Tulsa Law Review

Volume 49
Issue 2 *Book Review*

Article 14

Winter 2013

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Recommended Citation
Robin West, *Liberal Responsibilities*, 49 Tulsa L. Rev. 393 (2013).

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LIBERAL RESPONSIBILITIES

Robin West *

COREY BRETTSCHNEIDER, WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY?: HOW DEMOCRACIES CAN PROTECT EXPRESSION AND PROMOTE EQUALITY (2012). Pp. 232. Hardcover $35.00.

JAMES E. FLEMING & LINDA C. MCCLAIN, ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES (2013). Pp. 384. Hardcover $49.95.

Corey Brettschneider's book, *When the State Speaks, What Should it Say?: How Democracies Can Protect Expression and Promote Equality*,[1] and James Fleming and Linda McClain's *Ordered Liberty: Rights, Responsibilities and Virtues*[2] share a good deal of common ground. Both books aim to defend or rehabilitate constitutional liberalism, and liberal constitutional rights in particular, against communitarian and left wing critics. Both seek to do so by focusing on various responsibilities implied or suggested by liberal rights, but which have also been somewhat obscured by them. They both see the liberal rights tradition as intrinsically worthy and as capable of justly mediating the relations between citizens and states, but they also both argue for a midway correction, in the direction of a deeper appreciation of and to some degree a wider role for the responsibilities required by liberalism of states and citizens.

Professor Brettschneider's focus is on the liberal and distinctively American constitutional right, which he generally endorses, to engage in hate speech, and he accordingly defends the right against various critics, such as Jeremy Waldron and Charles Lawrence, who criticize this right for undermining equality.[3] But Brettschneider has a good deal of sympathy for the criticism, and as a result his defense of robust First Amendment protections for hate speech moves a long way to meet it. What is missing from more traditional liberal defenses of a broad First Amendment right to engage in hateful speech, Brettschneider argues, is an

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1. COREY BRETTSCHNEIDER, WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY?: HOW DEMOCRACIES CAN PROTECT EXPRESSION AND PROMOTE EQUALITY (2012).

2. JAMES E. FLEMING & LINDA C. MCCLAIN, ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES (2013).

3. JEREMY WALDRON, THE HARM IN HATE SPEECH (2012); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (1990). *See also* CATHARINE A. MACKINNON, ONLY WORDS (1996); Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

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acknowledgement of the responsibility of the liberal state to also promote the equality that speech tends to undermine, and to do so by explicitly criticizing the content of the hateful speech that it so vigilantly protects.[4] First Amendment rights to speech cannot be faulted on the grounds that they insulate spheres within which hate groups prosper, so long as the state that protects those rights also counters the hate speech they generate with persuasive speech of its own, which both reaffirms the state's commitment to the equality and dignity of all of us, and explains the ways in which protection of even noxious and harmful speech furthers those commitments.

In a parallel fashion, Fleming and McClain articulate and then defend a general conception of "constitutional liberalism" and its core individual rights against various critics, including communitarians such as Mary Ann Glendon[5] and Michael Sandel,[6] and "minimalists" such as Cass Sunstein[7] and Jeremy Waldron,[8] who argue that for various reasons those individual rights have undermined either civic society or democratic processes or both. But they too have some sympathy for the criticism, and their defense is likewise quite different from the traditional. Unlike most defenders of liberal constitutionalism, they insist that constitutional liberalism should be explicitly committed to promoting the responsibility of citizens for formulating their own conception of the good and their own theories of justice, which in turn will jointly contribute to responsible democratic and personal self-government.[9] Constitutional liberalism does not undermine civic responsibilities, but it can and should make the grounds of its support of them far more explicit. Accordingly, for Fleming and McClain, various substantive due process rights, such as the right to abortion,[10] the right to marry and to sexual expression,[11] and to educate one's children,[12] cannot be faulted for creating virtue-free zones of reckless license, so long as it is understood, as the Court has sometimes—but fitfully—tried to do in the dozens of cases it canvases; that those rights are justified, largely or in part, by their tendency not only to protect liberty, but also to form the basis for the development of responsible citizens. These citizens, by virtue of their rights, are more capable of occupying a space in the political order in an informed and responsible way and of formulating and following through on a conception of the good that will guide their own life paths.

So, both Brettschneider, on the First Amendment, and Fleming and McClain, on (loosely) the Fourteenth Amendment, respond to critiques of those rights by invoking some essential connection between the realm of rights and the realm of responsibilities: for Brettschneider, the responsibility of the state to speak, when fun-

4. BRETTSCHNEIDER, *supra* note 1, at 3–4.
5. *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).
6. *See* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982).
7. CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA (2005).
8. Jeremy Waldron, *The Core of the Case Against Judicial Review,* 115 YALE L.J. 1346 (2006).
9. FLEMING & MCCLAIN, *supra*, note 2 at 2, 115.
10. *See generally id.*
11. *Id.* at 178-206.
12. *Id.* at 139-45.

damentally liberal values are undermined by hateful speech that the liberal state itself must protect, and for Fleming and McClain, the responsibility of individuals to formulate theories of the good and of justice to guide their public and private decisions and that, they argue, is in fact furthered, rather than undercut, by robust individual due process, privacy, and liberty rights. Both books accordingly advance our appreciation of the capacity for nuance and flexibility in liberal understandings of rights, and both, taken jointly, may signify an important shift in liberal thinking regarding rights: all three authors urge a heightened focus on responsibility, not as a critique of liberal rights, but rather, as an essential feature of them. Rights generally, and the abortion right in particular per Fleming and McClain, do not undercut personal responsibility, contra the claims of communitarian critics, nor do free speech rights, per Brettschneider, necessarily undermine equality, as argued by egalitarian critics of the overly broad First Amendment protection of hate speech, so long as the state tends to its responsibility to respond to it. Both books thus aim to defend a version of liberalism and constitutional protection of liberal values, and both would seek to amend liberalism by demanding a greater attention to, or at least a greater articulation of the responsibilities of either states or citizens implied by the very qualities of liberalism that have captured the attention of its critics.[13] We should attend to the responsibilities implied by the zones of insularity generated by individual rights, according to Fleming and McClain, and to the responsibility of the state to criticize the speech facilitated by the rights it protects, so as to bolster the equality that hate speech seeks to undermine, according to Brettschneider.

This shared ground—both books defend liberal constitutional rights by highlighting the responsibilities they entail—goes hand in hand with some common strengths but also some common limitations. Let me start with their shared strengths. Both books are refreshingly feminist: Fleming and McClain quite explicitly, and Brettschneider more implicitly, but nevertheless strongly.[14] Both recognize and even centralize the importance of the private sphere for either the equality or subordination of women and girls, and both accordingly grapple with the Constitution's, and the liberal rights tradition's, problematic valorization of that sphere. Fleming and McClain do so by seeking to better support various rights, primarily reproductive rights, that are necessary to women's equality,[15] and Brettschneider does so by recognizing the relevance of familial beliefs and child raising practices to the equal democratic position and participation of women and girls.[16] Both grapple with problems of either constitutionalism and rights or rights-lessness that arguably damage women's prospects for equality and good lives. Both attend to problems of our very private as well as our public lives that often lie at the heart of constitutionalism: the quality of our public education and the threat to it posed by homeschooling movements,[17] the tension between the privacy we not only cherish but

13. *See generally* BRETTSCHNEIDER, *supra* note 1; FLEMING & MCCLAIN, *supra* note 2.
14. *See, e.g.*, BRETTSCHNEIDER, *supra* note 1, at 11, 32, 36–37, 53–54; FLEMING & MCCLAIN, *supra* note 2, at 51-80, 98-117.
15. *See generally* FLEMING & MCCLAIN, *supra* note 2.
16. BRETTSCHNEIDER, *supra* note 1, at 53–54.
17. FLEMING & MCCLAIN, *supra* note 2 at 140-45.

need to envision and then create good lives for ourselves, and the community and state support we need to sustain those good lives but which can threaten that privacy, the quality of our private relationships and the importance of those relationships—including marriage—to our status as free and equal citizens with dignity and recognition by the state,[18] the importance of our faith and religious beliefs to our communities and selves, but with a clear-eyed recognition of the challenges those faiths and those beliefs can pose to our national and civic quest for equality and dignity for all citizens.[19] Both books seek an understanding of the Constitution's role in mediating these tensions, and in helping us collectively lean forward toward a just state, without sacrificing our private and intimate lives, rightly insulated from the pressures of state mandates and communitarian pressures to conform, and both are attuned to the very real possibilities that the Constitution and the Court most responsible for its interpretation might get it very wrong, threatening our privacy, our intimate lives, and our equality and dignity all.[20] The books jointly portend, we should hope, a turn in constitutional theory toward a frank recognition of these problems, a sensitivity to and awareness of the problematic nature of the privacy and speech we so highly value, and a willingness and desire to understand the intersection of constitutional law and aspirations with our very ordinary, private, familial lives, as well as with more public problems of statecraft. All of this collectively is a hugely welcome change in the tone as well as content of our constitutional scholarship regarding the First and Fourteenth Amendments' protections of liberty and privacy.

