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THE FEDERALIST PROVENANCE OF THE PRINCIPLE OF PRIVACY

ELVIN T. LIM*

ABSTRACT

The right to privacy is the centerpiece of modern liberal constitutional thought in the United States. But liberals rarely invoke “the Founding” to justify this right, as if conceding that the right to privacy was somehow a radical departure from “original meaning,” perhaps pulled out of the hat by “activist” judges taking great interpretive liberties with the constitutional text. Far from being an unorthodox and modern invention, I argue here that privacy is a principle grounded in the very architecture of the Constitution as enumerated in its Articles, perhaps even more so than in particular sections of the Bill of Rights, as is currently understood. More specifically, modern liberalism’s articulation of the right to privacy in the twentieth century against state legislative leviathans bears a family resemblance to three principles in the Federalists’ political theory, which introduced the new federalism, the new liberalism, and the new republicanism, which in turn are embedded in three interrelated structural innovations that would presage the modern turn to privacy: (1) the establishment of a stronger union would nationalize rights and introduce the radical idea that the federal government was not antithetical to liberty but would better guarantee it (the new federalism); (2) the creation of a large republic would acknowledge that fellow citizens, even more so than kings, can threaten our liberties (the new liberalism); and finally, (3) the introduction of the separation of powers would reverse the classical commitment to homogeneity and affirm instead the virtue of heterogeneity in understanding and constituting the republican commonweal (the new republicanism).

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I. INTRODUCTION

One would have thought that the most liberal of liberal nations, one forged out of revolution against monarchy at the height of the Enlightenment, would have explicitly taken some notion of privacy, the right “to be let alone,” and placed it front and center in its Constitution as a permanent bulwark against totalitarian government.¹ But this was not the path the framers took. Privacy does not explicitly appear in the Articles of the Constitution, and even when it does appear in the (Fourth and Fifth) Amendments, it would seem that the framers were concerned with informational rather than decisional privacy—arguably, just what modern privacy advocates hold most dear. This seeming silence lends some credence to the claim that modern notions of decisional privacy were pulled out of the hat by “activist” judges in the second half of the twentieth century and have little to do with “founding” views. I will argue in this Paper that this is an erroneous, Anti-Federalized view of the American “founding.”

In introducing a new federalism, a new liberalism, and a new republicanism, Publius was a trailblazer for our modern notions of decisional privacy. If he did not call privacy by its name, it is because these three principles were artfully embedded in three architectural innovations created in the Constitution: a stronger union, a large republic, and a system of separated powers. Each of these architectural innovations served to push the states, the foundational units of the Confederation from 1776 to 1787, into the background, and only then allowed the individual to merge into the foreground of the new Union. Though arguably tentative, the turn to the “private as self” of our time was at least prefigured in these eighteenth-century innovations.²

II. THE LEGACY OF THE FIRST FOUNDING

It was a radical project. As Rome was not built in a day, the Federalists’ vision of “a more perfect Union” took time to unfold because it chafed greatly against a very different union that already existed before the Federalists came onto the scene. For the United States has had not one, but two Foundings.³ In the beginning were the states, tied in a “league of friendship,” under the Articles of Confederation and Perpetual Union.⁴ This was what I have called the First Founding, which established the old federalism that the Anti-Federalists defended in 1787 and 1788. Behind state lines,

1. The phrase is taken from Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

2. Joe Bailey, *From Public to Private: The Development of the Concept of the “Private,”* 69 SOC. RES. 15, 23 (2002).

3. ELVIN T. LIM, *THE LOVERS’ QUARREL* (2014).

4. ARTICLES OF CONFEDERATION of 1781, art. III, para. 1.

these mostly old-school classical republicans presumed that virtuous individuals would, or at least ought to, subvert their private interests for the common good.⁵ As long as the states remained the preeminent and foundational units of the union as then conceived, and as long as Americans were persuaded that that individual liberty was best protected by, and therefore subordinated to, the state legislatures, the individual could not see the light of day. Indeed, the First Founding explains the resistance to Publius' nationalizing project, in response to which he was compelled to honor the legacy of state sovereignty in the composition of the Senate, in the electoral college, in Article Five, in the Bill of Rights, and most unequivocally, in the Tenth Amendment. All of this the Federalists had to concede even though it was *because* of the failure of coordination between the states that the delegates had come to Philadelphia. The problem (for the Federalists) had to become (for the Anti-Federalists) part of the solution. So it is one of the grand ironies of the Second Founding of 1787–1788 that while the Federalists won the immediate battle of ratification for a stronger union, they might have lost the on-going ground war over the scope and extent of states' rights, at least until the Civil War and possibly beyond.

States' sovereignty (or later, rights) was the paramount principle of 1776. The text of the Declaration of Independence, after all, begins with "The unanimous Declaration of the thirteen united States of America."⁶ This was our First Founding, and the Declaration of Independence (and to a lesser extent the Articles of Confederation, and later, the Bill of Rights) was its sacred text(s). While much attention has been devoted to the line, "life, liberty, and the pursuit of happiness," wherefrom the case might be made that the Revolution was inspired by liberalism and the commitment to natural and/or individual rights, the overwhelming majority of the rest of the text suggests that the Revolutionaries were classical republicans fighting fiercely to separate their *communities* from the Crown.⁷ The Revolution did not involve a sea of individuals revolting from George III, and it certainly did not return an unconstituted mob of women and men to the state of nature. Rather, even in the act of severance was the not-so-implicit act of constitution: "the Representatives of the united States of America . . . solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent *States*."⁸ The First Founding created thirteen sovereign states, and it was simply assumed that it was under the auspices of these states that individual "life, liberty, and the pursuit of happi-

5. GORDON WOOD, CREATION OF THE AMERICAN REPUBLIC 53 (1969).

6. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (noting the capitalization States in original and lack of capitalization of the word "united").

