

Embracing Liberty: A Comprehensive Approach to Life, Liberty, and the Pursuit of Happiness

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INTRODUCTION

The concept of liberty is a cornerstone of political philosophy that shapes our understanding of rights and the ethical frameworks that govern society. Traditionally, liberty has been divided into two distinct categories: negative liberty, which emphasizes freedom from interference, and positive liberty, which focuses on the capacity to act upon one’s free will.¹ This duality has fueled a persistent debate among scholars and policymakers about the nature and implications of freedom. This Note rejects liberty as a binary construct and instead promotes a unified concept that denies the supposed antagonistic nature of negative and positive freedom.² Importantly, this paper focuses on the direct effect this theory has on human rights, underscoring that liberty, as it should be recognized, accounts for robust human rights that encompass civil, political, economic, and social dimensions.

This Note argues that the Founding Fathers, who were profoundly influenced by the works of philosophers such as Aristotle and Locke, shared in this holistic understanding of liberty, and this unified conception of liberty has significant implications for constitutional interpretation, particularly in relation to the considerations of “life and liberty.” The interpretation of liberty as a unified concept has practical ramifications, especially in contemporary challenges surrounding healthcare, housing, and education. As these issues become increasingly contentious, it is crucial to consider how policies can honor both personal freedoms and the imperative of social welfare. Recognizing liberty as an interrelated concept leads to a more equitable and just society that respects individual autonomy while ensuring access to essential services.

This Note explores the unified concept of liberty in six sections. Section I presents a triadic system of freedom: an agent, certain preventing conditions, and

1. For a more thorough defense, see Alexandra Kotter, *The Ability of Positive and Negative Liberty*, ELECTRONIC THESES AND DISSERTATIONS (May 2022), <https://egrove.olemiss.edu/cgi/viewcontent.cgi?article=3241&context=etd> [https://perma.cc/KVK2-ZW7B].

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certain doings or becomings of the agent.³ This one concept of freedom effectively demonstrates how the dichotomy between positive and negative freedom is false. Section II explores historical perspectives, focusing on how Aristotle and Locke influenced the Founders' approach to liberty, then demonstrates the effect this has on Constitutional interpretation: the recognition of the guarantee of social and economic rights. Section III explains how positive liberty results in positive rights and uses property rights to demonstrate that a system of both positive and negative rights is needed in order to justify many kinds of rights. Section IV identifies two key moments in American history—Franklin D. Roosevelt's "Second Bill of Rights" and Jimmy Carter's advocacy of human rights treaties—which demonstrate how the realization of liberty in the form of positive rights can fulfill the Constitution's promise of liberty. Section V explains the practical implications of this system. First by showing how certain agendas, such as former Secretary of State Mike Pompeo's "Commission on Unalienable Rights,"⁴ fail to adequately account for human rights, and then by identifying how certain rights can be realized, such as a right to healthcare and housing. Finally, Section VII explains how this framework imposes ethical and professional duties on attorneys, particularly when advocating for a broader and more inclusive interpretation of liberty.

I. LIBERTY AS EITHER "NEGATIVE" OR "POSITIVE" IS A FALSE DICHOTOMY

The conception of liberty as either "negative" or "positive" is a false dichotomy. Rather, liberty is a single concept, and any notion of liberty worth pursuing necessarily entails aspects of both what we often refer to as positive and negative liberty. To show the false dichotomy between positive and negative freedom, Gerald MacCallum asserts that liberty is a single concept that always includes aspects of both "freedom from" and "freedom to" conditions.⁵ He believes that liberty exists as a triad between 1) an agent, 2) certain preventing conditions, and 3) certain doings or becomings of the agent. The format is: "x is (is not) free from y to do (not do, become, not become) z."⁶ Here, x represents the agents, y encompasses the preventing conditions—constraints and barriers—and z denotes the actions or conditions sought by the agents. The triadic structure reveals that proponents of positive or negative liberty are really just differing over interpretations of the variables x, y, and z, not about what liberty itself is. As McCallum states, "[t]his characterization [of positive and negative liberty], however, cannot

3. Gerald C. MacCallum, Jr., *Negative and Positive Freedom*. 76 PHIL. REV. 312, 314. (1967).

4. See generally U.S. SECRETARY OF STATE, REPORT OF THE COMMISSION ON UNALIENABLE RIGHTS (2020), <https://www.state.gov/wp-content/uploads/2020/07/Draft-Report-of-the-Commission-on-Unalienable-Rights.pdf> [<https://perma.cc/8GAS-97MT>].

5. MacCallum, *supra* note 3.

6. *Id.*

distinguish two genuinely different kinds of freedom; it can serve only to emphasize one or the other of two features of every case of the freedom of agents.”⁷

For example, consider the case of a nicotine addict who has a specific destination in mind but goes in the opposite direction to buy a cigarette. Assessing their freedom involves interpreting each variable of the triad. If one asserts that the addict is free, it implies they are without external obstructions to fulfill their desire for a cigarette.⁸ Conversely, claiming they are unfree highlights the internal constraints—such as addiction—that prevent them from acting in accordance with their rational preferences.⁹ This example illustrates that both positive and negative elements are interwoven in our understanding of liberty, thereby dismantling the false dichotomy between negative and positive liberty. Indeed, “freedom is always *both* freedom from something and freedom to do or become something.”¹⁰

Because of this, MacCallum calls it “clumsy” and “misleading” to try to place people in certain “camps” of freedom, as no one can perfectly be one or the other.¹¹

We would be far better off to insist that they all have the same concept of freedom (as a triadic relation)—thus putting ourselves in a position to notice how, and inquire fruitfully into why, they identify differently what can serve as agent, preventing condition, and action or state of character vis-a-vis issues of freedom.¹²

So, “freedom from hunger,” while often thought of as a positive liberty, is better thought of in terms of the triad: “a world in which people would be free *from* barriers constituted by various specifiable agricultural, economic, and political conditions *to* get enough food to prevent hunger.”¹³

While positive and negative liberty are imperfect definitions, when thought of as complementary they encapsulate all of liberty. In addition, the widely recognized distinctions between positive and negative liberty (although imperfect) help better assess situations and identify the function of liberty. What is often referred to as positive and negative liberty are two non-antagonistic concepts of the one triadic relation, which working together, form the whole concept of liberty. This means that what is often thought of as positive liberty (such as social and economic rights) and negative liberty (such as civil and political rights) must work together in a complementary system in order for liberty to be truly realized. With this theory comes the acknowledgment that many instances of liberty

7. *Id.* at 318.

8. See Carter, *supra* note 1.

9. *Id.*

10. MacCallum, *supra* note 3, at 319.

11. *Id.* at 327.

12. *Id.*

13. *Id.* at 318 (emphasis in original).

cannot fit perfectly into a positive or negative camp, as these are imperfect descriptions of liberty, which can often overlap.

II. HISTORICAL BACKGROUND ON LIBERTY AND CONSTITUTIONAL INTERPRETATION

Understanding liberty in this manner necessitates a reevaluation of how rights are articulated and enforced within our legal frameworks. Recognizing the interdependence of liberty enables us to appreciate the significance of both “negative” rights, which focus on protecting individuals from interference, and “positive” rights, which focus on empowering individuals to pursue their own flourishing.

Applying this theory of liberty to constitutional interpretation, it becomes clear that the Framers of the Constitution were not endorsing a narrow conception of liberty. Instead, they drew upon the traditions of Locke and Aristotle to articulate a holistic understanding of liberty.¹⁴ These philosophers emphasized the importance of conditions conducive to human flourishing—suggesting that a robust conception of liberty must include provisions for social and economic rights alongside civil and political ones.

