BRINGING IT ALL BACK HOME?

ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES. James E. Fleming[1] and Linda C. McClain.[2] Cambridge, Mass.: Harvard University Press. 2013. Pp. 371. $49.95 (Cloth).

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"Can liberalism still tell powerful stories?" asked the intellectual historian and political theorist Eldon Eisenach in a recent essay.[4] In the late nineteenth and early twentieth centuries, the progenitors of the contemporary American liberal/left—Populists, proponents of the Social Gospel, and Progressives—met and beat the era's powerful legal and political conservatism with appeals to justice, equality, and a "new" freedom, not as abstract concepts, but made through telling stirring stories about the country's historical trajectory as a nation, and its progress toward Christian virtue.[5] The liberal Democratic triumph and establishment of a governing regime, however, coincided with the subsequent outbreak of the Second World War and then the Cold War. Both called into sharp question some of the main lines of the Populist and Progressive Era's proto-liberalism, including its breast-beating nationalism, its attraction to mass democracy, and, in domestic politics, its aggressively theological us-versus-them substantive commitments. Liberals, now in control of all branches of the national government (and most of the state governments), had no intention of retreating from any of their substantive policy

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4. Eldon J. Eisenach, *Can Liberalism Still Tell Powerful Stories?*, 11 THE EUROPEAN LEGACY: TOWARD NEW PARADIGMS 47 (2006).

5. *See, e.g.*, HERBERT CROLY, THE PROMISE OF AMERICAN LIFE (1909); THEODORE ROOSEVELT, THE NEW NATIONALISM (1910); WOODROW WILSON, THE NEW FREEDOM (1913).

commitments. But many started talking about those commitments, and justifying them, in new ways they believed to be better suited to the ambient intellectual and political context. In an age of liberal dominance, the commitment to the science of society and value neutrality became the new gold-standard in the thought and rhetoric of politics, public policy, and law.[6]

In his account of these developments, Eisenach argued that the decision of mid-twentieth century American liberals to make a commitment to neutral principles the cornerstone of their understanding of liberal democracy had three major effects. First, it gave preference in political and legal discourse to apodictic claims of individual right, as against an alternative understanding that the nature and scope of rights was to be determined politically, with the end of achieving common public purposes. This preference, in turn, underwrote the notion that courts were the polity's preeminent, and only reliable, "forum of principle." This served to redirect progressive/liberal reform out away from electoral politics and into the courts to an historically unprecedented degree. Second, it moved liberals away from the kinds of nationalist and patriotic visions referencing a common past and dreaming of a common, and better, future into legalistic and quasi-philosophical arguments about neutral principles of justice and fairness, to be applied by appropriately schooled judges. Third, these developments created a "narrative vacuum" which, should they seize the opportunity, the conservative opposition could fill anew with their own nationalist, religious, and patriotic visions—which, by the 1970s, conservatives have done. American liberalism has been on the defensive ever since.

It is precisely as this night fell on liberal dominance in American politics that two resplendent Owls of Minerva took flight: John Rawls's *A Theory of Justice* (1971) and Ronald Dworkin's *Taking Rights Seriously* (1977).[7] While armies of brainy Rawlsian political theorists and Dworkinian jurisprudes moved towards consolidating their Ivory Tower empires, conservatives reconstructed American politics, public policy, and constitutional thought. These two sophisticated, subtle, and

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6. Eisenach, *supra* note 4, at 60; *see also* DAVID A. HOLLINGER, SCIENCE, JEWS, AND SECULAR CULTURE: STUDIES IN MID-TWENTIETH-CENTURY AMERICAN INTELLECTUAL HISTORY (1996); EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE (1973); Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-National Influence Through Negative Models*, 1 I-CON 296 (2003).

7. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); JOHN RAWLS, A THEORY OF JUSTICE (1971).

soporific tomes certainly kindled enthusiasm amongst careerists in the groves of academe. But their all-but-storyless, a-political, ostensibly neutral, and maddeningly abstracted exposition left others cold. As liberalism's substitution of philosophical for narrative coherence, Eisenach concluded, "came liberalism's loss of the capacity to mobilize national majorities for common ends."[8] While Rawls and Dworkin may not be fully responsible for this these developments, they contributed to it in a major way, and epitomized it.