7. For this opposing view, see MICHAEL P. ZUCKERT, NATURAL RIGHTS AND THE NEW REPUBLICANISM (1994).

8. THE DECLARATION OF INDEPENDENCE para. 5 (U.S. 1776) (emphasis added).

ness” was best secured. There was little room for modern notions of decisional privacy in this classically republican vision of a community of communities.

Only this would explain, as Gordon Wood observed, how the “celebration of the public welfare and the safety of the people . . . justified the very severe restrictions put on private interests and rights throughout the Revolutionary crisis.”⁹ Modern anti-privacy advocates inherited their constitutional worldview from the First Founding, not the Second. Insofar as they thought individual liberty and the public good were reconcilable, it was because the Revolutionaries, and later the Anti-Federalists, prioritized political liberty over social equality.¹⁰ For them, the most important political rights were collective rather than individual. The First Founders and the Anti-Federalists understood that individual liberties could only be possible and entertained after collective political liberties—what was then commonly known as the “rights of Englishmen”—were secured. “This is why,” as Wood observed, “throughout the eighteenth century the Americans could contend for the broadest freedom of speech against the magistracy, while at the same time punishing with a severe strictness any seditious libels against the representatives of the people in the colonial assemblies.”¹¹ This seemingly paradoxical attitude toward individual rights persisted deep into the nineteenth century in the political thought of neo-Anti-Federalism (mostly within the Democratic Party), for as long as the Bill of Rights was understood as a bill of states’ rights claimed against the federal government and probably even beyond its “incorporation.”¹² History matters, and it gave the defenders of the status quo in 1787, and their intellectual descendants in the centuries to come, a big home field advantage.

If, when jurists and scholars refer to the “founding,” they mean the Revolution and what I call the First Founding, then they would be on very secure ground if they were to dismiss the twentieth-century turn to the individual and privacy as perversions of the spirit of ‘76. But the First Founding was not the Second Founding, when the Federalists mounted a revolution not against, but in favor of government and a national community.¹³ That there was not one set of “founders” but two makes all the difference in terms of establishing the constitutional pedigree of the right to privacy, and we should not conflate the Federalists’ innovations for the Anti-Federalists’ reservations. Perhaps there is no need to look to the Bill of Rights—

9. WOOD, *supra* note 5, at 63.

10. And this may be a reason to privilege the interpretation of the Second Amendment as a collective rather than an individual right.

11. WOOD, *supra* note 5, at 63.

12. Gary Gerstle, *The Resilient Power of the States Across the Long Nineteenth Century*, in *THE UNSUSTAINABLE AMERICAN STATE* (Lawrence Jacobs & Desmond King eds., 2009).

13. MAX M. ELTING, *A REVOLUTION IN FAVOR OF GOVERNMENT* (2003).

something Alexander Hamilton argued against in Federalist 84¹⁴—for privacy’s textual hook. Indeed, in looking for the right to privacy in the Bill, Progressive Era and modern liberal jurists and scholars may have been looking in the wrong place; perhaps even conceding too quickly that the original Constitution of 1787, sans Civil War Amendments, had no room for privacy, thereby ceding the constitutional high ground to defenders of “original meaning” who argue that privacy was an unorthodox invention of the twentieth century. The reverse is closer to the truth. Privacy advocates need not point to “penumbras” or “emanations”; the principles that animate privacy are not only there in the text of the Constitution, but are embedded in three interrelated features of its architecture: a stronger union and central government, the large republic, and the separation of powers. Modern liberals championing the right to privacy need not fear “textualists,” for they are arguably more original than the “originalists”—they are architecturalists averring the deep meaning of the Second Founding.

III. THE NEW (CENTRALIZED) FEDERALISM, NEW (HORIZONTALIST) LIBERALISM, AND NEW (HETEROGENIZED) REPUBLICANISM

Scholars have long noticed one clear pattern that connects the most famous cases involving decisional privacy: they have overwhelmingly involved sexual privacy.¹⁵ But there is another, perhaps, more fundamental and uniquely American point of commonality. Of all the many different ways American jurists could have come to understand privacy as a constitutional principle—it might have been, for example, conceived as a doctrine protecting households from state statutes, or political communities against the federal government, or corporations (the economic) against the state or federal governments (the political)—they have, in landmark cases, overwhelmingly chosen to think of it as a constitutional right wielded by individuals protecting them against morally invasive *state* statutes. These cases have all intersected with the major fault line of American politics: the contested boundary between federal powers and states’ rights, which is exactly what the battle between the First and Second Foundings was about.

Here is the canonical case history. In *Griswold v. Connecticut*, the Supreme Court struck down a Connecticut statute prohibiting “any drug, medicinal article or instrument for the purpose of preventing conception.”¹⁶ In *Roe v. Wade*, the Court, transitioning from the “penumbras” of the Bill of Rights as the basis of privacy to the Due Process Clause of the Fourteenth Amendment, decided that a Texas law criminalizing abortion was unconsti-

14. THE FEDERALIST NO. 84 (Alexander Hamilton).

15. See text accompanying *infra* notes 16–22. But see *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), and *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), for exceptions to this pattern.

16. 381 U.S. 479, 480 (1965).

tutional.¹⁷ Subsequently, the Court in *Eisenstadt v. Baird* struck down a Massachusetts law and extended the right to possess contraception to unmarried couples.¹⁸ Thirty years later, another Texas law criminalizing sodomy was declared unconstitutional in *Lawrence v. Texas*.¹⁹ In each of these landmark cases, the Court had to determine if Connecticut, Texas, or Massachusetts could demonstrate a legitimate state interest in regulating the use of contraception, abortion, and sexual intimacy.²⁰ So Jed Rubenfeld was on point when he argued that privacy protects us from “a society standardized and normalized, in which lives are too substantially or too rigidly directed. That is the threat posed by state power in our century.”²¹ He might have appended an important footnote to explain what he meant by “state power” because the Court has overwhelmingly perceived the threat of totalitarianism, at least from *Griswold* to *Lawrence*, from the state legislatures, and not the federal government.

