

## REVIEW

### **Common Good and Common Ground: The Inevitability of Fundamental Disagreement**

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*Ordered Liberty: Rights, Responsibilities, and Virtues*  
James E. Fleming and Linda C. McClain. Harvard, 2013.  
Pp 1, 273.

#### INTRODUCTION

Never before has the need for staking out common ground seemed more acute: we see the need in politics, in public discourse, in court decisions. With most elements of our political community retreating to greater polarization along many dimensions, the promise of reconciliation that Professors James Fleming and Linda McClain offer is a breath of fresh air. They reach out to the critics of liberalism with an assurance that, at least among liberals, civic republicans, communitarians, and progressives, there is a way to preserve the best of all and reach an approach to constitutional order that appropriately values the individual, the community, and the moral fabric of society. This is a constructive and appealing project.

The book is framed as a response to several charges against liberal theories of rights (p 2).<sup>1</sup> These charges arise primarily from arguments to the effect that the liberalism embodied in the current state of our constitutional system exalts rights over responsibilities, licensing irresponsible and even wrongful conduct

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<sup>1</sup> These include the “irresponsibility” critique that liberal theories of rights license irresponsibility (pp 18–21), the “neutrality” critique that liberal theories prevent the government from cultivating civic virtue (pp 81–83), the “perfectionist” critique that liberal theories inhibit the government from fostering substantive human goods or virtues (pp 177–206), and the “minimalist” critique that liberal theories are too thick and intrude too deeply on political processes (pp 177, 223–28).

and contributing to a decline in civic virtue within the populace. In the garb of a defense, Fleming and McClain reveal that they are somewhat sympathetic to versions of these charges and suggest that liberalism need not succumb to the critiques, if it is adapted properly. As their tantalizing undertaking unfolds, it becomes clear that the book is not really a defense at all. The defensive discussions are illustrative and anecdotal; the responses never quite defeat the charges, or even meet them head-on, but tend rather to deflect them as failing to understand what liberalism ought to be.

This suggests that the authors' more heartfelt project is the proffering of their own refinement of liberalism, a sort of Liberalism 2.0, if you will, which develops out of these defenses and is named "constitutional liberalism" (p 3). Framed strangely as short addenda nodding at agreement or disagreement with each of the critiques discussed more fully in later chapters (pp 53, 81, 113, 148, 178–79), the tenets of constitutional liberalism itself do not appear as a freestanding statement of the theory or its justifications. So we are left to piece it together from discrete observations on a whole array of different topics covered by the critiques and falling, quite comprehensively, under a heading of liberalism that appears to encompass social theory, social culture, political philosophy, constitutional theory, and constitutional doctrine. That is a great deal to join together.

The step that Fleming and McClain take is a brave one. In the past, Fleming has written from a decidedly liberal perspective on constitutional theory, emphasizing autonomy as the core of what government must secure for its people;<sup>2</sup> McClain has offered a feminist perspective on the roles of nongovernmental institutions in matters of family and other private spheres.<sup>3</sup> Fleming's domain has been primarily, though not entirely,

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<sup>2</sup> See, for example, James E. Fleming, *Securing Constitutional Democracy: The Case of Autonomy* 92–98 (Chicago 2006) (arguing that deliberative autonomy is a prerequisite for constitutional democracy); James E. Fleming, *Securing Deliberative Autonomy*, 48 *Stan L Rev* 1, 3 (1995) (“[D]eliberative autonomy is rooted, along with deliberative democracy, in the language and design of our Constitution.”).

<sup>3</sup> See, for example, Linda C. McClain, *The Place of Families: Fostering Capacity, Equality, and Responsibility* 77–83 (Harvard 2006) (arguing that the intimate connection between family life and proper democratic self-government need not entail gender inequality); Linda C. McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channeling Function of Family Law*, 28 *Cardozo L Rev* 2133, 2134–35 (2007) (arguing that, in light of changes to American society over the past fifty years, the institutions of family law, designed to “channel” people into “monogamous, heterosexual, and permanent” relationships, require rethinking).

constitutional;<sup>4</sup> McClain's has been primarily, though not entirely, societal.<sup>5</sup> They chose to cross boundaries to write a book that blends their two sets of theoretical perspectives and their two domains to produce the hybrid of constitutional liberalism. There is much to be learned from this ambitious effort. When it offers a path to reconciliation between conflicting foundational commitments in constitutional law, however, the book promises more than anyone could deliver.

At a high level of generality, the quest is a framework for "taking responsibilities and civic virtues as well as rights seriously" (p 3)—a project for which Professor Robin West called nearly a quarter of a century ago.<sup>6</sup> The theory latent in this intriguing book attempts to meet West's demand. It very conspicuously presents itself as a reconciliation of liberalism and communitarianism,<sup>7</sup> seeking to preserve the most attractive features of each—rights and responsibilities (pp 46–49). I am a sympathetic traveler on this journey, and whatever aim I take at the project, it is decidedly friendly fire. But the book has left me with the nagging concern that this reconciliation, like so many others in history, is ultimately hollow. As I will elaborate below, the case studies that constitute the volume reveal deep tensions that elude reconciliation at their core. As it turns out, on profound questions of moral conviction, it is difficult to offer compromise solutions that are satisfying to adherents of both camps. We can indeed aspire to areas of what Professor John Rawls called "overlapping consensus,"<sup>8</sup> but that terrain must remain quite thin, not probing too deeply into the disparate fundamental value systems that produce the areas of political consensus. In my view, the project does not avoid the matters of deep conviction sufficiently to aspire to consensus. Indeed, in every one of the case studies, constitutional liberalism has to take sides. And the side it takes is liberalism.

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<sup>4</sup> See note 2.