A. ARISTOTLE

Aristotle’s theory of virtue and emphasis on the government promotion of human flourishing¹⁵ impacted the Founding Fathers, evidenced by their commitment to virtue and elevation of the common good. Indeed, without the influence of Aristotle the Founding Fathers would not have emphasized the importance of the “pursuit of happiness” in the Declaration of Independence. According to Aristotle, freedom is not obtained simply by living in a free society; rather, freedom is obtained through internal character development.¹⁶ The best sort of human life is achieved through *eudaimonia*;¹⁷ and a person must develop specific character traits that allow for this sort of flourishing.¹⁸ Aristotle’s emphasis on virtue in the political realm is best understood within a positive liberty regime, as positive liberty allows for the polis to actively create conditions necessary for citizens to

14. See *infra* Section II.A and II.B.

15. See Edward Clayton, *Aristotle: Politics*. INTERNET ENCYCLOPEDIA OF PHIL., <https://iep.utm.edu/aristotle-politics/> [<https://perma.cc/82XE-82CP>] (last visited Mar. 23, 2025) (stating that according to Aristotle “[t]he community brings about virtue through education and through laws which prescribe certain actions and prohibit others”).

16. See Moira M. Walsh, *Aristotle’s Conception of Freedom*. 35 J. HIST. PHIL., 495, 495-496 (1997) (pointing out that while Aristotle does not talk about freedom specifically, a notion of freedom can be gleaned from *Politics* in which self-direction is “the crucial characteristic of a free person”).

17. Eudaimonia is the condition of human flourishing, often translated as “happiness,” although it means much more than a state of mind—it is activity of the rational soul in accordance with virtue. See Richard Kraut, *Aristotle’s Ethics*. STAN. ENCYCLOPEDIA OF PHIL. (July 2, 2022), <https://plato.stanford.edu/entries/aristotle-ethics/> [<https://perma.cc/V8YN-YUB7>]; ARISTOTLE, *POLITICS* bk. I, at 10 (C.D.C. Reeve, ed. and trans., 2017) (c. 350 B.C.E.).

18. See Kraut, *supra* note 17.

be self-sufficient and to achieve self-realization. Indeed, the political community plays an active role in “bringing about virtuous life in the citizenry.”¹⁹ As such, a system of purely negative liberty cannot bring about the good life.

According to Aristotle, there is one ultimate end: the excellent activity of the rational part of the soul.²⁰ “[F]or something to be *good* . . . is for it to be a component of or means to its flourishing.”²¹ This consists of the full development of one’s natural psychological and physical powers.²² On this basis a system of education, freedom of expression, property rights, healthcare, and other such rights may be defended. Aristotle, for example, recognized that there are certain preconditions for human flourishing because the soul must grow in order to be fulfilled.²³ According to Aristotle, health is a precondition for flourishing.²⁴ As such, a politically wise person would want to promote the health of citizens and even employ doctors in public service, as healthcare access is needed in order to nurture one’s intellect as a citizen.²⁵ This implies that access to healthcare is not merely a matter of social welfare but rather a fundamental component of liberty itself.

This Note argues that in applying Aristotle’s insights, the Founding Fathers understood that a system of negative rights alone—focused solely on protecting individuals from interference—would not suffice to cultivate a virtuous citizenry. Indeed, the Founding Fathers recognized that human flourishing is a necessary precondition for liberal democracy. Benjamin Franklin declared, “Only a virtuous people are capable of freedom,”²⁶ and James Madison stated, “To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea.”²⁷

Richard Kraut, a specialist in ancient Greek philosophy, argues that under an Aristotelian framework, goodness as flourishing is not an overarching framework, as it “cannot on its own specify in full detail how someone should live.”²⁸ The way we develop leaves room for endless individual differences based on skill and enjoyment, and it cultivates the ability to make decisions on our own.²⁹ Nearly

19. See Clayton, *supra* note 15.

20. See Kraut, *supra* note 17.

21. Richard Kraut, *Aristotle and Rawls on the Common Good*, THE CAMBRIDGE COMPANION TO ARISTOTLE’S POLITICS, ³⁵⁰, 364 (Marguerite Deslauriers and Pierre Destrée eds., 2013) (emphasis added).

22. *Id.*

23. See ARISTOTLE, NICOMACHEAN ETHICS bk. VII, at 132-33 (C.D.C. Reeve, ed. and trans., 2014) (c. 384 B.C.E.).

24. See *Id.*

25. See Thomas J Papadimos, *Healthcare access as a right, not a privilege: a construct of Western thought*, PHIL., ETHICS, AND HUMANITIES IN MEDICINE. (2007).

26. Jared Sparks, ed., *The Works of Benjamin Franklin*, TAPPAN, WHITTEMORE, AND MASON, Vol. 10, at 297 (1840).

27. James Madison, Speech in the Virginia Ratifying Convention, June 20, 1788 *reprinted in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 537 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott 1827).

28. See Kraut, *supra* note 21, at 365-66.

29. *Id.*

every child has “a full set of the powers whose enjoyable exercise, in their mature form, constitutes a flourishing life.”³⁰ Ultimately, he advocates for goodness as flourishing as it is a theory of well-being especially appropriate to democratic culture. Kraut’s interpretation of Aristotle implicitly acknowledges negative aspects of his framework, such as the freedom from tyranny.

This Note argues that the Founding Fathers recognized these values and, as such, emphasized the good and human flourishing. However, this Aristotelian line of reasoning has the ability to grant the government entirely too much power in the name of “the good” and potentially strip one of the ability to live a life of their choosing. Indeed, just as a system of purely negative rights cannot bring about the good life, the Founding Fathers recognized that positive rights alone could not bring about true liberty. A purely positive rights regime can lead to extensive government intervention, which could in turn lead to tyranny. Thus, the Founding Fathers advanced a balance: a framework that recognized the importance of both protecting individual freedoms and providing the necessary conditions for individuals to pursue their own happiness.

1. EDUCATION ACCORDING TO ARISTOTLE VERSUS THE FOUNDING FATHERS

Both Aristotle and the Founding Fathers recognized the critical role of public education in fostering virtue and citizenship. Aristotle comprehensively laid out the necessity of public education for a flourishing society.³¹ Likewise, in 1785 and 1787, ordinances were enacted that granted federal lands to states in order to create public schools, which the Founding Fathers viewed as essential to a functioning democracy.³²

According to Aristotle, education must be “one and the same for all.”³³ Furthermore, the ultimate goal of education is not merely the acquisition of knowledge, but rather it is the development of character and the ability to achieve eudaimonia, or human flourishing.³⁴ Indeed, Aristotle argues that a task, art, or science must be considered vulgar if it renders the body, soul, or mind of free men useless for the employment of virtue.³⁵ The Founding Fathers shared Aristotle’s belief in the importance of education for the cultivation of virtue to an extent. As Thomas Jefferson wrote,

30. *Id.* at 366.

31. See ARISTOTLE, *POLITICS*, bk. VIII, at 189 (C.D.C. Reeve, ed. and trans., 2017) (c. 350 B.C.E.).

32. Jack Jennings, *Get the Federal Government Out of Education? That Wasn't the Founding Fathers' Vision*, CTR. ON EDUC. POL'Y (Apr. 2011), <https://files.eric.ed.gov/fulltext/ED518386.pdf> [<https://perma.cc/XV78-3KXW>].

33. ARISTOTLE, *supra* note 31, at 189.

34. See *id.* at 190. See also, Pierre Destrée, *Education, leisure, and politics*, THE CAMBRIDGE COMPANION TO ARISTOTLE’S POLITICS, 301, 308 (Marguerite Deslauriers and Pierre Destrée eds., 2013) (“Aristotle is looking for the education that will best promote genuine happiness . . . Thus, in making his proposal as to the best possible education, his first concern is to reflect on what exactly happiness consists in. What are the sorts of values and activities the best polis must teach and promote in order to enable its citizens to live a happy life?”).

