

Book Review Symposium

Ordered Liberty: Three Views and a Response

SOME REALISM ABOUT CONSTITUTIONAL LIBERALISM¹

ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES,
AND VIRTUES. James E. Fleming² and Linda C.
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I. INTRODUCTION

Presidential elections often are good barometers of the national mood, though their fullest implications are likely best read in hindsight rather than on the eve of the primaries. Nevertheless, a fair reading of the 2012 national mood, as of this pre-election day writing, is that the American people are divided between a vision of government as ally versus government as antagonist. On the partisan poles are those who may be described as strongly and consistently pro-government in their leanings, on the one end, and those who are strongly and consistently libertarian, on the other end. Although most Americans likely lie in between these statism poles, and selectively invoke the benefits or harms of government power, broad-strokes political rhetoric today increasingly rings

1. Cf. J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375.

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libertarian bells. Anxiety about government efficacy, government wisdom, and government expanse has prompted conservatives and liberals alike to ask whether, and in what contexts, government assistance is a welcome means of assuring that individuals can fulfill their potential as well as assuring that the country can realize collective goals, versus an unwelcome, “nanny state” intrusion into individual freedoms.

In the scholarly version of these wider political debates, the discussion about the limits of government power over individual freedoms sometimes is couched in terms of communitarian versus liberal visions of government power, and how American constitutional law shapes each vision. Influential communitarian scholars for years have critiqued strong liberal theories of rights on the ground that they “exalt rights over responsibilities, licensing irresponsible conduct and spawning frivolous assertions of rights at the expense of encouraging personal responsibility and responsibility to community” (p. 1). In their view, limiting government power in the interest of preserving individual liberty has contributed to an erosion of the public good, and a weakening of civic virtue. Civil liberties and civil rights, as they have evolved since the 1960s, have imposed significant social costs that have mounted in ways that seriously compromise our collective well-being. According to these critics, “liberty as license”—that is, an approach to rights that takes them too absolutely—has been pursued instead of an “ordered liberty” that bows more deeply to the common good and that takes the *responsibility* part of the rights/responsibility balance more seriously (p. 1).

Central to this debate is how much, and in what contexts, government should be allowed to inculcate civic virtue. At what point does government intervention impermissibly erode individual and private associational autonomy? For example, is a federal command that all Americans do their part to assure affordable health insurance for all by purchasing insurance or suffering tax consequences an expression of “ordered liberty” or an undue invasion of liberty? Is a decision by a young and apparently healthy person to forgo purchase of health insurance irresponsible? A decision to undergo an early-term abortion? To enter into a same-sex relationship? Or, are all of these decisions ones that a liberal constitutional order properly must leave to the individual with little or no government restrictions?

How, if at all, do the classic communitarian arguments in favor of allowing government to inculcate civic virtue stack up

against the realities of governance? Do growing concerns about government dysfunction, gridlock, corruption, and hyper-partisanship undermine or fortify the communitarian arguments against liberal rights where they conflict with a “common good”? Finally, are communitarians right to insist that the recognition of liberal rights in fact requires or encourages government (and others) to suspend critical judgment of the decisions in ways that obscure the costs of rights, the “wrongness” of behaviors that nevertheless receive legal protection, and their potential harm to others?

James E. Fleming and Linda C. McClain have authored an important and intellectually accessible new book that canvasses the communitarian critique of a liberal theory of rights, and responds to its central claims. The book’s arrival is especially well timed given the roiling national debate about the proper reach of government authority, and may offer an important corrective to some of the Constitution-based claims being made in these debates, if not to more general claims about a culture of selfishness. It also debuts at a moment when arguments for and against particular constitutional rights, such as reproductive rights, are gaining momentum. That is, the scope and content of constitutional liberalism are very much at issue, with some seeking more liberty and others favoring less restraint on government power.

Building on decades of thoughtful scholarship that addresses communitarian and progressive objections to liberal theories of rights, the authors offer a persuasive response to arguments that *cultural* liberalism—the popular understanding and expression of liberal rights—is a natural extension of *constitutional* liberalism. As they explain, our *constitutional* liberalism, properly understood, is neither a deep font of strong libertarian principles that greatly restrict government power to inculcate virtues, nor a source of limitless government power to do so. Rather, it imposes a highly contextual brake on government power that rises and falls even within the context of so-called “fundamental rights” where liberty is most protected.

The constitutional doctrine they discuss matters, because the doctrine is the framework within which American constitutional liberalism operates. This judge-made law affords government ample power to incentivize virtue, to inculcate values, and even to penalize or criminalize its version of individual “irresponsibility.” In fact, libertarian complaints stem from a sense that the law offers individuals too little protection,

not too much. Consequently, the claim that constitutional liberalism has caused the alleged slide in our collective virtue by insisting on “empty toleration” of values and behaviors seems seriously overblown. Little in modern constitutional law or in actual government practice supports a narrow reading of government’s moral authority, or a dichotomous reading of rights versus responsibilities.

Fleming and McClain support this claim with several compelling constitutional examples. With each, they ask whether the law in fact requires government neutrality or “empty toleration.” Their analysis shows that government neutrality is rarely required, even in zones of otherwise protected constitutional privacy. For example, the constitutionally protected right to abortion does not compel the state to remain neutral regarding reproductive choices. Current law allows the government to weigh in on the exercise of this fundamental right, and many states now do so in increasingly forceful, non-neutral, and moralizing ways (pp. 53–63, 69–73).

Likewise, other fundamental rights—including freedom of expression—do not render government mute in the face of personal choices. Protection of harmful political expression—such as excessively vitriolic and misleading characterizations of one’s political opponents or lies about one’s own accomplishments or about others⁵—does not prohibit official or private condemnation of dirty politics or shameful falsehoods. Nor does protection of sexual autonomy or marital rights require government to remain agnostic regarding the responsible exercise of these rights.

