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## LEGITIMACY, “CONSTITUTIONAL PATRIOTISM,” AND THE COMMON LAW CONSTITUTION

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Professor Michael Dorf’s review of *The Living Constitution*<sup>1</sup> is both generous and enlightening. I disagree with very little of what Dorf says, and some of the critical points he makes have caused me to rethink my arguments in ways that, I hope, will address his concerns.

### I. FOCAL POINTS AND CONSTITUTIONAL PATRIOTISM

It is a fixed point of our legal system that the text of the Constitution is binding, in the sense that no argument about constitutional law can disregard the language of the text. Any claim about what the Constitution requires must ultimately invoke language in the text. And by the same token, it is never acceptable explicitly to ignore a provision of the text. For example, you cannot say about a provision of the text — as you can about a precedent — that it has been overruled by later legal developments or overtaken by events. Anyone who said things like that would show that he or she did not understand a fundamental feature of the American legal order.

As an abstract matter, it is easy to attack this aspect of our system. Thomas Jefferson showed the way. Why should we be ruled by (in the cliché) the dead hand of the past? Many pages have been devoted to answering that question, and I do not think an agreed-upon answer exists. To speak simply of “fidelity” to the Framers does not solve the problem; we are willing to be “unfaithful” to the Framers — that is, to reject their understanding of what the Constitution would require — in all sorts of ways. The problem is especially acute for someone who rejects originalism — even someone who rejects only what Professor Jack Balkin calls “original expected application” originalism, which is a form that nowadays even most professed originalists say they reject. The puzzle is this: why should we reject decisions that are not explicitly encoded in the text but that we are certain the Framers believed they were enacting, while slavishly (the Jeffersonian skeptic might say) following decisions that happen to be encoded in the text? Dorf makes the point well: “[I]f we need not be bound by the concrete expected

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<sup>1</sup> Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011 (2012).

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applications of long-dead framers and ratifiers, why should we be bound by the text they wrote?”<sup>2</sup>

Take, for example, the Framers’ decision that each state must have two Senators. No one would seriously suggest that the courts should order the Senate to be apportioned according to the principle of “one person, one vote.” At the same time, though, the courts have ordered state legislatures to be apportioned according to that principle, even though we know essentially to a certainty that the Framers of the relevant constitutional provisions did not believe that they were requiring state legislatures to be apportioned according to that rule. Why is the Framers’ decision about the Senate sacrosanct, but their decision about state legislatures subject to judicial revision? Again there are possible answers, but none that are generally accepted. It is puzzling that such a central feature of our legal system should be so incompletely justified.

The best justification, I think, is that the text serves as a kind of common ground, a focal point. It resolves some issues so that we do not have to relitigate them constantly. For example, it is very important to know when the President’s term of office ends, and the text of the Constitution tells us. On other matters — the nature of the criminal justice system, for example — the text narrows the range of options, even if it often does not give us clear answers. Both of these are vital functions that a written, generally accepted text serves very well. If we allowed departures from the text — if we overruled some provisions or declared them obsolete — we would impair, maybe fatally, the text’s ability to perform these functions.

Dorf says that this “focal-point account of the Constitution does not fully capture the role the Constitution plays in American life.”<sup>3</sup> He is clearly right about that. Dorf goes on to say that the “vision of ‘constitutional patriotism’” offered in Balkin’s impressive book *Living Originalism* “better fits Americans’ long-term attitudes toward our Constitution.”<sup>4</sup> I am a little leery of saying anything categorical about Americans’ attitudes toward the Constitution; Americans are a numerous and diverse bunch, and as Dorf notes, misapprehensions about the Constitution are widespread.<sup>5</sup> It is certainly true, though, that many people (including me) feel an attachment to the Constitution that goes well beyond what the focal-point theory describes.

But I do not think this is a weakness of the focal-point theory; on the contrary, I think it is a virtue. The focal-point view is an attempt to justify the use of the text to impose a legal regime — obligations

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<sup>2</sup> *Id.* at 2036–37.

<sup>3</sup> *Id.* at 2016.

<sup>4</sup> *Id.* (footnote omitted).

<sup>5</sup> *Id.* at 2041 & n. 166.