James Fleming and Linda McClain's new contribution to American constitutional theory, *Ordered Liberty: Rights, Responsibilities, and Virtues* bears all the marks of the Rawlsian/Dworkinian project: the Harvard imprint, the title pitched at a stratospheric level of abstraction (with its attendant promise to unite us all through consensus over the best and highest principles), and the presentation in the voice of the royal "we" (which makes it sound like Ronald Dworkin speaking *ex cathedra*, but here can be attributed to the book's provenance as a team effort). *Ordered Liberty* is meant to be a major intellectual event, announcing a new direction for Rawlsian/ Dworkinian constitutional thought. "Our constitutional liberalism" (for which the authors frequently substitute the term "constitutional liberalism" *tout court*) proposes an intricately negotiated *Pax Academia* between liberal constitutional theorists typically held to be uncompromising champions of autonomy and rights as aggressively enforced by courts and civic republican, communitarian, and conservative political theorists and legalists (like Michael Sandel, Mary Ann Glendon, Cass Sunstein, and others) who insist that politics and law be less about the judicial enforcement of (speculative/broadly defined) abstract right in the name of the autonomous individual and more about the valuing of the claims of concrete, locally and historically-constituted associations and communities, with a focus on responsibility, morality, and virtue. Put otherwise, they propose through an act of grand theoretical synthesis, to bring the liberal-communitarian debate to a close.

Amongst American historians, that debate, under the guise of liberalism versus republicanism, was brought (more or less) to a close some time ago. Not so, apparently in political and legal theory, where, while it still might be for this world, is nevertheless, by now, getting quite long in the tooth. One fears

8. Eisenach, *supra* note 4, at 60.

that, in the realm of political theory, its terms might be perpetual, as the debate goes to the heart of what Duncan Kennedy has called the "fundamental contradiction" of liberalism—that "relations with others are both necessary and incompatible with our freedom." This is the dilemma of individual versus collective self-determination.[9] Yet, historically, even in the realm of theory, it seems that a *modus vivendi* has been arrived at, at least within American constitutional law. As Fleming and McClain themselves explicitly and systematically demonstrate, a liberal-communitarian rapprochement is, and has long since, been practiced both on the Supreme Court (and, perhaps more importantly for mankind, in his most recent work, by the late Ronald Dworkin himself). Yet another Owl, it seems, has taken flight.

Since both the Supreme Court and Ronald Dworkin have been speaking prose all along, *Ordered Liberty* appears to be aimed primarily at the understandings of contemporary liberal constitutional theory by communitarian scholars (who have yet to notice these on-the-ground developments), and by conservatives (who have a vested interest in insisting, as against all evidence, that all (selfish) liberals care about are the vindication of their individual constitutional rights—morals and the broader public good be damned). *Ordered Liberty* at the very least brings these people up-to-date, and shows them up, which is no small service, and contribution.

Who are these liberals, Fleming and McClain ask, who care nothing for the common good, and only for autonomy, who spurn liberty for the pleasures of license? With the single exception of *Roe v. Wade* (1973) (which was reversed in relevant part by *Planned Parenthood v. Casey* (1992)), the authors argue, a hell-bent liberalism committed to pure autonomy has never guided the Supreme Court in its major decisions involving individual liberty (or Ronald Dworkin in his cogitations).[10] Both sides in the liberal-communitarian debate had and have valid points, which have long-since been synthesized (viz. liberty matters, and so does community). If a problem remains, it is not

9. *See* Howard Gillman, *The Antinomy of Public Purposes and Private Rights in the American Constitutional Tradition, or Why Communitarianism is Not Necessarily Exogenous to Liberal Constitutionalism*, 21 L. & SOC. INQUIRY 67 (1996) (citing Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1065, 1737 (1976)); *see also* Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 210–13 (1979).

10. Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of SE Pa. v. Casey, 505 U.S 833 (1992).

with liberals—they have met communitarians half-way—but with the communitarians themselves (particularly the liberal Democratic ones), many of whom refuse to stand up and say when they are willing to recognize critical constitutional rights.

