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Reconstructing Liberty

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RECONSTRUCTING LIBERTY

ROBIN WEST*

INTRODUCTION

It is commonly and rightly understood in this country that our constitutional system ensures, or seeks to ensure, that individuals are accorded the greatest degree of personal, political, social, and economic liberty possible, consistent with a like amount of liberty given to others, the duty and right of the community to establish the conditions for a moral and secure collective life, and the responsibility of the state to provide for the common defense of the community against outside aggression. Our distinctive cultural and constitutional commitment to individual liberty places very real restraints on what our elected representatives can do, even when they are acting in what all of us, or most of us, would consider our collective best interest. For example, we cannot outlaw marches by the Ku Klux Klan,1 or the burning of flags by political extremists,2 or the anti-Semitic, racist, or hateful speech of incendiary and potentially dangerous bigoted zealots.3 Nor can we simply outlaw those practices of religious sects that may have deleterious effects on the members, such as the refusal of certain Amish sects in the Eastern United States to allow

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their children to receive a public education past the eighth grade, the explicit exclusion (until recently) of blacks from positions of influence in the Mormon Church, or the continuing exclusion of women from positions of power, prestige, and influence in our dominant, mainstream, Protestant, Catholic, and Judaic faiths. We may believe correctly that a full civic education for every individual is not only desirable for its own sake but is an absolute prerequisite for meaningful participation in our shared political life. We may believe that racist speech is antithetical to the racial tolerance necessary to our continued existence as a pluralistic society, that flag-burning communicates no message worth hearing, and that women and blacks are entitled to the opportunity to aspire to positions of full participation and responsibility in religious life. Nevertheless, we are precluded from legislating in a way that would put the weight of the law behind these values because to do so ostensibly would do great violence to something we hold even more dear: the right and responsibility of the individual to think, speak, and act autonomously in matters of religious, political, and social life—to reach one's convictions on one's own and for oneself, unfettered by the moral dictates of the state, even where those dictates are benign and wise.

In constitutional discourse, this complex aspiration is often captured by the phrase "ordered liberty." The first thing to note about this aspiration of ordered liberty is that it is a relatively modern and distinctively liberal interpretation of our constitutional heritage. Thus, although Justice Cardozo coined the phrase "ordered liberty" in the 1930s, our modern understanding of ordered liberty protected by the Constitution came to full fruition with the liberty-expanding cases of the liberal Warren Court era. Quite possibly it received its most definitive formulation in the 1960s case Poe v. Ullman. Dissenting in Poe, Justice Harlan wrote:

4. See Wisconsin v. Yoder, 406 U.S. 205 (1972). In Yoder, after balancing the state's interest in education against impingement on fundamental right of Amish to raise children in manner consistent with religious precepts, the Court held unconstitutional a parent's conviction for refusing to send a child to a public school past the eighth grade. Id. at 234.

The Rehnquist Court, however, may be moving away from the general principle cited in the text. See Employment Div. v. Smith, 494 U.S. 872 (1990) (Oregon statute criminalizing nonrecreational drug use held not to infringe First Amendment rights of Native American Church members absent showing of specific intent to burden the minority religion).

5. The phrase apparently originated in Justice Cardozo's majority opinion Palko v. Connecticut, 302 U.S. 319 (1937). In Palko, the Court held that the kind of double jeopardy risked by a state statute permitting the state to appeal criminal cases (1) did not "violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,'" id. at 328 (citing Hebert v. Louisiana, 272 U.S. 312, 316 (1926)); (2) was not "of the very essence of a scheme of ordered liberty," id. at 325; and (3) was not unconstitutional. Id.

6. Id. at 325.

Implicit in the concept of ordered liberty are] those rights "which are . . . fundamental; which belong . . . to the citizens of all free governments" . . . for "the purposes [of securing] which men enter into society" . . . .

Due process [which protects such ordered liberty] has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . .

. . . [T]he liberty guaranteed by the Due Process Clause . . . is not a series of isolated points [represented by the Bill of Rights] . . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.9

To paraphrase a bit, our modern understanding of ordered liberty implies that the state may not interfere with the personal or individual decisions that are most fundamental to a free life or with those liberties the protection of which is what prompts individuals—or would prompt individuals if given the explicit option—to enter civic society in the first place. The driving idea behind this notion of ordered liberty is that the protection of those liberties by the state against its own tendency to intrude in the name of some shared political end is of a higher order or of greater importance to civic life than any other conceivable and temporal state goal. Which particular liberties we view as fundamental and hence requiring this constitutional protection against even wise and benign state regulation is, of course, a subject of deep and profound disagreement. There is, however, a remarkably broad consensus in our contemporary legal culture and in our national community generally about the quite modern and quite liberal idea or aspiration of ordered liberty: that there are some liberties, whatever they may be, so essential to an autonomous life that they must be kept free of state control.

In my comments, I will be largely critical of this understanding of ordered liberty, which I occasionally will call the "modern" or "liberal" interpretation of our constitutional heritage. I want to make two objections to this concept of liberty, one political and one historical. The political objection is that the modern conception of ordered liberty is a largely empty promise for women. My claim, very briefly, will be that even the ideal expressed by this conception of ordered liberty—to say nothing of the actual practices it protects—

is skewed against women in a significant manner. The historical objection is that the liberal conception of liberty is also a cramped, inaccurate understanding of our constitutional history. I will conclude by arguing that we could fundamentally reconceive liberty in a more generous and explicitly feminist way without doing violence to either liberalism or to the document we have inherited.

Before I embark on the main project, however, one preliminary comment is in order. I want to emphasize at the outset what I am not doing. By embracing a critical posture toward the generally liberal concept of ordered liberty so eloquently spelled out by Justice Harlan above and by advocating in its stead a quite different conception, I am not endorsing, and fervently hope not to be understood as endorsing, the conservative critique of ordered liberty presently being urged in a number of opinions by Justice Antonin Scalia of the United States Supreme Court.\footnote{9. See Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991); Michael H. v. Gerald D., 491 U.S. 110 (1989). In both cases, Justice Scalia argues that the liberty protected by substantive due process should be limited to those liberties historically and traditionally protected against precipitous majoritarian abridgment.} Furthermore, I do not mean to embrace the very different conception of that ideal being developed in a disturbingly large and growing number of recent Supreme Court decisions.\footnote{10. See, e.g., Rust v. Sullivan, 111 S. Ct. 1759 (1991) (regulation forbidding federally funded clinics to counsel regarding abortion does not violate constitutional right of privacy or free speech); Hodgson v. Minnesota, 110 S. Ct. 2926 (1990) (state statute requiring notice to both parents regarding abortion request by minors held constitutional if accompanied by judicial bypass); Employment Div. v. Smith, 494 U.S. 872 (1990) (state statute criminalizing nonrecreational drug use does not violate First Amendment rights of Native American Church members); Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (state statutes regulating abortion held constitutional; \textit{Roe v. Wade} trimester scheme explicitly questioned and arguably overruled); Bowers v. Hardwick, 478 U.S. 186 (1986) (statute criminalizing homosexual or heterosexual sodomy does not violate constitutional norms of privacy).} My general aim is to argue that the liberal understanding of ordered liberty articulated by Justices Cardozo and Harlan and given full meaning by the liberty-expanding cases of the Warren Court era is unduly cramped and ungenerous. It does not go far enough to do what it purports to do on its own terms, which is to protect the autonomy and liberty of individuals. Specifically, it does not protect the autonomy and liberty of women.