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and benefits — on people. That legal regime will be imposed by force if necessary. It seems to me that such a justification should, if possible, not invoke deep affective attachments to the Constitution.

More specifically, I think the justification has to be something that would persuade a person — a version of the Jeffersonian skeptic — who, let's say, belongs to a distinctive religious or ethnic community with roots outside the United States, and whose attitude is: I want to live in this country, and I will play by the rules, but the Constitution is not part of my traditions and my heritage; I do not have any particularly strong patriotic or affective ties to the United States, its Constitution, or its institutions. It seems to me that we should have a justification that explains to that individual why he or she is bound by the text of the Constitution. I think the focal-point theory provides such a justification. It gives a reason for following the text that everyone can accept, irrespective of any affective or emotional ties to the Constitution or to American traditions.

Of course many of us do have such affective ties, as Dorf says, and any attempt “fully [to] capture the role the Constitution plays in American life” would have to say much more than the focal-point theory says. But if we are not trying to give such a full account — but instead just trying to figure out why the text can be used (as it unquestionably can be) to impose legal obligations on people — then we need a justification that is based on reason alone and does not rely on patriotic sentiments. Otherwise the justification is in a sense sectarian, even if the sect is one to which most of us belong.

## II. LEGITIMACY AND “DREADFUL RESULTS”

Dorf questions whether a common law approach to constitutional law is sufficiently democratic.<sup>6</sup> He first asks whether the common law approach can “lead to dreadful results” or is “more likely to be self-correcting than other methods of interpretation.”<sup>7</sup> He suggests that there is no guarantee that the common law approach will avoid substantively bad results; he gives the Supreme Court's recent decision in *Citizens United v. FEC*<sup>8</sup> as an example.<sup>9</sup> On this point Dorf is right again. There is no guarantee that the common law approach will always yield results that are right as a matter of fairness or good policy, and I agree with Dorf that *Citizens United* is an example of a case that uses, essentially, a common law approach to reach a result that is subs-

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<sup>6</sup> *Id.* at 2046–49.

<sup>7</sup> *Id.* at 2046.

<sup>8</sup> 130 S. Ct. 876 (2010).

<sup>9</sup> Dorf, *supra* note 1, at 2046–47.

tantively bad.<sup>10</sup> The question, Dorf says, should be not whether the common law approach necessarily produces good substantive results, but only whether it produces “*legitimate* results.”<sup>11</sup>

Legitimacy is a difficult notion to work with,<sup>12</sup> but Dorf’s analysis is again illuminating. If I understand him correctly, he argues that the common law approach, to be legitimate, must in some way be democratic. Specifically, he says that a defense of the common law approach to constitutional law “ought to say that decisions reached through the common law method that stand the test of time derive their legitimacy from popular acceptance, not just from judicial craft.”<sup>13</sup> He adds that “[a]lthough *The Living Constitution* emphasizes the Burkean virtues of the common law, it is best read as ultimately relying on democratic inputs to legitimate the living Constitution.”<sup>14</sup>

Dorf’s comments raise an important issue — about the legitimacy of a common law constitutional system — that requires more attention than I gave it in *The Living Constitution*. As Dorf implies, to say that a political institution is “legitimate” is not to say that it always produces perfectly just results; if that were the test, few if any existing governments would be legitimate. Rather, an institution can be legitimate as long as it is reasonably just. Also, of course, the institution has to be generally accepted by the population that it purports to govern. We do not have to debate whether the Articles of Confederation were more just than the Constitution in order to know that the Articles are not now the legitimate government of the United States.<sup>15</sup>

If legitimacy is understood in that way, then our common law constitutional system is legitimate for several reasons. First, it *is* our system, and it is generally accepted. That is what I argued in *The Living Constitution*, in any event. The principles that we accept as a correct account of what the Constitution requires are, in substantial degree, the product of a common law–like process. That descriptive claim ad-

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<sup>10</sup> I am not sure I agree with Dorf’s other example, *Bush v. Gore*, 531 U.S. 98 (2000); I do not think that decision can be justified on common law grounds. See David A. Strauss, *Bush v. Gore: What Were They Thinking?*, 68 U. CHI. L. REV. 737 (2001). For examples of instances in which I believe it would now be unlawful (or at least of questionable legality) to reach a result that might otherwise be substantively better, see David A. Strauss, *Tragedies Under the Common Law Constitution*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

<sup>11</sup> Dorf, *supra* note 1, at 2047 (emphasis in original).

