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Ordered Liberty: Response to Michael Dorf

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ORDERED LIBERTY: RESPONSE TO MICHAEL DORF

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We appreciate Michael Dorf's serious engagement with our book and his conclusion that "it responds effectively to the charge that liberalism focuses on rights to the exclusion of responsibilities."[1] He charges us, however, with an "errant theodicy" – with making the "claim that we have . . . the freedoms we have *in virtue of* a freestanding principle that respectful treatment of persons requires granting them autonomy as responsibility."[2] He also criticizes us for deriving basic liberties from a "freestanding interest in autonomy."[3] In this response we aim to clarify our argument concerning responsibility as autonomy and to reject the interpretation of our book as deriving basic liberties from any such freestanding principle of autonomy.

In *Ordered Liberty* we develop a civic liberalism that answers four charges against liberal theories of rights: (1) *irresponsibility* (the argument famously made by Mary Ann Glendon, that such rights license irresponsible conduct and preclude governmental pursuit of responsibility in the exercise of rights); (2) *neutrality* (that such theories require neutrality among competing conceptions of the good life, undermining civil society as "seedbeds of virtue" and precluding government from promoting good lives); (3) *wrongness* (that liberals justify rights of autonomy on the ground of "empty" toleration of wrong conduct instead of respect for the personal capacity for responsibility or recognition of the substantive moral goods or virtues fostered by protecting such rights); and (4) *absoluteness* (that liberals take rights too absolutely, to the

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We thank Michael C. Dorf for writing his thoughtful Review Essay, for presenting it at the Boston University School of Law Symposium on our book on February 11, 2013, and for posting a modified version of his Review Essay on the Balkinization blog's Symposium on our book, which took place from February 19 to 22, 2013. *Symposium on Fleming and McClain,* Ordered Liberty, BALKINIZATION (Mar. 19, 2013), http://balkin.blogspot.com/2013/03/symposium-on-fleming-and-mcclain.html. Our response is based on our remarks at the Boston University Symposium and our post on the Balkinization blog in response to Dorf. We thank Jack Balkin for facilitating the Balkinization Symposium.

[1] Michael C. Dorf, *Liberalism's Errant Theodicy*, 93 B.U. L. REV. 1469, 1478 (2013).

[2] *Id.*

[3] *Id.* at 1472.

subordination of responsibilities, virtues, and the common good, and in doing so debilitate the political processes and impoverish judgment).[4]

As we understand Dorf, he focuses on our book's response to the irresponsibility critique. There, in chapters two and three, we show the degree to which our civic liberalism permits government to *encourage* responsibility in the exercise of rights but not *compel* what it holds is the responsible decision. We do not argue for a general right to responsibility as autonomy. We fear that we may have given the contrary impression through our stylized contrast between (1) responsibility as accountability to community and (2) responsibility as autonomy or self-government and our use of Glendon and Ronald Dworkin as foils representing these two understandings.[5] Our response to the irresponsibility critique, however, is not a political theory project of deriving rights from a freestanding principle of autonomy. It is a constitutional theory project of showing the ways in which recognizing constitutional rights like procreative autonomy leaves room for government to moralize by, for example, encouraging pregnant women to deliberate responsibly and conscientiously before having an abortion.

Our primary treatment of the grounds for justifying rights comes later in the book, in response to the wrongness critique and the absoluteness critique. There we undertake the constitutional theory project of justifying constitutional rights already recognized in our constitutional cases on grounds of both individual autonomy and the moral goods fostered by protecting them. We do this, for example, with respect to the right of procreative autonomy and the right to same-sex marriage.[6] We grant that our justification of basic liberties is not merely backward-looking, concerned only with justifying the constitutional rights already recognized. We contemplate that the constitutional practice of securing ordered liberty should go on as before, reasoning by analogy from cases already decided to the new cases that arise, developing lines of doctrine in a principled and coherent way.[7] Even here, though, we propose elaboration of basic liberties through common law constitutional interpretation and reasoning by analogy rather than through working from and elaborating a freestanding principle of autonomy. Indeed, in chapter nine, in our debunking of the "myth of strict scrutiny for fundamental rights" under the Due Process Clause and our analysis of the actual practice of reasoned judgment concerning ordered liberty in the line of cases from *Meyer v. Nebraska*[8] through *Planned*

[4] JAMES E. FLEMING & LINDA C. MCCLAIN, ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES 1-2 (2013).

[5] *Id.* at 6, 51, 53-68.

[6] *Id.* at 177-206.

[7] *Id.* at 241-67; *see also* JAMES E. FLEMING, SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY 116-20, 126-27 (2006).

[8] 262 U.S. 390 (1923).