Justice Scalia’s critique is quite the opposite.\footnote{11. According to Justice Scalia, the most important things the Court should protect in the name of the liberty protected by the due process clause of the Fourteenth Amendment are not the private decisions that occur in the spheres of life necessary to the preservation of true individual autonomy, but rather, the decisions or spheres of life that historically and traditionally have been understood as insulated against state encroachment. \textit{See Haslip}, 111 S. Ct. at 1032; \textit{Michael H.}, 491 U.S. at 100. It should be apparent at once that this is a far narrower
clearly believes that the liberal understanding of ordered liberty as tied to the fundamental needs and interests of the ideally autonomous individual is too generous toward the individual. He believes that it has unduly limited the sphere of legitimate state control of individual liberty and privacy and has granted the individual too much freedom vis-à-vis the community and state within which the individual must live and be a part. Accordingly, Justice Scalia and his conservative colleagues want to shrink the sphere of ordered liberty so as to guarantee less liberty and provide more order. By contrast, I would like to see us expand that sphere. Unlike Justice Scalia’s attack, my critique of the liberal understanding of ordered liberty is decidedly friendly.

As the center of power on the Court shifts from the liberal bloc of the Warren-Burger years to the conservative bloc of the Rehnquist-Scalia years, it becomes less clear, of course, what role friendly critiques such as the one I intend to offer are to play in our constitutional conversations. We are at this moment occupying an
ambiguous historical moment with regard to very basic constitutional norms. It is not clear whether the liberal understanding of ordered liberty briefly spelled out above will survive the conservative revolution on the Court presently underway. Should Justice Scalia’s reformulation of ordered liberty—according to which the Constitution protects, in the name of liberty, the traditions of our collective past rather than the decisions of an ideally autonomous and individual life—prove successful, then so-called friendly critiques of the liberal understanding of ordered liberty may become, in a constitutional sense, simply beside the point.

On the other hand, if the liberal understanding of ordered liberty does survive, then it is imperative that we criticize it and try to improve upon it. What I am calling the liberal conception of ordered liberty does still dominate constitutional discussion, interpretation, and doctrine. It is still the ruling doctrine and is still a fundamental part of our constitutional law. It should go without saying (although in this time of hyper-patriotism it unfortunately often does not) that we best honor the Constitution and the law we create under it not by blindly revering its doctrines and certainly not by pledging our loyalty to its present form, but by interpreting it, struggling with it, criticizing it, setting its goals against itself, and forcing it and us to be true to our noblest selves. To the extent that the concept of ordered liberty elaborated by the liberal Court during the Warren Court years is still a part of the law that governs us, we should subject it to criticism so as to improve upon it, the principles it articulates, and the societal practices it governs.

Even if the conservative Court succeeds in replacing the liberal aspiration of ordered liberty honored by the Warren Court with the very different set of conservative aspirations urged by Justice Scalia, friendly critiques of the liberal concept of ordered liberty are still important to make and hear. The aspiration of ordered liberty imperfectly implemented by the great liberal decisions of the Warren Court is not only a constitutional aspiration, important as constitutionalism may be, but also a cornerstone of modern liberal theory. As a part of the political theory and of the utopian dream we call liberalism, a dream that predates and heavily informs our constitutional ideas and practices, it behooves us to “get it right.” We should strive to make our conception of ordered liberty the best it can be, even if the liberalism of which it is a part survives as only a dissident voice, rather than a living part, of our positive constitutional law.

I. Ordered Liberty

The liberal and relatively modern conception of ordered liberty I want to address has at least two salient features. First, the regime of ordered liberty to which we aspire is, to use Isaiah Berlin’s famous
formulation, a regime of negative rather than positive liberty.\textsuperscript{12} It is liberty or freedom from, not liberty or freedom to, which the Bill of Rights protects. When we speak of ordered liberty, we speak of the individual's liberty or freedom from invasion, intrusion, meddling, or over-regulation rather than the positive liberty or freedom to live a particular way, to attain one's full potential, actualize one's inner nature, or even govern oneself in a well-run democratic or majoritarian system.\textsuperscript{13} We generally are not concerned, in our constitutional aspiration to ordered liberty, with the freedom that comes from being well-fed, clothed, sheltered, educated, or actively participating in the laws that govern us.\textsuperscript{14} We are concerned instead with the freedom to be ourselves within some defined sphere—the freedom to make our own decisions, think our own thoughts, worship our own deities, and choose our own way of life within some sphere the boundaries of which admittedly are not clearly discernible but which are absolutely inviolable once drawn. We are concerned with the right to be left alone\textsuperscript{15} and not with the right to any particular way to be. Where those boundaries within which we have the right to be left alone are to be drawn will be and must be a function of our known human nature and, as such, will be debated endlessly. That the boundaries must be drawn somewhere, however, is the very essence of the liberal interpretation of our Constitution as well as, perhaps, the very essence of modern liberalism. The political philosopher Isaiah Berlin describes negative liberty in this way:

[S]ome portion of human existence must remain independent of the sphere of social control. To invade that preserve, however small, would be despotism. . . . We must preserve a minimum area of personal freedom if we are not to "degrade or deny our nature". . . . What then must the minimum be? That which a man cannot give up without offending against the essence of his human nature. What is this essence? What are the standards which it entails? This has been, and perhaps always will be, a matter of infinite debate. But whatever the principle in terms of which the area of non-interference is to be drawn, whether it is that of natural


\textsuperscript{13} Id. at 121-22.


\textsuperscript{15} Samuel Warren and Louis Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).
law or natural rights, or of utility or the pronouncement of a
categorical imperative, or the sanctity of the social contract, . . .
liberty in this sense means liberty from; absence of interference
beyond the shifting, but always recognizable, frontier. 16

With only a few exceptions, most notably the right to vote
guaranteed by the Fifteenth Amendment, the ordered liberty that the
Constitution protects, according to the modern conception, is our
negative liberty to be left alone and not our positive liberty to food,
shelter, a job or an income, or to a fulfilled, prosperous, meaningful,
and self-governed life. The constitutional preference for negative over
positive liberty is captured by the oft-made claim that the Constitution
itself is a negative one. The Constitution, it is said, protects our
negative rights to be free from intrusion instead of our positive rights
to a positively free, active, involved, civic, or healthy existence. The
Constitution at least according to its modern interpreters, is a shield
of protection; it is not a sword of entitlement.

