

TALKING ABOUT REGULATION: POLITICAL DISCOURSE AND REGULATORY GRIDLOCK

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JOSH

The era of big government is over.

TOBY

Oh, when did this happen?

JOSH

This morning, we had a meeting.¹

To be a “policy wonk” is to like the complexities and details of which public policies are appropriate and best for the country. Most Americans, however, understand public policy debates through policy framing that organizes and simplifies policy information. Political interests compete by framing their arguments in ways that feed into this cognitive tendency of voters.

Policy framing uses two fundamental policy frames concerning different interpretations of liberty. First, government opponents use a “negative liberty” policy frame that characterizes markets as generating negative liberty. Negative liberty was defined by Isaiah Berlin as the absence of obstacles that are external to a person, which would include the absence of government restraints.² Markets generate negative liberty because participants can make choices in their self-interest free of

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1. *The West Wing: He Shall from Time to Time . . .* (NBC television broadcast Jan. 12, 2000), <http://www.westwingtranscripts.com/search.php?flag=getTranscript&id=12>.

2. ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 121–22 (1969).

government regulation. Second, supporters of government use a “positive liberty” policy frame. Positive liberty, as defined by Berlin, is the availability of meaningful choice and the capacity to exercise it.³ Government generates positive liberty by freeing individuals from market obstacles and constraints that prevent them from choices and behaviors that they would like to undertake. An individual who lacks health care insurance, for example, may find his life cut short because of the inability to afford decent health care.⁴ When government assists that individual to gain successful health care, it creates positive liberty for that person.

One person’s increased positive liberty, of course, can be another person’s loss of negative liberty—the very reason that Berlin wrote an essay about positive and negative liberty.⁵ When government increases the positive liberty of regulatory beneficiaries, it will reduce the negative liberty of regulated entities. Similarly, when government increases positive liberty by providing public goods and social welfare programs, the negative liberty of taxpayers is reduced. The ultimate question is, therefore, what mix of government and markets we ought to have in our country.⁶ This essay is interested in how policy frames and political discourse affect the answer to that question.

The contention of this paper is that these two competing policy frames are behind the history of government in the United States. Expansions of government are associated with some form of positive liberty rhetoric while successful opposition to government expansion is associated with some form of negative liberty rhetoric. At times, one policy frame has been more dominant than the other, but even during these periods, the other policy frame has been successful. Moreover, even when one policy frame has been more dominant, the other policy frame has eventually displaced it.

3. *Id.* at 122.

4. David Gorski, *Mortality and Lack of Health Insurance*, SCI-BASED MED. (Oct. 15, 2012), <https://www.sciencebasedmedicine.org/health-insurance-and-mortality/>.

5. See BERLIN, *supra* note 2, at 123.

6. See JACOB S. HACKER & PAUL PIERSON, AMERICAN AMNESIA: HOW THE WAR ON GOVERNMENT LED US TO FORGET WHAT MADE AMERICA PROSPER 7 (2016) (identifying the “mixed economy”—a mix of government and markets—as “a human solution to human problems”).

To establish this content, I begin with an explanation of the relationship of politics, policy, and law, and then consider the influence of policy framing on politics, legislation, and law. This section also explains my claim that policy framing reflects arguments about negative and positive liberty. Next, there follows a brief history of government expansion in the United States that reveals the role of positive and negative policy framing in influencing arguments for and against government. A noteworthy aspect of this history is that significant government expansion tends to occur in relatively short periods. There is significantly less expansion in much longer periods of time, although some expansion typically does occur. As I explain next, this asymmetry results from a number of political and institutional advantages available to negative liberty proponents.

This essay concludes by considering why negative liberty proponents, despite these advantages, have not been able to entirely stymie the expansion of government in response to a positive liberty frame and finds that this pattern is likely to continue. The fictional Bartlett White House in *The West Wing* was wrong: the era of big government is not over.

I. REGULATORY LAW AND POLICY

In our recent book, *Achieving Democracy*,⁷ Joe Tomain and I propose a model of regulatory legislation that evolved from “our efforts to teach law students about the nature of regulation.”⁸ The model understands legislation as resulting from the interaction of politics, policy, and law.⁹ The model, pictured below, predicts that regulatory legislation requires the favorable congruence of political support, policy support, and constitutional law.¹⁰ The “politics” circle includes the legislative proposals that have sufficient political support to be enacted,¹¹ and the “policy” circle

7. SIDNEY A. SHAPIRO & JOSEPH P. TOMAIN, *ACHIEVING DEMOCRACY: THE FUTURE OF PROGRESSIVE REGULATION* 116–19 (2014) [hereinafter *ACHIEVING DEMOCRACY*].

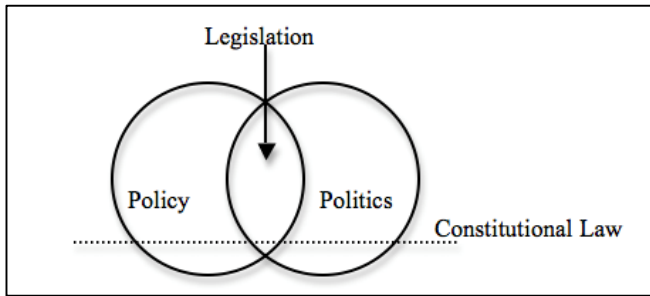
8. *Id.* at 115.

9. *Id.* at 116.

10. *Id.* at 118.

11. *Id.* at 116. More accurately, there is a super-majority (sixty votes) to close off a filibuster in the Senate seeking to block such legislation and assuming that it would pass the House of Representatives and be signed by the President. See Katherine Hunter & James Rowley, *Senate Changes Rules on Filibusters, Keeps Supermajority*, BLOOMBERG (Jan. 25,

includes the legislative proposals that have support in the policy community based on commonly accepted justifications for regulation.¹² The line marked “constitutional law” constrains the adoption of some legislation, such as prayer in public schools, even though there may be political and policy support for this idea.¹³



An interest group with a controversial idea must have at least some political power to be successful. As Michael Pertschuck observed, “Reports to Congress suggesting controversial action, unaccompanied by political momentum, ordinarily move the Congress with all the force of a bulldozer with an empty gas tank.”¹⁴ Conversely, legislation with broad political support still requires some policy justification in order to pass.¹⁵ Although the policy justification for a bill may be thin in the sense that there is scant support for the change or reform in the policy literature, members of Congress look for at least some policy rationale to support their political inclinations.¹⁶ This is one reason why lobbyists spend their time advancing policy arguments for their positions.¹⁷

As the next section discusses, political advocates employ a “policy frame” to build support for their policies. By

2013, 10:28 AM), <http://www.bloomberg.com/news/articles/2013-01-24/senate-leaders-said-to-agree-on-filibuster-rule-changes>.

12. ACHIEVING DEMOCRACY, *supra* note 7, at 116.

13. *Id.*; see, e.g., *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962) (striking down prayer in public schools).

14. MICHAEL PERTSCHUK, *GIANT KILLERS* 45 (1986).

15. See ACHIEVING DEMOCRACY, *supra* note 7, at 120–21 (discussing why pure political power is not sufficient to enact legislation).

16. *Id.*

17. See *id.* at 88–90 (discussing the role of agenda capture by various interest groups in pursuit of regulation).

contextualizing the policy issue, a policy frame explains how a proposed policy serves the political interests of the listener. Moreover, because it offers individuals a simpler way to understand the complexity of policy issues, it is more effective in building political support than efforts to justify the details of a policy proposal.

II. POLICY FRAMES

Political interests over American history have employed two basic types of policy framing. Anti-government forces have used policy frames that emphasize negative liberty while pro-government forces have used policy frames that emphasize positive liberty.

A. Policy Frames

The world is a complex place, and individuals have limited time and cognitive capacity to understand this complexity. We all, therefore, employ interpretative frameworks that allow us “to locate, perceive, identify, and label” the conditions and events that surround us.¹⁸ For public policy, framing allows us to organize and interpret a complex policy reality in a way that provides a guidepost for which policies we should support.¹⁹ Policy frames are, therefore, “cognitive and moral maps” that help simplify policy issues.²⁰ When individuals use different policy frames, they end up supporting different courses of action concerning what should be done, who should do it, and how to do it.²¹

Different interests compete to have their policy frames dominate public opinion.²² The goal of political competitors is to “capture the discursive processes that mediate political institutions

18. ERVING GOFFMAN, *FRAME ANALYSIS* 21 (1974).

19. Martin Rein & Donald Schön, *Reframing Policy Discourse*, in *THE ARGUMENTATIVE TURN IN POLICY ANALYSIS AND PLANNING* 145, 146 (Frank Fischer & John Forester eds., 1993).

20. Minah Kang & Jiho Jang, *NIMBY or NIABY? Who Defines a Policy Problem and Why: Analysis of Framing in Radioactive Waste Disposal Facility Placement in South Korea*, 54 *ASIA PAC. VIEWPOINT* 49, 51 (2013).

21. Rein & Schön, *supra* note 19, at 147.

22. DEBORAH STONE, *POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING* 202–03 (rev. ed. 2002).

and structures to shape political interests and actions.”²³ A political interest—or a set of interests—is successful when its policy frame becomes the dominant political belief in the country and policy makers respond accordingly.²⁴

B. Framing Regulation

A common form of policy framing is to “tell a story in which one set of people are oppressors and another are victims.”²⁵ Policy stories are, therefore, “more than empirical claims about sequences”; they are “fights about the possibility of control and the assignment of responsibility.”²⁶

Anti-government forces employ a story that makes citizens the victims of government oppression, which leads to the conclusion that government regulation should be avoided.²⁷ Capitalism is associated with negative liberty, and government with the reduction in that liberty.²⁸ The idea of this framing is that markets expand negative liberty because bargains are freely made between consenting and similarly situated individuals. Because both parties are made better off by the transaction, they both increase their personal utility. More broadly, markets offer a way of organizing our society without government intervention, except for property and contract law.²⁹ When markets are used to organize social and economic relationships, institutional arrangements reflect the personal choices of those participating in the markets.³⁰ All of this expands everyone’s negative freedom.