<sup>5</sup> See note 3.

<sup>6</sup> See Robin West, *The Supreme Court, 1989 Term—Foreword: Taking Freedom Seriously*, 104 Harv L Rev 43, 81–83 (1990).

<sup>7</sup> For discussion of communitarianism, see Michael J. Sandel, *Liberalism and the Limits of Justice* x (Cambridge 2d ed 1998) (associating communitarianism with "[t]he notion that justice is relative to the good, not independent of it," as liberalism would have it).

<sup>8</sup> See John Rawls, *Political Liberalism* 140 (Columbia 1993) (confining consensus to the political domain while leaving to citizens to settle how the political values relate to the other values in their comprehensive doctrine).

Some examples will help to highlight my claim that compromise on foundational constitutional questions is not meaningfully achievable. The book boldly addresses four of the most socially divisive topics of constitutional law as the landscape for fleshing out its constitutional liberalism. These are abortion, parents' authority over their children's education, private associational rights of exclusion, and marriage equality. In every case, for a variety of reasons, it turns out that the book's alluring promise of common ground is illusory. The following discussion will address each of these in turn.

### I. CAN RESPONSIBILITY SUPPLY COMMON GROUND?

Professor Mary Ann Glendon is the first critic up for discussion, with her condemnation of "rights talk" as a vehicle for fleeing responsibility, suggesting that an overly absolutist conception of rights has led to immunity for rights holders, who feel that they are insulated from moral scrutiny for their actions.<sup>9</sup> No issue highlights this attack as saliently as the abortion issue, a major focus of Glendon's work.<sup>10</sup> She launches the claim that the constitutional right to privacy fosters a lack of responsibility for doing the right thing, which she identifies as respecting the life of a fetus.<sup>11</sup>

The defense from Fleming and McClain is interesting. They helpfully contrast her attack with the interpretation of the Supreme Court's privacy jurisprudence put forward by one of the leading liberal legal philosophers, Professor Ronald Dworkin (pp 62–63). Dworkin has emphasized that the foundation of the individual right to privacy lies in the importance of vesting each

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<sup>9</sup> Pp 21–22, 50–52, citing Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* 15, 104–05 (Free Press 1991).

<sup>10</sup> See, for example, Glendon, *Rights Talk* at 63–66 (cited in note 9) (contrasting West German abortion law with American abortion law after *Roe v Wade*, 410 US 113 (1973)); Mary Ann Glendon, *Abortion and Divorce in Western Law* 10–62 (Harvard 1987) (offering a comprehensive comparative examination of abortion and divorce law in twenty countries).

<sup>11</sup> See, for example, Glendon, *Abortion and Divorce in Western Law* at 61 (cited in note 10) ("A law which communicates that abortion is a serious moral issue and that the fetus is entitled to protection will have a more beneficial influence on behavior and opinions, even though it permits abortion under some—even many—circumstances."). It is unclear to me why this counts as a communitarian argument, rather than a strictly majoritarian one, because it ultimately depends on the coercive power of the community in the form of state-enforced laws to prohibit and punish abortion. See also Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* 29 (Harvard 1996) (suggesting that some communitarians appeal to community to support the majoritarian premise).

individual with a sense of moral responsibility.<sup>12</sup> Thus, Glendon would allow the state to *require* certain actions, such as protecting the life of a fetus, as an exercise in moral responsibility,<sup>13</sup> while Dworkin would contend that state coercion would impermissibly *compromise* moral responsibility by taking away the individual's right to self-determination.<sup>14</sup> Both speak in the language of responsibility, but mean different things.

Fleming and McClain make a real contribution when they identify two types of responsibility, a notion at the core for both Glendon, the communitarian, and Dworkin, the liberal, and show how they talk past each other. Responsibility in Glendon's sense is responsibility to one's community, or to the common good.<sup>15</sup> This the authors call "responsibility as accountability" (p 51). Responsibility in Dworkin's sense is responsibility to make one's choices conscientiously, which the authors call "responsibility as autonomy" (p 51).<sup>16</sup> The difference between the two produces a chasm that accounts for the endlessness of a fruitless argument about whether rights do or do not implicate an element of responsibility.

Having illuminated this integral distinction between kinds of responsibility, however, Fleming and McClain go on to blur their own distinction—to the detriment of any hope of reconciliation. The response to Glendon comes in the form of a discussion of the Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v Casey*,<sup>17</sup> through the lens of responsibility (pp 53–62). On the one hand, *Casey* rested explicitly on the "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."<sup>18</sup> This is a statement grounded in autonomy, and the opinion relates this value to personal responsibility.<sup>19</sup> At the same time, however, the *Casey* opinion validated the idea that the state may try to influence a pregnant woman to encourage what it views as the

<sup>12</sup> See Ronald Dworkin, *The Great Abortion Case*, NY Rev Books 49, 51 (June 29, 1989).

<sup>13</sup> See Glendon, *Abortion and Divorce in Western Law* at 61 (cited in note 10).

<sup>14</sup> See Dworkin, *The Great Abortion Case*, NY Rev Books at 51 (cited in note 12).

<sup>15</sup> See Glendon, *Rights Talk* at 77–89 (cited in note 9).

<sup>16</sup> See Dworkin, *Freedom's Law* at 95 (cited in note 11) ("[L]eav[ing] citizens free . . . to decide as they think right . . . is what moral responsibility entails.").

<sup>17</sup> 505 US 833 (1992).

<sup>18</sup> *Id.* at 851 (plurality). Fleming and McClain quote this portion of the opinion in their book (p 54 & n 11).