The second feature of the modern conception of ordered liberty
has its origins not in liberal theory, but in constitutional doctrine.
By ordered liberty, we aspire to a regime that respects the negative
freedom of the individual, and more specifically, to a regime that
respects the negative freedom of the individual from undue inter­
meddling or interference from one and only one source—the state. 17

16. BERLIN, supra note 12, at 126-27. Although it is a common belief that
negative liberty and positive liberty are two sides of the same coin or in some way
are correlated with each other, this need not be the case, as Berlin tried to show in
his famous essay. Id. at 131. A society can be rich in one kind of liberty but poor
in the other. For example, as individual citizens, we might enjoy a great deal of
negative freedom such as the right to speak, worship, or be free of arbitrary arrest
even though we live in a virtual dictatorship. A dictator may decide in the interest
of stability or for relatively more benign reasons to grant citizens a broad sphere
of inviolable freedom within which they may do as they please, even though they
have no say in the governance of the society, no vote, and no right to political
representation or participation. In such a society, the individual would enjoy extensive
negative liberty but no positive liberty.

On the other hand, a society might be a perfectly functioning democracy, in
fact as well as theory, yet it may grant absolutely no negative freedom to the
individual citizen. This was the possibility that major classical liberal thinkers from
Mill to Berlin both saw and feared in western democracies. A governing majority,
perfectly representative of the public’s will, might decide to strip individuals of all
negative freedom and dictate on ideological grounds what individuals should think
and believe, what they should read, and how and who they should worship. Such
a society might be rich in positive freedom but poor in negative freedom. As Mill
insisted, insuring to each and every individual an equal power to oppress others is
no guarantee of liberty. A majority, no less than a tyrant, can squelch the negative
freedom necessary for individuality, genius, creativity, spontaneity, and life itself to
flourish. See generally JOHN STUART MILL, ON LIBERTY (1859).

17. See, e.g., DeShaney v. Winnebago County Dep’t of Social Servs., 489
U.S. 189 (1989) (constitutional guarantee to liberty triggered by state action, not by
Accordingly, the Constitution, the document on which we rely to give teeth to our aspirations, overwhelmingly is concerned with the potential for oppression in the relationship between the individual and both federal and state government. It does not, then, address the potential for oppression between the individual and other forms of organized social authority, such as the corporate employer, the trade union, the family, or the church, which also may infringe upon an individual’s negative freedom. In other words, the constitutional dictate of ordered liberty places limits only on the state’s potential for control. This second principle is what is often referred to in constitutional doctrine as the state action requirement. The constitutional guarantee of negative liberty is not triggered unless the state has acted in some way that infringes a protected and fundamental right. If we put these two principles together the modern conception of ordered liberty means that the Constitution protects the negative liberty of the individual against excessive intrusion by the state, by state officials, or, at the outer extreme, authorities acting under color of state authority.

Constitutional law is an admittedly complex subject, and the following generalities are subject to a host of exceptions. Nevertheless, from these two basic premises—that the liberty protected by our constitutional aspirations is negative, rather than positive, and that it is only liberty from state action and not liberty from other sources of social authority that is protected—we can generate not only much of the modern content, but more importantly for these purposes, most of the limits of our specific constitutional guarantees. From the first principle—that the Constitution protects negative rather than positive liberty—we can generate the limits the Court has imposed on the substance of the rights that the Constitution protects. We are guaranteed the freedom to speak, believe, associate or not associate with others, but we are not guaranteed an education, 18 adequate shelter, clothing, food, a job, or an income. 19 The former are negative freedoms while the latter, often called welfare rights, are examples of positive liberties and, hence, not protected. 20 We are guaranteed the freedom to send our children to a private school of our choice, if we can afford it, free of state interference to the contrary because this is easily characterized as a negative freedom. 21

19. On the need to create constitutional entitlements to these so-called welfare rights and arguments to the effect that the Constitution should guarantee them, see PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: THE DIARY OF A LAW PROFESSOR (1991); Michelman, Welfare Rights, supra note 14.
It is a part of the very general freedom to contract as one pleases without state interference—perhaps the quintessential negative liberty in a market economy—as well as the right to raise one's children according to one's own preferences without state interference. We are not, however, guaranteed the right to a private school education regardless of ability to pay or even to a quality public school education. The so-called right to an education is a positive freedom and, therefore, is not protected. We are still guaranteed (albeit narrowly) the right to procure contractually an abortion, if we can afford one, because this is a negative freedom and part of our right to be left alone. We are not guaranteed the right to an abortion whether or not we can pay for it because that would be a positive freedom and would not be protected. We are not even guaranteed the right to abortion counseling, for that, too, would be a positive right and, hence, not protected. We are (more or less) guaranteed the right to read whatever we wish within the confines of our own home, but we are not guaranteed the right to literacy. The former is part of the negative right to be left alone while the latter is, if anything, part of a positive concept of liberty. The general rule I am suggesting is this: The Constitution guarantees us the right to do certain things free of interference from social authority, but it does not guarantee us the absolute right to do those same things. The negative freedom that is the concern of the Constitution extends only to the right to procure goods or develop abilities free of interference from social authority. It does not positively guarantee the individual the goods themselves or access to the goods or access to the ability or skills necessary to procure them.

We can generate the limits of the scope of the rights the Constitution protects from the second principle—that the negative freedom which is the concern of the Constitution extends only to negative freedom against interference from the state, what is typically called the state action requirement. We are protected, for example, against

22. See Meyer v. Nebraska, 262 U.S. 390 (1923) (state law prohibiting the teaching of any modern language other than English unconstitutionally infringes freedom of parents to oversee children's upbringing and education).
25. See Harris v. McRae, 448 U.S. 297 (1980) (federal law withholding funds for even medically necessary abortions upheld; no general constitutional right to an abortion, only right to contract for abortion free of state interference); Maher v. Roe, 432 U.S. 464 (1977) (equal protection clause does not compel state to pay for medically necessary abortions although state may pay for indigent women's childbirth expenses).
the state’s censorship of certain ideas or modes of expression. Were a state to criminalize the utterance of communist, atheistic, Catholic, feminist, or white supremacist beliefs, such a statute most certainly would be ruled unconstitutional. We are not protected, however, against censorship of those same ideas by private publishers. Should the major publishers determine that certain ideas—communist, feminist, pacifist—do not sell and, therefore, decide not to publish, or should the media decide that certain points of view—critical perspectives on the Persian Gulf War, for example—decrease ratings and, therefore, decide not to air them, effectively censoring from the public discourse those contributions, there has been an unquestionable censoring of ideas from the public sphere. Nevertheless, there has been no constitutional violation. In fact, according to some commentators, Congress’s attempts to correct for this private censorship and impose upon private media obligations of fairness may be a constitutional violation of the private media’s right to uncensored expression. Consequently, while we all are protected against a wide range of official state censorship, women are not protected against the censorial, silencing effect of a pornography industry run amok, and African-Americans are not protected against the similarly silencing effect of racist hate speech—the murder of the spirit, to use the expression coined by law professor Patricia Williams. Similarly, while we are constitutionally protected against police violence and brutality, we receive no constitutional protection against violence and brutality from a fellow citizen, an abusive spouse, a lover, or a parent. Of course, the state’s criminal law may or may not accord


28. CBS v. Democratic Nat’l Comm., 412 U.S. 94 (1973) (refusal of CBS to accept DNC’s editorial advertisements did not violate latter’s constitutional rights). According to the Court in CBS, to limit journalistic discretion in the name of First Amendment rights would be “anomalous” and a “contradiction.” Id. at 120, 121.