Pro-government interests employ a story in which citizens are the victims of unregulated markets, which leads to the conclusion that government regulation is necessary.³¹ This story

23. Julian Go III, *Inventing Industrial Accidents and Their Insurance: Discourse and Workers’ Compensation in the United States, 1880s–1910s*, 20 SOC. SCI. HIST. 401, 406 (1996).

24. STONE, *supra* note 22, at 203.

25. *Id.* at 189.

26. Deborah A. Stone, *Causal Stories and the Formation of Policy Agendas*, 104 POL. SCI. Q. 281, 283 (1989).

27. See Sidney A. Shapiro, *Administrative Law After the Counter-Reformation: Restoring Faith in Pragmatic Government*, 48 U. KAN. L. REV. 689, 697 (2000).

28. See *id.* at 703–04.

29. See ACHIEVING DEMOCRACY, *supra* note 7, at 125–28 (discussing the market system).

30. See *id.*

31. Shapiro, *supra* note 27, at 692–94.

explains that the government increases positive liberty when it addresses the ways in which unregulated markets deny individuals control over their own lives, as, for example, when a market is monopolized and the monopolist uses its market power to extract monopoly rents.³² In this and other situations, a person lacks positive liberty because he does not have a meaningful choice or the capacity to exercise it. Government can increase positive liberty when it removes such obstacles.

Consider, for example, health care. Markets inevitably produce a range of wealth with the result that some persons will be poor.³³ Without sufficient money to buy health care, the poor stand a greater chance of becoming ill and dying prematurely.³⁴ If the government provides or subsidizes health care, then it has increased the positive liberty of the poor by saving their lives or by making it possible for them, as healthier persons, to live a more productive life. By acting collectively, the public can use the democratic process to address obstacles to positive liberty created by markets or that markets fail to address.

C. Communal Democracy

James Morone offers a complementary theory of policy framing to explain the expansion of government.³⁵ In his version, anti-government forces base their framing on Americans' dread of public power, and pro-government interests use a policy frame of direct, communal democracy.³⁶ As market conditions reveal defects in capitalism, reformers invoke this policy frame to "attack the status quo and demand changes that will empower the people."³⁷ This pro-government policy frame is reassuring because it creates a "central image of the democratic wish: the direct

32. See SIDNEY A. SHAPIRO & JOSEPH P. TOMAIN, *REGULATORY LAW AND POLICY: CASES AND MATERIALS* 101–04 (3d ed. 2003) [hereinafter *REGULATORY LAW AND POLICY*].

33. See *id.* at 524–28.

34. See *id.* (discussing the consequence of excludable goods from the poor).

35. JAMES A. MORONE, *THE DEMOCRATIC WISH: POPULAR PARTICIPATION AND THE LIMITS OF AMERICAN GOVERNMENT* 1 (rev. ed. 1998) (framing American politics as the "search for more direct democracy" that "expands the scope and authority of the state"); cf. JOHN G. GUNNEL, *IMAGINING THE AMERICAN POLITY: POLITICAL SCIENCE AND THE DISCOURSE OF DEMOCRACY* 15 (2004) (noting efforts to establish the legitimacy of government by contending that "despite appearances to the contrary" there is "an American people that is the author and subject of democratic government").

36. MORONE, *supra* note 35, at 1.

37. *Id.* at 10.

participation of a united people pursuing a shared communal interest.”³⁸

Morone’s theory implicitly recognizes the concepts of negative and positive liberty. Americans’ dread of government is based on government’s reduction of their negative liberty.³⁹ When markets deny Americans positive liberty—the availability of choices and the resources to make those choices⁴⁰—they turn to the democratic process to restore the missing positive liberty. When people regain control over their lives because of government regulation, power is returned to the people. Thus, Morone proposes a useful insight. Positive liberty is associated with a policy frame of communal democracy. Reformers persuade the public to support regulatory legislation by reassuring them that, as in a New England town meeting, there is a communal act of consent to additional government.

This “democratic wish” is mythical, of course, because the country is far too big to have the type of conversation that occurs in a New England town meeting. But when citizens react to demands for positive liberty and the political system responds, there is an act of democracy; not the type of democracy that occurs in a New England town meeting, but an act of democracy nevertheless. As Richard Andrews has explained, “government is . . . [a] central arena in which the members of society choose and legitimize . . . their collective values.”⁴¹ He continues, “The principal purposes of legislative action are to weigh and affirm social values and to define and enforce the rights and duties of members of society, through representative democracy.”⁴²

III. POLICY CYCLES AND POLITICAL DISCOURSE

We can see how these competing policy frames have influenced politics by considering the history of policy cycles and political discourse. At times, the negative liberty policy frame has been dominant, and there has been less expansion of government

38. *Id.* at 5.

39. *See id.* at 2–5.

40. *See id.* at 9–12.

41. Richard N. L. Andrews, *Cost-Benefit Analysis as Regulatory Reform*, in *COST-BENEFIT ANALYSIS AND ENVIRONMENTAL REGULATION: POLITICS, ETHICS & METHODS* 107, 112 (David Swartzman et al. eds., 1982).

42. *Id.*

in response to a positive liberty policy frame. At other times, there has been a dominant positive liberty policy frame, and the negative policy frame has been less successful in preventing the significant expansion of government. Still, both policy frames have been operating during this history, although the nature of the arguments associated with each policy frame is tied to the nature of the political economy of the time period.

A. In the Beginning

The new Constitution established a national government of limited powers, a system of checks and balances, a Bill of Rights, and a system of federalism to protect individuals against the power of a central government.⁴³ While these constraints reflected the Framers' concerns about protecting negative liberty, this was not their dominant aim as some historians have suggested.⁴⁴ They also understood the value of positive liberty, although they did not use that term. They were not necessarily opposed to using government to expand positive liberty. Rather, they were concerned that government, when it acted, would serve the public interest, rather than the interests of some faction.⁴⁵

Government intervention in markets was the standard custom in the American colonies and early years of the country.⁴⁶ As Lawrence Friedman notes, "A century before Adam Smith, the proprietors, squires and magistrates of America certainly did not believe that the government was best that governed least."⁴⁷ Economic regulation was fairly extensive in the states and included the regulation of staple crops such as tobacco, business establishments such as taverns, and even wage regulations.⁴⁸

More broadly, both the federal and state governments promoted economic development. "The states and, to a lesser

43. U.S. CONST. art. I–III (establishing a government with three branches and a system of checks and balances); *id.* amends. I–X (establishing the Bill of Rights).

44. *See, e.g.*, DAVID F. PRINDLE, *THE PARADOX OF DEMOCRATIC CAPITALISM: POLITICS AND ECONOMICS IN AMERICAN THOUGHT* 22 (2006) (characterizing the Constitution as a method to "pit ambitious men against one another until they exhaust themselves, and therefore have no remaining energy to oppress their fellow citizens"); *see also* MORTON WHITE, *PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION* 162 (1987).

45. *See* *ACHIEVING DEMOCRACY*, *supra* note 7, at 19–21.

46. *Id.* at 18.

47. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 77 (2d ed. 1985).

48. *ACHIEVING DEMOCRACY*, *supra* note 7, at 18.

extent, the federal government financed badly needed internal improvements, such as canals, roads, railroads, and bridges, and used the power of eminent domain to secure rights-of-way, and even materials, for the previous projects.”⁴⁹ The new federal government also established a national bank and a system of protective tariffs to stabilize the money supply and protect infant American industry.⁵⁰

Jefferson and Hamilton famously disagreed which level of government—federal or state—should be responsible for economic development, but they agreed that there should be government support of economic development.⁵¹ Hamilton, a mercantilist, saw the government as a “grand instrument by which to transform a pastoral economy into a booming industrial nation.”⁵² Jefferson opposed Hamilton’s plans because of concerns that a remote national government would be corrupted by wealth and power at the national level, a risk that was less likely in local, self-governing communities.⁵³ Jefferson nevertheless purchased the Louisiana Territory from the French and signed a series of laws to regulate the sale of land in undeveloped areas in order to limit land speculation and provide revenue for the federal government.⁵⁴

More telling, when Jefferson drafted the Declaration of Independence, he declared that governments are “instituted” to secure the rights of “Life, Liberty and the pursuit of Happiness”⁵⁵ instead of repeating Locke’s definition of fundamental rights as “life, liberty, and estate.”⁵⁶ Cal Jillson suggests that Jefferson’s reference to the “‘pursuit of Happiness’ suggests a goal well beyond security that we might call human fulfillment and thriving,” and he points to the fact that the Declaration declared that people have the right to replace a government that does not

49. REGULATORY LAW AND POLICY, *supra* note 32, at 5.

50. James Willard Hurst, *Alexander Hamilton, Lawmaker*, 78 COLUM. L. REV. 483, 490, 511 (1978).

51. ACHIEVING DEMOCRACY, *supra* note 7, at 20–21.

52. ARTHUR M. SCHLESINGER, JR., THE CYCLES OF AMERICAN HISTORY 220 (1986).

53. ACHIEVING DEMOCRACY, *supra* note 7, at 20–21.

54. *Id.*

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

56. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 341 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690).

achieve their “Safety and Happiness.”⁵⁷ For him, this indicates that Jefferson believed that “people empower government in the expectation that it will help them realize or achieve security and happiness.”⁵⁸

Consider, as well, that the preamble to the Constitution indicates that it is being established, among other goals, “to . . . establish Justice, . . . promote the general Welfare, and secure the Blessings of Liberty.”⁵⁹ When the goal of securing the “Blessings of Liberty” is considered with the goals of establishing “Justice” and promoting the “general Welfare,” the preamble can be read to contain a commitment to positive liberty.