<sup>19</sup> See *Casey*, 505 US at 851 (plurality) ("Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.").

morally or socially responsible exercise of her right, by informing her of “philosophic and social arguments . . . in favor of continuing the pregnancy.”<sup>20</sup> This novel element of permissible moral suasion introduces the idea of “responsibility to community” into a discussion of a right (p 1).<sup>21</sup> The opinion, in other words, employed both kinds of responsibility in reaching its compromise decision, which transformed the right to terminate a pregnancy from a fundamental right to be let alone into a liberty interest more accommodating of state regulation and influence.

Fleming and McClain praise this dual emphasis in *Casey* as a salutary “melding” of the two forms of responsibility (pp 51–52). They join Dworkin in affirming a more robust, less neutral role for the state than classic liberal paradigms allow, and they accept the *Casey* idea that government may seek to encourage responsible decision making in the exercise of the right (pp 66–68).<sup>22</sup> This mélange of the two faces of responsibility is offered up as common ground in response to Glendon’s critique (p 68). The right to privacy and a responsibility to community can exist side by side, they urge (pp 79–80).

But is this really common ground? It is true that the *Casey* approach permits greater accommodation of the responsibility to community than did its predecessor, *Roe v Wade*.<sup>23</sup> But it is still a defining feature of *Casey* and its “undue burden” test that the ultimate choice about whether to terminate a pregnancy must rest with the woman, not the state.<sup>24</sup> We can all wish for a world in which a woman listens to all counsel and influence, makes her decision free of any coercion, and chooses to continue her pregnancy. Everyone could embrace that result. But the test is what happens when she does not choose that option. We must

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<sup>20</sup> Id at 872 (plurality).

<sup>21</sup> As a matter of constitutional interpretation (as distinct from social justice), this result is made possible by giving greater weight to the state interest in protecting the life of a fetus. Thus, the analysis may be unique to the particular right involved in *Casey*, in recognition of the unique and intractable controversy at stake. It is hard to imagine, for example, that anyone in the mainstream of a modern liberal society would permit the government to seek to influence a person’s right to choose what church to attend or what to write on a picket sign.

<sup>22</sup> There are nuances that my brief exposition cannot accommodate, but I do not want to be inaccurate. Fleming and McClain believe government encouragement of reflective decision making is justified as long as it is indeed facilitating the autonomous exercise of a choice, and not in effect overwhelming that exercise (p 67). They hesitate to “embrace the idea that government encourages reflective decision making by persuading against the exercise of a protected choice” (p 67).

<sup>23</sup> 410 US 113 (1973).

<sup>24</sup> *Casey*, 505 US at 878–79 (plurality).

consider where a theory stands when she chooses to terminate her pregnancy, as *Casey* and Dworkin, in his commentary on *Casey*, require that she be allowed to do in the service of personal dignity and self-determination.<sup>25</sup> This bottom line is utterly at odds with Glendon's call for responsibility to do the right thing, defined to exclude abortion. Even though *Casey*, and with it constitutional liberalism, mitigated the formerly rigid understanding of a rights holder as insulated from all outside influences, it could not compromise on the ultimate tenet that divides liberalism from communitarianism: the denial to a state of the power to coerce a choice on a matter essential to autonomy. On that there can be no compromise.

As if to sweeten the pot of reconciliation, Fleming and McClain offer something more to the communitarians and progressives. The authors endorse a portion of Professor Robin West's position, calling for society to provide a better network of support for women in the reproductive aspects of their lives, for many important reasons, one of which is to reduce the need for abortion (pp 75–80). West, a feminist critic of liberalism, had argued that protecting the right to abortion through the courts undermines this social goal<sup>26</sup> by obscuring public responsibility, by deflecting attention and resources from the task of preventing unwanted pregnancies, and by truncating the overall “aspirational feminist vision of reproductive justice.”<sup>27</sup> While rejecting West's view that “the defense of a constitutional right to abortion in the courts . . . hinder[s] the securing of a positive reproductive justice agenda in the legislatures,” (p 78), Fleming and McClain embrace her broader concern by interpreting the idea of “responsibility as autonomy”—the foundation for the individual right to privacy—to include within it an obligation on government “to establish the material and social preconditions for women's equal citizenship,” including access to reproductive justice (p 79). Unlike West, who found the Constitution flawed precisely because it does not contain affirmative obligations on government to address such matters as reproductive justice,<sup>28</sup> Fleming and McClain “conceive[ ] the Constitution as a charter

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<sup>25</sup> See Dworkin, *Freedom's Law* at 120 (cited in note 11).

<sup>26</sup> See Robin West, *From Choice to Reproductive Justice: De-constitutionalizing Abortion Rights*, 118 Yale L J 1394, 1409–12 (2009).

<sup>27</sup> *Id.* at 1422–43.

<sup>28</sup> See Robin L. West, *Constitutional Scepticism*, 72 BU L Rev 765, 774–80 (1992).

of positive benefits imposing affirmative obligations upon government to secure the preconditions for reproductive justice” (p 80).

The laudable social aspiration reflected in this conception of the Constitution as a charter of positive benefits is nevertheless stunning as an explicit constitutional claim. The authors do not elaborate in this book on how autonomy, which has concrete and established roots in constitutional theory and precedent, gives rise to an affirmative obligation on government to provide “material and social preconditions” (p 79),<sup>29</sup> which does not. It is unclear how the obligation would be implemented.