32. WILLIAMS, supra note 19, at 73. Williams is perhaps our only eloquent contemporary poet-lawyer.
us protection from such private violence, but whether it does or not is of no constitutional moment. Even if the state does nothing to protect us against such violence, there has been no constitutional violation. So long as the violence came from a private citizen, there has been no state action. At worst, there has been only state inaction, and that, as the Supreme Court has made clear, is simply not enough. The citizen, we might say, has no constitutional right to a police force.\footnote{See DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 196-97 (1989).}

To recapitulate, the modern concept of ordered liberty governing the great bulk of our modern constitutional law is constituted by, and limited by, two principles: (1) the philosophical and political notion that there is some sphere of individual conduct, belief, and expression that should be inviolable against the intrusion, intervention, or interference of social authority; and (2) the more purely constitutional (and distinctively American) notion that the individual’s negative freedom has been infringed wrongly only if it is the state, rather than some other social authority or private force, responsible for the infringement. Before beginning my critique, it may be worth noting one general logical feature of the liberal concept of ordered liberty as I have just described it. Contrary to a widespread misunderstanding, the two principles that constitute and limit the modern understanding of ordered liberty—the preference for negative liberty and the state action requirement—are logically independent of each other. Not only is the state action requirement not required by the preference for negative over positive liberty, but in many cases, it is fundamentally at odds with it. If we are truly concerned with the negative freedom of individuals, then we should be concerned with unnecessary limitations on our interference with those freedoms whatever the source, whether it be the state or some other form of organized social authority. There surely are forms of organized social authority that are at times more intrusive, more interventionist, more controlling, and more interfering with an individual’s right to be left alone than the state. Indeed, it may only be through state intervention that these private infringements of the individual’s negative liberty can be addressed.

Imagine, for example, the profound interference with the negative liberty to do, think, act, believe and say as one pleases, worked by some Mormon communities on the developing sense of self and society of thirteen- or fourteen-year-old adolescent girls, primed by their parents and their community not for participatory and autonomous adulthood, but for continuing infantilization and dependency through a too-early marriage. Imagine the similar effect on the negative liberty of the Amish child occasioned by the Amish com-
munity's refusal to allow their children a high school education. There may be reasons, even compelling reasons, for insisting that the state ought not interfere with the practices of these insular religious communities. We may value religious diversity in these subcommunities for their own sake, as Mill urged that we should.\(^{34}\) Alternatively, we may fear the sort of spill-over consequences of unleashing state power on such groups. I am not arguing for greater control of these religious minorities. What I insist on is the more limited point that whatever the argument might be for nonintervention by the state into the freedom of these religious groups to oppress their individual members, it cannot be based on the principle of negative liberty standing alone, for that principle often will cut the other way. Although the negative freedom of groups or subcommunities to be left alone might be furthered, the individual's negative freedom is hurt, not helped, by the state's policy of nonintervention into these private spheres of communal coercion, intimidation, and control.\(^{35}\) True devotion to the principle of negative liberty should sometimes counsel for state intervention into private relations and sometimes counsel against it. There is no necessary connection between the respect for individual autonomy, which informs our commitment to negative liberty, and the fear of excessive state control, which informs our constitutional state action doctrine. Both commitments might be justified, but they must be justified on independent grounds; neither follows from the other.

II. ORDERED LIBERTY AND WOMEN'S RIGHTS

Whatever its internal logic, the modern conception of ordered liberty currently guiding constitutional law has not served women well. The reason is simple enough: the modern conception of ordered liberty does not capture and, so long as the modern interpretation dominates, the Constitution does not guarantee the liberties that women peculiarly lack in this country. As a consequence, the constraints under which women distinctively live are not those prohibited by constitutional mandate. In a formal sense, the problem is twofold. First, many of the liberties women lack are positive rather than negative and not protected for that reason. Second, whether characterized as positive or negative, the constraints that limit women's liberty typically are not imposed by the state, but by private and

\(^{34}\) Mill specifically defended the polygamous practices of the Mormons on just these grounds, but he did so without considering, and perhaps not noticing, that those practices endanger the very individual liberties specifically defended in near absolute terms in earlier sections of his famous essay. See MILL, ON LIBERTY, supra note 16, at 73.

\(^{35}\) We unduly flatter these spheres with the appellation "community."
sometimes very private, even intimate, relationships and are not prohibited for that reason. Indeed, the mismatch between the liberty protected by the Constitution and the liberty women distinctively lack is so great as to make the Constitution irrelevant at best and often a positive danger to women's lives. From the perspective of women's liberty, it is truly not clear at this point in our history whether the Constitution and the ordered liberty it protects is worthy of celebration or a part of an immense societal problem that still remains to be solved. 36

I will give two examples of the general incompatibility of women's needs and our ruling, liberal conception of ordered liberty. If we look directly at contemporary women's lives, we can identify two constraints within which women live quite distinctively and which disproportionately limit our freedom. First, women, far more than men, live within the constraints of gender roles assigning to women far greater responsibility for child-raising and domestic labor. 37 This is what Arlie Hochschild provocatively calls the "second shift" phenomenon: women, in effect, work two jobs in this society to a man's one. One of these jobs is often underpaid, and the second, the domestic shift, is utterly unpaid. 38 Consequently, by virtue of their unequal responsibility for domestic and child-care labor, women find it difficult or impossible to be economically self-sufficient through participation in the paid labor market or to be involved in the public sphere of political decisionmaking. There are a limited number of hours in a day, and so long as women continue to work two jobs to a man's one, and continue to be trained to willingly accept this inequity and men trained to expect it, women will find it proportionately more difficult than men to live otherwise autonomous, politically engaged, economically self-sufficient lives. As long as there is laundry to wash, diapers to change, children to feed, houses to clean, and meals to make, and as long as women disproportionately are doing it, there is that much less time for women to vote, campaign, hold public office, sit on boards, create art and culture, and live otherwise positively free lives. 39 Just as important, so long

36. That is, if women are ever to be men's equals in the civic, economic, and private spheres in which we live out our lives.
38. See Hochschild, supra note 37.
39. For an eloquent treatment of the conflict between mothering and the production of culture, see TILLIE OLSEN, SILENCES 203-12 (1978).
as women are and feel responsible for these tasks, the absolutely obvious incompatibility of that work with the positive liberty praised by classical liberals40 and modern civic republicans41 alike—full, rounded, independent, politically participatory lives led in the public sphere—will continue to imply for and to women the inescapable message that we are unsuitable for the liberty men expect and often (but not always) receive as a matter of course. Indeed, as suggested by the sixties term “Women’s Liberation,” the fact that women find political participation and economic self-sufficiency a much more illusive goal than men might be described as the most important finding of the second wave of twentieth-century feminism that captured our collective political imagination in the 1960s and early 1970s.42