This should not be surprising because the Framers were “enthusiastic state builders” who sought to replace the Articles of Confederation with a government sufficiently strong to protect and regulate the new nation.⁶⁰

That the Constitution creates separation of powers as a check on the abuse of federal power is not at odds with this conclusion. James Madison “did not go to Philadelphia seeking gridlock,”⁶¹ and he did not expect his system of checks and balances to prevent this goal.⁶² He understood the system of checks and balances as the way to ensure that the public good would prevail over private interests because legislators would deliver effective government by gaining agreement among them.⁶³

By the 1820s, there was widespread agreement that the government would protect infant industries, make internal structural improvements such as canals and roadways, and use a national bank to manage the currency.⁶⁴ Henry Clay described this three-prong approach to positive liberty as the “American system.”⁶⁵

57. CAL JILLSON, *PURSUING THE AMERICAN DREAM: OPPORTUNITY AND EXCLUSION OVER FOUR CENTURIES* 58–59 (2004).

58. *ACHIEVING DEMOCRACY*, *supra* note 7, at 20.

59. U.S. CONST. pmbl.

60. HACKER & PIERSON, *supra* note 6, at 105.

61. *Id.* at 11.

62. *Id.* at 11–12.

63. PRINDLE, *supra* note 44, at 28; GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 505 (rev. ed. 1998).

64. *ACHIEVING DEMOCRACY*, *supra* note 7, at 20.

65. MICHAEL LIND, *LAND OF PROMISE: AN ECONOMIC HISTORY OF THE UNITED STATES* 106 (2012).

To say the least, the pursuit of positive liberty in the early years of this country was inconsistent with the sanctioning of slavery, limitations on voting, and discrimination against women, among other failures.⁶⁶ Nevertheless, efforts to promote economic development reflect a policy frame of positive liberty, despite strong concerns of an autocratic government—a reflection of negative liberty. This commitment to positive liberty, however, would soon change.

B. From Jackson to the Populists and Progressives

The election of President Andrew Jackson in 1828 marked a turn towards negative liberty domination—with the prominent exception of the Lincoln Administration⁶⁷—until the rise of the Populists and Progressives starting in the 1880s, as described below. As the nineteenth century progressed, Americans began to associate market opportunity with negative freedom because they perceived that a growing economy and the westward expansion of the nation offered them an opportunity to better themselves.⁶⁸ Alexis de Tocqueville, who coined the term “individualism,”⁶⁹ was impressed by the extent to which Americans “saw their society as egalitarian and individualistic.”⁷⁰ Americans, de Tocqueville observed, “are apt to imagine that their whole destiny is in their own hands.”⁷¹

As America industrialized, the robber barons, industrial interests, and their political supporters were only too happy to support this policy frame. They reoriented “Jefferson’s vision of America to become one of property ownership free from” government regulation, ignoring Jefferson’s willingness to use local government to achieve the common good.⁷² They cited Adam Smith as “arguing that unfettered individualism produced the greatest economic good, while ignoring Smith’s moral

66. See Marcia L. McCormick, *The Equality Paradise: Paradoxes of the Law’s Power to Advance Equality*, 13 TEX. WESLYAN L. REV. 515, 519–20, 529–30 (2007) (discussing populations prohibited from achieving equality early on in American history).

67. ACHIEVING DEMOCRACY, *supra* note 7, at 21–24.

68. *Id.* at 21.

69. JILLSON, *supra* note 57, at 85.

70. *Id.*

71. *Id.*

72. ACHIEVING DEMOCRACY, *supra* note 7, at 22.

sentiments.”⁷³ They pointed to Herbert Spenser’s bastardization of Charles Darwin to claim that survival of the fittest through economic competition was necessary for civilization to advance.⁷⁴

At the same time, however, business interests had no hesitations about accepting government regulation when it was beneficial to them. Arthur Schlesinger, Jr. explains, “The exaltation of laissez-faire into a quasi-official creed was a conjuror’s trick. Most of the worshippers at the shrine of undefiled private enterprise found the new cult entirely compatible with government assistance to business.”⁷⁵ Conservative federal judges readily accepted this inconsistency by upholding protective tariffs⁷⁶ while at the same time striking down legislation that “favored employers over employees, creditors over debtors, and railroads over farmers.”⁷⁷

Abraham Lincoln’s brief time in office was a short, but very significant, interruption in the dominant negative liberty discourse in the country. President Lincoln sought to expand the economy by supporting tariff legislation, a national banking act, a Homestead Act that made virtually free western lands available to the public, and the Morrill-Land Grant College Act, which set federally-owned lands to be used by the states to establish the land-grant universities.⁷⁸ All of this was in support of “the right to rise,”⁷⁹ the goal of bringing “economic opportunity for the widest possible circle of hardworking Americans.”⁸⁰ For Lincoln, the government should seek to give all Americans a “fair chance in the race of life.”⁸¹

Fighting the Civil War was President Lincoln’s greatest achievement in establishing a fair chance in the race of life. He opposed the South’s secession because it was an effort to establish

73. *Id.*

74. See PRINDLE, *supra* note 44, at 108–09.

75. SCHLESINGER, *supra* note 52, at 234.

76. See, e.g., *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892) (upholding tariff setting authority delegated to the executive branch in the McKinley Act).

77. ACHIEVING DEMOCRACY, *supra* note 7, at 23.

78. *Id.*

79. GABOR S. BORITT, *LINCOLN AND THE ECONOMICS OF THE AMERICAN DREAM* 1 (1978).

80. HAROLD HOLZER & NORTON GARFINKLE, *A JUST AND GENEROUS NATION: ABRAHAM LINCOLN AND THE FIGHT FOR AMERICAN OPPORTUNITY* 2 (2015).

81. Abraham Lincoln, Message to Special Session of Congress (July 4, 1861), in 4 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 438 (Roy P. Basler ed., 1953).

an independent nation based on denial of opportunity.⁸² In the Gettysburg Address, Lincoln eloquently characterized the Civil War as a fight to achieve a truer liberty:

Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal . . . It is for us the living . . . to be here dedicated to the great task remaining before us—that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth.⁸³

“Abraham Lincoln’s American Dream,” Jillson observes, “was of a nation in which every man, by which he came almost to mean men and women of every color, had an unobstructed chance to rise in society by dint of their own preparation, sagacity, strength, and effort.”⁸⁴ Shapiro and Tomain note, “Lincoln’s presidency forever changed the contours of our country as well as the constitutional rules by which we live in favor of individual equality.”⁸⁵

C. The Populists and Progressives

The transition of the country from an agrarian society to an industrial one spawned a period of government expansion addressing the social and economic problems created by industrialization.⁸⁶ The first manifestation of reform, the Populist movement, led to state and federal regulation of the railroads.⁸⁷ In 1887, Congress established the Interstate Commerce Commission (“ICC”), the first modern regulatory agency, which shifted the focus of the federal government from economic expansion to the

82. HOLZER & GARFINKLE, *supra* note 80, at 3 (“Lincoln largely fought the Civil War over . . . establishing a role for government in securing and guaranteeing economic opportunity for its citizens . . .”).

83. Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), <http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm>.

84. JILLSON, *supra* note 57, at 99.

85. ACHIEVING DEMOCRACY, *supra* note 7, at 24.

86. *Id.*

87. REGULATORY LAW AND POLICY, *supra* note 32, at 7–9.

regulation of business practices—the first time the federal government had engaged in such efforts.⁸⁸ The shift was momentous because, as Kermit Hall notes, it was the “building block upon which the administrative state of the twentieth century subsequently rose.”⁸⁹

In a second wave of reform, the Progressives, a group of religious and social reformers, supported legislation that established government as a countervailing power to corporate and industrial concentration.⁹⁰ Congress responded by passing the Sherman Antitrust Act, Food and Drug Act, Meat Inspection Act, Hepburn Act, Federal Trade Commission Act, Federal Power Act, Radio Act, and Air Commerce Act.⁹¹

Hebert Croly, a significant Progressive writer, struck a positive liberty theme when, echoing President Lincoln’s support of government to create a “fair chance, in the race of life,”⁹² he wrote: “[I]t would be absurd to claim that, because all the rivals toed the same mark, a man’s victory or defeat depended exclusively on his own efforts.”⁹³ “John Dewey and William James, relying on their new philosophy of pragmatism, attacked Social Darwinism, explaining that social arrangements were socially constituted, not the product of natural law, as the Social Darwinists contended.”⁹⁴ Teddy Roosevelt campaigned on a platform of “genuine democracy”—a “democracy economically and politically”⁹⁵—which sought to balance the gigantic industrial combinations with a neutral, powerful state that could create the conditions of fair economic progress.⁹⁶ These policy frames were bolstered by the work of muckraking journalists such as Ida Tarbell, whose *The History of the Standard Oil Company* exposed “the business practices and abuses of John D. Rockefeller, America’s most powerful CEO at the time.”⁹⁷

88. See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1191–92 (1986) (noting that the government shifted from “promotional” regulation to the “policing model” of regulation).

89. KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 206 (1989).

90. ACHIEVING DEMOCRACY, *supra* note 7, at 25.

91. *Id.* at 26.