Some kinds of accommodations to liberalism’s critics can be achieved through an interpretation of specific constitutional clauses within the interpretative space of precedent and traditional constitutional practice. In *Casey*, for example, as seen in the discussion above, the plurality’s opinion preserved the basic structure of a due process analysis by assessing the nature of the individual right at stake alongside the nature and strength of the state’s interest in limiting that right.<sup>30</sup> The element of compromise was introduced into the analysis by the plurality’s choice to place a higher value on the state’s interest in protecting a fetus than prior cases had done, and a correspondingly lower value on the woman’s interest in being left alone.<sup>31</sup> That more nuanced state interest was depicted as comprising several strands, including a more communitarian objective of seeking to influence the woman to exercise her right in the way the state prefers.<sup>32</sup> The constitutional right at issue was adjusted, accordingly,

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<sup>29</sup> These preconditions include “attention to problems such as sexual violence, other threats to women’s bodily integrity, and women’s poverty” (p 79). It is possible, but not altogether clear, that the authors intend to include in the material conditions the aspects of reproductive justice advocated by West, such as healthcare, abortion services, prenatal care, childcare, and quality public education (pp 76–79).

<sup>30</sup> See *Casey*, 505 US at 846 (plurality) (“Before viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure.”). This is not to suggest that the change it wrought was not significant, but just that, as Fleming and McClain argue in another chapter, due process analysis has never been treated as an all-or-nothing endeavor (p 239). The “undue burden” analysis introduced in *Casey*, while a significant departure from *Roe*, still bears a family resemblance to other liberty cases (pp 258–60). See Rebecca L. Brown, *The Fragmented Liberty Clause*, 41 Wm & Mary L Rev 65, 91–93 (1999) (arguing that the heart of liberty protection has always been the assessment of state reasons residing in the common good).

<sup>31</sup> See *Casey*, 505 US at 869 (plurality).

<sup>32</sup> See *id.* at 873 (plurality) (“States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning.”).



through interpretation, by means of a redistribution of weight on the scales of ordered liberty.<sup>33</sup> This effected a change in attitude, outcome, and analysis, but it was not a profound change in the way the Constitution operates.

It is a much more radical endeavor to suggest that the Constitution should be interpreted to supply a wholly different set of obligations on government than has ever been recognized before, to serve communitarian values, based on unspecified constitutional sources.<sup>34</sup> The words the authors chose are reminiscent of the language Dworkin used when he defended the position that the Constitution should be read to give meaning to government's obligation to secure the conditions of democracy.<sup>35</sup> But Dworkin's conditions of democracy clearly anticipated a negative conception: that government is precluded from treating people in certain disparaging ways.<sup>36</sup> While Dworkin may have favored a more affirmative understanding of the government's duties as a matter of social policy, he recognized that as an interpretation of the Constitution, it would not satisfy his requirement of integrity. "Even a judge who believes," he wrote on a related argument, "that abstract justice requires economic equality cannot interpret the equal protection clause as making equality of wealth . . . a constitutional requirement, because that interpretation simply does not fit American history or practice, or the rest of the Constitution."<sup>37</sup> Thus, *Ordered Liberty's* call for such a pervasive constitutional requirement in the service of autonomy seems to embark on an ambitious objective of interpreting the Constitution to be "the best it can be" (p 210), but without explaining how the proposed reading satisfies any limiting principles, such as Dworkin's notions of fit and integrity.<sup>38</sup>

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<sup>33</sup> See note 21 and accompanying text (discussing how *Casey* introduced the value of moral suasion as an aspect of the weight given to the state's interest).

<sup>34</sup> The authors make a passing reference to the Preamble (p 114) and cite to other work (p 114 n 9), in which there is a suggestion that *The Federalist* embraced a "positive constitutionalism" of strong and energetic government. Sotirios A. Barber and James E. Fleming, *Constitutional Interpretation: The Basic Questions* 37 (Oxford 2007) (emphasis omitted).

<sup>35</sup> See Dworkin, *Freedom's Law* at 17 (cited in note 11). The democratic conditions, as defended by Dworkin, require "equal status for all citizens." *Id.*

<sup>36</sup> See *id.* (offering an example of a "law provid[ing] that only members of one race were eligible for public office" as an unconstitutional compromise of duty to respect the democratic conditions).

<sup>37</sup> *Id.* at 11.

<sup>38</sup> See Ronald Dworkin, *Law's Empire* 225, 238–43 (Belknap 1986) (arguing that the law should be interpreted to be "the best constructive interpretation of the community's legal practice," as determined by the twin criteria of fit and integrity—that is, fidelity

There is a strong case to be made that the Constitution should be read to enable self-government rather than to limit it. Professor Christopher Eisgruber, for one, has forcefully defended the view that “we should regard the Constitution’s abstract provisions . . . as invitations which call upon Americans to exercise their own best judgment about moral and political principles.”<sup>39</sup> Constitutional liberalism sounds a similar note when it aspires to “protect[] important rights but not preclud[e] government from encouraging responsibility or inculcating civic virtues” (p 17). There is a gulf between not precluding government from inculcating civic virtues, however, and finding in the Constitution a *requirement* that government embark on a formative project to provide infrastructure for achieving specific benefits.<sup>40</sup> That claim, regrettably, swims against the current of constitutional tradition and thus calls out for a sustained constitutional argument, which this book does not supply.<sup>41</sup>

The ideal of reproductive justice may well have a place in a Rawlsian conception of what is needed as a framework for justice in a society.<sup>42</sup> It is plausible as a strategy for enhancing both liberty and equality in our society. But this is a place in which the crossing of domains is problematic for the authors. While Rawls’s political liberalism spoke to a conception of justice, Fleming and McClain seek to ground their constitutional liberalism

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to the past and moral correctness). The authors express an inclination to adopt this limit (pp 209–10). Some critics of Dworkin have suggested that even the limitations of fit and integrity are insufficient to corral the breadth of interpretative judgment authorized by the perfectionist account. See, for example, Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s Moral Reading of the Constitution*, 65 Fordham L Rev 1269, 1270 (1997) (professing that “fit” does not constrain the Dworkinian judge from doing what the judge thinks is right).