Tellingly, in each of the above landmark cases, the dissenting Justices crying foul invoked some version of the states’ rights argument, exactly what their intellectual forebears, the Anti-Federalists, did in 1787 to 1788.²²

17. 410 U.S. 113 (1973). Although Justice William O. Douglas, in his concurring opinion, also turned to the Bill of Rights to argue that the constitutional right to privacy was based on the First, Fourth, Fifth, and Ninth Amendments. *Id.* at 167 (“For concurring opinion of Mr. Justice Douglas, see *post*, p. 209.”); *Doe v. Bolton*, 410 U.S. 179, 209–15 (1973) (Douglas, J., concurring).

18. 405 U.S. 438 (1972).

19. 539 U.S. 558 (2003).

20. There are, of course, informational privacy cases invoking the right against the federal government, but I do not discuss them here because no one denies the textual basis for them.

21. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 784 (1989).

22. In his dissent to *Griswold*, Justice Stewart wrote:

Until today, no member of this Court has ever suggested that the Ninth Amendment meant anything else, and the idea that a federal court could ever use the Ninth Amendment to annul a law passed by the elected representatives of the people of the State of Connecticut would have caused James Madison no little wonder.

Griswold v. Connecticut, 381 U.S. 479, 530 (1965). In his dissent to *Roe*, Justice Rehnquist wrote:

The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental.’

Roe, 410 U.S. at 175 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). In his dissent to *Eisenstadt*, Justice Burger wrote, “My disagreement with the opinion of the Court and that of MR. JUSTICE WHITE goes far beyond mere puzzlement, however, for these opinions seriously invade the constitutional prerogatives of the States, and regrettably hark back to the heyday of substantive due process.” *Eisenstadt*, 405 U.S. at 467. In his dissent to *Lawrence*, Justice Scalia wrote:

[P]ersuading one’s fellow citizens is one thing, and imposing one’s views in absence of democratic majority will is something else. I would no more *require* a State to criminalize homosexual acts—or, for that matter, display *any* moral disapprobation of

Their protest is more than coincidental. After all, the Bill of Rights, a charter appended to the Constitution at the demand of the Anti-Federalists, had been intended to protect states' rights in the eighteenth century and was never intended to accomplish the reverse in the twentieth. The Bill began, of course, with an emphatically negative injunction that "Congress shall make no law . . ." and concluded with a positive and capacious affirmation of states' rights: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Bill was an Anti-Federalist reservation, not a Federalist innovation.

In what follows, I will argue that the Federalists' architectonic act of the Second Founding, alongside the principles they adduced in defense of it, as laid out in Table 1, anticipated our modern turn to privacy in three fundamental and mutually reinforcing ways. First, the Federalists advocated a stronger union and a stronger central government with more robust powers to rein in the centrifugalizing tendencies of the state legislatures and to protect individual liberties. We might call this the new, centralized federalism. Second, the Federalists understood that with the King gone, the threat to liberty for a republican citizenry no longer came from on high, but also horizontally, from our friends on the side. Liberty meant more than freedom from the King, it also meant freedom from oppressive majorities—our fellow citizens. The large republic was an institutional solution designed to resolve this problem. We might call this the new, horizontalist liberalism. Third, when the Federalists envisioned a large republic, in order to limit the perils of this newfound state of affairs, they had to embrace heterogeneity—a given condition in large republics—when before homogeneity was understood to be the necessary pre-condition for republicanism. They institutionalized this heterogeneity in the large republic as well as in the separation of powers. We might call this the new, heterogenized republicanism. The Second Founding's reconceptualization of federalism, liberalism, and republicanism had far-reaching consequences that reverberate in our own day. In particular, the new federalism's prioritization of the federal Constitution and the national majority as opposed to the state constitutions as the superior guarantor of individual liberty, the new liberalism's anticipation that our fellow citizens can threaten our liberty, and the new republicanism's revalorization of heterogeneity from an ancient vice into a modern virtue are all entirely in sync with, if not the progenitors of, the modern right to privacy. I elaborate on all three fronts below.

them—than I would *forbid* it to do so. What Texas has chosen to do is well within the range of traditional democratic action.

Lawrence, 539 U.S. at 603.

Table 1: The Old v. the New and Federalism, Liberalism, and Republicanism

	Anti-Federalist (Defenders of the First Founding)		Federalist (Second Founders)	
	Architectural (Old)	Ideational (Old)	Architectural (New)	Ideational (New)
Federalism	League of Nations (small republics)	<i>Peripheralized</i> Federalism	Nation	<i>Centralized</i> Federalism
Liberalism	(League of) small republics	<i>Verticalist</i> liberalism (Freedom from kings)	Large republic	<i>Horizontalist</i> liberalism (Freedom from the effects of faction)
Republicanism	Legislative Sovereignty	<i>Homogenous</i> republicanism	Separation of Powers	<i>Heterogenized</i> republicanism

A. *The New, Centralized Federalism*

Modern privacy advocates believe that all Americans have certain decisional freedoms, and these freedoms do not depend on which state we live in. These rights are nationalized. Privacy advocates believe that states should not be allowed to legislate on intimate matters of personal choice in such a way that contravenes the nation's highest law, and if need be, the federal government should be empowered to enforce this. None of this would have been possible had the Federalists not centralized federalism.

Publius did not assume that the state legislatures knew what was best for their citizens; indeed, many Federalists saw them as potential roadblocks to liberty, which is why they pivoted in favor of a stronger union and central government. Madison *et al.* believed that a movement from a community of communities in the direction of a national community—one that became a community of individuals—was necessary to rein in the mischief of the state legislatures. For if the states were once the foundational units of the Confederation, the Federalists had to find a new and equally legitimate foundational unit for the Union, one that could justify the (partial) transfer of sovereignty from the state governments to the new federal government. The individual had to come into the foreground when the First Founding's community of communities gave way to the Second Founding's community of individuals.