92. JILLSON, *supra* note 57, at 99.

93. HERBERT CROLY, *THE PROMISE OF AMERICAN LIFE* 181 (1909).

94. ACHIEVING DEMOCRACY, *supra* note 7, at 26.

95. JILLSON, *supra* note 57, at 166 n.21 (quoting Roosevelt).

96. PRINDLE, *supra* note 44, at 169.

97. ACHIEVING DEMOCRACY, *supra* note 7, at 25–26.

A conservative judiciary, who fought to protect laissez-faireism on behalf of negative liberty, fought back against government expansion. No case better illustrates this resistance than *Lochner v. New York*, which held that state hour legislation interfered with the freedom to contract in violation of the Fourteenth Amendment.⁹⁸ *Lochner* and similar cases were influenced by legal theorists such as Thomas Cooley who “insisted that government should not use its power to improve the condition of one social group at the expense of another.”⁹⁹ In other words, Cooley interpreted the Constitution as prohibiting the use of government to promote positive liberty by expanding economic opportunity and engaging in protective regulation because it impinged on the negative liberty of some. While the courts did not universally oppose new regulation—the Supreme Court eventually accepted ICC regulation¹⁰⁰—the judiciary remained an obstacle to expansion of government until during the New Deal.¹⁰¹

D. *The New Deal*

The federal government was substantially expanded in response to the dire economic situation of the country during the Great Depression and because the negative liberty policy frame of laissez-faireism had lost all of its credibility in light of those economic conditions.¹⁰² Some new programs returned the government to the role of economic development that it had assumed after ratification of the Constitution.¹⁰³ For example, the GI Bill was a key element in promoting the economic development of the 1950s, which in turn created a vast middle class in the United States for the first time.¹⁰⁴ As Melissa Murray has established, “the Bill was

98. *Lochner v. New York*, 198 U.S. 45, 64 (1905).

99. HALL, *supra* note 89, at 226.

100. *Id.* at 235.

101. *See id.* at 246 (“[J]udges gave far broader discretion to legislatures than historians have usually recognized. . . . But the judiciary clung to the notion that they had a special responsibility to protect traditional economic rights”); Rabin, *supra* note 88, at 1236 (“The justices pressed their predilections [sic] for limited controls on the market as far as seemed rhetorically defensible in dealing with a particular regulatory agency or state regulatory scheme, and no further.”).

102. ACHIEVING DEMOCRACY, *supra* note 7, at 27.

103. *See id.* at 28–29; *supra* Part III, Section A.

104. ACHIEVING DEMOCRACY, *supra* note 7, at 29–30.

responsible for democratizing higher education and home ownership, and in so doing, transformed the nation from a steeply hierarchical society divided by wealth and class to once in which citizens aspired to and achieved middle class status.”¹⁰⁵

Other reforms added to the role of policing market behavior that had started in the Progressive Era. During the New Deal, Congress established the National Labor Relations Board, the Securities and Exchange Commission, and bank regulatory agencies.¹⁰⁶ Still other legislation added new responsibilities to the federal government’s portfolio of powers. The government took on the role of “protect[ing] economic opportunity through macro-economic management of the” economy,¹⁰⁷ and it engaged in direct economic assistance when Congress established the Social Security Act, which has lifted many elderly persons out of dire poverty.¹⁰⁸

To defend these actions, President Franklin Roosevelt spoke about positive liberty in his *Four Freedoms* speech in 1941.¹⁰⁹ The President observed that development of the nation’s military strength was essential to preserving citizens’ negative liberty: “[T]his is no time for any of us to stop thinking about the social and economic problems which are the root cause of the social revolution which is today a supreme factor in the world.”¹¹⁰ Linking negative and positive liberty, he went on:

For there is nothing mysterious about the foundations of a healthy and strong democracy. The basic things expected by our people of their political and economic systems are simple. They are: Equality of opportunity for youth and for others. Jobs for those who can work. Security for those who need it. The ending of special privilege for the few. The preservation of civil liberties for all. The enjoyment of the fruits of scientific

105. Melissa Murphy, *When War Is Work: The GI Bill, Citizenship, and the Civic Generation*, 96 CALIF. L. REV. 967, 974 (2008).

106. ACHIEVING DEMOCRACY, *supra* note 7, at 29.

107. *Id.* at 28.

108. *Id.* at 28–29.

109. Franklin Delano Roosevelt, State of the Union Address: The Four Freedoms Speech (Jan. 6, 1941), <http://www.archives.gov/historical-docs/todays-doc/?dod-date=106> (discussing increased government regulation and oversight to provide economic opportunities for Americans).

110. *Id.*

progress in a wider and constantly rising standard of living.¹¹¹

President Roosevelt sought, among other freedoms, the “freedom from want, which . . . means economic understandings which will secure . . . healthy peacetime life for [a nation’s] inhabitants.”¹¹² Four years later, in his last State of the Union address, President Roosevelt returned to positive liberty when he pressed for an “Economic Bill of Rights” that would commit the country to ensuring that Americans earned enough for adequate food, clothing, shelter, medical care, and education, as well as protection in old age.¹¹³

The Supreme Court initially resisted the New Deal, in particular by declaring unconstitutional the National Industrial Recovery Act and the Agricultural Adjustment Act,¹¹⁴ which were intended to create an infrastructure for economic recovery.¹¹⁵ In *United States v. Carolene Products Co.*,¹¹⁶ however, the Court ended its opposition to positive government.¹¹⁷ The case definitively declared that the mix of negative and positive liberty was a question of legislative judgment unless legislative decisions threatened insular minorities who were unable to protect themselves in the democratic process.¹¹⁸

E. The 1960s and 1970s

The New Deal forever changed the relationship between government and markets, establishing a significant government program of positive liberty. In the 1960s and 1970s, the environmental, consumer, civil rights, and women’s movements

111. *Id.*

112. *Id.*

113. Franklin Delano Roosevelt, State of the Union Message to Congress (Jan. 11, 1944), http://www.fdrlibrary.marist.edu/archives/address_text.html.

114. *United States v. Butler*, 297 U.S. 1, 68 (1936) (declaring unconstitutional the Agricultural Adjustment Act); *Schechter Poultry Co. v. United States*, 295 U.S. 495, 542 (1935) (declaring unconstitutional the National Industrial Recovery Act).

115. ACHIEVING DEMOCRACY, *supra* note 7, at 28–29.

116. *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

117. *Id.* The decision came in the wake of a threat by President Roosevelt to increase the number of justices on the Supreme Court, which would have enabled him to create a pro-New Deal majority, although it is not clear whether this was the cause of the change of heart. See Rabin, *supra* note 88, at 1259–62.

118. *Carolene*, 304 U.S. at 154.

led to a further expansion of positive liberty that was unprecedented even by the standards of the New Deal.¹¹⁹ Congress established “more than five hundred separate social programs” to address poverty and the lack of economic opportunity;¹²⁰ passed the Civil Rights, Higher Education, and Voting Rights Acts;¹²¹ and established twenty-five major laws to address consumer, health and safety, and environmental issues.¹²²

President Lyndon Johnson argued that these laws were necessary to achieve a “Great Society” that ensured “the happiness of our people,”¹²³ echoing Jefferson’s words in the Declaration of Independence that government exists to secure the rights of “Life, Liberty and the pursuit of Happiness.”¹²⁴ The President rallied the country to move “upward to the Great Society,” a place where there is “an end to poverty and racial injustice” and where “every child can find knowledge to enrich his mind and to enlarge his talents.”¹²⁵

At the Civil Rights March on Washington, Reverend Martin Luther King, Jr. rallied the nation to support civil rights legislation.¹²⁶ Echoing Lincoln’s appeal to positive liberty in his Gettysburg Address and Jefferson’s commitment to using government in the pursuit of life, liberty, and happiness, Reverend King noted: “When the architects of our republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note . . . that all men, yes, black men as well as white men, would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness.”¹²⁷

He called on the people of this nation to use the powers of the federal government to achieve positive liberty for African-Americans with his powerful “I have a dream” rhetoric: “I have a

119. ACHIEVING DEMOCRACY, *supra* note 7, at 30–31.

120. JILLSON, *supra* note 57, at 220.

121. ACHIEVING DEMOCRACY, *supra* note 7, at 30–31.

122. MICHAEL PERTSCHUK, REVOLT AGAINST REGULATION: THE RISE AND PAUSE OF THE CONSUMER MOVEMENT 5 (1982).

123. Lyndon B. Johnson, *The Great Society*, 3 MICH. Q. REV. 230, 230 (1964).

124. See *supra* note 55 and accompanying text.

125. Johnson, *supra* note 123.

126. JILLSON, *supra* note 57, at 209.

127. Reverend Martin Luther King, Jr., I Have a Dream (Aug. 28, 1963), <https://www.archives.gov/press/exhibits/dream-speech.pdf>.

dream that one day this nation will rise up and live out the true meaning of its creed: 'We hold these truths to be self-evident, that all men are created equal.'"¹²⁸

Calls for environmental, product, and health and safety legislation emphasized the government's inability to prevent corporations and others from despoiling the environment and committing other social ills.¹²⁹ Books and news accounts that focused on the harms to people and the environment that were occurring backed up this framing. In *Silent Spring*, for example, Rachael Carson vividly established that "[f]or the first time in the history of the world, every human being is now subjected to contact with dangerous chemicals, from the moment of conception until death."¹³⁰ Environmental activists emphasized the necessity of protecting the environment by characterizing it as a "spaceship" or "lifeboat" for humankind.¹³¹ In a call for more positive liberty, advocates sought to shift responsibility for protecting people and the environment from the "lax authority of market mechanisms and common law to . . . federal government regulation."¹³²

F. Since 1980

The election of President Ronald Reagan began a shift to a more negative liberty discourse that has continued, with important exceptions, until the present time. President Reagan set the tone for this shift when he declared, "In this present crisis, government is not the solution to our problem; government is the problem."¹³³ George Gilder's book, *Wealth and Poverty*,¹³⁴ linked negative liberty and economic prosperity, creating for the conservative movement a "justification, a polemic, and an anthem."¹³⁵ He argued that entrepreneurs were responsible for the creation of economic wealth, and government efforts to tax them, therefore, reduced

128. *Id.*

129. Shapiro, *supra* note 27, at 692.

130. RACHEL CARSON, *SILENT SPRING* 15 (1962).

131. RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 57 (2004).

132. MICHAEL W. MCCANN, *TAKING REFORM SERIOUSLY: PERSPECTIVES ON PUBLIC INTEREST LIBERALISM* 82 (1986).

133. Ronald Reagan, Inaugural Address (Jan. 20, 1981), <https://reaganlibrary.archives.gov/archives/speeches/1981/12081a.htm>.