<sup>39</sup> Christopher L. Eisgruber, *Constitutional Self-Government* 3 (Harvard 2001).

<sup>40</sup> Robin West, whom Fleming and McClain credit with the idea for this requirement of reproductive justice, did not seek to ground it in the Constitution. Rather, she has written that the failure of the Constitution to address such positive obligations on government to protect and nurture vulnerable populations is a fatal flaw in its design. See West, 72 BU L Rev at 769 (cited in note 28).

<sup>41</sup> Two footnotes cite to Sotirios A. Barber, *Welfare and the Constitution* (Princeton 2003), for such an argument (pp 10 n 25, 76 n 108).

<sup>42</sup> Fleming and McClain’s book aspires to be an analogue to Rawls’s theory (p 3). But Rawls’s project, as I understand it, was not an apologia to American law or a theory of constitutional interpretation. See Rawls, *Political Liberalism* at 340 (cited in note 8) (emphasizing that his framework “belongs to a conception of justice,” as distinct from an account of how democracy works or the specifics of any constitutional regime). Thus, he was free to reflect on the elements of a just social order unconstrained by the realities of American practice. By grounding their claim in the Constitution, Fleming and McClain distinguish their project from that of Rawls.

in the Constitution with enforceable obligations on government (p 273). What is a forceful argument for the betterment of our social fabric does not necessarily translate to a serious claim that the Constitution can be enlisted to achieve that end.

What would such an obligation look like? Would courts enforce it? Would budgets be struck down if they did not contain funding for it? These questions are not meant to be glib. They are important to probe the possibility of reconciliation and common ground because they call into question the robustness of the compromise at issue between liberalism and communitarianism.

Recall that *Ordered Liberty* suggested this affirmative obligation on government—to provide the infrastructure for responsible reproduction—essentially as a compromise in exchange for the communitarians’ relinquishment of the state’s power to prohibit abortion. The compromise insists that liberalism must ultimately value autonomy enough to preserve the choice for the pregnant woman, but Liberalism 2.0 softens that blow by calling for a social infrastructure to educate, support, and sustain women in the childbearing and child-rearing choices that they make. This trade-off would have high stakes for the communitarians, because it preserves a right to privacy that includes the choice to terminate a pregnancy. Yet the constitutional structure that we have cannot plausibly make good on the bargain by requiring states to supply material support for reproductive justice.<sup>43</sup> If the communitarian ideal of reproductive justice is merely an aspiration, then its value to reconciliation is hard to see when the liberal ideal of autonomy is preserved by a judicially enforceable right. On this point, constitutional liberalism does not supply a genuine promise of common ground.

## II. IS THERE COMMON GROUND BETWEEN ASSOCIATIONAL FREEDOM AND EQUALITY?

The description of the next issue as “associational freedom” in tension with “equality” should raise a red flag signaling hazardous territory. Many will recall that one of the vigorous claims offered in the now-discredited defense of racial segregation in

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<sup>43</sup> See *San Antonio Independent School District v Rodriguez*, 411 US 1, 33 (1973) (“It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.”); *DeShaney v Winnebago County Department of Social Services*, 489 US 189, 196 (1989) (noting that the Due Process Clauses “generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests”).

public schools was a claim to free association grounded in the First Amendment. Few people today, liberal or not, would embrace Herbert Wechsler's endorsement of the associational rationale for public segregation.<sup>44</sup> But similar arguments still arise in the context of private associations that claim a right to constitute their groups without state interference, for the purpose of expressing their core beliefs.

The book acknowledges the tension between allowing private associations to define and compose themselves as they wish (a republican ideal) and the principle of antidiscrimination (a liberal ideal). In 1984, in *Roberts v United States Jaycees*,<sup>45</sup> the Court required the all-male civic organization to comply with a state law prohibiting gender discrimination, ordering the admission of women as members.<sup>46</sup> In 2000, in *Boy Scouts of America v Dale*,<sup>47</sup> the Court declined to require the Boy Scouts to comply with a state law prohibiting discrimination on the basis of sexual orientation and validated its exclusion of gay scouts.<sup>48</sup> Essential to the holdings was that the *Roberts* opinion rejected the organization's characterization of both its own message and the ways in which compliance would hinder that message,<sup>49</sup> while the *Dale* opinion deferred to the organization on both issues.<sup>50</sup> At the risk of oversimplifying, these cases seem at least arguably inconsistent.<sup>51</sup> Fleming and McClain endorse the *Roberts* approach, supportively calling it a "mutual adjustment" of liberties, and reject *Dale* as having given insufficient concern to equal citizenship of citizens (pp 153, 155). There are many

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<sup>44</sup> See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv L Rev 1, 34 (1959) ("[T]he question posed by state-enforced segregation is not one of discrimination at all. Its human and its constitutional dimensions lie entirely elsewhere, in the denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved.").

<sup>45</sup> 468 US 609 (1984).

<sup>46</sup> *Id.* at 621 ("[W]e conclude that the Jaycees chapters lack the distinctive characteristics that might afford constitutional protection to the decision of its members to exclude women.").

<sup>47</sup> 530 US 640 (2000).

<sup>48</sup> *Id.* at 644.

<sup>49</sup> *Roberts*, 468 US at 621, 627–28.

<sup>50</sup> *Dale*, 530 US at 649–50 (citing and quoting the Boy Scouts's mission statement, including the Scout Oath, in defining the organization's "general mission" and functioning). The dissent points out why the Boy Scouts's claim, on the facts, was no more plausible than the Jaycees's had been. See *Dale*, 530 US at 668–71 (Stevens dissenting).

