observe in the present Part that to be a "right" that counts, the claim must be one that is recognized by the state. Thus, since there is no recognized "right" of this sort to punch someone in the nose, this particular activity would not be properly included in the "liberty" set. Hence, liberty comes to be understood as that set of alternative actions which one has a "right" to perform, and "license" describes those activities which one does not have such a right to perform. This reasoning is troublesome, of course, because it leaves "rights" and hence liberty, totally at the mercy of the state. But if the depiction of the present state of affairs suggested in the text is moderately accurate, this indeed is the situation we face. A positivist sense of rights and a state-related concept of liberty are now our controlling perspectives. There is certainly plenty of evidence to support this conclusion, not the least of which is John Hart Ely's purely procedural view of the content of the Constitution. ELY, supra note 114. Recall also Justice Oliver Wendell Holmes' approach to this matter, noted in Part I of this essay, supra at p. 13. See also Donaldson, Regulation of Conduct in Relation to Land—The Need to Purge Natural Law Constraints from the Fourteenth Amendment, 16 WM. & MARY L. REV. 187, 190 (1974) ("property" described as a "dynamic concept that can be changed as the public's needs demand").

131. Reich, supra note 128.
132. Id. at 734-737.
133. Indeed, Reich recognized the connections between liberty and property, and emphasized them:

During the industrial revolution, when property was liberated from feudal restraints, philosophers hailed property as the basis of liberty, and argued that it must be free from the demands of government or society. But as private property grew, so did abuses resulting from its use. In a crowded world, a man's use of his property increasingly affected his neighbor, and one man's exercise of a right might seriously impair the rights of others. Property became power over others; the farm landowner, the city landlord, and the working man's boss were able to oppress their tenants or employees. Great aggregations of property resulted in private control of entire industries and basic services capable of affecting a whole area or even a nation. At the same time, much private property lost its individuality and in effect became socialized. Multiple
can view this phenomenon as either primarily negative or primarily positive. It is primarily negative if one focuses on the dramatically expanded role of government in creating constraints on our actions. It is primarily positive if one emphasizes the government's creation of new opportunities for individual choice and the government's offer of augmented protections of both old and new arrays of alternative behavior. In either case the political and legal power from which this liberty draws its substance have become the twin foci of the modern regulated state.

Although there are many manifestations of this phenomenon in contemporary life, I shall mention only one. The concentration of our sense of liberty in public institutions has proceeded hand in hand with a general preoccupation with the distribution of the economic pie rather than its expansion. Two events seem to have occurred roughly simultaneously: one is the general success of capitalism, which has made continued economic growth seem a theoretical rather than a real issue; the other is the breakdown and de-emphasis of nonpublic social institutions. The result, as Gerald Sirkin argues, is a decreasing sense of individualism and community and an increasing reliance upon centralized authority. Families, churches, and even the marketplace have ownership of corporations helped to separate personality from property, and property from power. When the corporations began to stop competing, to merge, agree, and make mutual plans, they became private governments. Finally, they sought the aid and partnership of the state, and thus by their own volition became part of public government.

These changes led to a movement for reform, which sought to limit arbitrary power and protect the common man. But the reform did not restore the individual to his domain. What the corporation had taken from him, the reform simply handed on the government. And government carried further the powers formerly exercised by the corporation. Government as an employer, or as a dispenser of wealth, has used the theory that it was handing out gratuities to claim a managerial power as great as that which the capitalists claimed. Moreover, the corporations allied themselves with, or actually took over, part of government's system of power. Today it is the combined power of government and the corporations that presses against the individual.

Id. at 772, 773.

134. See, e.g., Sirkin, supra note 56, at 183-85, 188.
135. Id. at 183-85.
136. Id. 184-85:

We are in the midst not merely of the movement from capitalism to socialism . . . but of something more fundamental: the decline
lost their guiding influence precisely because they are decentralized. Hence the constraints which government imposes are downgraded in importance. This is particularly true in the economic arena, for restrictions here are not only diffuse, but are usually felt only indirectly by individuals. Moreover, in a generally successful regulated economy, the gains from remaining an individualist and aloof from government entanglement are outweighed by the costs of doing so. Hence, it is no surprise at all that the concept of liberty has expanded from its original individualist sense of simply an absence of external constraints to the more complex modern demand for access not only to the general economic success of the society, but also to the political process that helps carve it up. We, as a society, have developed new understandings concerning the definitional elements of, for example, "meaningfulness" and "harm to the liberty of others." But as our attention has turned from production of wealth to its distribution, we have also developed a new sense of the "rule of law" as a political ideal, a topic developed by Professor Butler in his paper, and a discussion to which I defer.

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of the individualistic ethos, which underlies capitalism, and the rise of the authoritarian ethos, which underlies socialism.

137. Id. at 183.