134. GEORGE GILDER, *WEALTH AND POVERTY* (1981).

135. PRINDLE, *supra* note 44, at 246.

economic growth.¹³⁶ He also blamed social welfare programs for creating poverty because they removed the incentive of the poor to escape their condition.¹³⁷ Continuing this theme, President Reagan, in 1987, announced his own version of the fundamental four freedoms: the freedom to work, to enjoy the fruits of one's own labor, to own property, and to control that property.¹³⁸

Conservatives seized on Gilder's prescription for economic growth and poverty reduction to justify reductions in taxes and cuts in social welfare programs.¹³⁹ "A belief in supply side economics (cutting taxes to spur economic growth) became a litmus test for political conservatives in the United States" and remains so today.¹⁴⁰ In turn, the loss of government revenue and the resulting deficits became a justification for downsizing government, an effort to "starve the beast,"¹⁴¹ which has hampered government in carrying out its program of positive liberty. There has also been deregulation of the transportation, natural gas, and oil regulations,¹⁴² and financial markets were deregulated during the Clinton Administration.¹⁴³ Moreover, President Clinton signed a controversial welfare reform bill that deemphasized government assistance and emphasized finding employment,¹⁴⁴ which embodied Gilder's negative liberty argument that government assistance replaced market incentives for the poor.¹⁴⁵

President Obama's election in 2008 ushered in a brief period of government expansion.¹⁴⁶ Democratic majorities in the

136. See GILDER, *supra* note 134, at 44–66.

137. *Id.* at 45.

138. Ronald Reagan, America's Economic Bill of Rights (July 3, 1987), <http://www.presidency.ucsb.edu/ws/index.php?pid=34513>.

139. ACHIEVING DEMOCRACY, *supra* note 7, at 35–36.

140. *Id.* at 34–36.

141. Bruce Bartlett, "Starve the Beast": *Origins and Development of a Budgetary Metaphor*, 12 INDEP. REV. 5, 5 (2007).

142. ACHIEVING DEMOCRACY, *supra* note 7, at 34.

143. See, e.g., Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338, 1341 (codified as amended at 12 U.S.C. § 24 (2012)) (repealing the Glass-Steagall Act, 12 U.S.C. § 377, which prohibited commercial banks from engaging in the investment business).

144. See, e.g., Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2113 (codified as amended at 42 U.S.C. § 601 (1996)).

145. *Id.*

146. See ACHIEVING DEMOCRACY, *supra* note 7, at 36.

Senate and House passed the Affordable Care Act, enacted equal pay for women legislation, restructured student lending, expanded healthcare insurance, instituted financial institution regulation in the wake of the Wall Street meltdown that created an economic recession—including a consumer protection bureau—and increased research and development investments in clean energy, among other initiatives.¹⁴⁷ The President also won reelection in 2012 against an opponent who employed negative policy frames, including favoring repeal of the Affordable Care Act.¹⁴⁸

After his reelection, President Obama defended the role of government in producing positive liberty in his second inaugural address, when he observed:

What makes us exceptional—what makes us American—is our allegiance to an idea articulated in a declaration made more than two centuries ago: “We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness.”

... [H]istory tells us that while these truths may be self-evident, they’ve never been self-executing; that while freedom is a gift from God, it must be secured by His people here on Earth. . . .

....

Together, we determined that a modern economy requires railroads and highways to speed travel and commerce, schools and colleges to train our workers.

Together, we discovered that a free market only thrives when there are rules to ensure competition and fair play.

147. *Id.*

148. *Id.* at 37.

Together, we resolved that a great nation must care for the vulnerable, and protect its people from life's worst hazards and misfortune.¹⁴⁹

Nevertheless, neither the positive nor negative liberty paradigms have completely dominated. In 2010, the Republicans took back control of the House of Representatives from the Democrats, employed, among other tactics, a negative liberty policy frame,¹⁵⁰ and opposed nearly all efforts by the Obama Administration to expand government.¹⁵¹ The President, however, has been able to take some actions on behalf of positive liberty by relying on administrative action, including immigration reform¹⁵² and regulation of greenhouse gases.¹⁵³

IV. EXPLAINING REGULATORY CYCLES

The expansion of government in the United States is associated with a positive liberty policy frame, and the defense of markets is associated with a negative liberty policy frame. Although each discourse has been influential, most significant expansions of government have come in short periods of time while government opponents have been able to head off government expansion for longer periods of time.¹⁵⁴

Positive liberty advocates have had more difficulty dislodging their opponents' policy framing because the negative

149. Barack Obama, Inaugural Address (Jan. 21, 2013), <https://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama>.

150. Paul Kane, *Resurgent Republicans Take Back Control of the House*, WASH. POST (Nov. 3, 2010, 2:09 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/03/AR2010110308842.html> (“[V]oters backed Republicans in every region of the country after a campaign that focused on downsizing government and rolling back Obama’s signature legislative accomplishments.”).

151. THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* 18 (2012).

152. See, e.g., Press Release, Office of the Press Sec’y, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), <https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>; Press Release, Dep’t of Homeland Sec., Secretary Napolitano Announces Deferred Action Process for Young People who Are Low Enforcement Priorities (June 15, 2012), <https://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low>.

153. See, e.g., 40 C.F.R. pt. 60 (2015).

154. ACHIEVING DEMOCRACY, *supra* note 7, at 42.

liberty advocates have a number of significant advantages. Positive liberty advocates are handicapped by the difficulty of organizing individuals who would benefit from government action, the spending advantage of negative liberty proponents, the lack of positive rights in the Constitution, how individuals process policy framing, and the failure of progressive elected leaders to support positive liberty policy framing.

A. *The Collective Action Disparity*

Frank Baumgartner and Bryan Jones have explained regulatory cycles by focusing on the greater political power of those who support a negative liberty policy frame.¹⁵⁵ They characterize the prevailing political equilibrium in the country using a “punctured equilibrium” model.¹⁵⁶ A negative liberty discourse is the usual equilibrium because of the success of powerful, pro-market interests in dominating political discourse by focusing on Americans’ preference for capitalism and small government.¹⁵⁷ Yet, given the right set of conditions, pro-market forces can shift the country to a positive liberty discourse, thereby puncturing the dominant negative liberty discourse and leading to expanded government.

Negative liberty proponents have greater political power because of a collective action disparity, which refers to the limited incentive of individuals to organize to obtain greater positive liberty.¹⁵⁸ One reason is that each individual receives only a small benefit from regulatory action even though it can produce enormous benefits for the public as a whole.¹⁵⁹ By comparison, individual corporations or wealthy individuals each derive a significantly greater economic benefit from stopping government regulation, and the cost of organizing this more limited number of companies and individuals is significantly less.¹⁶⁰

155. See generally FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* (1993).

156. *Id.* at 1.

157. *Id.* at 15–16.

158. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 2 (1965).

159. James Q. Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 357, 367 (James Wilson ed., 1980).

160. ROBERT G. KAISER, *SO DAMN MUCH MONEY: THE TRIUMPH OF LOBBYING AND THE CORROSION OF AMERICAN GOVERNMENT* 23 (2009) (describing politicians’ ability to

A negative liberty political equilibrium is likely to continue so long as legislators are not accountable to the public for favoring special interests over the general public interest, a condition known as “slack.”¹⁶¹ When slack is reduced, legislators become more accountable to public sentiment with the result that they are more likely to vote for laws that regulate the business community.¹⁶² Pro-government advocates are more likely to mobilize this latent public sentiment when they can link their positive liberty policy framing to public issues of high public salience, such as environmental disasters, obvious economic failures, such as the recent recession caused by reckless Wall Street behavior, or a series of industrial accidents.¹⁶³ As discussed earlier, this is done by a policy story that identifies those who would defend unregulated markets as the oppressors and new regulatory or social regulation as the solution.¹⁶⁴

Baumgartner and Jones attribute the long periods of dominant market discourse to the collective action problems that hinder political organization on behalf of positive liberty.¹⁶⁵ While that much is true, it is possible to identify four additional constraints that challenge positive liberty advocates.

B. The Spending Disparity

Although there is no authoritative estimate of the total amount spent by conservative and progressive funders to influence public opinion, available information suggests that negative liberty proponents have spent billions of dollars on establishing a dominant policy frame.¹⁶⁶ This spending has far outpaced the

quickly raise money from those who can receive favors from the politician); LAWRENCE LESSIG, *REPUBLIC LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011).

161. Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. (SPECIAL ISSUE) 167, 176–77 (1990).

162. *Id.* at 191–94.

163. Wilson, *supra* note 159, at 370.

164. *See supra* notes 17–18 and accompanying text.