35. ARISTOTLE, *supra* note 31, at 190.

[N]o government can continue good but under the controul of the people; and . . . their minds were to be informed, by education, what is right & what wrong; to be encouraged in habits of virtue, & deterred from those of vice . . . [T]hese are the inculcations necessary to render the people a sure basis for the structure of order & good government.³⁶

However, the Founding Fathers' vision diverged in depth and scope, reflecting their distinct philosophical differences on a positive liberty regime.

While the Founding Fathers acknowledged the need for moral education, their approach was often more focused on the transmission of knowledge necessary for civic participation rather than the comprehensive moral development envisioned by Aristotle. John Adams stated, ". . . liberty cannot be preserved without a general knowledge among the people who have a *right*, from the frame of their nature, to knowledge."³⁷ In fear of the domination of a group of citizens or "factions" that are united by a common interest adverse to the rights of other citizens and who may use government power to act, Madison appealed to the strength of diverse minds. He stated, ". . . [when] you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens."³⁸ Indeed, the Founding Fathers sought to prepare citizens to make informed decisions in a democratic society. However, the Founders were more cautious about direct state involvement in shaping individual thought because it could lead to the imposition of a singular moral framework.³⁹

While both perspectives highlight the importance of education in fostering virtue and civic engagement, Aristotle's vision encompasses a much broader understanding of what it means to be an educated citizen. The Founding Fathers, while valuing the moral dimensions of education, ultimately prioritized the cultivation of informed, rational citizens capable of self-governance within a framework that respects individual autonomy. The Founding Fathers understood there needs to be a balance of liberty interests. There needs to be education and there needs to be freedom from the government dictating exactly what the good life is for each person.

B. LOCKE

Locke has largely been considered an advocate of a negative liberty regime.⁴⁰ He emphasizes the absence of interference, claiming, "for liberty is, to be free

36. Thomas Jefferson, *Thomas Jefferson to John Adams, 10 December 1819* PRINCETON UNIV. PRESS (2018) (1819). <https://founders.archives.gov/documents/Jefferson/03-15-02-0240> [<https://perma.cc/9L3P-9VQS>].

37. John Adams, *A Dissertation on the Canon and Feudal Law* (1765) (emphasis added), <https://teachingamericanhistory.org/document/a-dissertation-on-the-canon-and-feudal-law/> [<https://perma.cc/WE4Y-5222>].

38. THE FEDERALIST NO. 10 (James Madison).

39. *See id.*

40. *See* Carter, *supra* note 1.

from restraint and violence from others.”⁴¹ However, Locke also warns against conflating liberty with “license,” as it implies a lack of moral constraints.⁴² He states, “ill deserves the name of confinement which hedges us in only from bogs and precipices.”⁴³ He argues that true liberty does not require the toleration of harmful actions or chaos. For example, being *restrained* from falling into a bog is a form of freedom because it protects the individual from danger.⁴⁴

This is arguably an endorsement of MacCallum’s third freedom-variable that would be considered positive.⁴⁵ Indeed, he is “restricting this variable to actions that are not immoral (liberty is not license) and to those that are in the agent’s own interests (I am not unfree if prevented from falling into a bog).”⁴⁶ This “morally loaded” conception of freedom relies on positive liberty interests.⁴⁷ The complexities in Locke’s views demonstrate that freedom is more intricate than a simple binary, and it is difficult to place someone into either a negative or positive liberty regime. This is because liberty encompasses notions of what is often referred to as positive and negative liberty.

Further, when we read Locke removed from a strict negative liberty lens, we see that according to him, the role of government is not just to refrain from interfering with individual freedoms (a negative interpretation) but also to actively promote the well-being of society (a positive interpretation). Alex Tuckness argues that when Locke declares, “as much as possible mankind is to be preserved,” his use of the phrase “as much as possible” indicates a proactive approach to ensuring the survival and flourishing of humanity.⁴⁸ As such, the government’s duties include recognizing positive rights that contribute to the common good. “On this view,” Tuckness states, “the power to promote the common good extends to actions designed to increase population, improve the military, strengthen the economy and infrastructure, and so on, provided these steps are indirectly useful to the goal of preserving the society.”⁴⁹

III. FROM LIBERTY TO RIGHTS

The Founding Fathers established negative rights while also focusing on preserving human flourishing and the public good. Their understanding of liberty’s potential is made clear through the U.S. Constitution and the Bill of Rights. While some argue that the Founding Fathers focused primarily on negative rights,

41. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* Sect. 57 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

42. Carter, *supra* note 1.

43. LOCKE, *supra* note 41.

44. *See id.*

45. Carter, *supra* note 1.

46. *Id.*

47. *Id.*

48. Alex Tuckness, *Locke’s Political Philosophy*, STAN. ENCYCLOPEDIA OF PHIL. (2020), <https://plato.stanford.edu/entries/locke-political/>.

49. *Id.*

citing the Bill of Rights' emphasis on protection from government interference,⁵⁰ this view minimizes the instances where they acknowledged the need for governmental action to promote the welfare of the populace, which suggests a holistic understanding of liberty. For example, the establishment of post offices⁵¹ and the promotion of infrastructure⁵² reflect a commitment to facilitating conditions for individual success and for exercising other liberties such as communication and mobility.

The Founding Fathers' understanding of positive *liberty* supports the idea of positive *rights*. A government that values liberty must ensure that individuals have the necessary means to exercise that liberty. This is because liberty is not an abstract idea—it requires institutional supports to be meaningful, and these supports take the form of rights. Thus, recognizing positive rights is essential for achieving a just and equitable society. Indeed, the U.S. Constitution and the Bill of Rights reflect this understanding. The preamble's reference to promoting the "general welfare"⁵³ indicates that the Founding Fathers recognized the government's role in ensuring the conditions necessary for individual flourishing, which suggests an implicit acknowledgment of positive rights.⁵⁴ In addition, the Declaration of Independence's reference to the "pursuit of happiness"⁵⁵ should be interpreted as implying a positive right to basic necessities that enable citizens to achieve well-being.⁵⁶ Without the necessary means to pursue happiness, liberty is a hollow notion.

50. See, e.g., David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 864 (1986) ("Our Constitution," wrote Judge Posner, "is a charter of negative rather than positive liberties" . . . "The men who wrote the Bill of Rights were not concerned that Government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services.") (quoting *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir.), cert. denied, 465 U.S. 1049 (1983)).

51. U.S. CONST. art. I, § 8, cl. 7.

52. While there was certainly debate as to the constitutionality of congressionally funded infrastructure, there were many proponents including George Washington, Alexander Hamilton, and James Monroe. See, e.g., Adam J. White, *Infrastructure Policy: Lessons from American History*, 35 NEW ATLANTIS, 3, 8, 11, 13, 19 (2012). <https://www.jstor.org/stable/43152719>. Further, even Thomas Jefferson, at first a staunch critic, began to show "extraordinary confidence" in national infrastructure. *Id.* at 14. This shift began when he signed the Ohio Enabling Act which proposed a comprehensive plan for national infrastructure development. *Id.* ("As that fund accumulated, Jefferson called on Congress to devote future budget surpluses 'to rivers, canals, roads, arts, manufactures, education, and other great objects within each state.'").

53. U.S. CONST. pmbl.

54. The phrase "general welfare" appears both in the Preamble and in Article I of the Constitution, emphasizing the Founders' commitment to flourishing. This dual reference underscores that the promotion of the general welfare is intended to guide the entire Constitution's provisions, including those addressing areas such as commerce and civil rights, rather than being limited solely to taxation and spending.

55. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

56. See DANIELLE ALLEN, OUR DECLARATION: A READING OF THE DECLARATION OF INDEPENDENCE IN DEFENSE OF EQUALITY 17, 35-36 (2014) (arguing that the Declaration of Independence was intended to ensure equality and freedom, and that egalitarian commitments are not at the expense of a reduction in liberty).

By recognizing that positive liberty was integral to the Founding Fathers' vision, it becomes clear that current discussions about positive rights such as healthcare, education, and other social services are not a departure from their ideals but rather an extension of them. For instance, the establishment of public education systems in various states is a practical application of the Founding Fathers' vision, as it aligns with their understanding of an informed citizenry being essential for a functioning democracy. Just as the right to legal counsel in criminal proceedings is considered necessary to fully utilize the right to a fair trial, so should food and shelter be considered essential to an individual flourishing, the general welfare, and the pursuit of happiness.

A. PROPERTY RIGHTS

The idea of property rights serves as a practical example that helps illuminate the relationship between a holistic understanding of liberty and positive rights.⁵⁷ Property, regarded as a fundamental right in many liberal traditions, presents a clear case where both forms of liberty are necessary for its justification. Property rights are often justified through negative liberty, as they focus on protecting individuals from external interference.⁵⁸ However, property rights cannot be justified through negative rights alone. As a whole, property rights are a massive constraint on negative liberty. Indeed, while you are securing the individual negative freedom of one individual's right to property, you are necessarily constraining everyone else's negative freedom to own that same property. Elizabeth Anderson states, "Rights entail that others have correlative duties. To have a property right to something is to have a claim against others, enforceable by the state, that they not act in particular ways with respect to that thing."⁵⁹ As such, an appeal to negative liberty alone does not justify a right to property.

The acknowledgment of positive liberty works to stabilize the negative liberty argument. Indeed, when it comes to property rights, certain "interferences" are bound to happen because not everyone can have the same property. However, when we bring positive liberty into the equation we see that it is permissible to claim some space for yourself and your permissible pursuits, but you also must leave space for others in order to promote positive liberty and allow for others to pursue their goals as well.⁶⁰ In addition, one should have the positive freedom to secure a good in which one has invested their labor and have the assurance of access to this good in the future.⁶¹ To be clear, positive liberty should be

57. For a more thorough defense, see Alexandra Kotter, *The Ability of Positive and Negative Liberty*, at Section IV.B. ELECTRONIC THESES AND DISSERTATIONS (May 2022), <https://egrove.olemiss.edu/cgi/viewcontent.cgi?article=3241&context=etd> [<https://perma.cc/KVK2-ZW7B>].

58. See, e.g., Elizabeth Anderson, *Freedom and Equality*, THE OXFORD HANDBOOK OF FREEDOM, 121, 127 (David Schmidtz and Carmen E Pavel eds., 2018).

59. *Id.* at 128.

60. Barbara Herman makes an argument which inspired the point about being a moral agent in a community of equals. See Barbara Herman, *The Practice of Moral Judgment*, 82 J. PHIL. 414, 414-36. (1985).

61. See Anderson, *supra* note 58, at 129.

promoted above, yet work with, negative liberty in order to secure property rights. Indeed, property rights are best promoted in relation to the common good, ensuring that individual negative freedoms do not override the collective interest. This approach fosters greater positive freedom for everyone: “The infrastructure of private property rights is a public good, justified by its promotion of opportunities—of positive freedom—for all.”⁶²

Further, linking property rights solely with negative liberty overlooks the ways in which the exercise of property rights also requires positive conditions—access to resources, security, and a functioning legal system—that enable individuals to fully enjoy those rights.⁶³ In this way, property rights are not merely about freedom from interference, but also about governments ensuring that individuals have the means to exercise their autonomy and achieve personal flourishing. Property rights can only truly be protected through an appeal to a system of negative and positive liberties. The promotion of negative liberty effectively negates interferences of the stronger upon the weaker. However, negative liberty should not override positive liberty. Positive liberty assures one the external resources needed to both survive and exercise one’s free will. Indeed, only if certain interferences are forbidden and certain resources guaranteed, can we be free.

Some might argue that this system is invalid because positive liberty is being guaranteed at the “cost” of negative liberty as it allows for a person to proscribe someone else from owning their same land. However, this “cost” of negative liberty is only a cost in a *descriptive* sense. Freedom relevant to political philosophy is *normative* in nature.⁶⁴ As such, this is not a discussion of purely descriptive concepts of freedom—instead it is speaking of freedom which can be considered desirable. Freedom to murder, for example, is freedom in the descriptive sense but not in the normative sense—normatively speaking, you are not experiencing a loss of freedom if you are proscribed from murdering. Similarly, this note argues you are not unfree if you are proscribed from owning another individual’s property, as a loss of liberty in the descriptive sense does not amount to a loss of liberty in a politically significant sense. This, at most, restricts license but not freedom.⁶⁵ A normative conception of liberty reveals that both positive and negative liberty are integral to property rights.

Further, there is no such thing as a purely negative regime, and as such “costs” of negative liberty are unavoidable. Meaning that negative liberties require affirmative action in order to be guaranteed,⁶⁶ further indicating how there are not

62. *Id.* at 131.

63. See CASS SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 198–99 (2006).

64. See Ralf Bader, *Moralized Conceptions of Liberty*, *THE OXFORD HANDBOOK OF FREEDOM*, 83, 86. (David Schmidtz and Carmen E Pavel eds., 2018) (stating that “only rights-violating interferences infringe liberty, whereas preventing someone from doing something that person does not have a right to do does not restrict freedom,” instead it “restricts license”).

65. *Id.* at 86.

66. See SUNSTEIN, *supra* note 63, at 198–99 (2006).

clear and distinct lines through positive and negative liberty. Indeed, government intervention has largely been celebrated when it comes to aiding aims of the rich, such as enforcing a right to property, to which many resources and hundreds of millions of dollars are devoted each year.⁶⁷ Why, then, is government intervention looked down upon when it comes to aiding the poor?⁶⁸ The Founding Fathers recognized that true freedom cannot be achieved merely through the absence of government.⁶⁹ Rather, positive liberty—the government’s role in ensuring the conditions for flourishing—must be integral to a just society. It is this positive liberty “interference” of the government that actually produces freedom and allows for a right to property, and this right to property necessitates proper constraints.

IV. LIBERTY REALIZED

In the pursuit of a just society, liberty must be actively realized in the lives of individuals through concrete policies. The understanding of liberty as both negative and positive rights is not just a historical or philosophical concept but a practical framework for addressing the pressing issues of human equality and freedom. Two moments in American history—Franklin D. Roosevelt’s “Second Bill of Rights” and Jimmy Carter’s advocacy for international human rights—demonstrate how the realization of liberty in the form of positive rights can fulfill the Constitution’s promise of liberty. For instance, civil and political rights—such as freedom of speech, assembly, and the right to vote—are essential for democratic engagement. However, these rights are often insufficient on their own. Economic and social rights, including access to healthcare, education, and a living wage, empower individuals to fully exercise their civil liberties. When individuals are guaranteed basic necessities, they are more capable of participating meaningfully in society.

The Founding Fathers, knowing they could not provide an exhaustive document, wrote a broad and abstract Constitution and Bill of Rights filled with both enumerated and unenumerated rights and principles.⁷⁰ Certainly not all rights are explicit in the constitution. Madison himself feared that enumerating certain rights in the Bill of Rights would be used to deny other rights of the people, and he combatted this with the Ninth Amendment, explicitly defending the unenumerated rights of the people.⁷¹ Alexander Hamilton also feared that a Bill of Rights would limit the rights of the people instead of protecting them.⁷²

67. *Id.* at 200.