"And happily for the *republican cause*," Madison submitted in Federalist 51, "the practicable sphere may be carried to a very great extent, by a

judicious modification and mixture of the *federal principle*.”²³ Continuing with perhaps the most famous move in the *Federalist Papers*, he suggested, “Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens.”²⁴ The idea of “a majority of the whole” was, of course, a fundamental departure from how the First Founders understood their political community—as little more than, as the Articles of Confederation put it, “a league of friendship” among sovereign states, not unlike the European Union today.²⁵ In linking the fate of the individual with the nation in the argument that minority rights were better protected in a large than in a small republic, Publius was deftly nationalizing rights at the same time that he was centralizing federalism.

The creation of “a more perfect Union” was a watershed moment for the idea of federalism, which had always referred to peripheralized federalism up until the Federalist intervention.²⁶ As was the understanding under the arrangement under the Articles of Confederation, each republic was sovereign and legitimate in its own right; no one republic was a creature of the union of which it was a part, because each republic, as indicated in the rule of unanimity in Article 13 of the old constitution, retained a veto on any proposed amendment to the constitution.²⁷ To audaciously suggest that a Union could be made “more perfect,” as the Federalists did, was to turn the word “union” from a description of a relationship between republics into an entity in its own right (though arguably this transformation would be completed only after the Civil War). This is what Madison meant when he so deftly characterized the new republic the Federalists were creating as “partly federal and partly national.”²⁸ While tipping the hat to the First Founding in various parts of the Constitution, such as in the Bill of Rights, in effect, the Second Founding was inaugurating a very different kind of union. Between 1776 and 1789, a league of nations would become a nation. This major architectural flip underneath the surface nomenclatural continuity (“federalism”) explains some of the most vociferous debates about the meaning of federalism in American history, from the Nullification Crisis of the 1830s to the Civil War. The debate continues today in our deliberations about privacy because when we say “federalism” we do not mean the same thing. Just as the Federalists extolled the merits of a more centralized federalism to the Anti-Federalists in the late 1780s, the privacy cases of the twentieth century might be fairly described as representing a neo-Federalist

23. THE FEDERALIST NO. 51 (Alexander Hamilton).

24. *Id.*

25. ARTICLES OF CONFEDERATION OF 1781, art. III, para. 1.

26. For the distinction between “peripheralized” and “centralized” federalism, see WILLIAM RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE 5–8 (1964).

27. ARTICLES OF CONFEDERATION OF 1781, art. XIII, para. 1.

28. THE FEDERALIST NO. 39 (James Madison).

arc underway, when privacy's ascension coincided with a new impatience with the myopic tendency of state governments.²⁹ In this very important regard, the plaintiffs in *Griswold*, *Roe*, and *Lawrence* were on the same page as Publius.

The Second Founders were persuaded that the state legislative leviathans that had sprouted in the post-Revolutionary period were the cause of majority tyranny in the states on the one hand, and collective inaction across the Confederation on the other. If the First Founders erred on the assumption that the states could do no wrong, the Second Founders erred on the assumption that the states could do a lot of wrong (and the federal government, not quite as much as its detractors claimed). Far from being a devotee of the old, peripheralized federalism, the arch-nationalist Alexander Hamilton, in Federalist 84, even argued against the need for a Bill of Rights, because, among other reasons, he probably understood the bite of the Tenth Amendment.³⁰ In rejecting the need for a Bill of Rights in Federalist 84, Hamilton warned of the danger of trying to (and inevitably failing to) codify the infinite rights of the people; but he was also turning the Anti-Federalist understanding of rights on its head, saying, "The truth is, after all the declamations we have heard, that the Constitution is itself, in every rational sense, and to every useful purpose, a bill of rights."³¹ And that was why there was no need, in his mind, for pessimistic elaborations of the kind the Anti-Federalists wanted. The "rights of the citizens . . . are to be found in *any part of the instrument which establishes the government*," Hamilton proudly proclaimed.³²

This was a spectacularly modern argument, one that proposed that a thesis encapsulated its antithesis, and one that we often associate with Abraham Lincoln and the Reconstructors; yet Hamilton had made it first. In synthesizing powers and rights, Hamilton made it clear that he was on the side of the former; more importantly, he was conjoining the fate of citizens with the federal government itself. The Federalists, unlike the Anti-Federalists and their descendants, did not think of the Constitution as a negative charter restraining government to protect individual liberties, but as a positive charter creating government in order to protect individual liberty. To nationalize liberty in this manner—untethering the individual from the states—was also to individualize our rights. We see here also that Hamilton was more than a textualist; he was an architecturalist. Rights are to be found in "any part of the instrument which establishes the government."³³ For him, the rights of citizens, the Constitution, and the government it es-

29. Cf. BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014).

30. THE FEDERALIST NO. 84 (Alexander Hamilton).

31. *Id.*

32. *Id.* (emphasis added).

33. *Id.*

established cohere in a single, complex gestalt. So it is something of a meta-historical irony, then, that privacy advocates have turned to the Bill of Rights—the second(ary) and not the first part of the Constitution that Hamilton had argued was unnecessary—to promote the very claims that the Second Founders had first advanced. They might have taken Hamilton’s advice to look to the first half of the “instrument.” As its very clausal chronology indicates, the Constitution was first and foremost a positive instrument that created a national community and governing powers (and in this important regard distinct from the Declaration), and only secondarily a negative charter of rights that restrained these powers. Indeed, it should be said, the Bill of Rights was ratified in 1791, only two years after the Constitution came into operation. The Constitution’s Articles are more “original” than its Amendments. The Federalists believed that federal powers vested in a stronger central government, not states’ rights, would more reliably secure the blessings of liberty to us and our posterity.

To be sure, Hamilton did not win his fight against the need for a Bill of Rights, but the point is he made this argument reconciling rights and powers—and prioritizing powers—well before (and perhaps anticipating the trials of and the run-up to) the Civil War. Like privacy advocates today, Hamilton saw the protection of rights as entirely consistent with the new, centralized federalism. He conceived of the stronger union and federal government not as a threat to liberty, but as the single innovation that would secure the blessings of liberty to us and our posterity.