In advocating their new framework, Fleming and McClain recur to the work of political theorists Stephen Macedo and William Galston, who—in books with titles all but indistinguishable from Fleming and McClain's—have been working to integrate considerations of virtue into the liberal political framework for over two decades.[11] Even Ronald Dworkin, we are told, hardly precluded consideration of the common good from his arguments, even for rights as trumps (the metaphor implies, Fleming and McClain say, that there are other cards on the table). Through what they describe as a "synthesis of liberalism, civic republicanism, and feminism" extending the arguments of Dworkin, Fleming and McClain propose what they hold to be "the most defensible ordering of rights, responsibilities, and virtues in the American constitutional order" (p. 3).

Central to their framework is the proposal of a "formative project for constitutional liberalism" (p. 115). By this purported "third way," government would act to cultivate and encourage responsible decisionmaking by rights-bearing individuals. Rather than being relativistic, agnostic, or non-judgmental about the substantive choices individuals make, Fleming and McClain's constitutional liberalism would defer to those choices out of (substantive) respect. In the authors' model, government would concern itself with the formation of reflective, responsible individuals who act in a way that is worthy of respect—with forging the conditions for the responsible exercise of a deliberative autonomy (or liberal virtue). The authors' framework rests on a distinction they draw between two types of responsibility: *responsibility as accountability* (to community) versus *responsibility as autonomy* (or self-government). With the former, the actor is "answerable to others for the manner and consequences of exercising one's rights." With the latter, he or she is trusted "to exercise moral responsibility in making decisions guided by conscience and deliberation." In this way, "constitutional liberalism aspires to secure the preconditions for

11. *See* WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE (1991); STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUES, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM (1990).

ordered liberty, not liberty without responsibilities"; it does not countenance indifference to matters of the collective public good (pp. 6–7).

All this is sensible enough. But, as always, when dealing with the characteristic abstractions of this literature, I'm never quite sure what is at stake—or how. Since when has the government evinced no concern for how people exercised their rights, or, in a broad sense, have such concerns been rendered off-limits? And since when has a commitment to "dignity," "autonomy," "equal concern and respect," or "the common good" ever decided a concrete case as a logical deduction from principle? To those who intuitively share Fleming and McClain's feelings about what dignity and respect require, their deductions from principle (like those of Rawls and Dworkin) will seem ineluctable. To others, they are *non sequiturs*.

The issue is raised in the book's very title, with its proud commitment to "ordered liberty."[12] This phrase itself is worth pausing over. It might be abstract, but it is hardly without content. There is certainly such a thing as liberty without order, which is either anarchy or license (though some would dispute the application of the word "liberty" to such a state). One can also imagine a "disordered liberty"—perhaps a liberty with some kind of order, but one that is either random or erratic in its protections, or out of harmony with any appropriate conception of the good. Order without liberty would to most of us connote tyranny. And disorder without liberty is a tooth-and-claw Hobbesian state of nature. "Ordered liberty"—liberty under law—is thus a useful, and real, concept. That said, though, within free societies, it is a consensus commitment.[13] When applied to describe an intricately theorized and specified constitutional theory like Fleming and McClain's, or to resolve almost any concrete, hotly-dispute case in the U.S. Supreme Court, how much work can the concept actually do?

This is illustrated by the most prominent uses of the phrase in twentieth century American law and politics. Law professors will immediately recognize it as Justice Cardozo's from his celebrated double-jeopardy opinion in *Palko v. Connecticut* (1937).[14] Students of American political thought, however, will

12. Or what John Rawls, with his characteristic brio, called "a well-ordered society." RAWLS, *supra* note 7, at 453.

13. *Ordered Liberty*'s apt epigraph is Locke's famous statement in his *Second Treatise on Civil Government* that "where there is no law, there is no freedom."

14. *Palko v. Connecticut*, 302 U.S. 319 (1937).

recognize it the phase used earlier by the President who appointed Cardozo to the High Court, Herbert Hoover, in an equally well-known 1928 campaign speech on "Rugged Individualism." Like Fleming, McClain, and Cardozo, Hoover counted himself a staunch proponent of "ordered liberty"—while denouncing government interference with business, socialism, paternalism, and bureaucracy (is this what John Rawls calls an "overlapping consensus"?).[15] But, then again, for all practical purposes, so what? Herbert Hoover's America and Fleming and McClain's America would be very different places. And those differences might very well track those that divide liberals from conservatives in contemporary (constitutional) politics. These are two very different "ordered liberties." Between the idea and the reality falls the shadow.