68. *Id.*

69. *See supra* Section II.A.

70. *See* Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L.R. 223, 225. (1943).

71. James Madison, *Annals of Congress 439* (Gales and Seaton ed. 1834) (statement of Rep. Madison).

72. *See* Caplan, *supra* note 70, at 240-41.

In addition, judicial interpretation of the Constitution can guarantee rights which might differ from the original meaning of the text. In his book, *The Second Bill of Rights*, Cass Sunstein points to a ban on sex discrimination justified under the equal protection clause as an example.⁷³ *Brown v. Board of Education* acts as another apt example. Certainly, when passing the Fourteenth Amendment, the authors believed racial segregation was appropriate under the amendment.⁷⁴ However, years later when deciding *Brown*, the Supreme Court favored the constitutional requirement of “equal” over the original meaning of the amendment.⁷⁵ So, if this has happened for sex and racial equality, why has it not happened for social and economic rights as well?⁷⁶ To better understand this, we look first to Franklin D. Roosevelt’s “Second Bill of Rights.”

A. FDR’S SECOND BILL OF RIGHTS: A VISION OF FREEDOM FROM WANT

President Franklin D. Roosevelt famously introduced the concept of a “Second Bill of Rights” in his 1944 State of the Union address. In the address, Roosevelt articulated the need for economic security as a fundamental aspect of freedom.⁷⁷ He declared that certain rights such as the right to a job, an adequate income, and decent housing are essential for individuals to experience true freedom. Roosevelt argued that “freedom from want” is just as critical as freedom from oppression because it enables individuals to pursue their ambitions without the burden of economic insecurity. As he stated, “We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence.”⁷⁸ Notice that Roosevelt identifies freedom, not equality, as the goal. His goal is more modest than some might think, as he is advocating for decent opportunity for all.⁷⁹

Roosevelt’s Second Bill of Rights can be understood as an explicit recognition of the need for positive liberty. It was not enough to be free from governmental oppression (negative liberty); Roosevelt recognized that individuals must have the concrete means to live freely and independently. This vision was grounded in

73. See SUNSTEIN, *supra* note 63, at 126.

74. Appropriately dubbed the “*Dred Scott* problem” for originalists, William Eskridge states,

[t]he exclusion of a class of persons from otherwise express protection on the basis of prejudice against them at the time of enactment does not have an admirable history. Its *locus classicus* is *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), holding that free African Americans could not be “citizens” under Article III. Rebuffing the claim, in the Declaration of Independence, that ‘that all men are created equal,’ the Court explained, from historical evidence, that “it is too clear for dispute, that the enslaved African race were not intended to be included.”

Amici Curiae in Support of Employees at 17, *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (No. 17-1618).

75. See *Brown v. Bd. of Educ.*, 347 U.S. 483.

76. SUNSTEIN, *supra* note 63, at 126.

77. Franklin D. Roosevelt, *State of the Union Message to Congress* (1944), <https://www.presidency.ucsb.edu/documents/state-the-union-message-congress> [<https://perma.cc/6B3L-U2TV>].

78. *Id.*

79. SUNSTEIN, *supra* note 63, at 186.

the understanding that economic security and social well-being are prerequisites for the pursuit of happiness and the promotion of the general welfare. He stated,

I assert that modern society, acting through its Government, owes the definite obligation to prevent the starvation or dire want of any of its fellow men and women who try to maintain themselves but cannot. . . . If, as our Constitution tells us, our Federal Government was established among other things, 'to promote the general welfare,' it is our plain duty to provide for that security upon which welfare depends. . . . The security of the home, the security of livelihood, and the security of social insurance—are, it seems to me, a minimum . . . of the promise that we can offer to the American people. They constitute a right which belongs to every individual and every family willing to work.⁸⁰

These positive rights were designed to create the conditions necessary for individuals to pursue their happiness in the fullest sense. By calling for governmental action to ensure these rights, Roosevelt sought to move beyond a minimal conception of liberty that focuses solely on non-interference, advocating instead for a proactive role for government in securing material conditions for individual freedom.

Sunstein states that the second bill of rights can be understood as a precondition for constitutional rights, which is consistent with the ideas of both Roosevelt and Justice Thurgood Marshall.⁸¹ Justice Marshall felt there were fundamental interests that could be gleaned from the text of the Constitution, as some “constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution.”⁸² For example, while education is not explicitly mentioned in the Constitution, it is necessary in order for the right to free speech and the right to vote to be truly meaningful.⁸³

B. CARTER’S TREATIES AND ADVOCACY FOR HUMAN RIGHTS

Similarly, President Jimmy Carter’s foreign policy and his championing of human rights in the late 1970s mirrored the commitment to positive rights that Roosevelt articulated decades earlier. Carter made human rights a pillar of his presidency, arguing that the protection of political and civil rights—often considered synonymous with liberty—must be accompanied by efforts to secure the economic, social, and cultural rights necessary for individuals to be free. He viewed human rights not just as the absence of oppression but as a comprehensive set of protections that ensure overall flourishing. Importantly, he pointed to the Constitution as the basis for these ideals and stated, “what makes us Americans . . . [is] a common devotion to the liberties enshrined in our Constitution. . . . Uniquely, ours is a nation

80. *Id.* at 72.

81. *Id.* at 185.

82. *Id.* at 167–68.

83. *Id.* at 185.

founded on an idea of human rights. From our own history we know how powerful that idea can be.”⁸⁴

Carter’s approach was encapsulated in his promotion of international human rights treaties. He signed five human rights treaties,⁸⁵ but the Senate refused to ratify them. These treaties reflect an international consensus that liberty is not limited to political freedoms alone. By pushing for the ratification of such treaties, Carter sought to enshrine in international law the notion that economic and social rights are essential components of liberty. So, in addition to citing freedom from arbitrary violence as a human right, he also identified hunger, disease, and poverty as severe threats to “human potential.”⁸⁶ Carter’s human rights agenda was thus a powerful assertion of liberty, building on the Founding Fathers’ recognition that government has a vital role in creating the conditions necessary for individual flourishing and emphasizing the interconnectedness of political, civil, and social rights.

Both Roosevelt and Carter understood that liberty, in its fullest sense, is a relational concept that encompasses both negative and positive rights. They recognized that a society that values freedom must ensure that its citizens have the means to live with dignity and pursue their happiness. Their respective policies and visions reflect the continuing evolution of the American ideal of liberty, aligning with the Founding Fathers’ recognition that government plays a crucial role in securing the conditions necessary for individual flourishing.

When we view the Constitution through the lens of the promotion of the general welfare, it becomes clear that access to essential services like education, healthcare, food, and housing are vital components of a just society. The struggle for liberty, as they understood it, is ongoing, requiring both a commitment to protecting individual rights from government overreach (negative liberty) and a robust effort to ensure that all citizens have access to the resources and opportunities necessary to thrive (positive liberty). This holistic understanding of liberty calls for a vision of human rights that recognizes the inseparability of civil, political, social, and economic freedoms in the creation of a just society.

C. SUPREME COURT AND SOCIAL AND ECONOMIC RIGHTS

Now, let us return to the question previously posed: If social and economic rights are indeed guaranteed in the Constitution, why have they not been

84. *Remarks by President Carter*, FOREIGN RELATIONS OF THE U.S., 1977–1980, VOL. I, FOUNDATIONS OF FOREIGN POLICY, Doc 101, <https://history.state.gov/historicaldocuments/frus1977-80v01/d101> [<https://perma.cc/MLK7-UZ8P>].