<sup>51</sup> The disparate ways of valuing associational expression can perhaps be explained by the times in which they occurred: an antiwoman message was no longer socially acceptable in 1984, but an antigay message was likely still socially acceptable in 2000. I do not suggest that this is a principled distinction on the constitutional question.

reasons to agree with their ultimate conclusion, but not because common ground was achieved. Accepting *Roberts* means that a state will have the power to impose a principle of inclusion on a private organization, even when that organization claims that its core message will be compromised. This is not a “mutual adjustment” of liberties that “might secure the core or central range of application of both freedoms” (p 153). Rather, it is a decision that a norm of equality will prevail over a more pluralist aspiration of diversity in private associations. Thus, it is not clear that constitutional liberalism succeeds in “accord[ing] priority to the basic liberties while also addressing conflicts among them” (p 150). Once equality has its way, the conflicting values of associational autonomy and pluralism retain little, if any, recognizable influence.<sup>52</sup> This is a triumph of a liberal ideal, not a compromise of it.

### III. COMMON GROUND IN SHARED RESPONSIBILITY FOR EDUCATION OF CHILDREN

The book offers an interesting and helpful discussion regarding the imbuing of civil society with a more robust role than classic liberal theory permits, in cultivating virtue and promoting what the authors call “democratic and personal self-government” (p 112). They suggest a scheme that supports government’s inculcation of moral virtues linked to self-government and citizenship (including tolerance, civility, reciprocity, and cooperation), while not permitting government to promote values that belong to a particular comprehensive moral doctrine (p 116). The paradox of tolerance—must we tolerate the intolerant?—has plagued liberal theory forever.<sup>53</sup> But constitutional liberalism does not recognize the paradox: under its aegis,

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<sup>52</sup> The book offers an alternative path to the pursuit of national norms of equality and inclusiveness, through funding conditions, as addressed in the cases of *Bob Jones University v United States*, 461 US 574, 605 (1983) (upholding the denial of tax exemption to a university engaging in racially discriminatory policies), and *Christian Legal Society v Martinez*, 130 S Ct 2971, 2995 (2010) (upholding the law school’s denial of official recognition to a student group that did not accept all students). See pp 158–69. Discretionary refusal to fund institutions that do not comport with national ideals may avoid the constitutional confrontations caused by direct requirements of inclusion, as long as the refusal does not amount to a compromise of religious rights.

<sup>53</sup> See, for example, John Rawls, *A Theory of Justice* 220 (Belknap 1971) (concluding that “while an intolerant sect does not itself have title to complain of intolerance, its freedom should be restricted only when the tolerant sincerely and with reason believe that their own security and that of the institutions of liberty are in danger”); John Locke, *A Letter concerning Toleration* 49–51 (Hackett 1983) (James H. Tully, ed).

government toleration will not apply to value systems that fail the requirement of reasonableness by denying equal citizenship to women or other groups (p 117).<sup>54</sup> The overlapping consensus comprising the foundations for social institutions need not include such doctrines. But where is the common ground?

The question becomes more concrete when the conflict enters the constitutional domain, with parents seeking to withdraw their children from public education, sometimes on religious grounds. Constitutional liberalism seeks to “reconcile the dual authority of parents and schools to educate children” (p 139). This is a complicated question to which I cannot purport to do justice in its particulars and on which I learned a great deal from the book. But the ultimate resolution adds fuel to my claim regarding the elusive nature of compromise on core issues. Constitutional liberalism’s solution is that parents will be allowed to homeschool their children (pp 140–41), but in order to preserve the critical role of the state in teaching the civic virtues for citizenship, homeschooled children would be required to attend a civics curriculum, publicly designed and taught, on matters relating to equality, tolerance, liberty, and opportunity (p 142). This cleaving of a child’s education into two domains, controlled either by the family or by the government, has a feel of compromise to it. In application, however, the content of such a mandatory civics course lies exactly at the heart of what religious or conscientious objectors to public schools are seeking to be exempted from. The civics course’s indispensable principles of tolerance and equality are profoundly inconsistent with some comprehensive moral doctrines based on fundamentalist belief systems. There is no way to avoid deciding that those belief systems must yield to the liberal civic virtues.

Constitutional liberalism does what any liberal theory worth its salt must do: it departs from a requirement of government neutrality in order to foster in society the foundational principles intrinsic to a just social order, which include equality and tolerance. But when those very values are contested, a social order justified by them does not rest on common ground.

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<sup>54</sup> It seems right that tolerance should not and cannot extend to groups that practice inequality, because equality is a principle on which liberalism cannot compromise. But it does not seem accurate to speak of this as an accommodation to those fundamentalist doctrines for which inequality is a foundational tenet.

#### IV. FINDING COMMON GROUND IN JUSTIFYING MARRIAGE EQUALITY

Finally, the issue of marriage equality completes the quartet of major debates addressed by constitutional liberalism. The book takes up the very provocative challenge of the republican theorist, Professor Michael J. Sandel. As the book portrays it, Sandel's claim is that the recognition of marriage for same-sex couples cannot and should not be resolved based on value-neutral principles such as equality and autonomy (p 188). Rather, he urges, "[W]e have to think through the purpose of marriage and the virtues it honors. And this carries us onto contested moral terrain, where we can't remain neutral toward competing conceptions of the good life" (p 188).<sup>55</sup> The only way to recognize marriage for couples of the same sex, on this account, is to commit to a particular set of beliefs about marriage and find those unions to be worthy of state validation as consistent with those beliefs.