B. The New, Horizontalist Liberalism

If modern anti-privacy advocates tend to think of the kind of rights protected by privacy as “special rights,” it is because they tend to think of rights as claims against government, not against fellow citizens. They think of abortion rights and gay rights as needlessly divisive requests of one part of the citizenry upon another. They do not take seriously the proposition that some citizens, especially when they constitute majorities, can oppress other citizens. Privacy advocates, on the other hand, recognize that government is not necessarily always the problem. They see a new source of tyranny when before it came only from kings. For them, rights are more than restraints against government; they are also trumps against democratic majorities. In other words, if anti-privacy advocates practice a verticalist liberalism against government from on high, privacy advocates observe a horizontalist liberalism against supposed friends on our side when they constitute a tyrannical majority—and this reorientation of liberalism, especially difficult in the age of revolutions, was one of Publius’ major innovations embedded in the very architecture of the large republic.

The public/private relationship, which is least as old as the distinction Aristotle made between the *polis* and the *oikos*, did not really become a

“great dichotomy” of western political thought until the early modern era, about the time when liberal theorists began to articulate restraints against royal/papal authority and the private sphere was reborn and reconceived as a zone of autonomy and immunity from state action.³⁴ This was the old, verticalist liberalism against kings, relevant at a time when there were still kings—understandably, a preoccupation of the First Founders. The Anti-Federalists, who analogized the proposed federal government to the King (or the King-in-Parliament) betrayed these ancient fears. But not the Federalists, who did not mistake ancient fears for modern woes. Publius did not automatically assume, as the Anti-Federalists generally did, that the center was always corrupt and the periphery always virtuous. The large republic, after all, was intended to neutralize some of the wayward tendencies of some in the periphery.

The First Founders were republican, but they were liberal too. They articulated the rights of Englishmen trampled by George III, as their cousins had done against Charles I. But when the Revolutionary War came to an end, the romantic vision of the states as cradles of republican liberty—where each community was free to design its own constitution and route to life, liberty, and the pursuit of happiness, free from the dictates of either the King or a central authority—did not quite come to be. Those that would become Federalists came to appreciate that in slaying the King, they had unleashed new woes. Though peripheralized federalism facilitated pluralism and diversity across the states, it was also predicated on a significant degree of homogeneity *within* each state,³⁵ allowing majority factions to dominate in the state legislatures. As Edmund Randolph lamented of his home state of Virginia, “the history of the violations of the constitution extends from the year 1776 to this present time—violations made by formal acts of the legislature: every thing has been drawn within the legislative vortex.”³⁶ This was the vexing legacy of the First Founding for which the Second Founding was the solution.

Madison and many Federalists shared Randolph’s concern and understood that in the post-Revolutionary Era, Americans had to rethink their understanding of liberalism. If old liberals saw kings and central governments as the most likely source of tyranny, new liberals (and especially later, New Deal liberals) came to appreciate that republics faced a different source of tyranny: from our fellow citizens.³⁷ But Madison made the point more tactfully than Randolph (and perhaps this is why neo-Federalists and neo-Anti-

34. Norberto Bobbio, *The Great Dichotomy: Public/Private*, in *DEMOCRACY AND DICTATORSHIP* (Peter Kennealy, trans., 1989).

35. See *infra* Part III.C.

36. 3 JOHNATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS* 66 (Jonathan Elliot ed., 2d ed. 1937).

37. Neither side used the terms “liberal” or “liberalism” but I use the term as shorthand for a set of ideas that were salient in the eighteenth century that we could come to call liberalism.

Federalists claim him equally as their own). Understanding that it would have been counterproductive to attack the state legislatures—sacred artifacts of the First Founding—to whom the Anti-Federalists were fiercely loyal, Madison put the blame instead on the factions that had taken control of state legislatures. He opened Federalist 10, cautiously (even sheepishly), saying, “The valuable improvements made by the American constitutions on the popular models, both ancient and modern, cannot certainly be too much admired; but it would be an unwarrantable partiality, to contend that they have as effectually obviated the danger on this side, as was wished and expected.”³⁸ With the old oppressors gone, citizens became “much more disposed to vex and oppress *each other*.”³⁹ We must not forget that Publius was more than a bewigged Founder; he had an agenda too. With these words, he would construct the critical intellectual bridge from the old, verticalist liberalism against kings and the new, horizontalist liberalism against arbitrarily powerful groups of citizens (factions) at a time when the memory of British rule was still fresh in the minds of most Americans. We should not underestimate how radical this move was just because modern, post-New Deal liberalism has completed this revolution in thought. Madison was, of course, in Federalist 10, casting aspersions on the league of small republics established by the Articles of Confederation when he argued, “a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction.”⁴⁰ His proposed solution to the effects of faction, an enlarged republic, benefited from the probability that “a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good.”⁴¹

In effect, Madison had proffered what others would later elaborate as pathologies of the state action doctrine—the problem of factions and majority tyranny meant that it is not just kings or governments that needed to be constrained, but arbitrarily powerful groups of citizens, too.⁴² This concern would be eloquently articulated in Federalist 51: “It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the *other part*.”⁴³ Those who sing to the virtues of negative liberty in either the Revolutionary Era or modern America seldom take seriously the possibility that citizens can be oppressed not only from on high, but by each other. This horizontalist perspective is one that modern liberals share with the delegates

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

39. *Id.* (emphasis added).

40. *Id.*

41. *Id.*

42. Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779, 793 (2004).

43. THE FEDERALIST NO. 51 (Alexander Hamilton) (emphasis added).

at Philadelphia. When modern liberals invoke privacy against what they perceive to be over-zealous legislation by the states, it is because they still believe, as Madison had once warned, that majority factions in a state can often produce laws that can oppress minorities. With the King gone and democratically elected legislatures in his place, both came to appreciate the new potential face of tyranny.

C. The New, Heterogenized Republicanism

When privacy advocates celebrate the right “to be let alone,”—stating the case in the negative—they are also affirming the right of individuals to make their own decisions and life plans because there are multiple, equally valid conceptions of good decisions and no one conception is superior to another.⁴⁴ This plural understanding of the pursuit of happiness could not have occurred if Publius had not introduced heterogeneity or diversity—instantiated both in the large republic and in the separation of powers—as a legitimate ingredient of his new, heterogenized republicanism.