85. Such as the International Covenant on Economic, Social, and Cultural Rights (ICESCR), see Ann M. Piccard, *The United States’ Failure to Ratify the International Covenant on Economic, Social and Cultural Rights: Must the Poor Be Always with Us*, 13 ST. MARY’S L. REV. ON RACE & SOCIAL JUSTICE 231, 232.

86. *Remarks by President Carter*, FOREIGN RELATIONS OF THE U.S., 1977–1980, VOL. I, FOUNDATIONS OF FOREIGN POLICY, Doc 101.

explicitly recognized? Sunstein demonstrates how the Supreme Court was on the verge of recognizing such rights and, through a number of landmark cases, gradually incorporated elements of the Second Bill of Rights into its jurisprudence.⁸⁷ For example, criminal defendants have the right to an attorney, provided by the government if they are indigent; indigent persons also have a right to a subsidized divorce; a state may not remove someone from welfare benefits without a hearing if there is a dispute over the facts; and there is arguably a right to some level of education.⁸⁸ However, Sunstein argues that the Court might have gone much further in recognizing economic and social rights had it not been for Richard Nixon's presidency, during which he appointed four Supreme Court justices who significantly altered the course of the Court's ideology.⁸⁹

In *Shapiro v. Thompson*, the Supreme Court struck down a California law that imposed a one-year waiting period before arrivals to the state could receive benefits.⁹⁰ The Court stated that California denied "welfare aid upon which may depend on the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life."⁹¹ In doing so, the Court came extremely close to saying that the Constitution confers a right to welfare benefits. Indeed, would not a state that did not provide welfare benefits to its citizens be penalizing them in the same way the California law did? Sunstein argues its emphasis on "food, shelter, and other necessities of life" embodies Roosevelt's "most dramatic claims about individual rights."⁹²

In *Memorial Hospital v. Maricopa County*, the Court struck down an Arizona law requiring a person to live in the state for one year before they could receive non-emergency medical care paid for by the county.⁹³ The Court held the "denial of the basic 'necessities of life' to be a penalty"⁹⁴ and that "medical care is as much 'a basic necessity of life' to an indigent as welfare assistance."⁹⁵ While these cases indicate the Court's willingness to recognize a right to welfare and medical care, they ultimately addressed issues of discrimination, rather than affirming a constitutional right to such benefits for all citizens.

In *Goldberg v. Kelly*, the Court held that welfare benefits count as a kind of "new property," and are protected under the due process clause, guaranteeing citizens a hearing before they were removed from their welfare benefits. The Court stated,

87. See SUNSTEIN, *supra* note 63, at 153.

88. See *id.* at 171; *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963); *Boddie v. Connecticut*, 401 U.S. 371, 383 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970); *Plyer v. Doe*, 457 U.S. 202, 228-30, 239 (1982).

89. See SUNSTEIN, *supra* note 63, at 153, 163.

90. See *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969).

91. SUNSTEIN, *supra* note 63, at 160 (quoting *Shapiro*, 394 US 618).

92. *Id.*

93. See *Mem'l Hosp.l v. Maricopa Cnty.*, 415 U.S. 250, 259 (1974).

94. SUNSTEIN, *supra* note 63, at 160 (quoting *Mem'l Hosp.*, 415 U.S. 250).

95. *Id.*

From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders . . . [Welfare] can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. [Public] assistance, then, is not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.'⁹⁶

As Sunstein points out, the Court makes a "striking reference" to the Constitution, signaling a willingness to consider that the Constitution grants a right to subsistence.⁹⁷ The Court seems to echo Roosevelt's notion that "necessitous men are not free men."⁹⁸

Despite these precedents, the Court's momentum toward recognizing a right to economic and social rights was ultimately derailed by the conservative shift in the Court during Nixon's presidency.⁹⁹ The justices appointed during this time steered the Court away from expanding its interpretation of constitutional rights to include social and economic entitlements, and the Court has retreated from further development of such rights in the decades that followed.¹⁰⁰

V. PRACTICAL IMPLICATIONS

A. PRACTICES THAT ARE ILLEGITIMATE UNDER THIS THEORY

A system of negative and positive rights helps to protect human rights and illustrates how certain practices are an illegitimate aim of liberty. The struggle for human rights directly links social and economic rights as a pertinent aim. The Universal Declaration of Human Rights (UDHR), adopted by the United Nations in 1948, explicitly includes economic and social rights as human rights.¹⁰¹ The UDHR highlights a number of rights, including the right to work, the right to education, and the right to an adequate standard of living which underscore the importance of positive rights in achieving human dignity.

The failure to recognize and safeguard economic and social rights has perpetuated inequality in the United States. The U.S. fares poorly on both income inequality and poverty rates compared to other Organisation for Economic Cooperation and Development (OECD) nations.¹⁰² Black and Hispanic people are twice as likely to be among the working poor than white or Asian people—even

96. *Id.* at 161-162.

97. *Id.* at 162.

98. *Id.* (quoting Franklin D. Roosevelt, *State of the Union Message to Congress* (1944)).

99. *Id.* at 163.

100. *Id.*

101. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

102. JoAnn Kamuf Ward, *The Human Rights Lessons from COVID-19: Equality Requires Economic and Social Rights Protections*, JUST SECURITY (April 9, 2020), <https://www.justsecurity.org/69602/the-human-rights-lessons-from-covid-19-equality-requires-economic-and-social-rights-protections/> [<https://perma.cc/D4YZ-2GJG>].

for those with a college degree.¹⁰³ Compared to similarly wealthy OECD countries, the U.S. ranks last in healthcare quality and access.¹⁰⁴ JoAnn Kamuf Ward states, “[w]hen we take stock of where we are, it is clear that an approach that eschews economic and social protections leads to poor outcomes across the board, but communities of color are the most negatively impacted.”¹⁰⁵ Yet still, the United States frequently opposes the legal enforceability of economic and social rights, which is highlighted by former Secretary of State Mike Pompeo’s “Commission on Unalienable Rights.”¹⁰⁶

The Pompeo Commission indicates that economic and social rights are secondary to negative rights, advancing a restrictive interpretation of the nation’s founding documents and the UDHR. His approach not only narrows the scope of fundamental rights but also seeks to redefine U.S. policy priorities in a way that deprioritizes protections for economic and social rights.¹⁰⁷ This policy is in opposition to the holistic nature of liberty put forth in the U.S. Constitution and the nature of human rights put forth in the UDHR. In addition, by referring to essential rights that have been granted as “divisive social and political controversies,” it ignores key functions of the Constitution such as the force of the Fourteenth Amendment, which guarantees equal protection and due process (an implication of a duty to safeguard all individuals’ rights, not just negative ones)¹⁰⁸

Finally, Pompeo’s approach distorts the broader vision the Founding Fathers had for the country. In acknowledging that the Constitution could not foresee every possible right, James Madison wrote, “no language is so copious as to supply words and phrases for every complex idea.”¹⁰⁹ Thomas Jefferson highlighted generational autonomy, asserting, “[E]ach generation is as independent as the one preceding, as that was of all which had gone before. [I]t has then, like them, a right to chuse for itself the form of government it believes most promotive of its own happiness”¹¹⁰ This recognition of the evolving need to advance rights and responsibilities underscores the Founding Fathers’ belief in a dynamic understanding of liberty—one that adapts to contemporary challenges.

B. JUSTIFYING HOUSING AND HEALTHCARE THROUGH A SYSTEM OF POSITIVE AND NEGATIVE LIBERTY

Liberty as a unified concept can be illustrated through various legal challenges, particularly in the realms of housing and healthcare. These issues underscore the

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. Jane Stromseth, *Reclaiming Human Rights from the Pompeo Commission— Part 1*, JUST SECURITY (Sept. 22, 2020), <https://www.justsecurity.org/72530/reclaiming-human-rights-from-the-pompeo-commission-part-1/> [https://perma.cc/6P6C-DAD7].