Fleming and McClain offer to assuage Sandel's criticism by suggesting that our constitutional jurisprudence and public culture have embraced both strands of argument in favor of marriage equality, those sounding in liberal neutrality and those, like Sandel's, sounding in state recognition of moral goods. The book offers examples of language in the judicial opinions recognizing marriage for same-sex couples (pp 192–97), as well as in legislative debates concerning legislation on the topic of broadening marriage, which offers both kinds of justifications for marriage equality (pp 199–203). Some statements articulate a liberal argument involving "freedom of choice and nondiscrimination"; others address the purposes and worth of same-sex relationships and their fitness for marriage within our societal understanding of the value of that institution (p 206). Common ground arises, the authors conclude, in the ability of both kinds of argument to stand side by side; constitutional liberalism embraces this coexistence and accommodates both strands of argument in its approach to the issue (pp 183, 206).

In my view, even this accommodation is again quite thin. If I understand Sandel's concern, it is not that a frank discussion of the moral meaning of marriage may *enrich* the understanding

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<sup>55</sup> The authors quote Michael J. Sandel, *Justice: What's the Right Thing to Do?* 258–60 (Farrar, Straus and Giroux 2009).

of marriage equality, but rather that it must *supplant* it.<sup>56</sup> He suggests that any use of liberal toleration arguments in discussions of sexual orientation actually demeans the intimate associations involved and works harm by avoiding engagement with their moral worth (pp 180–81).<sup>57</sup> Yet if courts were to adopt the kind of reasoning Sandel suggests, by selecting among the qualities society thinks marriage or other intimate relationships should celebrate and affirm, they would run head-on into basic liberal values by directly engaging the state in the project of resolving competing conceptions of the good.<sup>58</sup> The two conceptions of what a state may or must do, therefore, are mutually exclusive.

It is true, as the book documents, that arguments in the mode of Sandel’s “moral goods” argument do appear in many discussions of marriage equality, alongside arguments based in equality and personal choice (pp 188–90). But I would suggest that this does not indicate that our courts and legislatures have adopted any part of the perfectionist civic-republican approach advocated by Sandel. Rather, it shows that assessing the nature of a same-sex union is an essential aspect of a classic-liberal analysis under the Equal Protection Clause. Equal treatment under our doctrine is guaranteed only for those groups or individuals who are similarly situated.<sup>59</sup> In order to determine whether a couple who may not marry is similarly situated with one who may, a court must decide whether the two kinds of couples involved bear a similar relationship to the institution into which only one is permitted to enter.<sup>60</sup> Inevitably, therefore,

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<sup>56</sup> See *id.* at 253–60 (“[T]he case for same-sex marriage can’t be made on nonjudgmental grounds. It depends on a certain conception of the telos of marriage.”).

<sup>57</sup> See Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 Cal L Rev 521, 537 (1989) (arguing that mere toleration of homosexuality demeans it by “put[ting] homosexual intimacy on a par with obscenity”).

<sup>58</sup> This is different from the inquiry into whether laws are rationally related to a legitimate governmental purpose, which does not require moral analysis, as Fleming and McClain acknowledge (p 189).

<sup>59</sup> See, for example, *Tennessee v Lane*, 541 US 509, 522 (2004) (“[T]he Fourteenth Amendment[] command[s] that all persons similarly situated should be treated alike.”) (quotation marks and citation omitted). See also Geoffrey R. Stone, et al, *Constitutional Law* 501–03 (Aspen 7th ed 2013) (explaining equal treatment in terms of relevant differences).

<sup>60</sup> See, for example, *New York City Transit Authority v Beazer*, 440 US 568, 588 (1979) (upholding a rule denying methadone users employment because relevant differences render the two groups distinguishable with regard to fitness for transit authority jobs); *Massachusetts v United States Department of Health and Human Services*, 698 F Supp 2d 234, 248 (D Mass 2010) (holding that the Defense of Marriage Act, in denying



such a case requires the two sides to debate whether same-sex couples are equally suited to the status that marriage bestows. This issue will entail arguments about both marriage and same-sex relationships, in qualitative terms.

The presence of qualitative arguments about the worthiness of same-sex couples in the marriage debates is not, therefore, a sign that our courts and legislatures have adopted the moral doctrine that Sandel advocates, as the book suggests (pp 188–89), or that such doctrine is capable of reconciliation with liberalism. These qualitative considerations, indeed, are entirely consistent with liberalism’s traditional commitment to government neutrality concerning competing conceptions of virtue. They arise in our discourse because they are a necessary part of the value-neutral analysis of whether an inequality has occurred, based on whether the parties are similarly situated with respect to a law. Thus, the coexistence of these two strands of argument side by side in the discourse does not support the claim that the two inconsistent approaches required by liberalism and Sandel’s comprehensive vision have reached accommodation.

#### V. CAN WE HAVE RIGHTS AND RESPONSIBILITIES?

All four of these salient topics implicate the fundamental commitments of the liberal tradition: autonomy and equality.<sup>61</sup> The thoughtful treatment of these four issues by Fleming and McClain ultimately demonstrates important differences between what can be the subject of compromise and what cannot. Constitutional liberalism offers a different face of liberalism: a more receptive, less rigid, more responsible face, if you will. The nods that it makes to allowing a more generous approach to information, public rhetoric of responsibility, state support for productive causes and social policies that ask more of citizens, inculcation of civic virtue, and the fostering of the capacities of citizenship all suggest a new ground for public discourse, a welcome retreat from the atomistic “rights talk” of old. In those ways, the book reflects a different attitude, a more fruitful one, for liberalism. The flexibility it embraces in recognition of the

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“marriage-based benefits to same-sex married couples, though the same benefits are provided to similarly-situated heterosexual couples . . . imposes an unconstitutional condition on the receipt of federal funding”).