In recognizing the higher probability of citizen-on-citizen, rather than king-on-citizen oppression in a republic, the Federalists were not giving up on republicanism, but proposing the integration of private and public that did not figure in the states-centered classical republicanism of the Anti-Federalists, or even for some Federalists. As John Adams wrote, “if a majority are capable of preferring their own private interest, or that of their families, counties, and party, to that of the nation collectively, some provision must be made in the constitution, in favor of justice, to compel all to respect the common right, the public good, the universal law, in preference to all private and partial considerations.”⁴⁵ If what Adams termed “private and partial” considerations were once *subordinated* to public ones in the states, as prescribed by classical republicanism, Madison would propose, with his new republicanism, that the *reconciliation* of “private and partial” considerations with the “public good” was now an important and legitimate goal of the large republic. To enlarge the sphere, after all, was also an attempt to extend the reach of our empathy and fellow-feeling to individuals across state lines. This, however, was only possible if the Federalists could convince the Anti-Federalists that no one state or a majority within a state had a monopoly on the meaning of the public good. Publius understood full well that homogeneity, as a virtue in classical and states-centered republicanism, had to give way to heterogeneity as an unavoidable reality in a large republic; and he tried to reconcile public and private by acknowledg-

44. Warren & Brandeis, *supra* note 1, at 205.

45. 3 JOHN ADAMS, A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 216 (London, John Stockdale, 2d. ed. 1794).

ing both under the neutral banner of “interest.”⁴⁶ The Anti-Federalists, for their part, resisted these innovations because they felt it unrealistic to expect citizens to stretch the ambit of their empathies to citizens outside of their immediate communities. They failed to imagine plural routes in the pursuit of happiness or that these routes could be accorded equal respect in the same republic. They were, to put things partially, “men of little faith.”⁴⁷

If, for the Anti-Federalists, the peripheralized federalism that Americans had known from 1776 to 1787 was meant to preserve homogeneity inside each state under conditions of heterogeneity across the states (*E Uno Plures* perhaps, as opposed to *E Pluribus Unum*), Madison reversed these priorities in his proposed large republic, which would eradicate the consequences of homogeneity *inside* each state (majority faction) by encouraging heterogeneity *across* the states. To modernize republicanism and to make it even better than its classical variant, Madison did not subordinate the private to the public; instead, he embraced the private as a constitutive part of the public. (In this way, Madison may well have anticipated some of the objections to the reification of the public/private distinction and to privacy itself by modern theorists.)⁴⁸ In his disquisition against faction in Federalist 10, Madison wrote, “To secure the public good and private rights against the danger . . . faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed.”⁴⁹ In Federalist 14, he celebrated the twin pillars of “private rights and public happiness.”⁵⁰ And in Hamilton’s discussion of the separation of powers in Federalist 51, he was guided by the aim to “divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights.”⁵¹

The Anti-Federalists’ commitment to homogeneity on the one hand and the Federalists to heterogeneity on the other also came attached to two different ideal theories of representation that have passed down to our time. Since the Anti-Federalists envisioned small homogenous republics, they prescribed a mirroring or descriptive theory of representation. Accurate and

46. J. G. A. POCOCK, *THE MACHIAVELLIAN MOMENT* 521 (1975). Publius’ synthesis was, arguably, the earlier incarnation of the New Deal architect Archibald MacLeish’s ontological view: “the public world with us has *become* the private world, and the private world has become the public.” ARCHIBALD MACLEISH, *A TIME TO SPEAK: THE SELECTED PROSE OF ARCHIBALD MACLEISH* 62 (1955).

47. Cecilia Kenyon, *Men of Little Faith: Antifederalists on the Nature of Representative Government*, 12 WM. & MARY Q. 3 (1955).

48. See, e.g., CATHARINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987); SEYLA BENHABIB, *CRITIQUE, NORM, AND UTOPIA: A STUDY OF THE FOUNDATIONS OF CRITICAL THEORY* (1986).

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

50. THE FEDERALIST NO. 14 (James Madison).

51. THE FEDERALIST NO. 51 (Alexander Hamilton).

responsible representation required a close relationship and similarity in values and outlook between the representative and the represented. Anti-Federalists like Brutus rejected Madison's reconceptualization of classical republicanism because they feared that the large republic would be "composed of such heterogeneous and discordant principles, as would be constantly contending with each other."⁵² Another Anti-Federalist, A Columbia Patriot, scoffed at the "heterogeneous phantom" the Federalists had constructed at Philadelphia.⁵³ But that, of course, was precisely Madison's point. Since the Federalists preferred a large heterogeneous republic which necessarily multiplied the geographic (and presumably, ideological) distance between the center and the periphery, they were committed to a virtual theory of representation that held that a representative physically far from and different in outlook from the represented could nevertheless be capable of looking out for the interests of the represented.⁵⁴ Such a representative would be able to do so as long as s/he remains neutral with regard to a variety of different life plans. This is the theory of representation most consistent with liberal neutrality.⁵⁵

The Federalists' new, heterogenized republicanism is especially evident in the major institutional output of their "science of politics,"⁵⁶ the separation of powers. If the fundamental message of the separation of powers is that no one branch has a monopoly on the people's will, then the complex, separationist architecture of the Constitution indicates the Federalist stay on the old, homogenized republican belief that the common good exists as a single veritable reality that precedes the Newtonian interaction of the branches. Until such interaction and jostling occurs to produce a consensual statement of the popular will, the Constitution renders any unilateral (or factious) attempt to speak on behalf of the people, whether by a president, a senator, or a member of Congress, presumptively invalid. In this, Madison's new science rejected the ancient techniques of divination exercised by either kings or demagogues, and posited that the only truth (of the popular will) that republican governments can come to know is the truth that emerges after the people's different representatives have each presented their equally valid versions of it. In this dynamic approach to the truth might, arguably, be found the seed of what would come to be known, in the twentieth century, as pluralism—which is just what privacy, at bottom, fosters. Unlike the Anti-Federalists, who jealously guarded the full and unmitigated sovereignty of the states to ward off the consequences of excessive

52. 2 THE COMPLETE ANTI-FEDERALIST 370 (Herbert Storing ed., 1981).