Also, government may be constitutionally required to protect individual rights, but it is not required to provide financial support for the exercise of the rights. It *may* do so, short of fairly limited and contested constitutional limits. This in turn gives government formidable power to influence private decisions—power that can look, and feel, more coercive than instructive.⁶

Still another important caveat to constitutional liberalism is that it polices only government power, not private power. With the notable exception of the Thirteenth Amendment,⁷ which restricts private power directly, constitutional rights obtain vis-à-

5. See *infra* text accompanying notes 19–20.

6. See *infra* text accompanying notes 26–30.

7. U.S. Const. amend. XIII.

vis government authority, not private authority. The so-called “state action doctrine”⁸ is a profoundly significant limit on the reach of constitutional rights that is often neglected in arguments against expansive civil liberties.

Finally, constitutional liberalism respects rights on a continuum. The constitutional practice entails a balance between rights and responsibility, between government and private power, not an all-or-nothing choice between them. It identifies rights, and grants the judiciary power to police them. But judges do so in a context, and according to standards, that typically—not rarely—require deference to the politically accountable branches of government.

The constitutional case law therefore can accommodate communitarian arguments about the balance between rights and responsibilities. In each area of constitutional rights, the law offers rules and important exceptions. Due process protects reproductive privacy, except when it does not.⁹ Freedom of expression prohibits government limits on political speech, except when its national security consequences seem too great.¹⁰ The First Amendment requires accommodation of religious pluralism, except when it may leave “public education in shreds.”¹¹ The case law allows for family autonomy, except when it costs too much in terms of a collective interest in child physical well-being and capacity for meaningful adult autonomy and citizenship.¹² Constitutional law, unsurprisingly, tracks a wider cultural ambivalence about unbridled freedom from regulatory and social constraints, versus national or local government insistence on conformity.

8. See *Civil Rights Cases*, 109 U.S. 3 (1883). See also *Virginia v. Rives*, 100 U.S. 313, 318 (1879); *U.S. v. Cruikshank*, 92 U.S. 542, 554–55 (1875).

9. See, e.g., *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding on facial challenge the Partial-Birth Abortion Ban Act of 2003).

10. See, e.g., *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) (upholding restrictions on support provided to foreign terrorist organizations challenged on freedom of expression grounds).

11. See *McCullum v. Bd. of Educ.*, 333 U.S. 203, 255 (1948) (Jackson, J., concurring) (“If we are to eliminate everything that is objectionable to any of the warring sects or inconsistent with any of their doctrines, we will leave public education in shreds.”).

12. Compare *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (holding that state law unconstitutionally interfered with parental right to control the upbringing of one’s children by prohibiting parochial school education), with *Santosky v. Kramer*, 455 U.S. 745 (1982) (recognizing state right to terminate parental rights if need to do so is proven by clear and convincing evidence).

This is why, even in the current hyper-partisan climate,¹³ people on both sides of the electable political aisle (though not at their farthest edges) can plausibly invoke constitutional law as a basis for their claims. The law is broad enough to support *both* a moderate liberal and a moderate conservative spin on the proper reach of government power over individual “rights.” What is missing from many of these spins on constitutional law, however, is open acknowledgement of how strong claims in either direction have to be qualified by significant doctrine that belies them.

This is also why scholarly debates between moderate communitarian and moderate liberal visions of rights, upon closer examination, turn less on the alleged fundamentals of constitutional liberalism than on its specific applications. Neither side of this particular scholarly debate denies the importance of virtues *or* of rights. Communitarians concede the need for rights, and moderate liberals concede the need for virtue. As such, the dichotomy between them is easily overstated.

Fleming and McClain get this. They respectfully engage both sides of this theoretical debate and guide the reader to the following, sensible insight: *constitutional* liberalism cannot plausibly be blamed for any of the alleged excesses of our *cultural* liberalism. It can only be blamed—or praised—for adding liberal rights to our cultural vocabulary, and thereby asking government to moderate, but not abandon, its civic virtue impulses.

The authors conclude that the liberal rights vocabulary and the individual liberty values it represents are very much worth preserving, even though communitarians and liberal theorists may disagree on where to draw the liberal rights lines. They endorse a moderate form of constitutional “perfectionism” that makes space for government encouragement of virtue and responsibility, but not for compelled moral conformity or coercion. They also—notably—include a feminist perspective on liberal responsibility and ordered liberty.

Government can, in their view, cultivate virtue in a manner that respects freedom (p. 179). The liberal appeal to choice, autonomy, and toleration is not inherently in conflict with a

13. See THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (2012) (describing the current state of partisan political gridlock).

republican appeal to moral goods—at least it is not “in a liberal republican constitutional democracy such as our own” (p. 180). Government may, and should, both support rights and engage in a formative project that affirmatively instills the non-neutral virtues of liberal citizenship (p. 183). A central aim of this formative project should be to cultivate respect for public reason and for individual dignity (pp. 188–89).

II. FALSE DICHOTOMIES

Among the most important contributions of the Fleming and McClain book is its demonstration that those who indict constitutional liberalism for enervating civic virtues rely on a false dichotomy between rights and responsibilities. As the authors show, there actually are multiple false dichotomies operating here.

A. RIGHTS VERSUS RESPONSIBILITIES

The book spends considerable time on the primary dichotomy of rights versus responsibilities. The focus is the influential work of Mary Ann Glendon from the early 1990s that critiques American “rights talk” on the ground that it is silent on responsibilities in ways that other countries’ versions of rights are not (pp. 21–48). The silence is particularly lamentable in the modern world, she argues, because the “seedbeds of virtue” that once supplemented the constitutional text—such as strong families, associations, and collective moral and religious norms—have eroded (p. 24). Absent these cultural cords, Americans have only law to bind them, and its liberal strands are too thin to inspire collective virtue. We have come to regard our political birthright as freedom from morality and responsibility, not an inherited obligation to respect their dictates. Our national rights-centered (and self-centered) vocabulary is about our individual entitlements rather than about our common obligations, and our nation is the poorer for it.