165. BAUMGARTNER & JONES, *supra* note 155, at 11.

166. *See* DAVID CALLAHAN, NAT’L COMM. FOR RESPONSIVE PHILANTHROPY, *\$1 BILLION FOR IDEAS: CONSERVATIVE THINK TANKS IN THE 1990S* (1999), [https:// www.ncrp.org/wp-content/uploads/2016/11/1BillionForIdeas-lowres-1.pdf](https://www.ncrp.org/wp-content/uploads/2016/11/1BillionForIdeas-lowres-1.pdf) (noting that spending indicates conservative think tanks will likely top one billion dollars in the 1990s); JEFF KREHELY ET AL., NAT’L COMM. FOR RESPONSIVE PHILANTHROPY, *AXIS OF IDEOLOGY: CONSERVATIVE*

support of groups engaged in securing positive liberty. The budgets of the top eight progressive social groups, for example, totaled less than twenty-five percent of the budgets of the top five conservative think tanks in 1995.¹⁶⁷ According to another estimate, right-wing think tanks received \$295 million in support between 2003 and 2005, while left-wing think tanks received just \$75 million in the same period.¹⁶⁸

C. *The Constitutional Disparity*

Those engaging in negative liberty framing can also take advantage of the impact of the United States Constitution on the nation's political culture. Unlike many modern constitutions, the United States Constitution only establishes limitations on government; it does not commit government to providing for or protecting the public welfare.¹⁶⁹ For example, there is no federal constitutional right to a free public education.¹⁷⁰

At a minimum, then, there is a political imbalance in the country in which pro-government proponents cannot ground their arguments for positive liberty in the Constitution, while those who favor negative liberty can do so. As Michael Dorf argues, "It is difficult to imagine that the Constitution, as a guide to activism, would *not* constrain our politics."¹⁷¹ Consider, for example, the Tea Party's complaint that the administrative state

FOUNDATIONS AND PUBLIC POLICY 10 (2004), <https://ncrp.org/images/stories/AxisofIdeology.pdf> (noting spending reached \$1.8 billion in 2001); Lewis H. Lapham, *Tentacles of Rage: The Republican Propaganda Mill, a Brief History*, HARPER'S MAG., Sept. 2004, at 31, 32 (noting roughly three billion dollars over thirty years).

167. Sally Covington, *How Conservative Philanthropies and Think Tanks Transform U.S. Policy*, COVERT ACTION Q. (Winter 1998), <http://www.thirdworldtraveler.com/Democracy/ConservThinkTanks.html>.

168. David Teather, *Liberals Pledge Millions to Revive US Left*, THE GUARDIAN (Aug. 8, 2005), <http://www.guardian.co.uk/world/2005/aug/08/usa.davidteather>.

169. See U.S. CONST. Cass Sunstein argues that the reason the Constitution is framed only in negative terms reflects the historical origins of the document. Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 90, 92 (Michael Ignatieff ed., 2005). The fact that the Constitution has not been amended to reflect Americans' commitment to positive liberty, he contends, has more to do with the Framers' decision to make it extremely difficult to amend the Constitution, rather than a popular will that rejects the idea of positive liberty. *Id.* at 99.

170. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

171. Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2053 (2011) (reviewing JACK M. BALKIN, *LIVING ORIGINALISM* (2011) and DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010)).

“abandoned an American tradition of individualism in what amounted to ‘the decisive wrong turn in American history.’”¹⁷² The “Constitution in exile” movement of legal scholars likewise claims the very existence of the administrative state is illegitimate because it departs from Founding Era conceptions of individual rights, limited government, and due process.¹⁷³

The administrative state that promotes positive liberty is constitutionally suspect for another reason. Americans, James Freedman notes, have never entirely accepted the legitimacy of positive government, despite the fact that administrative law exists to ensure the reasonability of government action.¹⁷⁴ He attributes this response to “a deeper uneasiness over the place and function of the administrative process in American government”¹⁷⁵ At bottom, “the difficulty is fitting the ‘round peg’ of administrative government into the ‘square hole’ of the nation’s constitutional culture.”¹⁷⁶ “Since the attributes of modern administrative government are missing from the basic constitutional design” of separation of powers, “the nation’s sense of uneasiness with the administrative process has persisted.”¹⁷⁷

D. The Cognitive Fit Disparity

Another advantage of advocates for negative liberty is that their policy frame fits better with how people commonly filter information. As discussed earlier, individuals use policy frames to

172. DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES, 1900–1940*, at 7 (2014).

173. *See, e.g.*, RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 2 (2004) (stating that “the Constitution’s legitimacy cannot be taken for granted”); RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* 276 (2014) (asserting that the creation of agencies relies on an “aggressive reading” of the Necessary and Proper Clause of the Constitution, and that the creation of agencies is neither necessary, as “the powers of the president and the heads of departments can be supplemented by additional powers as needed,” nor proper, as agencies “undermine the safeguards of the separation of powers and of checks and balances found in the Constitution”); PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 7–8 (2014) (stating that administrative law “runs contrary to the very origin and nature of Anglo-American constitutional law”).

174. JAMES O. FREEDMAN, *CRISIS & LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* 7–9 (1978).

175. *Id.* at 9.

176. Sidney A. Shapiro, *Pragmatic Administrative Law*, 5 *ISSUES LEGAL SCHOLARSHIP*, 2005, art. 1, at 3.

177. *Id.*

filter and organize information about regulatory policy.¹⁷⁸ While this type of cognitive heuristic can help us to process information, it can also distort or bias our understanding of that information.¹⁷⁹ One such mistake, the “fundamental attribution error,” leads us to attribute an individual’s behavior to the person’s own dispositions and character traits,¹⁸⁰ although a logical analysis suggests that the behavior is the result of situational variables.¹⁸¹

It is easier, for example, to attribute someone’s poverty to his own behavior, blaming laziness for example, than it is to understand how poverty results from structural characteristics of markets and capitalism. Similarly, it is easier to assume that individuals who are rich became so by hard work and superior intelligence than it is to understand that their wealth may be the result of capturing the government in a way that produces economic rents.

Negative liberty advocates benefit from this cognitive tendency because “situational factors are cognitively hidden (often in plain sight), easily camouflaged and naturalized as mere background.”¹⁸² The fact that individuals are prone to miss situational factors makes it easier for those pressing a negative liberty policy frame to reinforce individual disposition as a way of gaining power, a situation that Jon Hanson and David Yosifon call “deep capture.”¹⁸³

For this reason, the attribution error creates a presumption against government action on behalf of positive liberty. After all, if consumers make free choices in markets, or are market losers because of their own personal traits, government regulation will

178. See *supra* text accompanying note 2.

179. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 7 (2011).

180. See SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 67–86 (2d ed. 1991) (1984) (explaining fundamental attribution error as a “bias in social perception” that causes a person to attribute an individual’s behavior to “his or her own dispositional qualities, rather than to situational factors”); LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY 4 (1991) (noting people’s inflated belief in the significance of personal traits and dispositions and discounting the extent to which individual behavior is influenced by the constraints of a situation).

181. Daniel T. Gilbert & Patrick S. Malone, *The Correspondence Bias*, 117 PSYCHOL. BULL. 21, 21 (1995).

182. Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 195 (2003).

183. *Id.*

reduce consumer welfare.¹⁸⁴ Similarly, because individuals are assumed to choose the risks that create health and safety risks,¹⁸⁵ there is a presumption against this type of regulation as well.¹⁸⁶

While the tendency to look for simple explanations of the world around us is internally motivated, the nature of the framing derives from the world around us, making it culturally dependent.¹⁸⁷ Americans, for example, are influenced to engage in dispositionism by the deep commitment to a market culture in this country.¹⁸⁸ Moreover, negative liberty advocates not only benefit from this cultural tendency, but they engage in advertising and advocacy that reinforces it.¹⁸⁹

Hanson and Yosifon suggest that deep capture will persist until situational factors are thrust on the public in the form of hard-to-miss situations.¹⁹⁰ This may help to explain the greater success of pro-government forces in establishing a positive liberty policy frame at a time when the harms of unregulated markets are more obvious, such as the role of Wall Street in bringing about the recent recession.¹⁹¹ Memories fade, however, and pro-market forces have been busy attacking the Dodd-Frank legislation on negative liberty grounds, accusing it, for example, of killing off jobs.¹⁹²

E. The Advocacy Disparity

A final reason for the lingering impact of the 1980s market discourse is that pro-democracy elected officials and candidates have been reluctant to defend the government's role in

184. *Id.* at 226–27.

185. W. KIP VISCUSI, *RISK BY CHOICE: REGULATING HEALTH AND SAFETY IN THE WORKPLACE* 4 (1983).

186. Hanson & Yosifon, *supra* note 182, at 227.

187. *See id.* at 250–59. Persons in cultures that are not individualist, as in the United States, do not share this disposition. *Id.* *See generally* RICHARD E. NISBETT, *THE GEOGRAPHY OF THOUGHT: HOW ASIANS AND WESTERNERS THINK DIFFERENTLY . . . AND WHY* (2003) (examining the divergent ways in which Eastern and Western cultures view the world and offering suggestions about how today's interdependent global cultures may be bridged).

188. Hanson & Yosifon, *supra* note 182, at 293.

189. *Id.* at 262–68.

190. *Id.* at 227.

191. *See, e.g.*, *ACHIEVING DEMOCRACY*, *supra* note 7, at 146.