53. 4 THE COMPLETE ANTI-FEDERALIST 275 (Herbert Storing ed., 1981).

54. Gerald De Maio & Douglas Muzzio, *The Will of the Community: Theories of Representation at the Founding and in Recent Political Practice*, 5 COMMONWEALTH 32, 39 (1991).

55. JOHN RAWLS, A THEORY OF JUSTICE (1971); Will Kymlicka, *Liberal Individualism and Liberal Neutrality*, 99 ETHICS 883 (1989).

56. THE FEDERALIST NO. 9 (James Madison).

diversity within their boundaries, Madison embraced, and even celebrated, heterogeneity as a fact of life in a large republic.

This also entailed a new understanding of the commonweal and its composition. The Federalists' common good was not conceived, as the old republicans held it, by an abnegation of what were once thought to be unclean thoughts, but by a common good forged by encouraging "[a]mbition . . . to counteract ambition." It is noteworthy that this aggressive language in Federalist 51 conjures the image of wolves (only inadvertently) guarding the sheep, not a harmonious pride of lions looking out for each other and the cubs.⁵⁷ Whereas the old, homogenized republicanism emphasized civic harmony, or *homonoia*,⁵⁸ Madison's new, heterogenized republicanism acknowledged the possibility of dissensus and to some degree even encouraged it. Indeed, nearly everything was fair play as potential input into the Constitution's machinery—even the vice considered most inimical to classical republicanism, ambition. This was a very different, agonistic, view of the ideal polity from the one inherited from antiquity and espoused by the Anti-Federalists; it was a dramatic overhaul of republicanism. Consider, for example, the opposing, conservative view implicit in Centinel's question, "If the administrators of every government are actuated by views of private interest and ambition, how is the welfare and happiness of the community to be the result of such jarring adverse interests?"⁵⁹ As Gordon Wood noted of the First Founders:

[T]he . . . individual rights so much talked of in 1776 were generally regarded as defenses designed to protect a united people against their rulers and not as devise intended to set off parts of the people against the majority. Few Whigs in 1776 were yet theoretically prepared to repudiate the belief in the corporate welfare as the goal of politics or to accept divisiveness and selfishness as the normative behavior of men.⁶⁰

If the First Founders and the Anti-Federalists expected virtuous individuals to submit their wills for the corporate welfare, Madison's new republicanism posited that the commonweal emerged not from the subversion of particular to general wills, but the interplay of all wills, even ambitious and selfish ones, within the institutional matrix of the new science. If Madison considered even ambition as a worthy input into the constitutional machinery in an era that disparaged it, then the private is no longer illegitimate but a necessary piece of the commonweal. Madison made it possible for contemporary liberals to argue that private thoughts are not ipso facto in-

57. THE FEDERALIST NO. 51 (Alexander Hamilton).

58. David E. Hahm, *The Mixed Constitution in Greek Thought*, in A COMPANION TO GREEK AND ROMAN THOUGHT 178, 180 (Ryan Balot ed., 2009).

59. 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 52, at 138.

60. WOOD, *supra* note 5, at 60.

admissible into the deliberative sphere. As Corey Brettschneider has argued in his re-reading of Rawls, “private life is not *a priori* distinct from or ‘protected’ from the political. Rights and privacy are grounded rather in the politics of mutual justification among citizens.”⁶¹ In presuming the equal validity of all preferences—public or private, selfish or selfless—Madison was reimagining, as Isaac Newton did for physics and Adam Smith did for economics, the role played by individuals and the way in which they interacted with and collectively came to constitute their communities.

Like the newly republican Federalists, and unlike the classically republican Anti-Federalists, privacy advocates contend that privacy is a necessary condition for liberty.⁶² One reason why they believe that privacy fosters liberty is that it is a bulwark against any monolithic imposition of moral and social values on the individual, and instead embraces heterogeneity and pluralism as necessary parameters for a vibrant society. The impetus for this view came first from the Federalists’ reconfiguration of republicanism. If moderns see privacy as fostering pluralism, the Second Founders presaged it by embracing heterogeneity as a necessary virtue in a large republic. The Federalists’ deliberate reshuffling of the binaries inherited from antiquity—federal/nation, tyranny from kings/tyranny from majority, homogeneity/heterogeneity, and so forth—made the new science of the Second Founding a dramatic advance on the old religion of the First Founding. In reimagining these binaries, Publius paved the way for the merging of national and state interests by the Progressives and liberals of the nineteenth and twentieth centuries.

IV. PRIVACY AS A NEO-FEDERALIST PRINCIPLE

The United States encounters a double conundrum when considering privacy, one general and one more specific: where the line is between the public and private, and where the line is between the states’ public and the national public. The lion’s share of the debate in the United States has fixated on the latter, and that is why it is so important to recall the Federalists’ position as our Second, but not our First Founders. Just as an appreciation of the original federalism, liberalism, and republicanism is critical for understanding the resistance to privacy, it is important to grasp the distinctly new versions of these ideas that have become the constitutional grounds for it. Privacy is unwelcome constitutional furniture for some modern conservatives in part because it represented an incursion into states’ rights, a subversion of their traditional understanding of liberalism against kings, and of homogenized republicanism.

61. Corey Brettschneider, *The Politics of the Personal: A Liberal Approach*, 101 AM. POL. SCI. REV. 19, 27 (2007).

62. ANITA ALLEN, UNPOPULAR PRIVACY: WHAT MUST WE HIDE? (2011); JUDITH W. DECEW, IN PURSUIT OF PRIVACY: LAW, ETHICS, AND THE RISE OF TECHNOLOGY (1997).