But as Fleming and McClain explain, one cannot draw the causal arrow so directly from our actual constitutional liberalism to this cultural construction of liberalism—even assuming it is an accurate depiction of what “we” think about our collective duties. Glendon and others critical of liberal rights often treat the early work of Ronald Dworkin, which describes rights as

“trumps,”¹⁴ as “the *bête noir* of [their] charges of irresponsibility” (p. 1).

These communitarian arguments miss the mark, for two reasons. First, Dworkin may have insisted that rights are “trumps,” and may have urged a strong version of liberal rights (pp. 22–23), but he did not mean *all* rights. His focus was on fundamental rights. Second, Dworkin clearly is not the authoritative voice of mainstream *constitutional* liberalism. A better example of the latter might be Chief Justice William Rehnquist, or his successor and former clerk, Chief Justice John Roberts. The better cultural and constitutional texts to examine to test the claim that constitutional rights talk has affected our cultural identity would be the judicial opinions that define the constitutional liberties, rather than academic tracts that analyze and critique these opinions.

Fleming and McClain discuss key pieces of this case law and show why the case law does not support the claim that constitutional liberalism rejects responsibility or even is silent on it. Two of their most powerful examples are the cases on reproductive freedom and on freedom of speech. Especially in recent years, the former allows explicitly for government actors to weigh in on whether and how a woman should exercise her reproductive freedoms (pp. 68–75). In the abortion context in particular, the Court has emphasized that a woman “cannot be isolated in her privacy;”¹⁵ she is far from it, in fact.

Even in the realm of freedom of speech, where the Court often is at its liberalism best, the full arc of the cases shows how much room government has to speak its own mind. The Court may insist that “one man’s vulgarity is another’s lyric,”¹⁶ but it also permits significant government restraint of speech in bounded settings, in nonpublic fora, on broadcast media, when minors are likely to be present, when government is funding the expression, and especially when the speech is properly regarded as the government’s own message.¹⁷ *Constitutional* liberalism allows for these forms of value-inflected, non-neutral restraints on freedom of expression. Likewise, liberalism *theory* is not in

14. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 184 (1977).

15. *Roe v. Wade*, 410 U.S. 113, 159 (1973).

16. *Cohen v. California*, 403 U.S. 15, 25 (1971).

17. See Toni M. Massaro & Robin Stryker, *Freedom of Speech, Liberal Democracy, and Emerging Evidence on Civility and Effective Democratic Engagement*, 54 ARIZ. L. REV. 375, 390–98 (2012) (discussing the limits of First Amendment protection and explaining why doctrine does not block all efforts to promote collective norms).

fatal tension with efforts to inspire responsible exercise of freedom of expression: for example, “government and other norm inculcators may have a *liberalism-based* interest in encouraging speakers to observe the habits of civility” in order to secure the conditions for the marketplace of ideas to work as intended, and have ample means of doing so.¹⁸

Nor does the protection of speaker autonomy mean government actors are powerless to condemn the speaker, even in their official voice. Cases that celebrate expressive autonomy often include judicial homilies about the harms of that freedom, or the moral shortcomings of the speaker. The dissents are one source of this official moralizing;¹⁹ but the majority opinions too are written in ways that express respect for the right, but contempt for the countercultural messenger.²⁰ Few people reading these opinions would come away with the sense that the protected speakers are cultural heroes, or that they should not suffer social ostracism or censure for their behavior.

As the authors correctly observe, there also are other ways in which government can, does, and should put its meaty thumb on the values scale. In Chapter 5, they explain how government plays a role in promoting civic virtues through annual Constitution Day celebrations, civic education, and control of public school curricula (pp. 112–45). They applaud these efforts, provided the lessons learned are ones that respect liberal democratic values,²¹ or as Gerald Graff has put it, that “teach the conflicts.”²² Of course, as the late 1980s-early 90s high octane debate about “cultural literacy” and calls for a nationally uniform curriculum demonstrated, these are never easy or noncontroversial lessons to craft.²³ But few liberal theorists deny

18. *Id.* at 399.

19. *See, e.g.,* *Snyder v. Phelps*, 131 S. Ct. 1207, 1222 (2011) (Alito, J., dissenting).

20. *See, e.g.,* *U.S. v. Alvarez*, 132 S. Ct. 2537, 2542, 2551 (2012) (plurality opinion) (Kennedy, J.) (striking down the Stolen Valor Act on First Amendment grounds, but stating about the respondent that “[l]ying was his habit” and describing his statements as “contemptible”).

21. They appreciate the complexity of balancing the liberal interest in non-coercion and respect for plural values against the collective interest in assuring that children are effectively trained in the habits of citizenship and a non-neutral respect for shared values. As Mark Yudof said years ago, there is no “Archimedean point.” Mark G. Yudof, *Library Book Selection and the Public Schools: The Quest for the Archimedean Point*, 59 IND. L.J. 527 (1984).

22. *See* GERALD GRAFF, *BEYOND THE CULTURE WARS: HOW TEACHING THE CONFLICTS CAN REVITALIZE AMERICAN EDUCATION* (1992). *See also* AMY GUTMAN, *DEMOCRATIC EDUCATION* (1987).