<sup>12</sup> For an important treatment of legitimacy in connection with constitutional law, see Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005).

<sup>13</sup> Dorf, *supra* note 1, at 2049.

<sup>14</sup> *Id.*

<sup>15</sup> I think this account of legitimacy, or something like it, is conventional. See, e.g., Fallon, *supra* note 12, at 1804–06; David A. Strauss, *Reply: Legitimacy and Obedience*, 118 HARV. L. REV. 1854, 1863 (2005).

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vances the normative claim that the common law approach to the Constitution is legitimate.

Second, our common law constitutional system produces results that are reasonably just — or at least it has a better chance of doing so than its competitors. Of course, whether a common law system produces just results ultimately depends on the people who administer it. But at least if a common law approach to the Constitution is compared to originalism (assuming originalism can be made coherent), a common law approach — because it is grounded in Burkean notions of humility but admits occasional, limited recourse to considerations of justice and good policy — is more likely to be reasonably just. That is the claim, in any event; if it is wrong, then to that extent the legitimacy of the common law approach can be questioned.

The focal-point justification for adhering to the text is important in this connection. The idea is to find a justification for a settled practice — the binding nature of the text — that should convince any reasonable person, irrespective of that person's cultural or religious beliefs or traditions. Such a justification enhances the legitimacy of the system. A justification that depended on a specific, sectarian conception of what it means to be an American would leave the system open to the charge that it was not fully legitimate because it unjustly required people to comply with that conception.

Finally, the Burkean approach that underpins the common law — although it is often seen as undemocratic or even antidemocratic — actually has a significant democratic basis. This is the important point that I take Dorf to be making and that I had not seen before. A central Burkean idea is that institutions and practices that have survived for a long time are likely to embody a latent wisdom, even if those institutions and practices cannot be easily justified in abstract terms. Burkeans might distrust a sudden outpouring of popular sentiment — that is the arguably undemocratic aspect of Burkeanism — but a true Burkean, Dorf says, will pay attention to whether, say, a principle of constitutional law has gained general acceptance among the people at large for an extended time. If a principle has taken hold among the people generally — not just among the elites — then, on Burkean logic, that is an additional reason to accept the principle.

This point of Dorf's bolsters the democratic credentials of the common law approach and, to that degree, enhances its legitimacy. In our system, decisions about what the Constitution requires — even when they are made by judges — are embedded in institutions that respond to popular sentiment. Legislatures can resist judicial rulings; new judges will be appointed by Presidents and confirmed by Senators, who have been elected. This means that judicial decisions that do not gain at least widespread acquiescence are less likely to survive. On the Burkean premises of the common law, that is how things should be. There is again a notable contrast with originalism. There

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is no reason to think that general public acceptance of a constitutional principle means that the principle is consistent with original understandings (or original public meanings, or whatever it is that originalists seek); and, by the same token, the public at large might reject interpretations that are correct on originalist grounds. By contrast, for the common law approach, long-term popular acceptance is one of the criteria of correctness. In this way — and I take this to be Dorf’s powerful point — the common law approach has a democratic pedigree superior to that of originalism.

One consequence of Dorf’s analysis is especially noteworthy in the current climate. The common law approach is hostile to what might be called constitutional fundamentalism — the view that any constitutional principle, no matter how well established, must ultimately be tested for conformity to a decision that was made when the relevant constitutional provision was adopted. The common law approach rejects this view. Under the common law approach, the requirements of the Constitution evolve over time and can become something quite different from what was contemplated when the constitutional provision in question was adopted. That is the sense in which the common law constitution is a living constitution. Dorf’s account of the democratic basis of the common law approach reinforces this central feature of that approach. As Dorf says, we have many reasons to reject originalism. His analysis of democratic legitimacy provides additional reasons and strengthens the case for a common law approach in particular.