Now for the shared limitation, which, I am afraid, might compromise the books' interest, at least for many contemporary constitutional theorists. The limitation (if it is that) is simply that both books are "traditional" works of liberal constitutional theory; there is not a hint of postmodernism or for that matter post-anything. There is no critical deconstruction, no discussion of neo-or post-Lochnerian libertarianism, and only occasional mentions of popular, progressive, or skeptical constitutionalism. Both books deal with constitutional problems and paradoxes that emerged from the case law and debates from two or three decades back, and generally with the tools of analysis and critique from that period as well. This in itself is hardly a fault, and contributes in some ways to the books' strengths: their targets and their analysis, partly as a result of the authors' decisions to eschew some of these trends, are crystal clear. But their traditionalism also limits their reach, and for two reasons.

First, both books have a (somewhat) dated choice of both subject matter and interlocutors. The various constitutional questions, conundrums, and paradoxes that McClain, Fleming and Brettschneider address all have their genesis in debates from the 1970s, 1980s, and 1990s when liberal constitutional theory generally, and individual rights in particular, were under more sustained attack from both communitarian critics, who worried about the excessive individualism of our rights tra-

18. BRETTSCHNEIDER, *supra* note 1, at 51-64; FLEMING & MCCLAIN, *supra* note 2 at 98-100.
19. BRETTSCHNEIDER, *supra* note 1, at 52; FLEMING & MCCLAIN, *supra*, note 2 at 129-39.
20. *See generally* BRETTSCHNEIDER, *supra* note 1; FLEMING & MCCLAIN, *supra* note 2.

dition,[21] and from the left wing critical legal studies and critical race theory movements,[22] who worried about its tensions with egalitarianism, than is true today. This is of course not entirely the case. Jeremy Waldron has emerged as a prominent rights critic just in the last decade,[23] and emerging rights, such as the right to bear arms and the right to marriage, have sustained the attention of more than just a handful of prominent constitutional theorists, including plenty who are critical of one or the other or both of these newly discovered rights.[24] Nevertheless, for the most part, the attacks on the First Amendment as overbroad because it is overprotective of hate speech, and on reproductive rights as undermining of civic virtue and individual responsibility, were far more center stage twenty to thirty years ago than they are today. Those rights, while still vitally important and if anything even more politically volatile now than they were then, nevertheless, were widely viewed in those decades as posing the central questions of eighties' and nineties' constitutional scholarship: the dubious and "penumbral" origins of the abortion right, and the hidden costs, the zones of moral insularity and the political subordination of some groups by others that First Amendment rights arguably create, all under the guise of privacy and liberty.[25]

In part, but only in part, the problem is simply a matter of the particular individual rights the three authors have chosen to study: Fleming and McClain focus heavily on the rights of individuals to procure abortions (among a number of other rights, including prominently the much newer right to same sex marriage) and Brettschneider, on the right to engage in hate speech and critics of those rights. By contrast, a number of our most prominent contemporary liberal and libertarian constitutional scholars who are squarely in the individual rights tradition have taken up a quite different generation of rights, many echoing Lochnerian or neo-Lochnerian themes, including the rights of the terminally ill to die,[26] the rights of

21. GLENDON, *supra* note 5; SANDEL, *supra* note 6.

22. Mark Tushnet, *Corporations and Free Speech*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 253 (David Kairys ed., 1982); Lawrence, *supra* note 3; Matsuda, *supra* note 3; Mark Tushnet, *An Essay on Rights*, 62 Tex. L. Rev. 1363 (1984).

23. WALDRON, *supra* note 3.

24. For commentary on gun rights, see Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139 (1996); Sanford Levinson, *Arms and Constitutional Design: An Essay for Laurence Tribe*, 42 TULSA L. REV. 883 (2007); Cass R. Sunstein, *Second Amendment Minimalism:* Heller *as* Griswold, 122 HARV. L. REV. 246 (2008). For commentary on marriage rights, see William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era*, 94 CAL. L. REV. 1323 (2006); Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375 (2010).

25. On abortion, see, e.g., ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE (1996); GLENDON, *supra* note 5; Catharine MacKinnon, *Privacy v. Equality: Beyond* Roe v. Wade, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 93 (1987); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375 (1985); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991); Tushnet, *supra* note 22. On hate speech and the First Amendment, see Charles R. Lawrence III, *Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy)*, 114 YALE L.J. 1353 (2005); Lawrence, *supra* note 3; Catharine A. MacKinnon, *Pornography As Defamation and Discrimination*, 71 B.U. L. REV. 793 (1991); Matsuda, *supra* note 3; Tushnet, *supra*, note 22.

26. *See* Ronald Dworkin et al., *Assisted Suicide: The Philosophers' Brief*, N.Y. REV. OF BOOKS (Mar. 27, 1997).

parents to homeschool,[27] the rights of sick people to use medical marijuana,[28] various rejuvenated rights to the unimpeded enjoyment of property,[29] and of course, newly minted Second Amendment rights to own and use guns.[30] This turn to a new generation of rights has in turn generated new paradigms of rights (or new wine in old Lochnerian bottles) as well as plenty of critical commentary.[31] But, with the exception of McClain and Fleming's treatment of homeschooling, there is little if any attention given over in these books to this neo-Lochnerian and libertarian rights revival, or to the critical attention it has received. Even within the domain created by the individual rights most directly addressed in these books—rights to hate speech, to procure birth control and abortions, and rights to same-sex marriage—the arguments are a bit backward looking. Today, worries over the overbreadth of our First Amendment rights of individuals to speech have been to some degree eclipsed by worries about overbroad First Amendment rights of corporations to finance and control elections in the name of free speech,[32] just as worries over individual rights to abortion or birth control have given way to worries over the religious or expressive rights of institutions, such as church-related or identified hospitals and universities, to withhold coverage for such services.[33] Institutions, associations, and corporations have in effect trumped individuals as the holders of rights we care about or despair.

But the mismatch between the subject matter of these books and current controversies goes a bit deeper than the question of "which rights." Debates over individual rights generally—their legitimacy, their origins, and their fidelity to text or history, whether or not they "conflict" with each other, when liberty and equality collide, as per Brettschneider's concerns, and whether or not they plant seeds of virtue or seeds of vice, as per Fleming and McClain's—in fact, have ceded ground in our canon of constitutional dilemmas, to worries regarding an utterly paralyzed first branch of government and an overly aggressive executive branch, leading a number of scholars to doubt the wisdom not just of this or that constitutional doctrine, but of the Constitution itself, and perhaps constitutionalism as well. Should the Constitution, with its various anti-majoritarian mechanisms and the generalized disdain for democratic processes it evinces, be re-evaluated in light of Congress's inability to pass even the most straightforward laws that most of us want, and that

27. *See* Kimberly A. Yuracko, *Education off the Grid: Constitutional Constraints on Homeschooling*, 96 CAL. L. REV. 101 (2008); Rob Reich, *The Civic Perils of Homeschooling*, 59 EDUC. 56 (2002), http://www.ascd.org/publications/educational-leadership/apr02/vol59/num07/The-Civic-Perils-of-Homeschooling.aspx.

28. *See* Randy E. Barnett, *The Presumption of Liberty and the Public Interest: Medical Marijuana and Fundamental Rights*, 22 WASH. U. J.L. & POL'Y 29 (2009).

29. *See* Randy E. Barnett, *Is the Constitution Libertarian?*, 2009 CATO SUP. CT. REV. 9 (2009).

30. *See* Randy Barnett, *Commentary*, 10 SETON HALL CONST. L.J. 849 (1999); Levinson, *supra* note 24. *See also* District of Columbia v. Heller, 554 U.S. 570 (2008).

31. *See* Barnett, *supra* note 29; Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751 (2009).

32. Ronald Dworkin, *The Decision That Threatens Democracy*, N.Y. REV. OF BOOKS (May 13, 2010).

33. *See, e.g.*, Susan J. Stabile, *State Attempts to Define Religion:The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 HARV. J.L. & PUB. POL'Y 741 (2005); Katherine A. White, *Crisis of Conscience: Reconciling Religions Health Care Providers' Beliefs and Patients' Rights*, 51 STAN. L. REV. 1703 (1999).

seem essential to protect the planet, the economy, or the public's safety?[34] Is its evident constraint on our lawmaking capacities hurting our collective future more than it is propping up our individual and corporate freedoms? Should the executive branch's thirst for unnecessary wars, drone strikes, targeted assassinations, state secrets, and torture, as evidenced by both of the last two presidents from starkly opposing ideologies and parties, suggest the need for such a re-evaluation? In fact, by contrast to the first branch's present inability to do anything at all, and the executive branch's proclivity to do a great deal too much, the Court's handling of individual rights cases, while occasionally worthy of either celebration or concern, might be the least of our constitutional problems; it might be the only part of the Constitution's tripartite scheme that seems to be still, somewhat, functioning as intended, and not in terribly pernicious ways. By contrast, the problems, some of them constitutional, besetting Congress and the Executive Branch seem to be truly paradigm shifting, at least in our constitutional scholarship. Is the Constitution itself really worth defending anymore, much less celebrating, with or without the marginal changes to its individual rights doctrine of the sort Brettschneider, Fleming and McClain propose? There is virtually none of this "constitutional skepticism" in either book. All three authors operate squarely within the traditions of a robust, liberal, constitutional faith.