23. *See* TONI MARIE MASSARO, *CONSTITUTIONAL LITERACY: A CORE CURRICULUM FOR A MULTICULTURAL NATION* (1993) (discussing debate and proposing

the importance of common lessons for American children as a precondition to liberal adulthood,²⁴ and all likely recognize the wisdom in Steven Shiffrin's observation that "children are the Achilles heel of liberal ideology."²⁵

Two other, profoundly important ways in which government may lend its moral voice to cultural conversations bear repeating here. First there is the so-called "government speech" exception, under which the Court has said government's own speech raises no First Amendment concern *at all*, apart from the Establishment Clause limits.²⁶ That is, when the message is clearly government's own, versus that of a private individual, it need not be content- or even viewpoint-neutral. Second is the government's mighty purse-strings power, which includes the right to condition access to funding on decency criteria,²⁷ on nondiscrimination criteria,²⁸ and other non-neutral conditions. The latter power and its proper constitutional limits have been at the heart of current controversies over ethnic studies curricula²⁹ and religious student groups seeking official status (pp. 146–76).³⁰ These controversies, like calls for civic education, bring to light how much power government reserves to make value-laden choices, despite our constitutional liberalism and even because of it.

Last but surely not least is the state action doctrine,³¹ which Fleming and McClain do not address in detail. In Chapter 4, they

balance between liberal and civic republican visions of a core curriculum).

24. *Id.* at 138–40.

25. Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 647 (1980).

26. *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009).

27. *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 572–73 (1998) (upholding congressional standards, on a facial challenge, that directed the National Endowment for the Arts to consider "general standards of decency and respect for the diverse beliefs and values of the American public" when evaluating the artistic merit of grant applications (quoting 20 U.S.C. § 954(d)(1)(1994)).

28. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 645 (2002) (upholding voucher program that conditioned application of vouchers on commitment not to "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion").

29. *See Arizona House Bill 2281*, which conditions state funding on not including courses or classes that "promote resentment toward a race or class of people" or that "advocate ethnic solidarity instead of the treatment of pupils as individuals" and that allegedly was triggered by Tucson High School's Mexican-American Studies Program. ARIZ. REV. STAT. ANN. § 15-112(A)(2), (4) (2012); *see also* H.B. 2281, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

30. *See Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971 (2010); *see also* Toni M. Massaro, *Christian Legal Society v. Martinez: Six Frames*, 38 HASTINGS CONST. L.Q. 569, 611–17 (2011).

31. *See supra* text accompanying note 8.

discuss civil society's role in "cultivating the 'seedbeds of virtue'" and outline the communitarian critique of the erosion of intermediate organizations between the individual and government that are necessary to cultivating virtue (pp. 81–111). What is missing here is the fundamental distinction between constitutional liberalism and rights imposed through democratic processes. If *constitutional* rights are the real threat to these intermediate institutions, then the peril is greatly mitigated by the fact that *only* government action can violate constitutional rights.³²

In fact, as the authors recognize (pp. 98–101), a common criticism of constitutional liberalism is that it conceptualizes liberty as freedom from government, not from private parties who may exercise their authority over individuals in profoundly illiberal ways. The public/private split is not a natural one, or one that neatly divides public responsibilities from private liberties. Nevertheless, the arc of the modern state action cases bends deeply toward allowing significant government support of private actors without thereby transforming the latter into "state actors" for constitutional purposes.³³ Private parties and intermediate social institutions therefore have wide constitutional space in which to enforce their moral visions, even with government assistance. If anything, the worry should be over too little enforceable liberal autonomy and values agnosticism, rather than too much.

B. NEGATIVE RIGHTS VERSUS POSITIVE RIGHTS

Closely related to the state action point is the negative rights critique of liberalism. A primary criticism of liberal rights theories has always been—from the political left and the political right—that liberalism is about negative rights rather than positive rights. The liberal version of rights, under this account, is best captured by the notion of "freedom from" government, and not "a charter of positive benefits imposing affirmative obligations upon government to secure the preconditions for . . . justice" (p. 7). Progressive theorists condemn constitutional liberalism for its impoverished view of government responsibility to provide food, medical care, education, housing, employment,

32. A notable exception here is the Thirteenth Amendment. *See supra* note 7.

33. *See, e.g.,* *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (holding that a private school that received over ninety percent of its funding from government sources was not, perforce, a state actor when it fired one of its teachers).

and other preconditions to an autonomous life. Communitarians, in turn, worry that the “freedom from” construction of rights promotes individual irresponsibility.

The first criticism is plainly important, though it is not the primary one advanced by communitarians. Fleming and McClain are sympathetic to the progressivism aims of many who find liberalism thin gruel for justice. But they also advance the argument that liberalism must acknowledge that it works only if certain preconditions are met, and they call for progressive corrections to our constitutional doctrine and practices that take this objection seriously. The baseline of liberal rights need not be abandoned, by their account, unless one interprets liberalism woodenly to deny the substantive corrections necessary for it to be more than an empty promise. Just as constitutional liberalism does not deny the costs of freedom, and allows government to weigh in on the exercise of rights in ways that promote responsibility, it does not disable government from stepping in to make liberalism practically feasible and humane. If it did, then surely the libertarian hue and cry over too many government “entitlements” and creeping socialism would be patently absurd. Many important government programs have emerged to support those who need assistance, especially children, to assure they have meaningful access to goods and services that are relevant to liberal autonomy. Existing programs may be woefully inadequate to meet the needs, but this is not because liberal rights talk prevents new or better ones from being adopted. On the contrary, the rights talk often may be useful ways of mustering political will to address the needs. The key here is to distinguish between liberalism *reality* and liberalism *mythology*.

Realism also requires one to recognize that liberal rights discourse may be mobilized in service of progressive ends. As Jack Balkin pointed out over two decades ago, even progressives who are profoundly skeptical of liberalism tropes in some constitutional settings—*i.e.*, because liberalism romanticizes individual autonomy, the private sphere, and *laissez-faire* approaches to pre-existing economic and social conditions—still may “cling to libertarianism” in other settings because they cannot think of any other way to conceptualize the specific rights.³⁴ The stickiness of the libertarian-sounding vocabulary should not be confused with the reality of the many communitarian and progressive amendments to liberalism that

34. See Balkin, *supra* note 1, at 387.

pervade constitutional doctrine and government practice, and that support the meaningful exercise of liberal rights. In sum, rights in the United States are not purely negative rights, and liberal rights talk has not made government responsiveness to progressive or communitarian demands impossible.