Second, women live within the constraints of a high risk of sexual violence and a pervasive fear of sexual violence inhibiting our actions in the public world and coloring our inner lives in the private.43 This greater vulnerability obviously compromises women’s physical security and psychological well-being in many ways of which I will mention only a few. First, both the violence itself and the fear of sexual violence quite obviously and dramatically limit women’s freedom to move about physically in our community to a much greater extent than such a fear limits men.44 Second, sexual violence and fear of sexual violence also drastically limit our choices and even our perception of our choices of ways to live.45 It makes marriage appear to be much safer and, hence, more desirable than it is. It makes nonmarital life styles—single, celibate, lesbian—both appear to be and in fact to be quite dangerous to say nothing of socially unacceptable. Third, sexual violence and the fear of it limit many women’s enjoyment of sexuality, and this, too, should be understood as a very real cost. Most damaging, however, fear of sexual violence, like fear generally, infantilizes women and leaves us more vulnerable, both in our own perceptions of ourselves and in others’ perceptions of us. The fear, as much as the actual violence, badly cripples women’s sense of ourselves and societal perceptions of us as auton-

40. See John Stuart Mill, Utilitarianism (1863); Mill, On Liberty, supra note 16.
42. See, e.g., Betty Friedan, Feminine Mystique (1983); Simone De Beauvoir, The Second Sex (1952).
omous, free and independent agents. For women in abusive marriages and intimate relationships, this infantilization and depersonalization is most extreme. In such relationships, sexual violence and the fear of it can strip away virtually all sense of self-possession. The repeatedly abused woman becomes, in fact as well as in self-image, a means, rather than an end, to the fulfillment of another's desires. She quite literally lacks the capacity to be herself when she has been put under the sovereign will of a violent and violence-prone partner. More generally, the fear of the potential for sexual violence from husbands, partners, potential partners, acquaintances, or strangers leaves all women, not just abused wives and rape victims, considerably more vulnerable, more dependent, and more constrained than our brothers, fathers, sons, and husbands.

Both the constraint of unequal parenting and the constraint of sexual violence profoundly limit women's political participation, economic self-sufficiency, physical security, and psychological well-being—or, in a word, women's autonomy. Both constraints limit some central aspect of women's liberty. What I want to show now is that in spite of the tremendous threat these constraints pose to women's liberty, neither of them, given the dominant, liberal understanding of ordered liberty, is particularly vulnerable to constitutional challenge or within the ambit of constitutional concern. Even worse, the societal conditions that facilitate and at times constitute these constraints may have constitutional protection, in the name of protecting negative liberty, against political or legal change. Let me comment on each of these constraints in a little more detail, showing why they are largely unamenable to constitutional challenge and why the social practices from which they arise may even be constitutionally protected.

I start with women's unequal parenting responsibility and the constraint it imposes on women's political and economic autonomy. Whatever else one might want to say about this particular constraint on women's lives, this much is clear: However unjust it may be and however pervasive its restrictive impact on women's potential, given the modern understanding of ordered liberty under the Constitution, the Constitution holds no promise of correcting it for two reasons. The first should be obvious enough from the way I have labelled the problem. The kind of autonomy of which women are deprived by virtue of the unequal distribution and unequal recognition of and compensation for domestic labor is almost paradigmatically positive rather than negative. It is the freedom to live a certain kind of involved, public, political, and economic life, not freedom from any

particular kind of intrusion. It is the freedom to be, in the fullest sense, a citizen that is threatened in part by women's unequal responsibility for parenting the young. So long as we continue to pledge our allegiance to a Constitution that protects negative but not positive liberty, the tremendous constraints imposed upon women's public lives by their unequal responsibilities for domestic labor will never rise to a constitutional magnitude. Whether or not it is unjust, it is not an injustice for which the Constitution as it is presently understood demands compensation.

Second, regardless of whether the liberty women lack by virtue of unequal and unpaid parenting is negative or positive, women's unequal parenting and domestic responsibility is still largely invulnerable to constitutional challenge because of the state action requirement. One need not be a naive adherent to a falsely innocent conception of the state to infer from the cross-cultural breadth of the problem and transgenerational depth of the problem that the assignment to women of disproportionate child-raising labor, domestic chores, and of a lesser role in public life is made not by any particular state or state official but by a complex, transsocietal, and transgenerational web of shared understandings about the nature of women and men, women's natural capacity for motherhood and disinclination for the life of the citizen, artist, intellectual, artisan, or wage-paid laborer, and men's societal inclination for all of the above and natural disinclination for parenting. We might, for purposes of brevity, call this complex, transsocietal, transgenerational web of shared understandings "patriarchy." My point is that patriarchy, so defined, is not (or certainly is not entirely) a product of state action no matter how broadly we might define either concept. Patriarchy infects not only our laws, but also our private lives and relations. It springs not only from our legal system, but also from our private orderings. Although the state may have from time to time in our history exacerbated it, legitimated it, enforced it, and may in some ways continue to do so, the state did not create patriarchy. For that fundamental reason, simply ending the state's complicity with it will not cure it. Women living in a state whose law is rigorously neutral toward women and men still will find themselves burdened by the inequality and injustice of a private regime of patriarchal control. Women will still find themselves unable to live the positively free life of the citizen because of it.

Simply put, if patriarchy persists at least to some degree and in some of its manifestations without benefit of state action,47 there simply is no constitutional violation, so long as we understand the Constitution to protect only our right to be free of state intervention.

47. In the example of unequal distribution in the private nuclear family of child-raising responsibility, there may well be no state action.
Regardless of whether the unjust distribution of labor and responsibility in the family sphere constrains women's positive liberty to full citizenship and autonomy or women's negative liberty to choose a way of life free of social authoritarian intervention, there is nothing unconstitutional in the injustice. The Constitution is silent on the many constraints, injustices, and inequalities perpetuated on women by the private forces we understand as patriarchal. In short, patriarchy is constitutional to the extent that it is autonomous from state control and creation.

The difficulty goes even deeper, however. Not only is patriarchy not unconstitutional, but, to the degree that patriarchy is woven into the fabric and pattern of our most private intimate lives, it may be even constitutionally protected. The Court has held repeatedly that our negative liberty to be free of state intervention at a minimum contains the liberty to create a private, familial life in whatever way the individual deems best and in line with her own beliefs about the meaning and content of the good life. The central and liberal understanding that whatever else negative liberty protects it must protect the relations of our intimate and familial lives typically is captured in one word: privacy. Because the Constitution protects our familial privacy, it arguably protects our access to birth control, our right to procure an abortion, to attend the private school of our choice, and, in general, to make whatever decisions we deem best about the way our children are raised. That privacy, however, comes with a terrible and often terrifying price to women. If, as a number of feminists now contend, private life is the home of patriarchy—if patriarchal control of women's choices and patriarchal domination of women's inner and public lives occur in the very private realm of home life—then the Constitution, above all else, protects the very system of power and control that constrains us. The complex system of ties peculiarly binding women and not men may be not only not unconstitutional, but positively constitutionally protected. If so, then the Constitution is not only not a shield against

48. See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). The privacy cases, which protect traditional, patriarchal, familial arrangements (both nuclear and otherwise and with the exception of the abortion decision), all protect private and social practices that have a pronounced negative impact on women's self-esteem, self-definition, and self-worth. See MacKinnon, Feminist Theory, supra note 30, at 184-95 (similar critique of the Court's privacy doctrine as insulating patriarchy).