Historically and methodologically minded constitutional theorists have also shifted ground, and they have done so more or less against the methodological thrust of both books. Even celebrants of robust constitutional rights have increasingly shifted away from the idea of an evolving or living constitution with its penumbral rights, and in particular those penumbral rights that gave rise to the contraception and abortion cases, and have refocused their attention on historical sources, originalism, strict construction, and textualism as primary justifications of those rights,[35] leavened by, at most, a begrudging acceptance of a constitutional common law that can unquestionably shift, or shape, our received constitutional history.[36] Yet, just as there is virtually no mention of the Lochnerian revival, or of constitutional skepticism, there is little to none of this relatively new turn to originalism and textualism in either book: the arguments all sound in late twentieth-century-styled traditionally liberal constitutional theory, which presupposes an evolving and even anti-historical Constitution. Fleming and McClain are not one bit bothered by the lack of textual grounding for the abortion right or the same-sex marriage right they defend; they do not discuss it one way or the other. The arguments against the rights that do concern them, and which they treat with a great deal of respect and care, are entirely moral and not grounded in Borkean-styled complaints about fidelity to text. Brettschneider likewise shows almost no interest in the political or constitutional histories of hate speech, beyond what can be

34. *See* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION (2006); LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE (2012); Waldron, *supra* note 8; Robin L. West, *Constitutional Scepticism*, 72 B.U. L. REV. 765 (1992).

35. *See* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549 (2009); Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641 (2013).

36. *See* David Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

gleaned from canonical First Amendment cases. Arguments for the doctrines and even more so for the doctrinal changes both books propose, are grounded, loosely, in Dworkinian premises. Both books aim to make the Constitution the best it can be, given sound but evolving principles of political morality, and the constraints of past "institutional settlements" such as precedent, text and history.[37] It is, in other words, an evolving Constitution these books are expounding, with plenty of citations to John Rawls,[38] Ronald Dworkin,[39] and John Stuart Mill,[40] and a smattering of references to Nozick,[41] but far fewer to Madison, Hamilton and the Federalist Papers. This methodological choice also affects the choice of subject matter: federalism, state-national government relations, and the separation of powers loom large in contemporary originalist debates, but there is little to none of any of that in either book.

So, there is a bit of a mismatch, just in terms of subject matter, between these books and the rights, method, and general stance toward constitutionalism that are of most interest to contemporary constitutional theorists. For both reasons—the somewhat dated feel to the issues chosen and the generally celebratory stance taken toward the evolving Constitution—both books might find a more limited audience than they deserve. For better or worse, perhaps, our appetite for extended scholarly treatments of the classic individual rights "paradoxes" and conundrums that absorb these books—that liberal rights create insular and constitutionally protected zones within which liberal values are routinely attacked, or that rights of privacy intended in part to strengthen and underscore the responsibilities of citizenship might actually undermine them—is weakening.

That would, I think, be a shame. In part because the books are somewhat out of step with contemporary debates, they are more than worth attending. The general theme that unites these books—that liberal constitutionalism is a morally worthwhile project of governance, and would be all the better were its proponents and devotees to self-consciously grapple with issues of responsibilities, whether of states or citizens—is well taken. It seems sound, and important. And, there is no question but that the liberal faith that McClain and Fleming, and Brettschneider are all defending is endangered, and could use reinvigorating. Old fashioned U.S.-styled liberalism, liberal constitutionalism and liberal rights all need their defenders, not only against the proponents of hate speech, worldwide as well as domestic, and against left or communitarian critics of liberalism, and against purportedly liberal states themselves which undermine their own legitimating principles on a depressingly routine basis, but also against those of us whose attention has simply moved on.

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37. *See* RONALD DWORKIN, LAW'S EMPIRE (1986); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978).

38. BRETTSCHNEIDER, *supra* note 1, at 19, 30–31, 34–35, 39, 53–55, 59, 67–68, 73, 75–76, 108, 113, 142–43, 154–55, 158–59; FLEMING & MCCLAIN, *supra* note 2, at 107-17, 9-10, 46, 87-99, 10, 83-89, 157, 148-51, 183-90.

39. BRETTSCHNEIDER, *supra* note 1, at 20–21, 73, 75–77, 78–79; FLEMING & MCCLAIN, *supra* note 2 at 1-7, 13, 32-36, 40-43, 46-49, 50-52, 62-69, 77-78, 93, 97, 148-49, 177-78, 189, 207, 209-10, 225-27, 233-37.

40. BRETTSCHNEIDER, *supra* note 1, at 13, 42–43, 66, 69, 77–78, 93, 97, FLEMING & MCCLAIN, *supra* note 2, at 93, 31-32, 41-42, 47.

41. BRETTSCHNEIDER, *supra* note 1, at 88.

That inattention is a failure of responsibility that brings us full circle to the shared interest of both books: liberal rights' connections to liberal responsibilities. As I will discuss in my conclusion below, perhaps the greatest threat to the American liberal faith today is simply that both citizens and officials increasingly fail to attend to even minimal understandings of the responsibilities of public-regarding governance in a liberal state, whether this one or any other. The balanced and eminently sane approach all three authors of these two books take toward rights and responsibilities might at least be balm for a seriously disturbed liberal spirit. It should also, though, begin a conversation, among liberal constitutionalists and between them and their critics, that could point us toward a re-enlivened but also more responsible conception of what a liberal state requires of us all.

In the sections below, I will very briefly elaborate that theme, and seek to expand on it, in the form of friendly amendments that might not be too uncongenial to the authors' concerns. First, though, I will review and comment on each book sequentially. Both books make important contributions, and I do not want my critical commentary to undercut my appreciation of those contributions. Of the two, Fleming and McClain's book is far more exhaustive and theoretically ambitious—it attempts a wholesale reinterpretation of large swaths of constitutional doctrine—while Brettschneider's is more pointed—for the most part he sticks to one issue, that of hate speech. Brettschneider's might also, though, be the more doctrinally imaginative; the reform he suggests to our First Amendment law and theory is original and interesting. I will start with Brettschneider's book in the first section below and then move on to Fleming and McClain's.

I. LIBERTY, EQUALITY, AND STATE RESPONSIBILITIES

Corey Brettschneider's *When the State Speaks*[42] confronts a core dilemma for liberalism and indeed for liberal states: how (and whether) liberal states can respond to the existence of hateful speech, practices, and the groups that sponsor them and promote them, in a way that checks the damage the hateful speech does to underlying liberal principles of free and equal citizenship, while at the same time respecting the rights as well as the free and equal citizenship of the speakers and groups that engage in it. Brettschneider rejects both of what he considers to be the two polar responses that pervade state responses, both here and elsewhere, to this dilemma, and that virtually exhaust the scholarly treatment of the issue. Likewise, at least in the U.S. and Canada: the civil libertarian (or "neutralist" and for the most part the American claim that private speech is just that—private—and therefore of no concern or relevance to public values, public deliberation, or public law. Accordingly, the state and the larger community both simply have no interest in private speech and should refrain from sanctioning or criminalizing it in any way,[43] on one hand, and on the other, that of "militant democrats"[44] (his phrase), some feminists, and most of the European liberal democracies, who argue that private hateful

42. BRETTSCHNEIDER, *supra* note 1.
43. *Id.* at 1-3, 9.
44. *Id.* at 5.

speech has very harmful and fully intended consequences and should be banned or censored in some meaningful way to stop its noxious spread.[45]

These two poles, Brettschneider argues, veer toward one or the other of two dystopian visions of the relation of the state to its citizens: the "militant egalitarian's" view, which urges greater criminalization of hate speech, risks what he calls the "Invasive State," meaning a state overly involved in our private lives—the traditional bogeyman of civil libertarians everywhere.[46] The liberal or neutralist view, on the other hand, according to which the state is and should be fundamentally unconcerned with the content of private speech, no matter how hateful or indeed how consequentially harmful, risks what he calls the "Hateful Society," a dystopia in which all rights and liberties are vigorously protected, but hate runs like an open sewer, undercutting the reasons we have rights in the first place, and with the consequence that some groups of citizens—women, racial minorities, gay and lesbian citizens—are frequently and even routinely subjected to hateful practices and utterances.[47] The question he raises and tries to answer in the book is how we can avoid both the Hateful Society, in which rights are protected but hate runs rampant and rabid, in the private sector, with inequality spiraling out of control and a lesser regard for the equality of us all as its clear result, and the Invasive State, in which hate is checked, but the state is a far too intrusive censor into our private lives, and not just hate speech, but all speech, thought, innovation, and eccentricity are chilled, compromising the joys those deeply human activities and attributes bring.

Brettschneider's provocative suggestion is to introduce a third possibility, fully captured by his introduction and then descriptive account of what we might call (although he doesn't use the phrase) the "persuasive state." The Persuasive State, unlike the Invasive State, refrains from coercion, and thus avoids its pitfalls, but on the other hand does not deny the relevance to public values of privately held and promulgated hateful beliefs, including those promulgated within the family and within religious traditions.[48] It can thereby at least attend to, whether it can fully counter, the dangers of the Hateful Society.[49] The State's response to the holders of hateful beliefs, Brettschneider believes, should be to seek to persuade those citizens to transform, modify, or drop their hateful beliefs to whatever extent those beliefs conflict with public democratic values, notably, values of free and equal citizenship. The state should in effect counter hateful speech with the argument that hateful beliefs undercut the very values of free and equal citizenship that undergird the rights enjoyed by the holders of those beliefs themselves. Perhaps those with hateful views will be persuaded, and will drop the views. But even if not, other citizens will hear the dialogue, with the result being that the state will have been respectful of the equal rights of all, and will not have been complicit in the spread of beliefs that fundamentally undercut democracy. Indeed, the state has a moral responsibility to engage in this speech. It owes it to the victims of the hate speech it protects,

45. *Id.* at 1-3.
46. *Id.* at 10.
47. *Id.* at 10-11.
48. *Id.* at 12-19.
49. *Id.*

and to the larger project of constitutionalism and liberalism both. It is essential to the stability, fraternity, and equality of the community that the hate speech it protects seeks to undermine.