Parenthood of Southeastern Pennsylvania v. Casey[9] and *Lawrence v. Texas*,[10] we implicitly reject any idea of a freestanding principle of autonomy.

We largely accept Dorf's list of the various "sorts of reasons [that] justify the recognition of a right or the conclusion that some proffered justification for infringing a recognized right falls short."[11] He suggests that autonomy doesn't add much, if anything, to the reasons on the list.[12] We agree that a freestanding principle of autonomy does not operate in constitutional cases as a basis for deriving rights. But we believe that common-sense understandings of autonomy do manifest themselves in constitutional cases, even through the very types of justifications on his list. Dorf writes: "For example, one can read *Griswold v. Connecticut* to rest on the proposition that there is a right of married couples to use contraception simply because any effort to enforce the prohibition would intrude on constitutionally protected privacy."[13] He then quotes *Griswold*: "'Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.'"[14] In justifying *Griswold*'s recognition of a right of privacy, we interpret these very passages as reflecting concern to protect freedom of intimate association within the marriage relationship in order to promote the "noble purposes" of the institution.[15] This interpretation illustrates what we call "deliberative autonomy."[16] Deliberative autonomy here is a structure that houses and articulates arguments made for basic liberties in constitutional cases in a way that shows their coherence and defensibility. The types of reasons for protecting rights of autonomy are down to earth, ecumenical, and familiar, not abstract, freestanding, or "theodicean."[17]

In clarifying our argument, it may be helpful to contrast two types of political and constitutional theory. The first purports to derive all of our basic liberties or constitutional rights from one basic principle, such as autonomy, dignity, liberty, or equal concern and respect.[18] The second, by contrast, begins with a list of basic liberties typically recognized in constitutional democracies such as our own (or already recognized in a constitutional practice like ours)

[9] 505 U.S. 833 (1992).

[10] 539 U.S. 588 (2003); FLEMING & MCCLAIN, *supra* note 4, at 241-67.

[11] Dorf, *supra* note 1, at 1475.

[12] *Id.* at 1475, 1477.

[13] *Id.* at 1473.

[14] *Id.* at 1473 n.18 (quoting Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965)).

[15] FLEMING & MCCLAIN, *supra* note 4, at 250-51.

[16] *Id.* at 3-4.

[17] FLEMING, *supra* note 7, at 94-100.

[18] *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 272-78 (1977) (deriving a package of fundamental rights from the constitutive principle of "equal concern and respect").

and aims to show how those basic liberties fit together and are best justified.[19] Dorf seems to interpret our theory as the former sort, but it is decidedly the latter. We begin with the basic liberties already recognized in certain constitutional cases and show how they fit together and are best justified as preconditions for what we call deliberative democracy and deliberative autonomy. In *Securing Constitutional Democracy: The Case of Autonomy*, one of us (Fleming) called this project a "constitutional constructivism" (by analogy to John Rawls's "political constructivism" as developed in his *Political Liberalism*).[20] The justifications for the basic liberties, moreover, appeal to the mutual support of a number of considerations that fit or hang together, not simply to one freestanding principle from which they all derive.[21] Dorf may recognize this obliquely, since his "main point" is that "affirming our belief in people's capacity to act responsibly does not count for much as a justification for individual rights, but it is a necessary feature of such rights as we do recognize."[22]

Finally, we grant that some philosophical accounts of free will may amount to what Dorf calls a liberal "theodicy." Dorf might criticize Dworkin's discussion of free will in *Justice for Hedgehogs*[23] along these lines, and even more so Dworkin's recent Einstein Lectures on "religion without god."[24] We do not believe that our account of securing ordered liberty makes any "theodicean" claim "that we have any of the freedoms we have *in virtue of* a freestanding principle that respectful treatment of persons requires granting them autonomy as responsibility."[25] Our conception of ordered liberty is constructivist, not theodicean.

[19] FLEMING & MCCLAIN, *supra* note 4, at 3-4; *see also* FLEMING, *supra* note 7, at 66-69.

[20] FLEMING, *supra* note 7, at 61-74; JOHN RAWLS, POLITICAL LIBERALISM 89-129 (1993).

[21] JOHN RAWLS, A THEORY OF JUSTICE 19, 48-51 (1971); JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 29-32 (2001); RAWLS, *supra* note 20, at 95-99.

[22] Dorf, *supra* note 1, at 1479.

[23] RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 219-52 (2011). We are not saying that such a criticism of Dworkin would be sound, but simply acknowledging that it would be more understandable that Dorf might criticize Dworkin on this ground.

[24] RONALD DWORKIN, RELIGION WITHOUT GOD (forthcoming 2013); Ronald Dworkin, *Religion Without God*, N.Y. REV. BOOKS, Apr. 4, 2013, at 67.

[25] Dorf, *supra* note 1, at 1478.