109. THE FEDERALIST NO. 37 (James Madison).

110. Thomas Jefferson, *Thomas Jefferson to “Henry Tompkinson” (Samuel Kercheval)*, FOUNDERS ONLINE (July 12, 1816).

ethical stakes involved in promoting a system of positive and negative liberty, and the proposed framework encourages a balanced approach to these issues. A unified concept of liberty invites discussion on how policies can be designed to honor both the right to personal freedom and the necessity of social welfare, helping to bridge divides in contentious areas. Indeed, positive liberty provides the means to achieve goals, while negative liberty protects the freedom to pursue them without coercion, and both are necessary for a full realization of human freedom.

1. HOUSING

In considering the right to housing, some might argue that such a right directly conflicts with a person's negative right to property or may be antithetical to the notion that one has a right to the goods in which they invest their labor. The response is that a right to housing is justifiable through an appeal to a system of negative and positive liberty.

A person's right to housing, justified through negative liberty, can guarantee freedom from external obstacles that prevent them from securing a place to live. In other words, individuals should be free to acquire housing without undue interference from the state or other individuals, such as no eviction without due process and no discrimination in the housing market. However, this does not confer a right to housing—it only ensures freedom from interference in the housing process, and there remains the problem that a positive right to housing is technically a restraint on negative liberty. After all, if the government must act to provide housing for all, might that undermine property rights or individual freedom? But again, the loss of ability to be granted that same housing is not a politically significant loss of freedom, but rather a loss of license.¹¹¹ In making this appeal, we bring positive liberty into the equation by molding conditions that are in the agent's own interest—the “freedom to” aspect of liberty.

Indeed, negative liberty requires affirmative action in order to be realized. Just as a right to housing will require government intervention, so does a negative right to property. In both instances, the right can only be realized through legal structures and the government's willingness to create and protect those rights.¹¹² As such, the same justifications for property rights apply to housing rights. Further, as Sunstein points out, those who are deprived of housing, food, and clothing have a legitimate claim that the government has violated their negative rights.¹¹³ A lack of housing is a result of the protection of others' property rights through laws of trespass which, in effect, prevent others from securing a home.¹¹⁴ When your ability to secure housing is fully aggravated, it is a loss of freedom in a politically significant sense. In other words, individuals without housing

111. See SUNSTEIN, *supra* note 63, at 198–99.

112. See *id.* at 201.

113. *Id.*

114. *Id.*

experience a denial of freedom because legal protections of property rights often result in barriers to basic needs, and ensuring access to housing through positive liberty mechanisms addresses this imbalance.

Positive liberty effectively justifies the right to stable and secure housing, furthering people's ability to participate fully in society, such as holding a job, accessing education, and maintaining health. When we view positive and negative liberty together, we can guarantee things such as preventing *restrictions* that disallow people *to pursue* their preferred form of living. For example, some housing voucher policies require potential tenants to reject a unit before being able to view the next unit. Such policies directly interfere with their ability to make informed decisions about housing that can best support their well-being and long-term success.

2. HEALTHCARE

In regard to healthcare, many worry that a positive right to healthcare will infringe on their negative liberty, especially when it comes to controlling their own resources, choosing their own providers, and making other decisions about their own health. In addition, if the government is required to provide healthcare for everyone, would that not infringe upon individual liberty by imposing taxes? The response, again, is that these worries can be remedied through the promotion of both positive and negative liberty and the fact that not having a right to healthcare is a bigger restraint on freedom than having it.¹¹⁵

A person's right to healthcare, justified through negative liberty, guarantees freedom from external barriers that prevent them from accessing medical services. Individuals should be free from certain interferences when seeking care, such as facing discrimination by providers and being denied care because of pre-existing conditions. However, as we know, negative liberty alone does not guarantee access to healthcare. A right to healthcare based on a system of positive and negative rights emphasizes the importance of access alongside individual autonomy which leads to policies that respect personal choice, such as in choosing a provider or opting out of government healthcare, while ensuring essential services are available to those who need it. Furthermore, access to a wide array of providers and treatments is not a guarantee in an unregulated private system. A holistic system is able to ensure that individuals have the ability to make meaningful decisions about their own health without the barriers of unaffordable or inaccessible care.

Healthcare policies that deny access to essential services place barriers between individuals and the care they need which is harmful to both negative and positive liberty. For example, some healthcare systems require individuals to first meet high deductibles or wait for approval before accessing necessary treatments.

115. For a compelling argument on the nexus between health and justice, see Norman Daniels, *JUST HEALTH: MEETING HEALTH NEEDS FAIRLY* 1 (2008), in which he highlights the moral importance of health and argues that promoting and restoring health is necessary in protecting individual opportunity.

These policies restrict individual freedom by making healthcare unaffordable or inaccessible, creating a situation where people are not free to make the health choices that are in their best interest. If someone cannot afford a certain treatment, they are not free to make informed decisions about their health because their choices are constrained by their economic situation. In this sense, the positive right to healthcare expands negative liberty by removing external obstacles that prevent individuals from fully exercising their personal freedom. Providing a right to healthcare through government intervention enables negative liberty, by preventing interferences, and positive liberty, by increasing opportunities for all.

In response to the claim that government provided healthcare infringes upon liberty by imposing taxes, Sunstein points out that opposing social and economic rights cannot be justified by claiming rights are protection *against* government.¹¹⁶ He highlights the fallacy of a complaint about taxes infringing upon negative liberty.

A monthly paycheck, dividends from stocks, and interest on investments exist only because of a legal order and a set of policies from which people benefit. . . . When some money counts as “ours,” it is not because nature so decreed it. It is because of an apparatus of rules involving ownership and contract. If an accompanying set of rules, called the rules of taxation, reduce the relevant amount, it is silly to try to complain about “government intrusion.” Government intrusion is what makes paychecks, stocks, and investment interest possible in the first place.¹¹⁷

Government’s intrusion ensures both positive and negative rights. As such, the argument—that the positive right to healthcare is a government intrusion but negative liberty is not an intrusion—necessarily fails.

Secondly healthcare, like education or public infrastructure, is a public good that supports the general welfare and personal liberty. Taxes to fund healthcare are a collective investment in the well-being of society. Under this theory, these taxes would not be an infringement on individual liberty, but rather a condition of our social contract, namely that individuals agree to pool resources in order to ensure that one can live freely and achieve one’s goals.

The right to housing and the right to healthcare, when understood through the lens of both positive and negative liberty, offer a more comprehensive view of freedom. By integrating positive and negative liberty, we can ensure that social policies work to expand freedom rather than restrict it. Rather than viewing liberty as a binary between freedom from interference and state intervention, we see that both conceptions of liberty, encompassing civil, political, social, and economic rights, are necessary to realize human potential. This vision respects both

116. As Justice Oliver Wendell Holmes, Jr. said: “I like to pay taxes. With them I buy civilization.” Felix Frankfurter, *MR. JUSTICE HOLMES AND THE SUPREME COURT* 42-43 (2d ed. 1961).

117. See SUNSTEIN, *supra* note 63, at 201.

individual autonomy and the public good, offering a holistic conception of liberty that supports a truly free society.

VI. LIBERTY AND LEGAL ETHICS

In exploring the ethical responsibilities of lawyers in advancing claims, it is crucial to consider the duties governing their professional conduct. Under Model Rule 3.1 of the *Model Rules of Professional Conduct*, a lawyer's conception of liberty must arguably be in line with the legal conception of liberty in order to bring claims.¹¹⁸ One might argue that even if the conception of liberty this note promotes is how liberty *ought* to be understood, a lawyer has a duty not to bring a claim on behalf of a client that does not comport with the *legal understanding* of what liberty is. For example, "unenumerated rights" are generally viewed as unprotected. However, this limitation should not deter lawyers from advancing novel arguments aimed at expanding the recognition of positive rights within the existing legal framework.