192. *See, e.g.*, James Devaney, *Rep. Hensarling: Dodd-Frank Is 'Job-Destroying Law,'* NEWSMAX (July 18, 2015, 8:18 AM), <http://www.newsmax.com/Newsfront/hensarling-dodd-frank-gop-weekly-address-job/2015/07/18/id/657778/>.

promoting positive liberty. President Obama's strong endorsement of the record of government in achieving positive liberty in his second inaugural address, quoted earlier, is atypical, even for him,¹⁹³ nor have pro-democracy politicians defended the bureaucrats who implement the government programs that generate positive liberty.¹⁹⁴

Positive liberty policy framing requires pro-democracy proponents to remind Americans of the successes of government that are responsible for the country we enjoy today. There can be no doubt that government has enhanced positive liberty, and there are no shortages of easy-to-point-out examples, such as the role of Social Security in lifting retired citizens out of dire poverty¹⁹⁵ or the success of environmental law in protecting us from toxic chemicals and dirty air and water.¹⁹⁶ This is particularly necessary in light of the advantages that those who press a negative liberty policy frame have over the competing positive liberty frame.

As long as the public retains a weak sense of positive government, the default equilibrium of a negative liberty policy discourse cannot be overcome,¹⁹⁷ nor do positive liberty advocates lack examples of how unregulated markets can reduce liberty. Take, for example, the conservative description of government intervention in markets as "job-killing regulations"¹⁹⁸ or their description of taxes as money "confiscated by the government."¹⁹⁹

To the limited extent that progressive politicians have defended positive government, they have been constrained by the

193. See *supra* note 149 and accompanying text.

194. See ACHIEVING DEMOCRACY, *supra* note 7, at 146.

195. Paul N. Van de Water et al., *Social Security Keeps 22 Million Americans Out of Poverty: A State-by-State Analysis*, CTR. ON BUDGET & POL'Y PRIORITIES (Oct. 25, 2013), <http://www.cbpp.org/research/social-security-keeps-22-million-americans-out-of-poverty-a-stat-e-by-state-analysis>.

196. RENA STEINZOR & SIDNEY SHAPIRO, *THE PEOPLE'S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC: SPECIAL INTERESTS, GOVERNMENT, AND THREATS TO HEALTH, SAFETY, AND THE ENVIRONMENT* 29–37 (2010).

197. ACHIEVING DEMOCRACY, *supra* note 7, at 137.

198. See, e.g., Albert J. Downs, *Cut Job-Killing Regulations to Boost Millennial Employment*, THE HILL (July 12, 2016, 2:27 PM), <http://thehill.com/blogs/congress-blog/economy-budget/287278-cut-job-killing-regulations-to-boost-millennial-employment>.

199. See, e.g., Peter Kay, *Do Conservatives Have a Moral Problem with Taxes or Is the Problem One Based on Their Opinion of the Efficiency of Government Services?*, QUORA (Feb. 29, 2012), <https://www.quora.com/Do-conservatives-have-a-moral-problem-with-taxes-or-is-the-problem-one-based-on-their-opinion-of-the-efficiency-of-government-services#n=12>.

lack of a pithy, resonant way to explain positive liberty—a sound bite, if you will. There is no shortage of negative liberty policy frames, such as “big government,” “welfare state,” and “job killing regulations,” but there are no similar short, catchy phrases to explain the alternative position. If people need a cognitive shortcut to mediate complex policy concepts, progressives have not yet found a way to do this.

The failure to defend government extends to the civil servants who work there. Vigorous bureaucratic bashing has been a staple of pro-liberty policy framing since the Reagan Administration. Professor Larry Hubbell notes how President Reagan portrayed bureaucrats as “loafers, incompetent buffoons, good old boys, or tyrants” (Hubbell’s own words), with “tyrants” being the worst description because it depicts public officials as reducing negative liberty by extending the “long hand of government” into citizens’ private lives.²⁰⁰ Members of Congress have readily joined the choir. In a study of congressional rhetoric, Professor Thad Hall found dramatic use of the derisive term “bureaucrat” (as opposed to the more positive term “public servant”) by Republican members of Congress, especially after President Bill Clinton took office.²⁰¹ The “bureaucrats” were never identified as located in a particular agency, but instead were “everywhere but nowhere.”²⁰²

Robust defenses of the bureaucracy are much more difficult to find.²⁰³ One of the rare exceptions is a speech by President Clinton after the bombing of the Murrah Federal Building in Oklahoma City, who pointed out at a memorial service:

This terrible sin took the lives of our American family, innocent children in that building only because their parents were trying to be good parents as well as good

200. Larry Hubbell, *Ronald Reagan as Presidential Symbol Maker: The Federal Bureaucrat as Loafer, Incompetent Buffoon, Good Ole Boy, and Tyrant*, 21 AM. REV. PUB. ADMIN. 237, 244 (1991).

201. STEINZOR & SHAPIRO, *supra* note 196, at 129; Thad E. Hall, *Live Bureaucrats and Dead Public Servants: How People in Government Are Discussed on the Floor of the House*, 62 PUB. ADMIN. REV. 242, 248 (2002). Hall studied congressional rhetoric in the House during the 103rd (1993–94) and 104th (1995–96) Congresses, which was when the Republicans took over control of the House from the Democrats for the first time since 1954. *Id.*

202. STEINZOR & SHAPIRO, *supra* note 196, at 129.

203. *See id.* at 127.

workers, citizens in the building going about their daily business and many there who served the rest of us, who worked to help the elderly and the disabled, who worked to support our farmers and our veterans, who worked to enforce our laws and to protect us. Let us say clearly, they served us well, and we are grateful.²⁰⁴

V. OVERCOMING THE NEGATIVE LIBERTY DISCOURSE

Despite the previously discussed advantages of the negative liberty advocates, they have been unable to completely dislodge government expansion in response to a positive liberty policy frame, even in the middle of long periods of a dominant negative liberty discourse. There are three reasons for the persistence of the positive liberty message and public support for government expansion. First, public opinion polling reminds us that Americans favor both positive and negative liberty,²⁰⁵ a fact that is easily forgotten in light of the dominance of the negative liberty discourse since 1980. Further, the longer that a market discourse remains dominant, the more likely it is that it will permit the excesses that have, in the past, led to a democratic discourse and a response by the government. Finally, advocates for negative liberty are handicapped in responding to shifts in public opinion in favor of positive liberty.

204. Bill Clinton, Time for Healing Ceremony (Apr. 23, 1995), <http://millercenter.org/president/speeches/speech-3441>.

205. PEW RESEARCH CTR., BEYOND DISTRUST: HOW AMERICANS VIEW THEIR GOVERNMENT 4 (Nov. 23, 2015), <http://www.people-press.org/files/2015/11/11-23-2015-Governance-release.pdf>. In the same way, only 20% of Americans described government as well-run in general, but a majority of 51–79% said that government was doing a good job in the same specific government programs as above. *Id.* These results are consistent with earlier polling, when the negative views about government were at an all-time low in 2015. *Id.* While 52% of Americans said that government does more harm than good, in a February 2012 Pew poll, 70–89% said that they would either expand or keep current levels of the five specific types of regulation. PEW RESEARCH CTR., AUTO BAILOUT NOW BACKED, STIMULUS DIVISIVE 3 (Feb. 23, 2012), <http://www.people-press.org/files/legacy-pdf/2-23-12%20Regulation%20release.pdf>. The proportion of people saying that they favored *reducing* regulation was as follows: car safety and efficiency: 9%; environmental protection: 17%; food protection and packaging: 7%; prescription drugs: 20%; and workplace safety and health: 10%. *Id.*

A. Americans' Dual Attitudes About Government

Public opinion polling in the United States consistently reveals that Americans are of two minds about government and markets. A 2015 Pew poll, for example, found that just 19% of Americans say that they trust government always or most of the time, but between 55% and 88% of the same respondents see a major role for government when asked about their support for specific government programs, such as ensuring safe food and medicine (87%) or protecting the environment (75%).²⁰⁶

Public opinion pollsters have various explanations for these inconsistencies, but in general they agree that public ambivalence reflects the dual loyalties of Americans to what I have characterized as negative and positive liberty.²⁰⁷ This dual commitment has not changed despite the political gridlock in Washington, as Cynthia Farina's excellent and deep analysis of polling indicates, except for the most extreme voters on the left and right.²⁰⁸ As a result, "Americans tend to be no more distant from one another today than they were in the 1950s,' even on social issues often thought to be driving polarization."²⁰⁹ Professor Farina concedes the fact that most voters are "cross-pressured" is "not enough to discredit the dark prophecies of a rancorous and gridlocked future," but given the polling evidence, we can be skeptical that political gridlock is here to stay.²¹⁰

206. See *supra* note 205 and accompanying text.

207. See, e.g., ALBERT H. CANTRIL & SUSAN DAVIS CANTRIL, *READING MIXED SIGNALS: AMBIVALENCE IN AMERICAN PUBLIC OPINION ABOUT GOVERNMENT* 138 (1999) (characterizing Americans as "ideologically conservative" and "operationally liberal"); HERBERT MCCLOSKEY & JOHN ZALLER, *THE AMERICAN ETHOS: PUBLIC ATTITUDES TOWARDS CAPITALISM AND DEMOCRACY* 185 (1988) (explaining that, for most Americans, differences in support for markets and government is revealed "mainly in the form of disagreements over incremental adjustments in existing practice—greater or less regulation of business, higher or lower pay for workers, more power or less power for unions").

208. Cynthia Farina, *Congressional Polarization: Terminal Constitutional Dysfunction*, 115 *COLUM. L. REV.* 1689, 1707 (2015) ("[A] solid majority of voters (and a sizeable plurality) of the 'politically engaged' are what political scientists call 'cross-pressured': holding a mix of liberal and conservative views that are not well-represented by either party.").

209. *Id.* at 1715 (quoting Seth J. Hill & Chris Tausanovitch, *A Disconnect in Representation? Comparison of Trends in Congressional and Public Polarization*, 77 *J. POL.* 1058, 1074 (2015)).

210. *Id.* at 1737.