In their demonstration that we all now share a commitment to the Court's role in securing "ordered liberty," Fleming and McClain, in a chapter entitled "The Myth of Strict Scrutiny for Fundamental Rights," survey recent landmark Supreme Court decisions involving claims of (substantive) due process liberty. They find that, in fact, the (mid-to-late twentieth century liberal, activist) Court has always related claims of autonomy to the well-being of the collective interests of society. This raises two questions: First, is it true? Second, if it is true, so what?

Is it true? As legal scholars, Fleming and McClain apply their Rawlsian abstractions to concrete cases. In doing so, the authors devote most of their attention to two kinds of cases. The first involve questions of family and parental rights (especially those involving the counterclaims of religion and the state—such as those well-worn toys in the Rawlsian sandbox, *Wisconsin v. Yoder* and *Mozert v. Hawkins*).[16] The second involve the Court's (substantive) due process liberty decisions involving bodily (mostly sexual and reproductive) autonomy. Given these pre-occupations, the case of gay rights—and of gay families in

15. Specifically, Hoover (who elsewhere proclaimed himself "an unashamed individualist") said that "By adherence to the principles of decentralized self-government, ordered liberty, equal opportunity, and freedom to the individual, our American experiment in human welfare has yielded a degree of well-being unparalleled in the world. It has come nearer to the abolition of poverty, to the abolition of fear of want, than humanity has ever reached before." Herbert Hoover, *Rugged Individualism*, *in* AMERICAN POLITICAL THOUGHT: A NORTON ANTHOLOGY 1140 (Isaac Kramnick and Theodore J. Lowi eds., 2009). *See* JOHN RAWLS, POLITICAL LIBERALISM (2005); RAWLS, *supra* note 7.

16. Wisconsin v. Yoder, 406 U.S. 205 (1972); Mozert v. Hawkins Cnty. Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987).

particular—represents something of a perfect storm (despite its abstracted title, much of *Ordered Liberty* is devoted to discussing gay rights).

The book's very substantive timeliness in this regard, however, can distract us from questions of selection bias. As for the first type of case, where schools and families are front and center, it is not hard, should it be deemed rhetorically helpful, to rustle up a claim for community that yields the same "liberal"[17] result coughed up pursuant to an argument from autonomy. As for the second, although sounding doctrinally in questions of liberty, they are clearly (also) cases involving group or caste equality (women, gays and lesbians). These types of cases are thus ripe for re-description as implicating serious questions of the public good, responsibility, citizenship, and virtue. The problem is that these two types of cases are only a small part of "rights revolution" cases that conservatives and communitarians criticize for being overly solicitous of claims anchored in arguments about autonomy. Where, I wondered, was the discussion of the claims of autonomy in cases involving, say, a jacket that says "Fuck the Draft," flag-burning, nude-dancing, the possession of pornographic films, cross-burning, hateful disruptive protests at military funerals, the banning of violent video games, the aggressive defense of criminal process rights, including aggressive assertions of the Fifth Amendment in cases involving charges of domestic subversion, etc.?[18] How do these types of cases fit into Fleming and McClain's framework emphasizing the creation of the conditions of "deliberative autonomy"? Right-wing communitarians like Mary Ann Glendon and Samuel Alito are more than happy to take on these issues. They argue that in these areas there is too much attention to rights, and not enough to the claims of community. Liberal/Left communitarians (and liberal liberals ostensibly moving to meet them halfway, like Fleming and McClain), however, are quite skittish about lingering over those types of issues. Why? Because, I would venture, in these cases, while one can certainly theorize one's way to the conclusion that it is in the community's best interest to afford constitutional protection to

17. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

18. Snyder v. Phelps, 130 S. Ct. 1737 (2010); Barnes v. Glen Theater, 501 U.S. 560 (1991); Texas v. Johnson, 491 U.S. 397 (1989); Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43 (1977); Cohen v. California, 403 U.S. 15 (1971); Stanley v. Georgia, 394 U.S. 557 (1969); Dennis v. U.S., 341 U.S. 494 (1951).