I am largely sympathetic to this project. I think it is entirely right for us to recognize the relevance of private hateful beliefs to public values, such as equality and freedom, equal respect, and due regard, and that it is entirely right as well for us to shift our focus, somewhat, from our worries concerning the overuse of the state's coercive role to the possible good a state can do when it acts in its persuasive capacity. And, I think it is right and extremely important that we shift our focus in our debates over hate speech to the state's responsibilities to respond to it, rather than individuals' rights to engage in it. It is a refreshing change of focus: what is the state's responsibility, rather than the individual's right, and what should the state say in response? Brettschneider shows us how to think of the state as a fully moral actor in this ongoing liberal project, rather than the two roles our traditional debates on this issue have articulated for it: the generator of unconstitutional laws that inhibit speech, or the sometimes overly zealous protector of individual rights to engage in it. The state is more complex than that, and can engage in multi-tasking with the best of us. One thing it can and should do, Brettschneider wisely points out, is publicly make the case for the liberty and equality for which rights exist, particularly where the speech those rights protect undermine them.[50] That insight alone, and that prescriptive suggestion for change, is a contribution to First Amendment doctrine and theory, as well as to our understanding of equality.

But there are problems, largely of coherence, that make it hard to understand the full import of Brettschneider's proposal. I will focus on three such problems, and then I will take up some more substantive objections. All of these objections are answerable, and I will suggest some ways to do so as I go.

So, on to the problems of coherence. First, it is truly difficult to understand who and what Brettschneider is talking about, when he talks about state speech, or what he could possibly envision, by suggesting that the state take up the (extremely phallic looking) microphone pictured on the front jacket cover of this book and use it. The state does, after all, always and already as they say, speak, and attempt to persuade, constantly. It is never quiet. The state speaks when it passes laws; it speaks when it justifies them in judicial decisions; it speaks when it promulgates administrative regulations and when it adjudicates those regulations; it speaks when it imposes sanctions in civil cases; it speaks when it educates children in public schools; and it speaks when it imprisons and fines and executes people. Almost all of that speech, furthermore, is "persuasive." Persuasive State speech is as present as air. Of course the state could and should use its rhetorical powers to promote liberal values of equality and freedom, equal respect, due regard, and human dignity. It already does this, obviously, but there is no reason it should not be urged to do so more, and to do so more reflectively and effectively. And, there is no reason it should not do so in the specific context of hate speech and pornography. This is what I take Brettschneider to be urging, and I support the effort.

50. *Id.* at 13-14.

It would be a much clearer proposal, though, if Brettschneider specified what sort of speechifying he has in mind. In the last chapter, he suggests doctrinal changes to our First Amendment case law that would give executive branch officials greater latitude to deny tax exemptions and deductions (as well as affirmative grants) to even purportedly religious groups that engage in hate speech.[51] That is an intriguing suggestion, and gives some content to an otherwise pretty vague suggestion: "persuasion" apparently includes the act of denying tax exemptions and withholding economic tax dollar support, and the "persuasive state" apparently includes the state that so withholds. But Brettschneider seems to have in mind more than this doctrinal change that comes late in the book and late in the argument. It would have been helpful if he would simply provide examples of the sorts of state speech he is envisioning, beyond the provision of symbolic holidays, in which the state is not already engaged. A thorough treatment of issues surrounding public education (he does give it cursory attention),[52] for example, from struggles over the content of curricula and school textbooks, to the merits and perils of unregulated homeschooling, might have been a good place to start, in putting a bit more meat on the bones of what is otherwise a somewhat empty, although aspirational, exhortation: the state should engage in more liberal moralizing. I will suggest other possibilities below. I just want to note here that the reader has to get to almost the end of the book before encountering a single example of the sort of Persuasive State speech Brettschneider is urging.

Second, there seems to be something unrealistic, and a bit naïve-sounding, about the nature of the hate speech Brettschneider seeks both to protect, through traditional First Amendment doctrine, and counter, through the persuasive efforts of the liberal state. Brettschneider writes as though that speech is largely ideological, spawned in political groups such as the KKK, private organizations such as the Jaycees, or in families that have and transmit to children overtly racist or sexist worldviews.[53] The counter to such bad ideas, Brettschneider sensibly maintains, are good ideas. What the state should do, then, about these groups with their wrong-headed and inegalitarian ideologies, is not censor them, but persuade their members that they should abandon their beliefs, at least to whatever degree they conflict with a thin and liberal conception of equal and free citizenship. Families that teach their daughters to accept a lesser and subordinate role than men,[54] and groups such as the Jaycees that teach their members to accept discriminatory membership policies, or the Boy Scouts with their homophobic refusal to acknowledge the full humanity of gay men and boys,[55] and groups such as the KKK that spread genocidal messages of hatred and contempt,[56] should not be censored. Rather, their members should be exhorted not to harbor their false beliefs. The members should in turn listen, and then change their beliefs accordingly. (It sounds a bit like Romney's "self-

51. *Id.* at 143-47.
52. *Id.* at 96-104.
53. *Id.* at 8, 72.
54. *Id.* at 54.
55. *Id.* at 130-32.
56. *Id.* at 8.

deportation" solution to the immigration problem). The state should in effect reason, and argue, not punish. If it does, it will win the argument, and that is that. The cure to bad speech is good speech, or so the state says in other contexts. The state should practice what it preaches.

There are two problems with this general conception. First, sometimes, at least, hate speech is motivated not by worked out noxious ideologies, such as a doctrinaire belief in white supremacy or male superiority, or any other set of beliefs, but rather, by, well, hate, pure and simple. Its targeted audience is not society in general, reachable through marches or rallies in the public square with signs and cross burnings, but rather a particular teenage girl, or a gay boy, or an insecure and vulnerable tween, targeted through harassing speech and images on Facebook. That harassing and harmful speech spawns not just feelings of inferiority, but self-inflicted cuttings, eating disorders, and suicides. What prompts it? Of course sometimes ideology plays a role: the harasser thinks wrongly that women, or gay boys, or black children are of lesser worth. If he or she could simply understand the wrongness of that belief the behavior would stop. But at least sometimes, and perhaps more often than not, that speech is the product of twisted psyches rather than noxious beliefs—not the sort of mindset to be changed through Persuasive State-sponsored speech. Brettschneider seems to have forgotten, or just underplayed the role of the "hate" in the hate speech he rightly deplores. Hate speech is not solely the product of wrong beliefs. It is also the product, in part, of hate.[57]

Second, and relatedly, it is hard to even know how to respond to Brettschneider's apparent insistence that it is morally incumbent upon people who hold these noxious views to change them so that they accord with the minimal decency required by liberal principles, and that the state should be engaged in the project of exhorting them to do so.[58] It is morally incumbent upon everyone who harbors these false beliefs, in other words, to listen to the state's arguments against them, and change their beliefs accordingly. Huh? Really? The families that keep their children home so as to avoid the liberalizing content of a public school education, and teach their daughters submissive and lesser roles, or the boy who torments his gay peers, or the white housewife who despises her black neighbors and lets them know it—they all, presumably, hate the liberal state and its exhortative, persuading liberal ways, at least as much or more as they hate the loosely liberal feminist and egalitarian ideas of gender and race equality the liberal state promulgates.[59] Like teenagers who are spurred on to double their consumption of cigarettes and alcohol by public health campaigns, surely illiberalists will be spurred to greater contempt for any state that tries to persuade them out of their entrenched habits of thought, feeling and child raising—habits that have at their core, not periphery, fear of and contempt for a state that preaches liberal values. It is hard to know even what is meant by the claim that the liberal state should exhort people who hate the liberal state

57. For a very different description, see DANIELLE CITRON, HATE 3.0: A CIVIL RIGHTS MOVEMENT TO COMBAT DISCRIMINATORY ONLINE HARASSMENT (forthcoming).

58. BRETTSCHNEIDER, *supra* note 1, at 88-89.

59. For an account from a judicial decision adjudicating a conflict between such a family and a public school, see Mozert v. Hawkins Cnty. Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987).

precisely because of its tendency toward exhortation of views they despise, to change those illiberal beliefs precisely because they are at odds with the liberal values at the heart of the liberal state they hate. One could say, I hate the state, because it beats up on me, so the solution to this problem is to direct the state to beat up on me some more so I will change my beliefs that a bullying state that beats up on me is something I hate? Substitute "persuades me" or "exhorts me" for "beats me up" and you get the problem. The very attempt at persuasion will underscore precisely what extreme anti-liberals find so hateful about the liberal state. It is what spurs the fringes among them to arm themselves in defense of black helicopters. Persuasive exhortatory P.C. talk by the liberal state, in other words, will backfire; just ask any teenager. There has to be another way.