B. Defective Market Discourse

Since Americans continue to be in favor of both positive and negative liberty, they are at some point likely to turn to the positive liberty policy frame. As history has demonstrated, a dominant negative liberty discourse allows the market excesses and abuses that are the basis for the positive liberty discourse in the first place.²¹¹ When this happens, negative liberty advocates are constrained by their own discourse in responding to shifts in public opinion in favor of positive liberty.

1. Markets Gone Wrong

Adam Smith famously described an “invisible hand” by which individual self-interest had the direct consequence of furthering the interests of “society more effectually than when [an individual] really intends to promote it.”²¹² Smith’s virtue, however, is the virtue of competitive markets, but market participants have strong incentives to cheat, thus frustrating the result that Smith extols.

Market participants “seek a competitive advantage through innovation or by being more efficient through cost reductions.”²¹³ While these actions can give a firm market power, “it also incentivizes other firms to follow suit, thereby eroding away the first firm’s superior market position.”²¹⁴ A firm, however, may find it less expensive to achieve a competitive advantage by creating (or taking advantage of) a market defect, such as limited consumer information or the lack of pollution regulation.²¹⁵ The firm may also find it less expensive to use its political power to enhance its profitability through favorable tax breaks or similar rent-seeking activity.²¹⁶

Market results will also contradict important political values, such as equity and fairness, which are associated with positive liberty. Markets reward intuition and innovation, which are socially desirable despite an adverse impact on wealth because

211. See BERLIN, *supra* note 2, at 134.

212. JERRY Z. MULLER, THE MIND AND THE MARKET: CAPITALISM IN MODERN EUROPEAN THOUGHT 66 (2002).

213. ACHIEVING DEMOCRACY, *supra* note 7, at 61.

214. *Id.*

215. *Id.*

216. *Id.*

of the economic incentives that are created. At the same time, everyone does not start in the same financial place; some persons may not be in a position to earn enough to afford housing, food, medical insurance, and the other necessities of life, and those with more wealth can disproportionately exercise political influence by shaping markets to their economic advantage.²¹⁷ Markets left to their own devices will, therefore, produce results that are socially undesirable, even if they are functioning without market defects.

There is no shortage of historical examples of these negative tendencies of markets. As seen earlier, the Progressive, New Deal, and Great Society eras were all responses to the limitations of markets and the economic and social damage they caused.²¹⁸ My argument is that these problems will continue to grow under a dominant negative liberty discourse because this discourse is simply unable to address these problems.

2. The Limitations of a Negative Liberty Discourse

A negative liberty discourse is inherently critical of government. Moreover, those who benefit from market imperfections and the current distribution of wealth use this discourse to protect the status quo and oppose government regulation and redistribution, allowing the problems to continue and grow. As Albert Hirschman explains, conservatives have consistently opposed the extension of positive liberty, employing a consistent set of rhetorical responses.²¹⁹ As seen earlier, the robber barons and their supporters defended the free market—despite the human misery and economic monopolies of the Industrial Age—as both natural (social Darwinism) and as Smith’s invisible hand, ignoring his moral sentiments.²²⁰ The business community and other conservatives bitterly opposed the New Deal,²²¹ and they

217. *Id.* at 62.

218. *See supra* Part III.

219. ALBERT O. HIRSCHMAN, *THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY* 7–8 (1991).

220. *See supra* notes 72–74 and accompanying text.

221. *See, e.g.*, ARTHUR M. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL* 471 (1958).

reacted to the Great Society by organizing a counter-reaction that led to the Reagan Era.²²²

Public policy analysis can reveal market defects and consider the implications of wealth maldistributions. History indicates that negative liberty advocates have conflated their policy framing and policy analysis, which has had the effect of blinding them to contrary evidence.²²³ For example, a belief in supply-side economics (cutting taxes to spur economic growth) became and remains a litmus test for political conservatives in the United States, even though there is meager, if any, support for the concept in the academic policy literature,²²⁴ and the concept was later disavowed by one of its chief architects, David Stockman.²²⁵

3. The Next Cycle

History suggests that a positive liberty frame will replace the negative liberty frame that has been more dominant since 1980. As this paper was written, there was evidence that this transition may be in progress.

Since 1980, the more dominant negative liberty frame has supported dominant tax, fiscal, and regulatory policies that have contributed to historical income inequality, historical wealth inequality, a decline in median household incomes, declining social mobility, and an increase in poverty.²²⁶ Those seeking to reverse these trends have employed positive liberty policy frames to call attention to these trends. “We are the 99 percent,” the slogan of the Occupy Wall Street Movement, not only captured the economic inequality²²⁷ but reminded the public that they had

222. See, e.g., THOMAS O. MCGARITY, FREEDOM TO HARM: THE LASTING LEGACY OF THE LAISSEZ FAIRE REVIVAL 5–6 (2013).

223. ACHIEVING DEMOCRACY, *supra* note 7, at 63.

224. See, e.g., Paul Krugman, *Charlatans, Cranks, and Kansas*, N.Y. TIMES (June 29, 2014), <http://www.nytimes.com/2014/06/30/opinion/paul-krugman-charlatans-cranks-and-kansas.html>.

225. DAVID STOCKMAN, THE TRIUMPH OF POLITICS: HOW THE REAGAN REVOLUTION FAILED 13 (1986).

226. ACHIEVING DEMOCRACY, *supra* note 7, at 65–66.

227. See Scott Horsley, *The Income Gap: Unfair, or Are We Just Jealous?*, NPR (Jan. 14, 2012, 8:44 AM), <http://www.npr.org/2012/01/14/145213421/the-income-gap-unfair-or-are-we-just-jealous> (quoting Paul Taylor of the Pew Research Center: “The Occupy Wall Street movement kind of crystallized the issue: 1 versus 99. [It’s] arguably the most successful slogan since ‘Hell no, we won’t go,’ going back to the Vietnam era ... trigger[ing] a lot of coverage about economic inequality.”).

the capacity to act through government to address the policies that produced this state of affairs.²²⁸ In Bernie Sanders's surprisingly successful campaign for the Democratic nomination, the candidate promised that a "political revolution is coming" when he spoke about economic inequality and indicated how he would use positive government to address this problem.²²⁹ Hillary Clinton, the Democratic nominee, spoke about "inclusive capitalism" to capture her proposals for government expansion to address economic inequality.²³⁰

The Republican Party found itself in a civil war over its traditional negative liberty policy positions, resulting in the nomination of Donald Trump, who displaced rivals that hewed to negative liberty policy frames.²³¹ In his promise to "Make America Great Again," Trump promised voters an activist government, including new restrictions on immigration and international trade, which he argued had limited economic opportunities of working class Americans.²³² At bottom, without regard to Trump's offensive language and false claims,²³³ his message is one of positive liberty, albeit misguided positive liberty.

Time will tell whether a positive liberty frame will become more dominant leading to another expansion of government. The campaign for President in 2015–2016, however, indicated that voters are receptive to positive liberty policy frames regarding economic inequality.

228. See *supra* notes 35–42 and accompanying text (discussing the positive liberty policy frame as "communal democracy").

229. Hunter Schwartz, *The 2016 Presidential Slogans, Ranked*, WASH. POST (May 8, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/05/08/the-2016-candidates-slogans-ranked/>.

230. Roger Casement, *Inclusive Capitalism—the Clintons' Economic Policy*, THOM HARTMANN (June 10, 2016, 3:57 AM), <http://www.thomhartmann.com/forum/2016/06/inclusive-capitalism-clintons-economic-policy>.

231. Matthew Continetti, *A Donald Trump Nomination Would Fundamentally Change the GOP*, NAT'L REV. (Dec. 12, 2015, 12:00 AM), <http://www.nationalreview.com/article/428392/party-divides-matthew-continetti> (noting that Republican presidential nominees since 1980 have been pro-trade, pro-immigration, and for market solutions).

232. *Id.*

233. See generally *All False Statements Involving Donald Trump*, POLITIFACT, <http://www.politifact.com/personalities/donald-trump/statements/byruling/false/> (last modified Jan. 27, 2017) (listing statements made by Donald Trump that have proven to be false).

VI. CONCLUSION

Most Americans understand public policy debates through policy framing that organizes and simplifies policy information. Although policy framing varies depending on the policy context, there nevertheless have been two basic policy frames in American history. A negative liberty policy frame extols the virtues of markets as producing individual liberty and opposes government as reducing that liberty. A positive liberty policy frame focuses on how government can increase individual liberty by freeing individuals from constraints produced in the market economy, creating positive liberty.

One policy frame is more dominant at times, but not to the complete exclusion of the other policy frame. When the negative liberty frame is more dominant, there is less expansion of government, but some expansion does occur.²³⁴ When the positive frame is dominant, there has been a significant expansion of government, but the negative frame still operates as a break on this expansion.²³⁵

When one policy frame has dominated, the other policy frame nevertheless has eventually displaced it. This cycling has occurred despite institutional and political advantages of the negative liberty advocates. Most Americans remain committed to both values, and they are willing to turn to government to solve newly arising problems²³⁶—problems for which negative liberty advocates have no answers. Negative liberty advocates have no answers because the new problems result from the operation of markets, and these advocates oppose the only solution available to address these problems—the expansion of government.

234. See generally Wilson Huhn, *A New Frontier: A Constitutional Perspective on "Socialized Medicine,"* 15 MICH. ST. J. MED. & L. 299, 312–15 (detailing the expansion of government during the Progressive Era, despite the judicial system's entrenchment in principles of negative liberty).

235. *Id.* at 320–22 (examining cases where the Supreme Court struck down federal regulations on negative liberty justifications during periods dominated by positive liberty policies).

236. David A. Moss, *Fixing What's Wrong with U.S. Politics*, HARV. BUS. REV. (Mar. 2012), <https://hbr.org/2012/03/fixing-whats-wrong-with-us-politics>.