Nazis taunting Auschwitz survivors or Klansmen parading and burning crosses, in these sorts of cases, claims of autonomy do the lion's share of the work to guide the Court to a (*politically*) liberal result in a (*politically*) plausible way.[19] The selection bias in *Ordered Liberty* (and similar scholarly endeavors) systematically draws attention away from the areas of civil liberties law where arguments about creating the conditions for responsible deliberative autonomy and full citizenship for unjustly oppressed (but, it is implied, morally noble) groups is likely to run up hardest against liberal (that is, contemporary Democratic Party) political commitments. The types of civil liberties cases that *Ordered Liberty* sidesteps do not (in any immediate way) involve the sort of cognitive formation that is at the heart of Fleming and McClain's foundational concept of "deliberative autonomy" (in the way that schools cases like *Wisconsin v. Yoder*—the case that has launched a thousand Rawlsian ships—does). Fleming and McClain's model for the reconciliation of liberty and community in due process liberty cases, moreover, does not work as well when despised groups are involved, so the authors are pretty much silent on cases involving them (that is why we have an ACLU). Indeed, their framework, as a matter of history, does not work very well for the same groups they do discuss, so long as those groups remain broadly despised or devalued by society (yet another indication that this book is most decidedly a strategic bid to sell liberalism in a conservative era). Fleming and McClain's constitutional liberalism can play its part effectively only at a very particular and identifiable time in constitutional development. In areas like women's reproductive liberty and gay rights, strong autonomy claims—made without reference to the common good—are *no longer* needed today. But they *were* either needed, or inevitable, in earlier stages of the fight for civil rights and liberties, when members of despised and oppressed out-groups worked up the courage to first claim their rights. In the U.S., rights-talk has been rallying talk: always has been, always will be. It is certainly a critical part of American culture, nationalism, and patriotism—that is, of American stories, right and left.[20] The initial demand

19. This is not to say that even extreme defenses of individual autonomy in free speech cases could not be theoretically justified in public good terms. Free speech theory has no problem claiming that affording maximum autonomy to speech advances the public good. The problem then collapses, of course. While they are nice in theory, these theories have a hard time flying politically, since they involve a relatively abstract and sophisticated constitutional theodicy.

20. I consider Mary Ann Glendon a European, not an American thinker.

for individual freedom (self-determination) through aggressive, non-relational, rights-talk is often critical for forging the identity, the self-conception—the pride—of members of social movements daring to act publicly as agents to assert their rights. While such defiant, assertive claims of entitlement to one's individual rights may seem, as a matter of political theory, like a claim to pure autonomy, individuals who make such claims are, paradoxically, in so doing, enrolling themselves in the scrolls of the collective American national story. The United States is the country in which the individual, through the proud assertion of his autonomy, is dissolved into something complete and great. This is, indeed, "the pursuit of happiness."

To be sure, it becomes easier over time, as a matter of psychology and then of political rhetoric and theory, for the shock troops of social movements demanding full citizenship and equality to focus on their commonalities with others, and the ways in which their freedom harmonizes with the freedom of all. Once a minimal level of autonomy is claimed and found—once enough autonomy is gained so that members of oppressed groups can stand on their own feet as self-determining agents—we are ripe for arguments that their freedoms are consonant with the broader public good.[21] In this temporal, developmental trajectory, the fabrication of a liberal constitutional theory reconciling individual liberty with the claims of community is the last stage in the process, a mopping-up operation. It is a bid for the institutionalization of movement politics through its absorption into law, which, in the end is only as stable as it is understood to advance the collective public good (*salus populi suprema lex est*). In this regard, we should understand Fleming and McClain's book as a bid, after long hard struggle, to bring it all back home.

As Dworkinians, Fleming, and McClain's road home, of course, runs through the reasoning of federal judges, who are to properly apply the authors' proposed "perfectionist" theory to concrete constitutional cases. Interestingly, and notably, their hero here is not William O. Douglas or even William J. Brennan (that is for those pony-tailed, old-school ACLU types) but the second Justice John Marshall Harlan. Harlan's approach to

21. *See* MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994); Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927 (2006); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001).

deciding civil liberties cases was distinctive in its refusal to follow the modern frameworks of analysis for those cases developed during the New Deal ascendency.