So, the proposal simply would have been stronger had Brettschneider specified more carefully the kind of hate speech he is targeting, and the kinds of responses that are envisioned, when he speaks of acts of state persuasion.

Now for the substantive problems with the proposal itself: that the state's response to hate speech, contra the censorship urged by militant democrats and the blind eye turned by civil libertarians, should be to engage in various acts of persuasion. There are three separate problems that I see. The first is a general worry about the way Brettschneider has characterized the persuasive state as an alternative to his two dystopias: the Invasive State on the one hand and the Hateful Society on the other. Brettschneider's Persuasive State is a well-intentioned, completely functional, and thoroughly liberal state, not beset by public choice woes, or administrative capture, or excessive corporate and private power, or know-nothing voters, politicians and their political parties, or noxious factionalism, or sagging economies, or even external threats. It is a pretty utopian state. Of course, it is also a hypothetical and idealized construct, meant to rhetorically counter the two dystopias he portrays, and which are implied by the poles of debate he is seeking to interrupt. It is not intended to describe any actual state, liberal or otherwise. But nevertheless, there is an odd blindness in Brettschneider's project to the distinctive dystopic possibilities to which his own utopian alternative might give rise.

Bluntly, it seems to me that in addition to the two dystopias that drive Brettschneider's project —the Invasive State and the Hateful Society—he might have added a third, implied by his own proffered alternative: the Hypocritical State. Just as the Invasive State is the dystopia masked by the egalitarian's political aspirations, and the Hateful Society the dystopia implied by the civil libertarian's, so the Hypocritical State, I suggest, is the dystopia which Brettschneider's proffered alternative—a speechifying state, committed to the rhetorical project of defending equality and liberty—possibly masks, and legitimates. In my view, he should have worried about that possibility, at least a little. Sometimes, when actual liberal states speak of the values of equality, diversity, and liberty, they are doing so at the very moment they are pursuing profoundly inegalitarian, stultifying, and oppressive ends. All that egalitarian persuasion might be toward the end of distracting people from the inegalitarian acts it is undertaking; in this dystopian vision of Brettschneider's proffered alternative, "state persuasion" is more or less a form of lamp-posting. It is designed, roughly, to drive the listener crazy, by insisting the state is

doing the opposite of what it is doing at that very moment. (We could call it the "Lamp-posting State.") But Brettschneider does not worry about this possibility at all. Rather, the Persuasive State in Brettschneider's imagination utters and apparently deeply believes liberal and democratic values, particularly the value of equal and free citizenship. There is no risk of hypocrisy anywhere in sight.

But surely the Hypocritical State is a danger worth attending. There is plenty of history, and quite a bit of scholarship, on this. Sometimes the Persuasive State's egalitarian and freedom respecting rhetoric is cover for actions that are viciously inegalitarian and disrespectful—even hateful. Sometimes, to use the critical language of the 1970s and 1980s, the Persuasive State is the "legitimating state"—its equality and freedom-promoting rhetoric is a cover for deeply illiberal impulses.[60] We need look no further in our own contemporary society than the very high-minded liberal, liberty-enhancing, and thoroughly moral justifications that various state actors—Supreme Court Justices, ninth grade civics teachers, federal and state prosecutors, pro bono lawyers from prestigious private law firms, judicial opinions by the bucket-load, and academic lawyers in the field—proffer, when discussing norms of our criminal law and procedure. Juxtapose all that equality and liberty promoting rhetoric about presumptions of innocence and the dignity-protecting rights of the worst criminal defendants and how we would rather let a hundred guilty men go free than punish a single innocent—with the reality of our grotesquely dysfunctional criminal justice system, promulgated by those self-same state actors, that incarcerates more citizens per capita than some of the most ghastly illiberal and totalitarian dictatorships on the planet, and does so for the flimsiest of reasons, with wildly disproportionate impacts on black and brown citizens, and in appallingly brutal conditions of confinement. The same "state" that speaks of the dignity, equality and respect owed to criminal defendants, when justifying criminal law, imposes penalties for the possession of crack cocaine at one hundred times the harshness as possession of powder cocaine and life sentences for trivial and victimless, as well as unproven crimes, executes prisoners in the face of proffered and unexamined evidence of innocence, and does so in a way that disproportionately kills African American citizens, and targets citizens abroad for execution on hidden evidence presented in secret tribunals of their alleged complicity with terror. The Hypocritical State or the Legitimating State (or the Lamp-Posting State) legitimates all of this mayhem and random violence it inflicts with high-flying language justifying its sanctions in terms completely congenial to liberal rights; indeed, often in terms suggesting that the state violence is mandated by those liberal values. It em-

60. For discussions of the legitimating role of legal rhetoric, and particularly of rights rhetoric, from critical literature, see, e.g., Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) (legitimating function of antidiscrimination rights); Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195 (1987) (legitimating function of contract rhetoric of freedom and equality, while law in fact serves ends of the economically dominant); Morton J. Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393 (1988) (legitimating function of rights to serve propertied interests); Tushnet, *supra* note 22 (legitimating function of First Amendment rhetoric of freedom of speech and thought, while law serves corporate ends).

ploys the rhetorical mechanisms of persuasion, in other words, so as to impose coercively its mandates in ways that express its utter contempt for the very moral and liberal values it self-righteously, loudly, and repeatedly extols.

The extraordinary gap between the liberal Persuasive State and the liberal incarceral and executing state may be the largest in the criminal justice field, but it by no means resides solely there. It may, in fact, also reside in the distance between the rhetoric of equality that it deploys, and that Brettschneider wants it to deploy more loudly, and the wide berth it gives to the hate speech it tolerates. In other words, the Persuasive State of Brettschneider's imagining might just be protesting a bit too loudly. It seems to me that particularly those of us attracted to the idea of the Persuasive State, and its potential for good, need to worry about this legitimating function of the Persuasive State, and to try to find ways to counter its influence.

The second substantive problem regards the myriad purposes served in Brettschneider's book by the line drawn between the persuasive and the coercive state, or the state when it is acting in its "expressive" mode, and when it is acting in its coercive mode. The distinction is a vital one in the book; not just theoretically, but practically. It lies at the heart of the most helpful doctrinal reform Brettschneider advocates: that First Amendment law and particularly the unconstitutional conditions doctrine be redrawn, so as to unequivocally permit the state to refuse to fund groups that sponsor illiberal beliefs, and whether or not those groups do so under cover of religious dogma, through withholding either direct grants or tax exemptions and deductions. The Coercive State cannot and should not censor these beliefs. The Persuasive State, though, can and should respond to the content of the ideas it is required to protect, and one way it can respond is by refusing to assist those groups in the marketplace of ideas. This important suggestion, though, obviously depends quite heavily on the distinction, if it can be maintained, between the "Coercive State," precluded by First Amendment as well as liberal principles from censoring hateful beliefs, and the "Persuasive State," which has the freedom and responsibility to counter such speech through persuasion.[61] According to Brettschneider, "persuasion" includes, notably, the act of withholding tax exempt status, and refusals to extend grants.[62] As he notes, the Supreme Court for the most part disagrees, as do many commentators.[63] A bit more development of the meaning of "persuasion," or "coercion," or both, might have helped bridge the gap between them.

More generally, though, the distinction Brettschneider draws between the Coercive and Persuasive State, is a little too black and white, even aside from its application to the problem of tax exemptions for religious or other groups that promulgate hate. The state does many things, at least some of which are not easily categorized as clear examples of coercion or clear examples of persuasion. Tax deductions and exemptions are just one such close case; there are other borderline cases as well. The state also regulates and coordinates across vast areas of social

61. BRETTSCHNEIDER, *supra* note 1, at 13, 109.
62. *Id.* at 128-40.
63. *Id.* at 137-40.

life, all of which can be understood as either "coercion" or "persuasion" under sufficiently broad definitions of either term.

Let me just give one example of what might be an ambiguous case, and which is completely undiscussed in Brettschneider's book, but which is of direct relevance to his general thesis, and that is the state's role in administering tort law, and adjudicating tort cases. The "state" administers a system of private law, including an array of tort remedies, so that citizens can pursue, through actions for monetary damages, some measure of corrective justice when they have been wronged, without turning to the punitive, "coercive" arm of the state. The state obviously facilitates these private actions. It is also in some sense responsible for the doctrine under which those actions proceed. It is not clear, though, in Brettschneider's treatment, where this private-rights-and-private-remedies-providing function falls. Does the state's provision of tort remedies for private wrongs constitute "persuasion" or "coercion?" It truly is not clear, and it also is not clear where Brettschneider might think it falls—particularly given that he considers incentives created through tax structures or the withholding of largesse from the public purse examples of "persuasion."