Here again, the state action doctrine plays a vital but often underappreciated role. Since the 1970s, the Court has retreated from earlier civil rights era cases that more readily found government involvement in private discrimination sufficient to trigger constitutional rights.³⁵ If federal, state, and local laws that apply to private associations intrude further into their autonomy than does the Constitution—which they surely do—this is not obviously a “communitarian” dilemma that can be explained by “too much liberalism.” It may be better described as too much rights-inflected communitarianism, due to “overregulation” by a majority that believes its intrusions into the private sphere are in the “common interest.”

C. LIBERTY VERSUS EQUALITY

A third, false dichotomy is the one sometimes drawn between liberty and equality. For some critics of liberalism, the heart of the problem is liberalism’s inadequate attention to private inequality. This argument comes in two basic forms. The most muscular form of the critique is that freedom for some will *always* entail less freedom for others, given the unequal distribution of power, wealth, and other goods among us. Only through redistributive measures and the rejection of strong liberalism principles can the agonizing inequality concerns be addressed. Liberalism *itself* is the cord that must be cut, in order to usher in a more progressive form of constitutional justice. For example, freedom of speech should be analyzed in light of unequal access to it, and government should be permitted to make significant adjustments to level the discourse playing field without worrying about traditional liberalism objections to these moves. To get there, substantive equality must become the first-tier constitutional concern, rather than beginning with an assumption of freedom from government action as the primary measure of constitutional liberty or invoking strictly liberal constructions of equality (*i.e.*, same treatment, but not same outcomes), and then adding equalizing corrections.

35. Compare *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961). with *Moose Lodge v. Irvis*, 407 U.S. 163 (1972).

The second form of the equality critique of liberalism is less adventurous. Here, the critique is not that government *cannot* respond to inequality because liberal assumptions bar these interventions; rather, it is that the liberal presumptions operate until they are pierced, and the piercing decisions often are unfair. The mythology of self-sufficient, liberal autonomous actors is maintained whenever it serves the interests of those in power. When liberalism does not serve these interests, however, government acts more swiftly to offer assistance even if doing so is the antithesis of libertarian *laissez-faire* rhetoric. Liberal rights thus may conflict with equal rights, but they do so selectively and contextually rather than inherently. The proper goal should be liberal rights for all, not just for some, and reasonably equal access to the baseline tools and conditions necessary to participate effectively in a liberal democratic society.

Fleming and McClain embrace the latter view. In other words, they see the liberty versus equality dichotomy, like the foregoing ones, as a false one. Nothing about constitutional liberalism principles *per se* *rules out* equality adjustments. Liberal rights do not exist in a social vacuum, and preexisting conditions matter a lot to the exercise of rights. Ordering of liberal rights in a pluralistic society thus may require more than the procedural correction of taking turns; it may entail ceding one's own liberal space, time, money, and freedoms in order to accommodate others' needs. But this redistribution of goods does not mean we abandon our liberal aspirations; it means we keep our progressive and communitarian wits about us and be vigilant to make corrections necessary to leveling the liberal playing field. Liberty and equality, by this account, are interdependent.

On a doctrinal level, of course, the Court has recognized that liberty and equality are intertwined. The original Bill of Rights nowhere cites equal protection of law, yet the Court in *Bolling v. Sharpe* asserted that "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive."³⁶ Indeed, no decent liberal order can exist without a thin version of equality, at the very least, if not a more robust form that requires affirmative action and that is aggressively anti-caste.

36. *Bolling v. Sharpe*, 347 U.S. 497, 498–99 (1954).

D. MINIMALISM VERSUS PERFECTIONISM: “THIN” VERSUS
“THICK” RIGHTS

A final false dichotomy that Fleming and McClain examine is the one drawn between minimal and perfectionist, or “thin” versus “thick” versions of constitutional liberalism. In this section, they focus in particular on the work of Michael Sandel, who argues that liberal justifications for liberal rights are too thin, and of Cass R. Sunstein, who makes the competing claim that they may be too thick (pp. 207–36).

As the authors show, however, constitutional liberalism *in practice* is both thick and thin. It makes very different demands, depending on the context and applicable set of competing concerns, and it might best be described as a form of mild perfectionism, which Fleming and McClain endorse. The practice is fairly non-intrusive into the political process, typically moves incrementally, not precipitously, and anticipates a balance of constitutional interests.

The least that constitutional liberalism requires is captured by the so-called “rational basis” standard of judicial review, under which courts strongly defer to government actors absent a showing that their decisions are grossly excessive, arbitrary and capricious, or inspired by baseless animus.³⁷ The most that constitutional liberalism requires is captured by the so-called “strict” or “exacting” scrutiny standard of judicial review, triggered by “fundamental” rights³⁸ and “suspect” classifications.³⁹ In these cases, the government bears the burden of proving that its actions promote a compelling or significant government purpose and that the measures are narrowly tailored to advance that purpose.

On the thin, rational basis end of the liberty spectrum the courts do very little to interfere with the political community’s policy decisions. As such, they are mindful of the Sunstein concern about judicial minimalism and potential backlash. This is so despite libertarian concerns about government programs that unduly burden liberty and property interests, and despite progressive concerns about the relative absence of meaningful or “thicker” constitutional protection of rights for the poor, and for

37. See, e.g., *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 489 (1955) (setting forth rational basis standard for judicial review of socioeconomic legislation).

38. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (describing the right to marry as a fundamental right that triggers elevated judicial scrutiny).