In *Ordered Liberty*, Fleming and McClain do not recount this history—which means that they don't set the context for the uses to which Cardozo put the concept of "ordered liberty" in his famous *Palko* opinion. There, Cardozo used it to distinguish between cases implicating those provisions of the Bill of Rights which are fundamental ("implicit in the concept of ordered liberty") and thus slated for application to the states by through "absorption" (what we call "incorporation") via the due process clause of the Fourteenth Amendment, and those which are not. Cardozo's use of the concept represented an early and critical step in what later became known as the "Preferred Freedoms" doctrine—the notion that some rights are so fundamental that they would be aggressively enforced at the national level by courts as a matter of constitutional law (rights). This marked a clear departure from the traditional, highly deferential nineteenth century "bad tendency" framework for rights enforcement, in which state determinations of the advancement of the common good, through the exercise of their police powers and other residual powers (see the Tenth Amendment) were left more or less untouched by the federal judiciary (community).[22] There was mutual adjustment of the claims of right and claims of community under this regime, too. But the claims of community were plainly weighted much more heavily.[23]

In their chapter on "The Myth of Strict Scrutiny for Fundamental Rights," Fleming and McClain pooh-pooh the tiers-of-scrutiny framework that was a direct outgrowth of, and the doctrinal embodiment of, the preferred freedoms approach to fundamental rights. That framework ostensibly placed fundamental rights claims on a plane all but impervious to regulation (Gerald Gunther's "strict in theory, fatal in fact").[24] But, Fleming and McClain argue, after surveying the Court's (recent) substantive due process liberty decisions, in spite of this

22. *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

23. *See* LEONARD LEVY, THE LAW OF COMMONWEALTH AND CHIEF JUSTICE SHAW (1957); WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996); Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POLITICAL RES. Q. 623 (1994).

24. Gerald Gunther, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

architecture, the Court has not been following it: like Justice Harlan, who never subscribed to this framework, it has been weighing rights against the collective good all along.

If you have kept your eye on the ball that Fleming and McClain are pitching you might not pause to reflect that, historically and theoretically the tiers framework was closely related not only to the question of uncabined judicial discretion (not a big concern for Dworkinians, but a very big concern to Progressives and New Dealers like Hugo Black),[25] but also to the question of whether the Bill of Rights was applicable to the states. In spurning one, we undercut the theoretical foundations of the other, since that framework too (as *Palko* suggests) was anchored in the understanding of some rights, as a matter of constitutional architecture, as being fundamental or "preferred." This was quite clear to Justice Harlan, who famously insisted—though Fleming and McClain never mention it—that the federal courts give the states significantly more leeway in interpreting the Bill of Rights than they would afford the federal government. Although he certainly was willing to come down on the side of rights in individual circumstances (he has lots of street-cred amongst contemporary liberals for his friendliness to privacy rights claims in the contraception case of *Poe v. Ullman*),[26] Harlan was big on deference to the community, speaking through its elected representatives in Congress or the states, even in cases involving rights. He eschewed bright-line doctrinal rules, preferring (like his predecessor liberal/conservative/rights-problematic predecessor Felix Frankfurter) to judge the fundamentalness of rights for purposes of judicial protection and incorporation on a case-by-case basis. As we drain the tub of the tiers-of-scrutiny bathwater, we would do well to keep a close eye on our babies.

Fleming and McClain heap special praise on Harlan for rejecting and confounding dichotomies, for being "at once progressive and conservative" (p. 197). They like his thoughtful balancing. As for where the balancing point should be in an untiered framework that makes no institutional commitment to stacking the deck in favor of judicial activism or restraint, or the claims of right as against those of community, it remains far from clear. The authors argue, of course, that, in the latter case, if

25. *See* MARK SILVERSTEIN, CONSTITUTIONAL FAITHS: FELIX FRANKFURTER, HUGO BLACK, AND THE PROCESS OF JUDICIAL DECISIONMAKING (1984).

26. Poe v. Ullman, 367 U.S. 497 (1961).

conceptualized properly, the two are one (and liberal Democrats get all they want, constitutionally, to boot). But Fleming and McClain's argument for precisely how this is so is based on their analysis of a subset of constitutional cases whose selection is both theoretically and historically skewed to support their thesis. These cases do not effectively speak to the full universe of civil liberties concerns.

Fleming and McClain's long-awaited reconciliation of the claims of order, liberty, rights, responsibility, and virtue depends upon the avoidance (or minimizing) of these cases and the obfuscation (or elision) of this history. The book strains toward a new liberalism that has once again gotten right with America. In so doing, it is in perfect harmony with the moment—and, I am afraid, the contemporary liberal predicament.