49. See Griswold, 381 U.S. at 485-86.


51. See Pierce, 268 U.S. at 534-35.


53. This is what is meant by the phrase "the personal is political." See generally MacKinnon, Feminist Theory, supra note 30, at 41, 94-95, 119-20.
injustice for women, but is itself a sword of injustice pointed very markedly at women. It is part of the problem, not part of the solution.

The constraint on women’s liberty occasioned by sexual violence, like that imposed by gender roles, is also not amenable to constitutional challenge under current constitutional interpretation. Unlike the constraint of gender roles, sexual violence might be a constraint on negative rather than positive liberty. As was the case with gender roles, however, the constraint on liberty occasioned by sexual violence is not a constraint directly worked by state action. Instead, it is a constraint imposed by men. Although the state unarguably aggravates the harm by casual, lax, or nonexistent enforcement of the criminal laws against sexual violence, it is the sexual violence actually perpetrated by men—strangers, acquaintances, dates, lovers, and husbands—rather than irrational or abusive states or state officials that most profoundly limits women’s liberty. To put the same point affirmatively, while we have a panoply of rights protecting us against abusive and violent action by the state, we do not have a constitutional right to be free of sexual violence. Because of the so-called state action requirement, the profound infringement of women’s liberty by sexual violence violates no constitutional right of sexual security, invokes no constitutional norm of ordered liberty, and triggers no constitutionally significant obligations. There is simply no real constitutional issue.

Thus, (and this is the central point of my critique) because the fear of sexual violence is not a fear of abusive state action, it is of absolutely no constitutional consequence. In the extreme case, arguably no constitutional guarantee would be breached were the state to cease enforcing entirely its criminal laws dealing with sexual violence. This would be an example of state inaction, not state action; and although it would undoubtedly give rise to constitutional litigation, there would be no clear-cut argument supporting such a challenge. The bottom line is that our constitutional guarantee of ordered liberty—our constitutional right to be free of abusive, irrational, or unnecessary infringement of our individual freedom—is a largely empty promise for women. It addresses what is, at worst, a marginal problem in women’s lives and leaves absolutely untouched the most glaring source of bondage.

In the case of the constraints of sexual violence no less than the constraints imposed by gender roles, the problem is not just that the constraint on freedom is not unconstitutional, or put affirmatively,
that we do not have a constitutional right to be protected against sexual assault. The problem is deeper than that. If the state were to take affirmative actions to address sexual violence and the violence that women suffer within intimate relations and private homes in particular, such action may itself be unconstitutional or, at least, raise constitutional problems. In the interest of the individual's negative liberty to do, think, speak, and act as he or she pleases, the Constitution generally protects the liberty of the individual against excessive or overzealous criminalization of private life and protects a realm of privacy (typically as co-extensive with family life) within which it is extremely difficult for the state to intrude. I am not saying that it would be unconstitutional for the state or for the federal government to undertake legislative action addressing the problem of domestic abuse or sexual violence. If it should do so through criminalization, however, both the general concept and the particular conception of the Constitution as the guardian of individual liberty against the criminal arm of the state would burden and limit its efforts.

The general problem, of which gender roles and sexual violence are but two examples, is that the modern Constitution, in the name of ordered liberty, defines, insulates, and then protects a realm of individual privacy within which the state may not intrude. It is within that very realm, however, that the subordination of women through violence and the threat of violence, through the assumption of unequal parenting obligations, and through the imposition of restrictive gender roles occurs most egregiously. We are left with this uncomfortable and possibly life-threatening constitutional paradox. The Constitution protects and guarantees ordered liberty, but it does not secure women's liberty. The Constitution protects the individual against abusive and violent state conduct, but not only does it not protect women against the abuse and violence that most threatens them, it perversely protects the sphere of privacy and liberty within which the abuse and violence takes place.

The deep incongruity between our modern liberal conception of ordered liberty and women's needs does, of course, have historical parallels. Throughout history, in fact, feminists have felt ambivalent about the Bill of Rights—from Abigail Adams' futile attempt to urge her husband to include women's interests, if not rights, in the early drafting of the original document to the late nineteenth-century abolitionist feminists' bitter disappointment with the Reconstruction Congress's refusal to include women's equality in the vision of social

justice embodied in the Fourteenth Amendment.\textsuperscript{56} The modern Constitution, however, informed by the distinctively modern liberal understanding of ordered liberty, does not only ignore women—although it does do that. It positively protects the sphere of privacy, negative liberty, and individual freedom within which women are most vulnerable and within which women are uniquely, individually, and definitively oppressed.\textsuperscript{57} Thus, through its commitment to a liberal and modern conception of liberty, the contemporary Constitution not only fails to protect women's needs and aspirations, but affirmatively protects the sphere of privacy and conduct within which women's subordination occurs.

III. LIBERTY, EQUALITY, AND AUTONOMY

There are two possible ways of addressing this conflict between women's needs, interests, and aspirations and our presently dominant, liberal interpretation of ordered liberty. The first of these, which I will call the egalitarian response, has become the near-standard response of feminist constitutional lawyers. It is, I believe, deeply flawed. The second has not received as much development, but may ultimately have more promise.

The egalitarian response begins with this correct and telling observation: The tension between women's interests and the modern interpretation of ordered liberty is not unique to women but, instead, exemplifies a much larger and deeper phenomenon, which is the tension, conflict, and contradiction between our constitutional commitment to liberty on the one hand and our political commitment to equality on the other.\textsuperscript{58} The conflict is not, in other words, between women's liberty and ordered liberty, as I have been describing it, but between equality and liberty. Individual liberty, no matter how construed, always comes at the cost of equality. Individual liberty, so to speak, "frees up" the sphere of action within which private individuals oppress each other. As the New Deal constitutionalists and liberals saw it, "freeing up" individual liberty in the economic sphere exacerbates and exaggerates differences in wealth between owners and laborers. Achieving some more egalitarian distribution of income requires limiting the negative liberty of individual economic actors. Similarly, in our own time, "freeing up" the negative liberty of individuals to say exactly what they please, no matter how racist,


\textsuperscript{58} See supra note 3 and accompanying text; see also West, \textit{Ideal of Liberty}, \textit{supra} note 11.
hateful, incendiary, or vicious exacerbates the harms of the worst kind of virulent racism still visited upon African-Americans in our society and, consequently, widens the social inequality between the white majority and the black minority.59 By allowing the individual a free rein in matters of speech, we subject members of racial minorities to injurious, belittling, sometimes emotionally crippling forms of racial insult—speech that we can all agree has absolutely no redeeming value. Likewise, by leaving the individual free to speak, hear, sell, or purchase whatever he or she wishes, we free up the multimillion dollar pornography industry to endanger women's self-image, lives, and safety through violent imagery that arguably increases the risk of sexual violence in an already violent society. By freeing the individual to act absolutely as he wishes within the privacy of his own home, we endanger the well-being and often the lives of children at the whim and mercy of sometimes less than loving parents. Examples could be multiplied.