39. See, e.g., *Johnson v. California*, 543 U.S. 499, 505 (2005) (stating that strict scrutiny applies to all government racial classifications).

other vulnerable classes of persons. Yet even the rational basis end of the spectrum is fanned. It ranges from its “toothless” version of nearly uncritical deference to a more searching inquiry into governmental reasons, based upon the importance of the interest at stake, the political vulnerability of the burdened persons, and any strong whiff of animus against them. When judicial review is at its thinnest, it still stands as a reminder that government actors are expected to observe baseline rationality and that courts reserve theoretical power to compel this, in particularly egregious cases.

On the thick, fundamental rights end of the spectrum, courts are more aggressive and betray some of the liberal perfectionism that Sandel admires and Glendon and Sunstein fear. But courts still consider political community interests as part of the rights calculus. Just as rational basis has a thick end, strict scrutiny has a thin one.

In short, neither pure minimalism nor pure perfectionism governs at either end of the rights spectrum, or even within the applicable categories. Judges locate liberal rights in “tiers,” but also on a continuum. Formalists might prefer less float in the process, or a meatier thumb on either side of the minimalism versus perfectionism scale, but the current constitutional case law respects neither desire.

This means that constitutional rights can begin on one end of the spectrum, and slowly migrate to the other end over time, as cultural understanding of the liberty interests at stake evolves. A thin, liberal justification for a right typically initiates the movement—say, a strong libertarian argument against criminalizing same-sex sodomy between two consenting adults in the privacy of their own home where no showing of tangible harm to others is made. But it can eventually ripen into a thicker, more perfectionist and value-laden justification for a related aspect of that minimalist right, such as the refusal to countenance private discrimination on the basis of sexual orientation by denying public funds to those who practice such discrimination, or official respect for the relationship by allowing same-sex partners to marry. A thin liberal right thereby may ripen into thick, fundamental status under which the conduct and the people thought to be defined by the conduct are more explicitly *affirmed*, not just protected from physical harm or imprisonment. But even when a right attains fundamental status, as reproductive rights and freedom of speech prove, the government still may moralize about the exercise of the right.

The liberal right to do something is not necessarily the right to be respected for it. Liberal rights obviously may hasten the process of gaining cultural approbation of the protected behavior, but they rarely are granted before cultural *tolerance* of the behavior has begun. In a plural society, one should not expect that the former will always follow from the latter, but the latter almost always precedes the former in any event.

Constitutional liberalism reflects these contextually and temporally variable aspects of rights. Our most partisan divides tend to trigger what Dan Kahan has called “thin walls liberalism,”⁴⁰ under which the most we can expect of each other is the behavior of people who live in “a building with thin walls.”⁴¹ In this liberal order, citizens “avoid the types of advocacy—akin to behaving raucously in a room that abuts one’s neighbor’s bedroom—that foreclose or impede the efforts of other groups to form understandings of law affirming to them.”⁴² At the least, we must “keep our voices down” as we exercise our own liberal rights in our own apartments. But we do have the right to *live there*. Tolerance, not respect, governs—but just barely.

On the other, thicker end of our liberal community aspirations we expect more than live-and-let-live, barely tolerant neighbors in a metaphorical urban apartment building: we seek a liberal order in which our fellow citizens know us, respect us, look out for our children, elect us to leadership roles, and include us in their thicker community embrace—especially when we are down on our luck.

But again, first-wave rights bearers often will settle for tolerance and thin walls—the right to *live there*—especially if the choice is between no rights and minimum rights. Moreover, the gestation period of the thicker version of rights (*i.e.*, rights justified by more than strictly libertarian justifications) can be generations; such perfectionism, even in its early or “mild” form, may lie just beyond the reach of a living human’s grasp. Consequently, thin walls liberalism is nothing to sneer at, is often hard won, and would be a lot to lose. First-wave rights bearers know this, and rarely take their first-step, liberal rights gains for

40. Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 147–48 (2007).

41. *Id.*

42. *Id.* at 148.

granted, or make liberal perfectionism the enemy of a liberal good.

The primary point, for Fleming and McClain's purposes, is that our constitutional liberalism includes both ends of the liberal rights continuum. The questions of when and where thin versions of rights should suffice, or thicker rights are called for, can be extremely divisive. The answers, however, are not obviously implied by invoking perfectionism or minimalism *per se*.

E. RESPONSIBILITY AS ACCOUNTABILITY VERSUS RESPONSIBILITY AS AUTONOMY

The authors do an excellent job of disclosing why the foregoing dichotomies are false. Yet they introduce one of their own, which suffers from similar weaknesses. Specifically, they attempt to rescue liberalism from the charge of irresponsibility by claiming that there are "two different, *although related*," meanings of responsibility: "*responsibility as accountability* to community versus *responsibility as autonomy*, or self-government, respectively" (p. 21). They elaborate on these concepts as follows:

As we use the terms, "responsibility as accountability" connotes being answerable to others for the manner and consequences of the exercise of one's rights, whereas "responsibility as autonomy" connotes self-governance, that is, entrusting the right-holder to exercise moral responsibility in making decisions guided by conscience and deliberation (p. 21).

The saving phrase here may be "*although related*." Nevertheless, the authors seem to believe the two concepts are sufficiently distinguishable to rest considerable weight on the distinction. Responsibility as autonomy, they continue, allows government to encourage *reflective decision making* without steering a person toward one choice or another (p. 68). For example, "balanced counseling" regarding whether to seek an abortion may be allowed (p. 68), but not governmental coercion or persuasion premised on paternalistic notions of women's incapacity to make independent decisions (p. 73).

I do not buy this distinction. The line between balanced, government measures that support reflective decision making and those that feel skewed in favor of government value choices and coercive is hopelessly fuzzy, subjective, and difficult to

isolate. One man's information about adoption options may be another woman's sermon against an early term abortion. Likewise, one parent's liberal-inspired civic education may be another's illiberal inculcation of secular humanism.⁴³ There is no such thing as neutral government education, or a neutral formative project. Even balance among non-neutral views relevant to the exercise of a right is difficult to achieve, given the time limited and didactic nature of counseling and of education.