It is a question, though, that is of obvious relevance to the issue that absorbs the book: the regulation, or recognition of hate speech, and the state's response to it. The distinction between the criminal law—clearly coercive—on the one hand, and regulatory or tort regimes on the other, in which the state provides the forum and spells out the remedy but private parties bring the actions, has been of vital importance to lawyers seeking to provide remedies for victims of hate speech, without encroaching on First Amendment rights.[64] As Brettschneider's overall project is somewhat aligned with theirs, at least in its goal—he too wants to figure out a way to respond to the anti-equalitarian content of hate speech without offending First Amendment guarantees—he might have looked a little more closely at some of those campaigns. So, for example, at least parts of the failed anti-pornography ordinances of the 1980s pursued by Catharine MacKinnon and Andrea Dworkin were specifically designed so as not to employ the punitive arm of the state: what was envisioned in some parts of those ordinances were civil actions for civil remedies, contemplating the imposition of monetary damages to be paid to the victims of pornography by purveyors, not punitive actions involving the criminal law and jail time. Do those actions, and the state's facilitation of them, constitute exemplars of "coercion" or "persuasion"? It seemed, at least to the backers of these ordinances, that the state's role in these actions was what Brettschneider calls persuasive, not coercive. I suspect that Brettschneider would disagree. But if so, this needs a defense. Is the state's role in facilitating private actions for the harms done by hate speech or pornography so injurious to the rights of purveyors to justify a ban on even such civil actions? This goes quite a bit further than what seems to be argued in the text, which is that criminal sanctions on hate speech would do so.

A recognition of the violations of rights arguably occasioned by criminalizing

64. *See* MacKinnon, *supra* note 25; Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).

various forms of hate speech by no means implies that a state which permits civil actions for those harms, followed by the imposition of monetary damages, also violates those rights. Rather, it looks like it requires only that the speakers internalize the harms occasioned by that speech, when the speech violates the civil rights of others, with civil rights there understood in its original and ordinary way: rights to dignity, to bodily integrity, to be free of the fear of assault in society and cyberspace both. The state provides the forum—the courthouse, court personnel, and the cause of action—such that those civil rights can be vindicated in the form of private actions. It seems to me that the state is performing a persuasive, and not a coercive function, when it acts as such. But if there is a claim to be made to the contrary, it is not spelt out in this book.

Another way to put this concern is that it is not clear where civil actions, as opposed to criminal sanctions, for hate speech and pornography would fall on Brettschneider's schematic divide of the state functions into "coercive" on the one hand and "persuasive" on the other. The state acts through common and constitutional tort law so as to inhibit or deter a wide range of speech acts involving an equally wide range of types of harms. Thus, the state defines as "tortious" various types of libel, slander, fraud, mail fraud, blackmail, perjury, assault, stalking, harassment, group defamation, and intentional infliction of emotional distress, among god knows how many others. (Some of these, of course, are also crimes.) Likewise, it defines as actionable various breaches of contract, copyright, and patent and trademark rights, virtually all of which also involve nothing or almost nothing but speech and speech acts. All of these torts and contract or copyright violations are occasioned by speech acts, and they all give rise to civil sanctions. The speech in all of these cases, like hate speech, does things, and (arguably) by so doing, causes harm. And the state's response likewise does something: the state defines torts and court rules, so as to facilitate a damage award, a punitive damages award, or a restraining order, in response to the harm all this speech causes. For the most part, when the state responds in such a way, it is facilitating a private remedy designed to require the actor to rectify the wrongs done by his actions, and to internalize those costs.

The same would be true of a (hypothetical) civil action for harms occasioned by hate speech or pornography. Yet, only with respect to such harmful speech are liberals and possibly Brettschneider (although it is not entirely clear) inclined to close the courthouse door and preclude not only criminal responses by the state, but also civil responses by harmed citizens. Why? Why is it only with respect to hate speech that the state must not permit civil recourse? Why is it only the harms occasioned by pornography or racist speech that inspire worries that any state allowing civil remedies is thereby acting coercively rather than persuasively? What is so peculiar about hate speech, and the harms it occasions, out of the vast array of torts and contract actions that turn on nothing but speech—libel, defamation, harassment, group libel, slander, blackmail, fraud, mail fraud, civil assault, emotional infliction of distress, breach of contract, trademark, copyright, perjury, plagiarism, and so on—that gives rise to the impulse to shield them with protection against a coercive state response?

More generally, the failure to define coercion, and its reach, has additional normative consequences in Brettschneider's argument. To reverse Robert Cover's insight from decades ago—that all state speech takes place on a field of violence[65]—all coercive state actions, from executions to the impositions of regulatory fines, civil sanctions, and parking tickets or taxes, also take place within a field of persuasive words. There is often coercion behind state attempts to be persuasive—think of the interactions between the pregnant woman seeking an abortion and the abortion provider required to educate the woman with respect to various attributes of the fetal life inside her—but there is also often, perhaps very often, maybe even always, persuasion behind the state's attempts to coerce. The efficacy of persuasive action requires an audience, and the state sometimes attempts to coerce attendance—think again of public education. Is it always wrong to require attendance? If not, this suggests a continuum rather than a bright line between acts of the state that are primarily persuasive, but accompanied by some measure of coercion, even if just coerced attendance, and acts of coercion accompanied by some measure of persuasion. Sometimes, the persuasion that accompanies coercive state action is just obnoxious and grating, and we'd be better off without it—just tell me what it will cost me, do not lecture me—when you are imposing a traffic fine. Sometimes, the coercion that might accompany persuasive action, however, is justified—think of the attachment of the salary that accompanies the imposition of a civil or regulatory fine, or as Brettschneider argues in some detail, the withdrawal of a tax exemption from religious views that are hateful.[66] The tax exemption, however, is not an anomaly; it is, rather, simply one example of a pervasive dynamic: Persuasive State speech accompanied by some measure of coercion. That dynamic, I think, requires more general treatment.

A final concern goes to the narrowness of Brettschneider's thesis. Why are we focused so exclusively on the role of the Persuasive State in promoting race and sex equality, rather than also on values pertaining to a fair or just distribution of resources? Should not the Persuasive State pursue, through persuasion, these liberal values as well? The paradox Brettschneider discovers of the state protecting hate speech for liberal reasons, even though the speech it protects undermines liberalism, is not limited to the context of speech and speech rights.[67] Much of the dynamic Brettschneider describes—of the back and forth between the dystopic images of an overly Invasive State on the one hand or a Hateful Society on the other—also is true in the realm of economic liberty and justice: in part for liberal sounding reasons regarding the dangers of concentrated state power and the values of individualism and entrepreneurship, we tend to let market generated outcomes lie, even where that results in massive inequalities in wealth, and hence concentrations of economic power, which in turn can squelch true individualism and liberty in the private sector.[68] Perhaps one way out of this box, as well as in the speech context, would be to

65. Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).
66. BRETTSCHNEIDER, *supra* note 1, at 161-63.
67. *Id.* at 12.
68. *Id.* at 3.

look at the role of the Persuasive State: a state that can explain its commitment to markets might go some way toward undoing the damage unregulated markets occasion, or on the other side, a state that can explain its commitment to regulating them might also bear a responsibility to explain how that regulation in fact furthers the liberties that it seemingly constrains. A shift in focus away from the pitfalls of the state's coercive role in taxing and redistributing wealth or in regulating private markets, and toward the potential of the state's persuasive role in these contexts, might yield benefits comparable to the shift in focus that Brettschneider advocates, and largely accomplishes, in the context of hate speech.

Were we to try this, however, we would face some of the problems outlined above. In addition to the invasive state and hateful society dystopias, we would also have to contend with the Inegalitarian State, and the Illiberal State, as well as the Hypocritical or Lamp-Posting State.[69] We would have to contend with the various ways in which the state acts that impact distributive justice concerns, but where the action is neither cleanly coercive nor cleanly persuasive, but some combination of both. Here, the weakness of the "coercive vs. persuasive" understanding of the state would come into sharp relief: the main way that the state affects distributive justice is through its regulatory, taxing and spending authority—all of which are viewed by some as so coercive as to be theft, and viewed by others as the paradigmatic exercise in Persuasive Statecraft. Similarly, its laws of inheritance, contract, and property rights, all of which aim to give full sway to private choice, are viewed by some, critical theorists most notably, but more generally, the political left, as so coercive as to be theft, and by others, primarily libertarians and liberals but some communitarians as well, as the heart of civil society. In all of these areas the state's acts of coercion are so intertwined with acts of persuasion that it will be hard to disentangle them—suggesting, I believe, the limits of the distinction. It might be better in this context, as well as in the context of hate speech, to look in a more granular way at the specific acts the state has taken without categorizing them as coercive or persuasive, and simply ask whether the state is saying the right things, when it speaks, as the wonderful title of Brettschneider's book suggests.[70]

II. LIBERTY, EQUALITY, AND INDIVIDUAL RESPONSIBILITIES

Jim Fleming and Linda McClain's terrific book is a generous reinterpretation of the major cases of the U.S. liberal constitutional canon, with the aim of underscoring their fit with a reconstituted liberalism that embraces some measure of communitarianism and feminism, and that distinctively requires—and nurtures—a healthy dollop of responsibility from its citizens.[71] Any number of Supreme Court authored constitutional cases, they argue, that have traditionally been held up to criticism for the ways they create virtue-free zones of insularity around the exercise of rights, do not in fact do so, and to the contrary, in important ways bolster rather than destroy civic virtue. Rights to procure abortions, for example, particularly as

69. *Id.* at 6.
70. *Id.*
71. FLEMING & MCCLAIN, *supra* note 2.

expounded in *Planned Parenthood v. Casey*,[72] do not simply grant rights to do bad things, they also promote responsible decision making around issues of life and family.[73] Parental rights to educate one's children as one sees fit, to take another example, carries in tow the responsibility for attending to their civic education, and all toward the end of ensuring the children can themselves mature into responsible citizens.[74] Those parental rights, therefore, must as a consequence be shared by the state, which must have the power as well as duty to provide a public education for all.[75] Rights of free speech and worship not only confer zones of impenetrable freedom around individuals, they also encourage individuals' responsibility for authoring their own conception of the good.[76] Virtually all such liberal rights, they argue, including the right to marry regardless of sexual orientation, rights to worship and associate as one wishes, as well as rights to be free of discrimination or abuse by some of those same associative private actors or groups, should all be understood as conferring not only a right, but also a space within which civic responsibility will be nurtured or allowed full force.[77] Conflicts between rights so understood should be resolved in ways that honor their dual function of nurturing or grounding responsibility, as well as insulating behavior in virtue-free zones of rights.[78] Rights not only do not conflict with the responsibility at the heart of citizenship, they also generally either presuppose it, or exist so as to nurture it, or allow it to flourish, among other ends.

