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## Editor's Foreword

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# SYMPOSIUM

## THE CONSTITUTION AND THE GOOD SOCIETY

### EDITORS' FOREWORD

On September 22nd and 23rd, 2000, Fordham University School of Law held the second in a series of conferences in constitutional theory.<sup>1</sup> Over twenty outstanding scholars convened to examine a number of questions concerning the relationship between the Constitution and the good society. Questions for general consideration included: Can the Constitution be fairly interpreted to commit "We the People" to pursuing a plausible version of the good society? Are its provisions and the scheme of government that it establishes adequate to that end? To the contrary, do the Constitution's commitments and omissions make it unlikely that the People will seek, much less attain, a good society? Do the institutional structures created by the Constitution help or hinder the development of a good society? How can constitutional government facilitate progress toward a good society?

The conference was organized into five panels, whose presentations and deliberations were guided by the following questions:

Panel 1. *The Constitution of Civic Virtue for a Good Society*: Does the Constitution require or presuppose a formative project of government inculcating in citizens the civic virtue necessary to promote and sustain a good society? Does it thwart or indeed forbid such a project? To what extent can the institutions of civil society support or even supplant government in cultivating civic virtue? What is the content of the civic virtue that should be inculcated in circumstances of moral disagreement and how does it relate to traditional moral virtue? Does it include respect for and appreciation of diversity? Should a formative project include cultivating attitudes that are critical of practices that deny liberty and equality?

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1. The first, in 1996, on Fidelity in Constitutional Theory, was published in the March issue of Volume 65 of the *Fordham Law Review*.

Panel 2. *The Constitution of Equal Citizenship for a Good Society*: Does the Constitution secure the preconditions for the status of equal citizenship of everyone? Does it obligate the government to eradicate the vestiges of caste systems? Beyond that, does it obligate the government affirmatively to secure the preconditions for the capable and effective exercise of basic liberties by all citizens? Do the Constitution's protections of certain freedoms and of equality itself limit what government may do to secure equal citizenship for all? Is it permissible or even imperative to regulate certain basic liberties, such as freedom of expression and freedom of association, for the sake of securing equal citizenship for members of groups who are subject to hostility or oppression on the basis of race, gender, or sexual orientation? Does the Constitution's commitment to equal citizenship constrain any formative project of inculcating civic virtue?

Panel 3. *The Constitution and the Obligations of Government to Secure the Material Preconditions for a Good Society*: Does the Constitution obligate the government to secure or facilitate the material preconditions for a good society, for example, by guaranteeing a social minimum of goods and services to meet the basic needs of all citizens? Or is provision for such preconditions constitutionally gratuitous? Indeed, does the Constitution's protection of property rights and economic liberties hinder or even preclude governmental provision for the material well-being of all? Furthermore, should we reorient constitutional theory toward discourse concerning the political economy of citizenship and questions such as "What economic arrangements are hospitable to self-government?"

Panel 4. *The Constitution Outside the Courts and the Pursuit of a Good Society*: What is the relationship between the commitments of our Constitution and those of a good society? Is there a tenable distinction between the partial, judicially enforceable Constitution and the whole Constitution that is binding outside the courts upon legislatures, executives, and citizens generally and, if so, what are the criteria for drawing that distinction? What is the best account of the thinness of our Constitution and our constitutional law, as compared with our thicker commitments to justice and a good society? Is such thinness a flaw or a virtue of our practice? What revisions of our practice would be necessary to give rigorous and coherent meaning to the idea of taking the Constitution seriously outside the courts?

Panel 5. *Constitutional Interpretation and Aspirations to a Good Society*: What form should constitutional interpretation by courts take in light of our aspirations to a good society? Should courts

engage in "moral readings" of the Constitution, for example, by elaborating abstract moral principles of liberty and equality or by making moral arguments about fostering human goods or virtues? Or should courts avoid such moral readings in favor of "judicial minimalism" and deciding one case at a time in order to leave matters open for democratic deliberation and decision? What should be the respective roles of interpretation and amendment (whether through Article V or outside it) in responding to imperfections in the Constitution? Does the quest for fidelity in constitutional interpretation further the pursuit of a good society or to the contrary undermine it? Should constitutional interpretation be more forward-looking and instrumental, pursuant to our aspirations to a good society, than most conceptions of constitutional interpretation contemplate or permit?

*Fordham Law Review* is honored to publish here the papers presented by the panelists, augmented and revised in many cases in light of the colloquy that followed each panel. The papers, for the most part, follow the order in which they were presented at the conference.

We would like to thank Dean John D. Feerick for his support, and the Fordham University School of Law Office of Academic Programs, in particular Helen Herman and Susan Doherty, for their help in the planning and administering of this conference. We greatly appreciate Fordham Professors James E. Fleming, Martin S. Flaherty, Abner S. Greene, Tracy E. Higgins, Robert J. Kaczorowski, William M. Treanor, and Benjamin C. Zipursky, who worked together in conceiving the conference and many of whom wrote papers or moderated panels. We also are considerably indebted to the co-organizers and co-sponsoring institutions: Professor Stephen L. Elkin of the University of Maryland, who is Chair of the Executive Board of the Committee on the Political Economy of the Good Society (PEGS); Mark V. Tushnet, Carmack Waterhouse Professor of Constitutional Law at Georgetown University Law Center; Lawrence G. Sager, Robert B. McKay Professor at New York University School of Law, and Sotirios A. Barber, Professor of Government at the University of Notre Dame. Our deepest gratitude is to Professor James E. Fleming, who served as the lead co-organizer of the conference and who acted as our liason in the gathering and editing of the papers in this issue of the *Fordham Law Review*.

*Notes & Observations*