The lesson to be learned from these conflicts, according to this view, is that increases in individual liberty generally come at the cost of decreases in equality. Put somewhat differently, according to the egalitarian critique, individual liberty invariably exacerbates, rather than ameliorates, the subordination of some groups by others—of women by men, of blacks by whites, of workers by capitalists—and, accordingly, widens the gap in power, prestige, and wealth between these groups. Liberty and equality, on this view, are in an inevitable tension: we cannot increase one without jeopardizing the other. If we want to do something real about equalizing men and women or blacks and whites, we will have to limit, somewhat, individual freedom; and if we want to increase individual liberty, we will have to jeopardize, to some degree, equality. To whatever extent we are constitutionally "constituted by" commitments to both ordered liberty and the civic, political, or, at least, formal equality of men and women, capitalists and laborers, and blacks and whites, we are committed inescapably to contradictory ideals.

The conflict I have been discussing between our modern understanding of ordered liberty and women's needs, on this view, simply partakes of this same general pattern. As noted above, "freeing up" speech facilitates the harms done to women through the propagation of pornography and, thus, exacerbates inequality. Protecting the privacy and freedom of individuals to do and say as we wish in our private, intimate lives frees men to oppress, abuse, exploit or, in the extreme, to rape, and thereby further weaken women. Protecting freedom of speech and expression frees a society riddled by inequities to perpetuate, in the name of freedom of ideas, notions of gender

59. See supra note 3 and accompanying text.
roles that continue to impoverish women. Conversely, each gain in
gender equality, like gains in equality generally, comes with the price
of a diminution in individual freedom: a shrinking of First Amend-
ment freedoms in the case of pornography, a piercing of family and
individual privacy in the case of domestic violence and inequitable
allocation of responsibility for parenting, and a diminution of indi-
vidual liberty in the case of greater criminalization of sexual violence
and greater enforcement of the sanctions already on the books.

If this general political and philosophical point is right, then the
constitutional strategy we should embrace to address the ill fit be-
tween our constitutional commitment to ordered liberty and women's
needs seems clear enough. Advocates for women's interests should
urge a general constitutional right to equality and then argue that
the right to equality is of greater magnitude than the countervailing
right, with which it is in tension, to individual liberty. If women are
guaranteed equality, if not through the failed ERA then through the
equal protection clause of the Fourteenth Amendment, at least our
commitment to liberty is limited by this counterbalancing commitment
to equality. The Constitution, on this view, gives weight to both
values, which are concededly in tension and which, accordingly, must
be weighed and balanced against each other by a court or interpretive
body sensitive to both. The Constitution, therefore, not only protects
the individual's negative liberty to speak and to privacy, but also
protects women's right to equality. Hence, limits on pornography
may be not only constitutional, but constitutionally required. Simi-
larly, I have argued elsewhere, the so-called marital rape exemption—
which provides that nonconsensual sex within marriage is not rape
and which is still in force in a number of states—may be unconsti-
tutional in spite of the infringement on marital privacy and individual
liberty that the criminalization of marital rape entails. Lastly, if
this view is right, when individuals arrange their private affairs so
as to allocate to women a grossly disproportionate amount of the
unpaid and under acknowledged labor of raising the next generation,
we face a problem of constitutional, not just moral and political,
magnitude.

I am in complete sympathy with the goal of women's equality
and also have considerable sympathy for the particular arguments
summarized above. There are, however, serious problems with the
general conception of the Constitution on which these arguments
rely. First, as a doctrinal matter, it is not at all clear that the

60. See MacKinnon, Feminist Theory, supra note 30, at 195-214; Mac-
Kinnon, Feminism Unmodified, supra note 43, at 184-94.
61. See West, Equality Theory, supra note 57; Note, To Have and To Hold:
The Marital Rape Exemption and the Fourteenth Amendment, 99 Harv. L. Rev.
1255 (1986).
Constitution contains even a general commitment to anyone's equality, for women or for any other group. The Fourteenth Amendment does, of course, guarantee us equal protection of the law, but it is unlikely that the framers intended the clause to mean, or the Court will ever interpret it as meaning, that the Constitution requires the sort of social, political, and economic equality women lack and that is threatened by an unbridled liberal devotion to ordered liberty.\(^6\)

As a purely strategic or prudential matter, then, the attempt to balance the commitment to liberty with a countervailing commitment of an equal constitutional magnitude to equality seems doomed to failure. There is no constitutional commitment to equality that comes anywhere near the weight, depth, breadth, history, or sincerity of our constitutional commitment to liberty. In any constitutional stand-off between liberty and equality, liberty is going to win. Liberty is an unmistakably constitutional requirement as well as a political and moral aspiration, while equality is, at best, a political aspiration and, at various points in our history including most notably this one, not a widely shared one.

The more basic problem, however, with this liberty versus equality view is that by conceiving of the needs, interests, and aspirations of women that are threatened by ordered liberty—interests in security, needs for economic self-sufficiency, and aspirations for cultural and political participation—as being symptomatic of inequality, egalitarians may have misdiagnosed the problem. The sorts of needs and interests at stake in these conflicts seem to be interests in, needs for, and aspirations of liberty, not equality.\(^6\)

Women need to be free of sexual violence both in the home and out in order not only to be equal, but also in order to be free in the most basic sense in which that ideal is ever invoked—to have freedom of movement from place to place at the time of one's choosing and for one's own chosen ends. While freedom from sexual violence ultimately would serve to equalize the relative social and economic positions of women and men, it is basically women's liberty and only secondarily women's equality that is lost when women lose the freedom to move about in public spaces free of the fear of molestation. Similarly, women need to be free of disproportionate obligations of labor in childraising not only in order to be equal, but also in order to be free to do other things—to be a fully participatory citizen, to work in the paid labor market, to create art, poetry, sculpture or ceramics, to philosophize,

\(^6\). See Robin L. West, Toward an Abolitionist Interpretation of the Fourteenth Amendment, 94 W. Va. L. Rev. 111 (1991). It is worth noting that our popular fundamental texts—the Pledge of Allegiance, America the Beautiful, the Star Spangled Banner—make no mention of equality but repeated references to liberty.

\(^6\). This was reflected in the since-discarded self-appellation of feminism during the sixties and early seventies as a movement of "Women's Liberation."
educate, or study. Again, freedom from unequal and unpaid childraising obligations unquestionably would serve to equalize women and men in any number of ways. What each woman loses when she is tied to burdensome and unfair domestic obligations, however, is not simply some share of an abstract group interest in the equality of women and men generally, but rather, and again in the most immediate sense imaginable, her own very individual and very personal liberty.