It seems to me that this is an extremely important emendation of constitutional liberalism. First, it is the citizen, rather than simply the "individual" that is at the center of Fleming and McClain's constitutional liberalism.[79] That alone is quite a sea-change: liberal constitutionalists have in the past focused overwhelmingly on the rights of individuals, rather than the responsibilities of citizenship. Responsibilities of citizenship, by contrast, have been the subject matter of civic republicans. That there is a clear distinction between the two, though, has been their shared ground, as well as the foundation of a good deal of conventional wisdom. Thus, we all know we have civic responsibilities—to vote and to serve on juries, most notably—and we know we have individual rights—to speech, worship, nondiscrimination, and privacy. But we have tended, both in theory and likely in the way we live our lives, to think of our individual rights and our citizenship obligations as separate and often in tension. We have rights to be left alone, but obligations to participate. We have rights to speak and think and read, and to align ourselves with absolutely any political creed we wish or no political creed at all; we have responsibilities, though, to participate in a very constrained and even choreographed public dialogue over the meaning of justice and its implications for our

72. Planned Parenthood v. Casey, 505 U.S. 833 (1992).
73. FLEMING & MCCLAIN, *supra* note 2, at 50-80.
74. *Id.* at 140.
75. *Id.* at 139-45.
76. *Id.* at 146-47.
77. *Id.*
78. *Id.* at 7.
79. *See id.*

public institutions, when it comes time to vote. We have rights not to be searched, or interfered with in any way by an intrusive state, but we have obligations to stand up and be counted, at least by voting and serving on juries and when a draft is in force by registering for military service. Our rights to be left alone, basically, are seemingly in tension with our obligations to participate. Individual rights and citizens' obligations, or responsibilities, look like they are at cross-purposes. It is not surprising that one—individual rights—have been the peculiar province of liberalism, and the other—citizenship obligations—of civic republicanism, one of liberalism's most important counterweights.

Entirely to their credit, Fleming and McClain are attempting to articulate a version of constitutional liberalism that not only denies this opposition but goes further: the strongest liberal justification of individual rights, they argue, is that those rights facilitate citizens' responsibility as well as liberty.[80] The reason we have rights to be left alone is not to push us toward isolation, narcissism, or a morbid individualism, but rather, in substantial part, to push us toward a more responsible engagement with civic life.[81] Rights make us better citizens, and therefore better able to perform our duties of citizenship responsibly. Individual rights are not, then, in tension with citizenship: they are facilitative of it. The opposition of civic republicanism with liberal individualism, and the opposition of the citizen to the individual, is simply mistaken. Liberal constitutional rights serve the individual in a myriad of ways, but one such way, is by enhancing his capacity for responsible citizenship.

I would like to offer an amendment, rather than critique, of the overall project. Fleming and McClain do not say as much as perhaps they could about the actual content of citizens' responsibilities. The adult who can shoulder the responsibilities of citizenship turns out to be the *raison d'être* of a goodly number of rights. But what exactly is the nature of the responsibility that citizens bear, qua citizen? Of what does it consist? What is the responsible citizen responsible for? They give a brief account early on:

> [W]e aspire to secure the preconditions for democratic and personal self-government: first, the basic liberties that are preconditions for deliberative democracy to enable citizens to apply their capacity for a conception of justice to deliberating about and judging the justice of basic institutions and social policies as well as the common good, and second, the basic liberties that are preconditions for deliberative autonomy to enable citizens to apply their capacity for a conception of the good to deliberating about and deciding how to live their own lives.[82]

The responsibility, then, that rights promote and that citizens must possess to live good lives is the responsibility for deliberation over conceptions of justice and

80. *Id.* at 146-47.
81. *Id.* at 77.
82. *Id.* at 3-4 (emphasis omitted).

the common good, as well as over the justice of institutions and social policies, so as to be a more responsible participant in democracy, and responsibility to deliberate over the nature of the individual good, so as to responsibly decide how to live our own lives.[83] This is, as the authors say several times, "responsibility as autonomy": the responsible citizen is the citizen who is responsible for him or herself, the course of her life, and her public-regarding decisions.[84]

In my view, this sets a peculiarly low bar: the responsibilities of citizenship that are seemingly protected or implied by the individual rights they canvas are not particularly demanding. The responsible citizen must formulate a conception of the good life, so that he might better lead one, and then a theory of justice and a theory of the "common good," so that he might sensibly vote. That is basically it. He is not responsible for actually promoting the common good, or any part of it, or justice, or just institutions; rather, he is responsible for formulating some conception of all of that so as to better participate in voting and public debate. Constitutional liberalism itself imposes no such obligations. He need not develop a sense of responsibility for the well being of his fellow citizens, beyond what might be required by whatever conception of justice he embraces. He need not shoulder any obligation or feel any responsibility for the shared fate of his community or neighborhood. He need bear no responsibility for subsequent generations or for the fates of far-flung peoples. He needs to be able to articulate some conception of justice, but not any particular conception that will render him minimally responsible for anyone's well-being but his own. The responsibility he will develop, and the responsibility that liberal rights will nurture, is his sense of ownership of his own conception of the good, of some view of justice that can dictate his public choices, and of responsibility for his own life and well being. This is an example, and an implication of the "responsibility as autonomy" version of responsibility that Fleming and McClain attribute to liberalism, and which they embrace.[85] It does not go beyond that. The liberal citizen has responsibilities as well as rights, but those responsibilities do not include responsibility for the collective decisions of his state, nation, or community. He need develop no sense of responsibility for the impact of his life or decisions on his fellow citizens.

It seems to me that this sets a low bar; it is only barely higher than the rock bottom responsibility of the individual rights-bearer, as described, and decried, by liberalism's critics.[86] I think it is too low, even by, particularly by, liberalism's own lights. I would think that in a liberal society, and particularly in a liberal constitutional society, citizens distinctively share in the project of sovereignty. The essence of constitutionalism, as we are so often reminded, is that "We the People" constitute the state: we authored its Constitution, we own its institutions of governance, and if so, then we are therefore in some measure responsible for both its machinations and its outcomes, at least in our capacities as citizens, rather than stand in a down-

83. *Id.* at 114-15.
84. *Id.* at 63-65, 111-15.
85. *Id.* at 40-79.
86. *Id.* at 1.

ward hierarchic relation to it.[87] What does that, in turn, imply, regarding our responsibilities? Well—We the People created the Constitution which in turn creates a government, and at least pursuant to that Constitution's Preamble, the government exists to promote the "general welfare."[88] Does not the citizen, then, have an obligation to do likewise? And if that is fair, then the citizen should share in the responsibilities not only of voters called on to exercise judgment, and of individuals to decide for themselves how to live, but for the full array of the responsibility of a sovereign to enhance the community's general well-being, albeit, for each such citizen, only in small measure. If citizens in liberal democracies share in sovereignty, and hence in the responsibilities of the sovereign, then perhaps it should be part of the work of constitutional liberalism to spell out in greater detail than is done in this book what that relationship might be, and what those obligations entail.

Let me make some suggestions to make a little clearer what I have in mind. What are the state's responsibilities, in a liberal constitutional state, and what does it suggest of citizens' responsibilities, if citizens share in them? Perhaps, if Brettschneider is right, the state has the responsibility to respond to hate speech with persuasion, and if so, perhaps citizens have responsibilities to do so as well.[89] But surely there are other responsibilities. A good "sovereign" in any form of government, but certainly including a liberal one, has a duty to care for his or its subjects in various welfare-enhancing ways—to protect them against violence, for example, both internal and external, as suggested by our own Constitution's Equal Protection Clause and the various Civil Rights Acts that clause was intended to ground, but also, and more generally, to promote their well-being. A citizen, then, in a liberal state in which the sovereign and the people are one and the same, might also share in the duty to care, even if only on occasion and in small measure, for his or her co-citizens. Each citizen in a liberal state, in other words, might have a fiduciary—like sovereign relation to every other. This element—a responsibility to care for co-citizens—seems to me to be missing from Fleming and McClain's account, but I think it would fit within it quite naturally.