This does not mean, however, that a non-coercion aspiration is meaningless, or that the liberalism insight is irrelevant to government approaches to its educative role. To say that we are influenced and shaped by our liberal democratic government, that government can and does moralize, or that rights and responsibilities are intertwined in a liberal democratic order, does not mean we do not ever invoke or draw the line between legitimate persuasion and illegitimate coercion. It means that the distinction between "responsibility as autonomy" and "responsibility as accountability" is subjective, and that Fleming and McClain do not prove that government abortion counseling necessarily crosses that newly-coined line. At some point, the theorist, teacher, or judge must make the leap, despite the inescapable subjectivity and value-inflection problem. In this particular case, I happen to agree with Fleming and McClain's judgment call, just not with their justification that it turns on a clear distinction between responsibility as autonomy versus responsibility as accountability.

The more important—and to me more convincing—feature of the distinction between these two forms of responsibility is that responsibility as autonomy more emphatically focuses attention on the liberal concern about coercion. It cautions government actors that liberalism presumes adult decision makers' autonomy, even as it anticipates some government influence on the exercise of that autonomy. It even presumes that *children* have rights, however limited, and are best treated with a liberal respect for their emerging capacity for self-governance. For liberal rights advocates like Fleming and McClain, this is a crucial reminder. It may curb government enthusiasm for more explicitly directive, paternalistic or

43. This notion is captured beautifully by the enduringly insightful work of Nomi Maya Stolzenberg, "He Drew a Circle That Shut Me Out": *Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581 (1993).

moralistic interventions, and it confronts directly the paradox of any “liberal education” agenda.

III. BEYOND FALSE DICHOTOMIES?

If these are all false dichotomies, and our constitutional liberalism is broad enough to embrace liberal rights *and* communitarian *and* progressive critiques of their perceived limitations and excesses, then what’s the root of the philosophical debates outlined here? Is it that Glendon simply misreads the doctrine, that Sandel expects more perfectionism in practice than the doctrine currently can deliver in selected cases, or that Sunstein expects too little of rights and over-predicts backlash based on isolated examples? Or is it that all of these writers are fundamentally moderate, as are Fleming and McClain, such that the theoretical differences between their takes on liberal rights are relatively modest, and can be accommodated within constitutional doctrine in ways that more radical communitarian, liberal, or progressive accounts could not?

I believe this last explanation is a major part of the answer. This book is a friendly amendment to Glendon-style communitarianism, and a mid-ground negotiation between Sandel’s perfectionism and Sunstein’s minimalism. One can easily imagine all five of these scholars on a panel, addressing the political hot button topics of same-sex marriage, abortion, and hate speech without a raised voice or failure to grasp—really grasp—each other’s points. They would not need to rely on thin walls liberalism to engage one another’s arguments, even where they diverge on the preferred outcomes or ways of justifying them. Their discussion is occurring within a quite congenial and thick community discourse circle.

Can the same be said of the rest of us, in this election year? Would reading Fleming and McClain’s respectful intervention make less moderate, less informed citizens better able to see how constitutional rights and responsibilities can co-exist? Might “we” be able to talk *to* each other about these same political wedge issues, not just *past* each other, by invoking this fuller account of our constitutional liberalism? Or are academic texts like this beside the political point, no matter how accessibly they are written?

I think books like this do matter, and not simply because of an occupational predisposition to think so. Scholars are not the

only ones currently engaged in the project of defending or reimagining our constitutional liberalism at a deeper level. Some of the efforts are silo-specific arguments to undo *Roe v. Wade*⁴⁴ or *Citizens United v. FEC*,⁴⁵ or to take *Lawrence v. Texas*⁴⁶ to the next level by extending the protected right to same-sex marriage. But a growing number of people are arguing for tectonic changes in constitutional law, and some even favor a second constitutional convention.⁴⁷ America today thus may be poised for a full-on public discussion of our constitutional liberalism, and *Ordered Liberty* may improve these public deliberations because it offers a more nuanced way of thinking about the potential benefits and costs of pitching big pieces of our constitutional liberalism, or pulling it up at the roots. The book shows the complexities and paradoxes of our constitutional law *as it is*, and therefore offers a saner, more realistic starting point for political arguments than many of the almost cartoonish hyperbole in some political discourse. It presents the current law, and the scholarly writing about that law, in a fair-minded and non-distorted manner.

The book also reveals the fuller arc of that law. If anything, Fleming and McClain's work may be too brief in this last respect. The authors omit significant other doctrines that also support their claim about the room for liberal rights *and* responsibility. For example, they might have added a longer account of the steady narrowing of the Establishment Clause brake on government accommodation of religion, which allows moral communities to seek government funding for religious education, faith-based charities, and other forms of official support for sectarian ends.⁴⁸ They also might have spent greater time on the state action conundrum, with its emphasis on the private/public split, or the transfer of government functions to private actors, both of which create a vast opening for private actors to pursue their non-neutral ends with no constitutional oversight whatsoever, and often with significant government support.

Still another useful topic might have been the many procedural and jurisdictional barriers to judicial protection of

44. 410 U.S. 113 (1973).

45. 558 U.S. 50 (2010).

46. 539 U.S. 558 (2003).

47. See, e.g., RESTORING FREEDOM, www.restoringfreedom.org (last visited Apr. 17, 2013); ROOTSTRIKERS, www.rootstrikers.org (last visited Apr. 17, 2013).

48. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

constitutional rights, which tame liberal rights.⁴⁹ And they may have expanded their discussion of how the Court in recent years has fortified, not restricted, freedom of association rights in ways that support private intermediate associations' right to set membership rules in ways that exclude some groups.⁵⁰

A fully panoptic view of our constitutional liberalism would reveal that it enforces (again, contextually and on a continuum) a range of liberty-protective principles that rein in government excesses: procedural and political process regularity, separation of powers, prospectivity and proportionality in lawmaking, transparency, and an independent judiciary.⁵¹ Which of these liberal values has been pursued in unduly aggressive ways that undermine our collective sense of responsibility for the common good? Where, exactly, should the constitutional liberalism cord be cut, shortened, or strengthened?

Finally, the authors might have discussed the chipping away at public schools' race-conscious affirmative action strategies by the modern Court.⁵² If the post-1960s civil rights revolution really is to blame for our alleged cultural decline, then what should we make of post-1991 (the year that the Glendon book, *Rights Talk*, was published) constitutional developments that belie the claim that civil rights are expanding?

More realism about our constitutional liberalism thus would be extremely useful, especially in this election year in which all political sides are waving the constitutional flag. A fresh start to political discussions about how we might need to move forward, or backward, or even to the side in our liberal rights regime would ask the discussants to consider the doctrinal evidence about what our liberal rights practice currently is, and whether it in fact is protecting rights at the expense of responsibilities.

49. An example is standing doctrine. *See, e.g.,* *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (holding that taxpayers lacked constitutional standing to challenge a tax credit, versus a tax expenditure, on Establishment Clause grounds).

50. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

51. *See* E. THOMAS SULLIVAN & TONI M. MASSARO, *THE ARC OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW* (manuscript on file with author) (discussing the shared liberal democratic values that "due process" protects).

52. *See, e.g.,* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701 (2007) (striking down race-conscious measures aimed at reducing racial isolation in public school student population). *See also* *Fisher v. Univ. of Tex.*, U.S. Supreme Court Case. No. 11-345 (pending affirmative action case involving the University of Texas).

IV. CONCLUSION

I am well aware, as are Fleming and McClain, that liberal rights *talk* can obfuscate as well as illuminate on the ground realities. Progressives' disgust with the obfuscatory consequences of liberalism rhetoric should be taken seriously.⁵³ Likewise, the non-neutral, perfectionist ends that many progressives favor remain unmet—especially the promise of protection of non-majority voices and concerns. We therefore should continue to advance progressive correctives that save liberalism from itself.

But liberalism rhetoric is neither the obvious cause of these injustices, nor the wrong tool for attacking them. Faith in liberalism—even misplaced faith—not only can be used to advance progressive ends but *is the language we currently have to work with* in pursuing these substantive ends. That familiar and available language is, for the reasons Fleming and McClain demonstrate, much richer and more nuanced than some of its critics claim. It also has been instrumental in achieving some quite admirable liberal democratic advances, including ones that advance equal rights. Again, first-wave rights bearers may know this best of all, and thus are often reluctant to toss aside the constitutional and rhetorical tools that helped them to achieve these hard fought victories.

Last, but surely not least, liberal rights talk insists, perhaps more than any of its more self-consciously value-inflected competitors, that we consider the possibility that everything we currently believe may be *wrong*. This is a valuable but perpetually repressed insight that is especially useful in a culturally and ideologically plural nation. A constitutional starting point that stresses our intellectual and other human frailties and requires us to reconsider our preconceptions and convictions has real value in opening our eyes to new insights, as any teacher, scientist, or political activist understands. Liberal neutrality may well be a myth, but it also is an intellectual framework that may be pitched at our peril. The many flaws of our constitutional liberalism—paradoxically and ironically—may be best revealed *only* if we invoke its obviously flawed “marketplace” political discourse principles, its easily mocked

53. A recent critique of liberalism's emphasis on the “free market” myth makes this point very powerfully. See BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* (2011). Cf. *LEFT LIBERALISM/LEFT CRITIQUE* (Wendy Brown and Janet Halley eds., 2002) (discussing the left political project and tensions between critiques of liberalism and pursuit of legal remedies).

agnosticism about substantive ends, and its uneven respect for procedural regularity. Unless and until we develop a better set of first principles, we thus might do well to maintain the liberal framework we have, and continue to use its vocabulary to press our competing claims for better and non-neutral outcomes. At the least, liberalism requires us to begin with respect for others' right to disagree about these non-neutral ends.

Fleming and McClain demonstrate this kind of liberalism-rooted respect for others' notions about what ends we should pursue. True, they are engaging others who themselves respect these discourse rules, and who operate within an academic American "rights talk" culture that is relatively tight. True, their "mild perfectionism" arguments are unlikely to persuade non-liberal, or more radical liberal theorists and political activists to move toward their precise version of ordered liberty. But the authors do an excellent job of responding to the claim that *constitutional* liberalism is the *cause* of the alleged rise of individual irresponsibility, by setting forth an account of constitutional liberalism that is based on doctrinal reality. This realism about our constitutional liberalism is a correction that most Americans—even across the political spectrum—can and should heed.

Finally, the authors maintain this liberalism-rooted respect for opponents' arguments even when discussing political wedge issues such as abortion and same-sex marriage. Their commitment to liberal tolerance—thin and thick—fortifies their ability to engage in respectful political discourse⁵⁴ about these and other, especially divisive constitutional concerns, and to give their opponents' arguments a fair hearing. Amidst the din of increasingly negative campaign speech, outrage news, cyber-echo-chambers, and other gross distortions of political discourse, theirs is a welcome intervention in tone as well as content.

For all of these reasons, the book makes an admirable contribution to a most timely and fundamental debate. It would be a terrific step forward in a political culture premised on self-governance if the various patriot armies marching under American constitutional banners would pause a moment to read it.

54. For an elaboration of principles of civil political discourse, and emerging evidence on the consequences of extreme incivility for democratic engagement, see Massaro & Stryker, *supra* note 17.