What I want to suggest is that instead of trying to limit liberty by urging equality as a counterweight, we should undertake, instead, a reconstruction of the modern interpretation of ordered liberty presently dominating both doctrine and understanding so as to include the liberties women distinctively lack. The place that reconstruction should start, I submit, is with the possibility that the modern interpretation of ordered liberty as protecting only negative liberty, and then only negative liberty infringed upon by the state rather than by other non-state authorities, is a flawed understanding of our constitutional tradition. The two limitations defining the modern conception of ordered liberty and rendering the Constitution’s promise so empty from the perspective of women’s lives and needs are flatly unjustified, given the breadth of political vision that inspired the general phrases of the Fourteenth Amendment, including its guarantee of liberty.

Let me begin with the distinction between negative and positive liberty. Whatever may be the merits of Berlin’s assessment of the comparative abstract value of negative and positive liberty, it is far more consistent with the abolitionist history of the Fourteenth Amendment to understand the liberty guaranteed by that amendment’s Due Process Clause in a positive rather than negative sense. What the post-Civil War reconstruction amendments were about fundamentally, after all, was securing the positive liberties of citizenship, self-governance, autonomy, and the end of bondage for the freed slaves. The war was not fought to ensure the privacy of the slave or to secure his negative right to read, think, act, and speak as he pleased free of state intervention. It just would not have been enough for the southern states to grant the slaves rights of privacy and liberty to read, think, and speak as they see fit yet leave them slaves—nonvoting, dependent, uncompensated, and unfree. In short, the war was not fought nor the reconstruction amendments passed to ensure the negative liberty of the slave. The war was fought (and surely this was primary) to ensure the slave’s positive rights to self-governance, independence, autonomy, and full citizenship. The right


65. Id. at 234-39.
of the citizen to enjoy his liberty and the state’s obligation not to deprive him of it other than by due process of law guaranteed by the Due Process Clause of the Fourteenth Amendment must be understood as including these positive rights of autonomy, economic self-sufficiency, and political self-governance.

Second, at least judging by the federal legislation passed in their immediate wake, a goodly part of what those amendments were intended to ensure was the positive liberty of the newly freed slaves not just against pernicious state action, but also against pernicious private action, which included the private relationship of master and slave itself, the private lynchings by the Ku Klux Klan, and the private refusals of service by innkeepers.66 In the post-Civil War era, legislation and other actions taken by the southern states unquestionably endangered the freed slaves. The greatest threat to the slaves and to their very lives was not state action, however, but private action coupled with state inaction, or in other words, the states’ refusal to act against life-threatening and highly organized attempts by private individuals and organizations to deprive the freed slaves of their lives and liberty. It was private, not state action, that posed the most immediate threat to both the negative and positive liberties of the freed slaves.67 Whatever else might be muddied about the intent of the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments, one thing is vividly clear from the Civil Rights legislation and particularly the Ku Klux Klan Act that followed: What was sought by this profound enlargement of our constitutional charter was a guarantee from private violence and private oppression toward the freed slaves. This included private violence facilitated not only by actions taken by the states, but also by the states’ inaction, whether by design or negligence, in the face of threats from private forces and individuals to the security of the former slaves’ lives and freedoms.

Thus, the most immediate history of the Fourteenth Amendment, which is the necessary constitutional origin of our modern commitment to ordered liberty, is profoundly at odds with the modern liberal conception of the liberty that amendment was intended to ensure. There is no doubt that the reconstruction amendments were intended in part to protect a sphere of negative liberty. By virtue of their slavery, the slaves indeed lacked what we now call the negative liberties of familial privacy: reproductive freedom, control, and re-

67. Such liberties would include the negative liberty to move freely about or simply to live, to contract to sell or buy property, or to earn a wage for one’s labor and the positive liberty to vote, run for office, assume the rights and responsibilities of full political citizenship.
responsibility; and freedom of thought and religion. There is also no doubt, though, that the reconstruction amendments were intended to wipe out slavery itself and not just these manifestations of it. They were intended to ensure not only these negative rights of free choice and privacy, but also the full positive liberty to which slavery is the absolute antithesis. There is also little doubt that the framers of the reconstruction amendments intended to render unconstitutional a wide range of state actions that were meant to maintain the actual if not the nominal relation of slave and master. But, again, it is absolutely clear not only from the record of the debate, but also by virtue of the wide-ranging legislation that followed their passage, that the amendments were intended to effect far more than pernicious state action. They also were intended to ensure freedom from private violence and oppression and to accomplish this by obligating the states to take affirmative action (to use a modern phrase) to prohibit, penalize, and criminalize (and thereby protect against) private deprivations of that positive liberty. Lastly, according to the explicit command of section five of the Fourteenth Amendment, the amendments were intended to ensure that if the states failed to act accordingly Congress would act in their stead.

Is there any modern lesson for contemporary life to be learned from this history? I think there is. As I have argued above, what women lack most profoundly in this culture is positive, not negative liberty. Women enjoy wide ranging rights to privacy, speech, thought, and religion. What women lack is the enjoyment of positive rights of autonomy, self-possession, economic self-sufficiency, and self-governance, to say nothing of the full rights and responsibilities of citizenship. Furthermore, women lack these liberties not because of pernicious state action but because of widespread and disabling patterns of private discrimination, societal indoctrination, and personal, intimate sexual violence coupled with pernicious or at least negligent state inaction. These conditions appear to be invincible to constitutional challenge. Indeed, to some degree they appear to be constitutionally protected. The consequence is that many women are and feel themselves to be constitutionally disenfranchised.

What I have argued in this paper is that we should be very cautious in identifying the cause of this disenfranchisement as our constitutional history and women’s exclusion from it, rather than modern and contemporary understandings. The two limits most modern interpreters read into our conception of ordered liberty—a preference for negative liberty and an insistence on state action—are a product not of our constitutional history, but of modern habits of the heart and mind. In fact, as a matter of constitutional history, the liberal limits we impose on our conception of ordered liberty may be utterly unjustified. If our constitutional history and, hence, our inherited constitutional meanings are broader, more ambitious, and indeed nobler than we have grown to believe, then the disabling
contradiction between our constitutional aspirations of individual liberty on the one hand and our political (whether or not constitutional) aspirations of political equality for women and men on the other may be more apparent than real. If so, then Congress and the states may have an affirmative obligation under the Due Process Clause of the Fourteenth Amendment not only to protect men and women’s right to be left alone, but also to protect women against private infringements of their right to be free of sexual violence and to be free of onerous domestic responsibilities that deprive us of full economic and political autonomy. Finally, were Congress and the states to act on these obligations, then women, in spite of our historical exclusion from the process of constitutionalizing and amending this country’s foundational beliefs, might come to have what women presently lack—some real stake in the constitutional system of rights and liberties that continues, however imperfectly, to give dignity to us all.