A citizen in a constitutionally liberal state, in which we the people constituted the state itself in order to enhance public well-being, has a responsibility not only to vote and deliberate, but also to support public institutions that in turn protect all citizens, including, notably, the police force and the military.[90] Such a citizen might then have a responsibility, stemming from citizenship, to turn to the community's police for protection against assault, and forego "self-help" and one's own weaponry, just as the individual may have a right to the protection against violence the state is obligated to provide. Likewise, a citizen in a liberal constitutional state might have a responsibility to participate in some way in the defense of one's country. A citizen in such a state may have a positive moral and political (as well as legal) duty to pay his or her fair share of taxes: that citizen-sovereign has a duty to pro-

87. *Id.* at 9-10.
88. *Id.*
89. BRETTSCHNEIDER, *supra* note 1.
90. FLEMING & MCCLAIN, *supra* note 2, at 114-15.

vide the goods necessary for the general common good, the cost of which is covered by the public purse. A citizen in a liberal state might also have a responsibility to support public education—to help defray the costs of educating all of our children, because their future is part of our responsibility—as well as to support other fora of public participation, such as libraries and museums, no less than public hearings and trials. Those public and participatory institutions promote the general welfare, which each of us is responsible for nurturing. It might not be solely a matter of deliberating jointly regarding the content of justice or the common good. It is also a matter of caring for each other in our citizen-sovereign capacity, and then providing support, through taxes, volunteer labor, or both, of those institutions and goods and provisions that increase the general well-being of our neighbors.

Fleming and McClain recognize, and argue for, the responsibility of the "state" to do much of this. The Constitution they defend distinctively consists of positive as well as negative rights: citizens have positive rights to various state provided goods, such as education and defense of the public against outside threats, and therefore, of positive duties, as well as rights, incumbent upon the state to provide those goods.[91] And, their book is overwhelmingly devoted to the thesis that individual citizens in liberally constitutional states have responsibilities that follow from their various rights.[92] What they do not do, though, is draw the inference that the citizen therefore shares in the responsibilities of the state to provide for the various goods, to which individuals have positive rights. These are what I would call the positive responsibilities of the sovereign citizen.

And why do they not? One reason might be simply that the citizen, in Fleming and McClain's argument, like the "individual" in more typical treatments of constitutional liberalism, is always opposed to, or contrasted with, or in some other relation to, "the state," or "the government," or sometimes to "the community." The citizen, in Fleming and McClain's treatment, has rights, both negative rights against the state and some positive rights to something from the state, and has responsibilities for formulating a theory of justice with which to deliberate about the justice of public institutions so as to inform his voting, and the responsibility to formulate his own conception of the good life.[93] The state, in turn, has responsibilities to foster those capacities in the citizen and has duties to provide goods to which the citizen has positive rights.[94] But the state and the citizen remain entirely separate entities. The state creates the conditions for liberalism, as well as the institutions that ensure and constitute it.

It seems to me this is a misstep. An explicit recognition of the citizen's sovereignty, and the responsibilities such a citizen has by virtue of his or her sovereignty, might sharpen the conflict between Fleming and McClain's soft perfectionism, or more generally, their communitarianism, and theories of liberalism that are indeed more insulating of individual freedom and action than theirs. Liberal individualism

91. *Id.*
92. *Id.*
93. *Id.* at 6-7.
94. *Id.* at 7.

does not have a way to speak of the sovereign responsibilities of the citizen. As a result, even if rights in a liberal individualist state do provide space for the development of various modes of individual responsibility, sovereign responsibility—the responsibility to care in a sovereign way for one's co-citizens—is not included; rather, the individual has a responsibility, at most, to prepare for his or her occasional role as voter, but the individual is nevertheless apart from and different from the government that recognizes the individual's rights. In a truly liberal state, however, or at least in a truly liberal state that has embraced Fleming and McClain's soft communitarianism and feminism, as well as their liberal regard for individual liberty, the citizen is constitutive of the state and of the government, not apart from it. She or he is responsible, then, in small measure, and only on occasion, but nevertheless shoulders some responsibility, for the well-being, the equal education, the equal opportunity, and the safety and security as well as the conditions of liberty, of all.

CONCLUSION

These books are both defenses of liberal rights, but they are defenses of a very particular sort: they both embrace, rather than resist, the moral claims at the core of the rights' critics' case against the various rights being defended. Brettschneider agrees with First Amendment critics that the content of hate speech is of relevance to public justifications of democracy, and that accordingly the state cannot simply ignore it.[95] Fleming and McClain agree with Glendon that the virtues matter, and with a range of critics, including Sandel and Sunstein and others, that democratic participation of citizens matters as well.[96] Both books then go on to resist the critics' conclusions: that abortion should therefore be criminalized, at least more than it is now, so as to further virtue, or that protection of individual rights should be cut back so as to ensure greater democratic participation, or that the First Amendment should be trimmed down in size to permit greater censorship of the speech that undercuts liberal values. Both do so, largely, by embracing a larger role for responsibility than that typically advanced by more traditional defenders of liberal values: the responsibility of the liberal state to counter noxious hate speech, and the responsibility entailed by rights of each citizen to formulate a vision of the good to guide his own life, and a conception of justice and of the common good to inform her decisions at the voting box.

Let me just note by conclusion that both could have gone further. Brettschneider could have asked whether the responsibility of states to respond to hate speech persuasively might include the responsibility to open the courthouse doors to private actions for compensation for the harms this wrongful conduct causes. This would enhance, presumably, the responsibility of citizens who engage in such speech for the harms they cause, and the responsibility of victims for ownership of the means of seeking recompense, well shy of petitioning the state to behave in a censorial way on their behalf. Tort law enhances responsibility in all three ways:

95. BRETTSCHNEIDER, *supra* note 1.
96. *See* GLENDON, *supra* note 5; SANDEL, *supra* note 6; SUNSTEIN, *supra* note 7.

the responsibility of the tortfeasor is enhanced if he or she is liable for harms caused, the responsibility of the victim is enhanced if he or she is given authorship of the private action that can generate a remedy, and the responsibility of the state is enhanced, if it persuasively authorizes the use of the courts, and the common law, toward these ends. It strikes me as a possibility that deserved at least a mention. The responsibility deficit in this field extends not only to state actors who fail to seize the opportunity to put forth egalitarian rhetoric. It also extends to private actors, individuals and corporations both, who are shielded from reckoning, and compensating, for the harms done by virtue of the speech acts they pursue.

Fleming and McClain's extremely promising and even inspirational reinterpretation of the liberal constitutional canon also, I think, suggests untaken paths that might deepen, and broaden the project. The rights they interpret, and defend, open the door for individual authorship of conceptions of the good and of justice, and all toward the end not only of permitting individuals to steer clear of all involvement with the state, but rather, of enhancing the individual's performance of duties of citizenship. Perhaps the additional content I suggest is missing from their books is a project for another day, or, as they suggest in a response to a version of this critique that I presented on-line, a project best understood as sounding in "political theory" rather than "constitutional theory." I'm not sure, though, that the fields should be so separated, or that they could be. What are the responsibilities of the citizen, in a liberal state, *qua* citizen? Surely they are different than they would be in a state that does not so distinctively share sovereignty, as well as rights, with its citizens. A citizen who partakes of the responsibilities of sovereignty, as well as the rights of individualism, presumably faces enhanced duties. What are they? Are they a part of the constitutional scheme? If the constitution articulates and protects rights, and the point of those rights is in part to enhance democratic participation rather than guarantee our rights to steer clear of it, then should not our constitutional theory, as well as our Constitution, at least point the way toward an understanding of what those duties might consist?

In other words, I sense a missed opportunity. We are facing, at least in the first two decades of this century but with no clear end in sight, a deficit on the side of sovereign and citizen responsibilities that truly staggers the imagination: we elect legislators that cannot or will not legislate, we engage in rites of citizenship, such as voting, with no regard for the public or common good, rather than individual gain, we overly privatize our children's schooling, increasingly our police forces, and of course most notoriously our public health, to the point of starving the public institutions charged with providing those goods. Furthermore, we now grant quasi-individual rights of speech and participation to extremely powerful corporate and associational entities who have absolutely no correlate sovereign responsibility to promote the common good or the justice of governmental institutions. This too contributes to the responsibility deficit. As a consequence of all of this we have underfunded schools, under-policed neighborhoods even while the prisons are overpopulated and citizens are over-stopped and frisked, little to no decent public health care, a surfeit of irresponsible corporate action and a system of private law that cannot seem to rise to the occasion to reverse that trend, an under-cared for dis-

eased planet, and an executive branch that conducts wars that are insufficiently scrutinized by journalists as well as watchdog congressional committees. If that is right, and I suspect that Fleming and McClain agree that it is, and if the Constitution, under their interpretation, requires of individuals and citizens some measure of responsibility for the good and the quality of our justice, then surely we have a problem of constitutional, and not just political dimension. Citizens, as sovereigns, as well as all of those corporations, associations, unions, and employers who increasingly reap the benefits of their status as newly discovered "individuals," are shirking those public responsibilities. The results, as Mary Ann Glendon, Michael Sandel, and other communitarians and civic republicans warned might happen some time ago, are indeed, in part, an impoverished public sphere, an undereducated population, a frayed social net, and a dangerously polluted planet.[97] The result is also, if Fleming and McClain are right about the core meaning of the United States Constitution, a compromised and denuded constitutional life. We have neglected our own constitutional tradition, no less than our cherished public and private rights, as we neglect the very public and other-regarding responsibilities of citizenship.

97. *See* GLENDON, *supra* note 5; SANDEL, *supra* note 6.