<sup>61</sup> See Rawls, *A Theory of Justice* at 505, 513 (cited in note 53) (arguing that a well-ordered society “allows for persons’ autonomy,” and identifying equality as “the least controversial element in the common sense idea of justice”).

virtues of some of liberalism's challengers is a good first step toward improving public debate, as illustrated by some of the examples in the book of conciliatory speeches by President Barack Obama urging responsibility and civic virtue (pp 1, 19, 34).

But when the core liberal values come head-to-head with opposing principles in a constitutional dispute, the attempt at accommodation is not as promising. The book's title demonstrates the problem. The title, *Ordered Liberty: Rights, Responsibility, and Virtues*, drew me in initially because I have long been a fan of the pithy term,<sup>62</sup> especially as refined by Justice John Marshall Harlan's elegant elaboration that constitutionally protected liberty reflects the balance that society has struck between the rights of an individual and the needs of organized society.<sup>63</sup>

But I came to realize that the book uses the term in a new way. Instead of envisioning ordered liberty as a reasoned, evolving judgment forming the boundaries between individual and state domains of determination, the book suggests a different interpretation of ordered liberty. Fleming and McClain elucidate their conception of ordered liberty through what they say it is not. It is not "liberty without virtues" (p 9). It is "not the absolutism of one liberty to the exclusion of other constitutional commitments" (p 12). It is "not liberty without responsibilities" (p 53). Hence they understand "ordered liberty" to mean the recognition of rights as themselves containing, or being limited by, obligations relating to civic virtue and responsibility to the common good. It is an understanding rooted in compromise.

This account of ordered liberty conflates the power of the state with the role of personal conscience. "Ordered liberty" has been understood by the Supreme Court to mean that the state may use coercive power to limit some rights of individuals when

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<sup>62</sup> See *Palko v Connecticut*, 302 US 319, 325 (1937) (Cardozo) (using the term "ordered liberty"). See also Rebecca L. Brown, *Liberty, the New Equality*, 77 NYU L Rev 1491, 1549 (2002) (discussing the important role of reasons in the balance of "ordered liberty"); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U Pa L Rev 1513, 1516 (1991) (exploring the relationship between structural constitutional norms and protection of liberty); Rebecca L. Brown, *The Logic of Majority Rule*, 9 U Pa J Const L 23, 42 (2006) (exploring the implications of ordered liberty's call for reasons grounded in common good as a structural protection of liberty).

<sup>63</sup> See *Poe v Ullman*, 367 US 497, 542, 554 (1961) (Harlan dissenting) (finding the state's claim of moral judgment inadequate as justification for invading an important liberty).

justified by the imperative of public order.<sup>64</sup> It means that the state sometimes may be permitted to invade the individual domain of liberty, restricting or punishing an individual's activities with justification grounded in the common good.<sup>65</sup> This analysis marks and preserves a line between the realm of liberty that is protected, on one side, and the realm that may be infringed, on the other.

Fleming and McClain's account of ordered liberty, by contrast, portrays a right that appears to *carry within it* an obligation of responsible exercise in light of the common good. Even on the "protected" side of the line where rights abide, therefore, the authors imply that an individual acts under some constraint based in responsibility. But this implication masks the conflict at the heart of the critiques of liberalism: Can the state reach across the line and compel responsible exercise of a right? I think many of liberalism's critics would say yes (or suggest that there is no line to cross). But liberals have to say no. A requirement of responsible exercise would turn a right into something that is not a right at all. It would allow order to swallow liberty.

The rights implicit in the concept of ordered liberty have not been, for the most part, viewed as absolutes. State interests are typically examined to see whether traditional notions of protected liberty may be overcome.<sup>66</sup> But the balance of ordered liberty refers to the process of determining what is protected—not to the way that a liberty, if protected, is exercised. In the context of freedom of speech, for example, the Court has been very clear that the right to speak cannot be limited by a social obligation to avoid offending an audience or degrading public discourse.<sup>67</sup> In this sense, responsibility in the exercise of rights must remain a matter of individual conscience rather than state power. It can certainly be a topic for aspiration, but not a subject of coercion.

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<sup>64</sup> See, for example, *Lochner v New York*, 198 US 45, 53 (1905) (stating that liberty is "held on such reasonable conditions as may be imposed by the governing power of the state"). While *West Coast Hotel Co v Parrish*, 300 US 379 (1937), is credited with effectively overruling *Lochner* on its specific holding, it did not repudiate the principle of ordered liberty permitting a state to curtail liberty only as necessary for the common good. Brown, 41 Wm & Mary L Rev at 70–82 (cited in note 30) (discussing cases).

<sup>65</sup> See *Palko*, 302 US at 325, overruled on other grounds by *Benton v Maryland*, 395 US 784 (1969).

<sup>66</sup> See, for example, *Palko*, 302 US at 325.

<sup>67</sup> See *Cohen v California*, 403 US 15, 25 (1971) ("[T]he State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us.").

## CONCLUSION

*Ordered Liberty* launches a formative project that urges a big change in the ways that Americans talk about rights, think about their own place in society, and receive education regarding public goods. Included in this change is a greater emphasis on our societal aspirations toward responsibility to community. The changes are informed by many sound arguments put forward by liberalism's critics. The success of the book lies in its ability to find, in our cultural and social practices, a place for increasing the value society places on the common good, and hence mitigating some of the negative consequences that may have followed from too much focus on rights and not enough on responsibilities. Therein lies a true promise of common ground in common good.

But when a system of ordered liberty moves beyond those arenas of public life in which overlapping consensus is possible, into the domain of constitutional law, in which accommodation would entail the compromise of core liberal principles, then order must take a back seat to liberty. Rights cannot be subject to communitarian or majoritarian approval; equality cannot yield to intolerance, and political status cannot depend on the tenets of contested moral belief systems. On those constitutive principles, we search in vain for common ground.