While certain unenumerated rights have historically been treated as peripheral, lawyers have a duty to argue for their inclusion when they are fundamental to realizing the full conception of liberty. Indeed, drawing on precedents such as *Goldberg* and *Shapiro*, lawyers can emphasize the ways in which denying access to basic necessities constitutes a deprivation of liberty in a legally significant sense. Lawyers are agents of systemic change, and they have the ability to use the legal system to challenge unjust laws. Without such novel arguments landmark decisions, like *Brown* and *Loving* (striking down separate but equal laws), *Griswold* and *Lawrence* (establishing the right to sexual autonomy/privacy), *Obergefell* (establishing marriage equality), and *Boren* and *Virginia VMI* (establishing protections against sex discrimination), would have never been decided.¹¹⁹

A unified concept of liberty does not grant attorneys the unbridled ability to bring frivolous claims. There are dangers in an unbalanced emphasis on positive liberty, such as excessive government intervention or totalitarianism. Lawyers therefore must carefully craft arguments that demonstrate the interconnectedness of these rights with principles of negative liberty (as specifically demonstrated in Sections III.A and V.B). A framework such as this when bringing claims or arguing for an "extension, modification or reversal of existing law" meets the good faith standard, comporting with Model Rule 3.1. The ethical obligations of the legal profession are inextricably linked to realizing liberty in its fullest sense. Attorneys therefore must seek not only to defend their client's civil and political rights but also their social and economic rights when appropriate.

118. See MODEL RULES OF PROF'L CONDUCT R. 3.1 (2021).

119. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 495; *Loving v. Virginia* 388 U.S. 1 (1967); *Griswold v. Connecticut* 381 U.S. 479 (1965); *Lawrence v. Texas* 539 U.S. 558, 562, 565 (2003); *Obergefell v. Hodges* 576 U.S. 644, 665 (2015); *Craig v. Boren* 429 U.S. 190, 208-10 (1976); and *United States v. Virginia* 518 U.S. 515, 519 (1996).

Jamal Greene critiques the overemphasis on “rights culture” and its tendency to focus on negative liberty through judicial decisions. He argues that an obsession with rights, especially when framing constitutional rights in terms of absolutes, leads to a focus on negative liberty which in turn hinders more constructive solutions for realizing positive liberty.¹²⁰ According to Greene, a robust conception of liberty should be developed through political compromise, deliberation, and mediation. This, he believes, avoids the zero-sum nature of rights battles that can emerge from court decisions, which divides us into those who have rights and those that do not.¹²¹

Greene critiques the current system for inhibiting the more nuanced, collaborative approach of mediation, which would focus on the facts of the case rather than rigid legal doctrines.¹²² Greene suggests that courts should focus on reconciling rights rather than declaring them, but mediation as Greene envisions it does not eliminate the need for judicial interpretation and legal advocacy. The problem with reducing the judicial function to mere mediation is that it risks diluting the power of legal precedents that have historically expanded those rights, which functionally protects citizens. While Greene’s concerns about judicial overreach are valid in some contexts, his own system would grant judges considerable discretion to impose whatever outcomes they prefer.¹²³

David Cole points out that Greene exaggerates the extent to which rights in the American legal system are treated as absolute. In reality, the Supreme Court’s interpretations of constitutional rights are far from rigid or absolute; they “reflect compromise and routinely permit constitutional rights to be overridden by competing interests.”¹²⁴ Greene’s preference for resolving rights disputes through political means, rather than judicial intervention, also fails to acknowledge that the judicial system serves as a safeguard for constitutional rights when the political process is too slow, inadequate, or unwilling to address the needs of marginalized communities.¹²⁵ The political process cannot be trusted to safeguard minority rights. In a democracy, the majority prevails, and leaving disputes over minority interests to politics often means those interests are vulnerable to being disregarded or suppressed entirely.¹²⁶ Courts have the ability to serve as a vital counter-majoritarian institution, protecting individual rights against the majority.¹²⁷

Thus, the challenge lies not in abandoning rights litigation but in ensuring that it is used responsibly and in a way that contributes to a larger democratic dialogue

120. See Jill Lepore, *Foreword* to JAMAL GREENE, *HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART* ix (2021).

121. *Id.* at xvii, xx.

122. *Id.*

123. See David Cole, *When Rights Went Right*, 69 N.Y. REV. (2022).

124. *Id.*

125. See *id.*

126. *Id.*

127. See *United States v. Carolene Prods. Co.* 304 U.S. 144, 152 n.4 (1938).

about liberty. Legal advocacy is able to push for a more inclusive definition of liberty that incorporates both negative and positive rights, without undermining the broader goals of democratic participation.¹²⁸ In fact, Greene's concern about excessive reliance on the judiciary to define and grant rights highlights the very need for strategic, principled advocacy. Lawyers can contribute to positive liberty by bringing legal claims that push the boundaries of legal precedent—generating dialogue between the courts, legislatures, and the public.¹²⁹

As such, lawyers should continue to advocate for the expansion of rights through the legal system, guided by the ethical responsibilities outlined in Model Rule 3.1, which should not be seen as a deterrent for lawyers seeking to bring novel arguments aimed at expanding the recognition of positive rights. Legal professionals have a duty to challenge existing legal interpretations when they fail to fully realize liberty in its broadest sense.¹³⁰ By doing so, they can contribute to an ongoing dialogue about what liberty means in a democratic society, ensuring that both negative and positive rights are adequately protected for every citizen.¹³¹

CONCLUSION

The holistic understanding of liberty, which includes both positive and negative concepts, leads to a more just society. By rejecting the false dichotomy between these two forms of freedom, this note highlights that liberty requires both the protection from interference and the resources to live well and pursue happiness. The Founding Fathers, drawing from Aristotle and Locke, recognized that liberty is necessarily intertwined with social and economic rights. Their successors, leaders like FDR and Carter, promoted this vision of liberty found in the Constitution, advocating for policies that align personal freedoms with social and economic rights.

This holistic system of liberty can be used to justify a wide range of rights. Indeed, a holistic understanding of negative and positive liberty adequately accounts for rights to healthcare and housing and resolves a number of worries that may arise from declaring such rights. Ultimately, without access to basic necessities, the promise of liberty becomes hollow—an abstract notion rather

128. See, e.g., *Brown v. Bd. of Ed.*, 347 U.S. 483, 494-95 (1954). *Brown* illustrates how strategic litigation can shift legal norms by challenging entrenched precedents, such as *Plessy v. Ferguson*, and push for a deeper, more inclusive understanding of liberty.

129. *Cf. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 522 (2012) (upholding the individual mandate in the Affordable Care Act).

130. See, e.g., *Obergefell v. Hodges*, 576 U.S. 644 (2015) (expanding the scope of marriage rights and contributing to a broader understanding of equal protection).

131. *Cf. Massachusetts v. EPA*, 549 U.S. 497, 505-06, 521, 525 (2007) (where advocacy for environmental protection highlighted the role of courts in advancing a healthy environment). This case pushes the boundaries of legal standing, offering a broader interpretation of the public's right to the safeguard of environmental resources.

than a tangible reality. Furthermore, lawyers must recognize their duty to bring these claims on behalf of their clients. This will bring forth a renewed commitment to integrating positive and negative rights within constitutional interpretation and public policy. Doing so not only honors the founding principles of liberty but also addresses the needs of contemporary society. This unified vision affirms that true freedom is not only about the absence of interference but also the presence of opportunities, which allow every individual to flourish.