Modern conservatives are actually closer in intellectual heritage to the First, rather than the Second Founders. They do not think that it is up to federal judges, reading powers allegedly implicit in the federal Constitution, to tell state legislatures what they can or cannot do. They are insistent that it is more important to guard against oppression from government than oppression from citizens—the latter they understand as a contradiction in terms. They contend that while it is important to maintain community standards of morality, it is foolhardy to affirm a national standard that also tries to reconcile every point of view. They are old federalists, old republicans, and old liberals. As one amongst them, M. E. Bradford put it, “there is theory in the private history of free Americans living privately in *communities*, within the ambit of family and friends: living under the eye of God.”⁶³ This is an Anti-Federalist understanding of privacy: one lived not as an individual but as a member of a small community. Though the Second Founding has formally displaced the First, old habits die hard.

But we should not adopt an Anti-Federalized understanding of the Constitution just because Publius said what he needed to say and did he needed to do to assure the Anti-Federalists that they were not substantially overhauling the principles of the First Founding. But of course he was; otherwise the maneuverings and machinations—and both were necessary—at Philadelphia would have been all for naught. The Federalists knew that jealousy between the states had created all sorts of problems for the Confederation; but they also knew that the Anti-Federalists were not about to give up on peripheralized federalism, verticalist liberalism, and homogeneous republicanism without a fight. And so, while the purest expression of state sovereignty—the requirement of unanimity for any amendment to the Articles of Confederation—was notably set aside in favor of the supermajority rule of 9/13 in Article 5 of the new Constitution, the principle of state sovereignty was recognized in the make-up of the Senate, in Articles 5 and 7, and later in the Bill of Rights and especially in the capaciously worded Tenth Amendment.⁶⁴ These provisions would have ramifications deep into the nineteenth and even into the twentieth century.⁶⁵ But we should not mistake the Federalists for the Anti-Federalists, the former’s compromises with their convictions. Rather than see the centralized federalism of the New Deal and the Great Society as aberrations to “founding” intent, one could just as plausibly argue that the delay was caused by these elements of

63. M. E. BRADFORD, *A BETTER GUIDE THAN REASON: FEDERALISTS AND ANTI-FEDERALISTS* 108 (1994) (emphasis added).

64. The resemblance of the Tenth Amendment to Article II of the first constitution is uncanny. The latter read: “Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.” ARTICLES OF CONFEDERATION OF 1781, art. II, para. 1.

65. GERSTLE, *supra* note 12; Kathleen S. Sullivan, *Marriage and Federal Police Power*, 20 *STUD. AM. POL. DEV.* 45 (2006).

the First Founding grafted on the Second. Together, they served to entrench the imposing police powers of the state governments regulating such matters as immigration, morality, public health, and marriage, under which any nascent notion of the individual or privacy was suffocated for at least another century and a half. The commitment to the collective welfare of citizens within each state, according to William Novak, meant that individual rights could not trump community interests—this was of course most acutely exemplified in the resistance to abolition and afterward with Jim Crow.⁶⁶ Indeed, as scholars since Tocqueville have observed, because the Constitution enumerated the powers of the federal government while leaving those of the state governments virtually unlimited in the Tenth Amendment, the Federalist concession to the Anti-Federalists precipitated a unique institutional matrix of governance in the nineteenth century comprising the state governments and civil and voluntary associations, or what Eldon Eisenach has called “parastate” institutions, playing a key role in public administration.⁶⁷ Before the advent of the federal administrative state, in the context of what Stephen Skowronek has called the “state of courts and parties,” individual rights were always conceived of and protected under the auspices of state and local authorities and civic associations.⁶⁸ All of this, arguably, came about in spite of, not because of, the Federalist persuasion.

Once we understand that Publius inaugurated a Second Founding, a case can be made that privacy advocates are not only more “originalist” than their naysayers have claimed; they are faithful architecturalists. This may be why, while some have found it a challenge to find a right to privacy in the “penumbras” and “emanations” of the Bill of Rights, it might be a more straightforward thing to find its essence instilled in the main body of the Constitution and its structure: in the very nature of a stronger union and its government, in the large republic, and in the separation of powers. If so, one of the under-theorized paradoxes of the Second Founding is that in extending the sphere and creating the biggest public that Americans have ever known, Publius also affirmed the most private of all private spheres, the individual. And if the modern renaissance of privacy bears a family resemblance to the Second Founding’s new federalism, liberalism, and republicanism, then privacy is much more than just an imprecise statement of negative liberty pulled out of a magic hat or weaved out of post-Civil War constitutional cloth. There is no need to defend the right to abortion, contraception, or same-sex marriage under (and only under) the old liberal doctrine; and there is no need to defend these rights under cover of night, as if

66. WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996).

67. ELDON J. EISENACH, *THE LOST PROMISE OF PROGRESSIVISM* 18 (1994).

68. STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920* (1982).

they protected odious practices that could only be grudgingly defended in the name of negative liberty.

Instead, the new federalism, liberalism, and republicanism would afford the modern liberal a more robust, positive set of reasons for defending privacy. Reading the new federalism, liberalism, and republicanism backwards, we can say that privacy as a constitutional principle is an affirmation of the duty We the People owe to each other to respect the presumptive validity of each citizens' choice of life plan; it is a reminder that we remain vigilant that majorities do not impose their definitions of a superior lifeplan to minorities; and that the Constitution is the highest law of the land that consecrates this national compact we have with one another. Even as we mark the fiftieth anniversary of *Griswold v. Connecticut*,⁶⁹ privacy advocates ought to consider if the principle they champion is as old as the republic—the new republic forged at the Second Founding, that is. The Federalists' modern understanding of nationalized rights (the new federalism), of the new face of tyranny (the new liberalism), and of the merits of heterogeneity (the new republicanism) were the critical innovations of the Second Founding that facilitated the turn to privacy. The formal introduction of the right to privacy in the twentieth century did not overhaul the Constitution; rather, it was another step in the direction of “a more perfect Union” first envisioned by Publius.

69. 381 U.S. 479 (1965).