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A New Constitutional Order?

Editors' Foreword

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SYMPOSIUM

A NEW CONSTITUTIONAL ORDER?

Editors' Foreword

On March 24th and 25th, 2006, Fordham University School of Law held the fourth in a series of conferences in constitutional and legal theory,¹ entitled *A New Constitutional Order?* In his introductory remarks, James E. Fleming, the Leonard F. Manning Distinguished Professor of Law at Fordham, and the organizer of this conference, eloquently framed the conference's overarching themes: "As we celebrate the Centennial of Fordham University School of Law and contemplate the post-September 11 world order and the dawn of the Roberts Court, it is fitting to ask whether we have entered a new constitutional order. If so, what are its contours, distinctive features, and commitments? If not, are we on the verge of doing so?" A number of outstanding scholars gathered to weigh in on these questions. Bruce Ackerman gave the keynote address, *Terrorism and the Emergency Constitution*. The remainder of the conference was organized into seven panels, whose presentations and deliberations were guided by the following themes:

Panel 1: *The Rehnquist Court and Beyond: Revolution, Counter-Revolution, or Mere Chastening of Constitutional Aspirations?* It is commonplace to speak of a "Warren Court revolution." And some have spoken of the Burger Court as "the counter-revolution that wasn't." Did the Rehnquist Court pull off a revolution or counter-revolution? Or do its significant decisions represent merely a "chastening of constitutional aspirations," as Mark Tushnet has argued? How would we know whether we are in the midst of or have undergone a constitutional revolution or counter-revolution? Do revolutionary transformations occur in convulsive moments or through gradual change, for example, through a process of partisan entrenchment? More generally, how should we account for radical reinterpretation of the Constitution by judges? This panel assesses competing theories of what constitutes a constitutional revolution and considers where matters stand at the dawn of the Roberts Court.

1. See Symposium, *Fidelity in Constitutional Theory*, 65 Fordham L. Rev. 1247, 1247-818 (1997); Symposium, *The Constitution and the Good Society*, 69 Fordham L. Rev. 1569, 1569-2200 (2001); and Symposium, *Rawls and the Law*, 72 Fordham L. Rev. 1381, 1381-2175 (2004).

Panel 2: *The Emergency Constitution in the Post-September 11 World Order*. It is sometimes said that the events of September 11 “changed everything.” What is the proper role of the Constitution during national emergencies, including responses to terrorist attacks? Should the Constitution be relaxed or suspended during such emergencies? Or should the Constitution’s general standards still apply, even as we acknowledge that certain measures that might be unconstitutional during peacetime may be permissible during emergencies? More generally, what is the most defensible conception of emergency powers in an age of terrorism? Should we, as Bruce Ackerman has argued in *Before the Next Attack*, construct a framework for an emergency constitution that allows for short-term measures in states of emergency, including responses to terrorist attacks, but which firmly draws the line against permanent restrictions on basic freedoms? Are our constitutional principles compatible with America as an imperial power?

Panel 3: *Constitutions in Exile: Is the Constitution a Charter of Negative Liberties or a Charter of Positive Benefits?* Many conservatives have argued that the real Constitution has been in exile since the New Deal and that it is time to restore it. For example, Randy Barnett has called for “restoring the lost Constitution,” a charter of negative liberties that adopts a presumption of liberty and against governmental regulation. At the same time, Sotirios A. Barber has defended a largely forgotten understanding of the Constitution (advanced by James Madison and Abraham Lincoln) as a charter of positive benefits under which government has affirmative duties to pursue the well-being of all the people. What are the merits of and prospects for these competing accounts of “Constitutions in exile”?

Panel 4: *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Over the last two decades, Ran Hirschl argues in *Towards Juristocracy*, the world has witnessed an “astonishingly rapid transition to juristocracy,” or the transfer of an unprecedented amount of power from representative institutions to judiciaries, whether domestic or supranational. This global trend is strikingly evident in constitutionalization and the increasing adoption of judicial review, even in countries that historically have resisted them. Many proponents of judicial review associate it with liberal and/or egalitarian values and portray it as promising progressive social or political change. Others, including Hirschl, emphasize the political construction of judicial power and are more skeptical about the potential of constitutionalization of rights and empowerment of judges for advancing progressive change. What are the origins and consequences of this new constitutionalism?

Panel 5: *Subnational Norms in the New Constitutional Order: Federalism*. For decades, conservatives have advocated “new

federalism(s)" and celebrated states and localities as sources of subnational norms. Liberals and progressives have distrusted federalism as protecting founts of norms contrary to national and universal norms. In recent years, conservatives have seen the virtues of national power to pursue their visions, just as liberals and progressives have seen the virtues of federalism to protect theirs. What are we to make of these developments, as manifested, for example, in the battle between proponents of the federal marriage amendment and defenders of state court decisions and state laws recognizing same-sex marriage and civil unions? Are commitments to federalism merely instrumental to political ends? Or does federalism have appeal in principle as part of a larger scheme of multiple repositories of power resisting national power?

Panel 6: *Subnational Norms in the New Constitutional Order: Civil Society and Families.* Many have called for reviving civil society and shoring up families not only to inculcate civic virtue but also to stand as buffers between the individual and the government, whether national or state. Though this discourse has long been dominated by conservatives, in recent years liberals, progressives, and feminists have examined the place of families and civil society in a formative project of fostering persons' capacities for democratic and personal self-government as well as in generating subnational enclaves of resistance to standardizing norms. What is the appropriate division of responsibility among families, other institutions of civil society, and government in the project of forming persons into capable, responsible, self-governing citizens? How do constitutional rights such as privacy or autonomy, equality, freedom of association, and freedom of religion facilitate yet also constrain such a formative project?

Panel 7: *The International Migration of Constitutional Norms in the New World Order.* In recent years, we have seen the migration of constitutional norms across national boundaries, both in framing constitutions and in interpreting them. For example, American constitutional lawyers have "exported" American constitutional norms through projects of constitution making in other countries. At the same time, some American courts have "imported" constitutional norms by citing decisions of foreign courts, referring to the laws of other countries, or invoking international human rights norms. Migration has occurred not only across national jurisdictions but also through the evolution of transnational governance, as in the constitutionalization of the European Union. What do such developments portend? What should be the character of the international migration of constitutional norms in the new world order?

The *Fordham Law Review* is honored to publish the papers presented and, in many cases, augmented and revised in light of the colloquy that

followed each panel, as well as the keynote address delivered by Bruce Ackerman.

We would like to thank Dean William Michael Treanor for his ongoing support of the *Law Review* and this series of conferences; the Fordham Law School Office of Academic Programs, in particular Helen Herman and Darin Neely, for their help in the planning and administering of this conference; and the Fordham Law School Library Administration and Staff, in particular Lawrence Abraham, for assistance in the publication of the conference. A number of Fordham professors moderated panels and/or contributed papers: Martin S. Flaherty, James E. Fleming, Abner S. Greene, Tracy E. Higgins, Thomas H. Lee, Catherine Powell, and Dorothy E. Roberts (while she was the Bacon-Kilkenny Distinguished Visiting Professor at Fordham). Our deepest gratitude is to Professor James E. Fleming, who conceived of the conference and served as its organizer.