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Recommended Citation

James E. Fleming, *The New Constitutional Order and the Heartening of Conservative Constitutional Aspirations*, in 75 *Fordham Law Review* 537 (2006).

Available at: https://scholarship.law.bu.edu/faculty_scholarship/2838

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THE NEW CONSTITUTIONAL ORDER AND THE HEARTENING OF CONSERVATIVE CONSTITUTIONAL ASPIRATIONS

*James E. Fleming**

I. INTRODUCTION

The basic question for this conference is whether we as a people have entered, or are on the verge of entering, a new constitutional order. In 2003, Mark Tushnet published a terrific book, *The New Constitutional Order*,¹ an expansion of his insightful *Foreword: The New Constitutional Order and the Chastening of Constitutional Ambition* in the *Harvard Law Review*.² The title of that book was an inspiration for the title of this conference. And the title of that article is the basis for the title of my article. For years, liberals and progressives have been anticipating or announcing a conservative revolution or counter-revolution ushering in a new constitutional order. Tushnet argued that the Rehnquist Court's constitutional jurisprudence amounted to a chastening of constitutional aspirations rather than a launching of a conservative revolution or counter-revolution.

Let me illustrate what he means by chastening as opposed to a revolution. Consider *United States v. Lopez*,³ in which the Rehnquist Court struck down the federal Gun-Free School Zones Act basically forbidding students to carry guns to school. It was the first case in sixty years in which the U.S. Supreme Court struck down a federal law as exceeding Congress's power to regulate interstate commerce. Some alarmist liberals and progressives saw the case as evidence of an impending conservative revolution. Tushnet, by contrast, viewed it as chastening and symbolic: It really just sent a message to Congress that there is no general federal police power. And, he argued, the Act itself was a largely symbolic instance of "feel good legislation"

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1. Mark Tushnet, *The New Constitutional Order* (2003) [hereinafter Tushnet, *The New Constitutional Order*].

2. Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Ambition*, 113 Harv. L. Rev. 29 (1999).

3. 514 U.S. 549 (1995).

(after all, every senator and representative wants to be sternly on record as being against kids taking guns to school).⁴

Subsequently, Tushnet wrote another wonderful book, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law*.⁵ There he acknowledged that the conservative decisions of the Rehnquist Court he had analyzed as chastening rather than revolutionary in his previous book indeed had planted the seeds for a revolution. Everything depends, he acknowledged, on the future: what kind of justices are appointed to the Supreme Court and what use they make of these decisions. If revolutionary Republicans instead of “chastening” Republicans (to say nothing of liberals) are appointed, these decisions may become the tools for revolution.⁶

It seems to me that the developments that Tushnet insightfully analyzes do represent a chastening of liberal and conservative constitutional aspirations. But I also believe that those developments have engendered a heartening of conservative constitutional aspirations—hence the title of my article. I mean a heartening in three senses. One, conservative aspirations have been heartened in the first instance by the very chastening of liberal and progressive constitutional aspirations as such. Consider, for example, conservatives who cut their teeth fulminating against a Warren Court revolution, and who lamented the Burger Court’s “counter-revolution that wasn’t.”⁷ They may have taken heart in seeing the Rehnquist Court more aggressively hold the line against liberal and progressive conceptions and concerns. And much of what defines conservative constitutional ambitions is opposition to liberal and progressive constitutional aspirations. I think Jed Rubenfeld captures this point perfectly in his brilliant new book, *Revolution by Judiciary*, where he characterizes the Rehnquist Court’s substantive agenda as an “anti-anti-discrimination agenda.”⁸ As I would put it, that agenda is defined in opposition to the liberal and progressive anti-discrimination agenda. Through this lens, we can grasp conservatives’ characterization of civil rights protections as “special rights” rather than as attempts to secure the status of equal citizenship for everyone.⁹

Two, conservative aspirations are expressed in some of the very developments that liberals and progressives view as the chastening of

4. Tushnet, *The New Constitutional Order*, *supra* note 1, at 38-42.

5. Mark Tushnet, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* (2005) [hereinafter Tushnet, *A Court Divided*].

6. *Id.* at 9-12, 319-45.

7. I allude here to *The Burger Court: The Counter-Revolution That Wasn't* (Vincent Blasi ed., 1983).

8. Jed Rubenfeld, *Revolution by Judiciary: The Structure of American Constitutional Law* 158-83 (2005).

9. In *Romer v. Evans*, 517 U.S. 620 (1996), the Court rejected the “special rights” argument in the context of protecting homosexuals against discrimination. The logic of the “special rights” argument extends to condemn protection of African Americans against discrimination. See Walter F. Murphy, James E. Fleming, Sotirios A. Barber & Stephen Macedo, *American Constitutional Interpretation* 1075 (3d ed. 2003).

aspirations. Here I am reminded of an exchange I had with Bruce Ackerman at one of Mark Tushnet's conferences at Georgetown some years ago. Bruce was disparaging this generation of citizens for their puny constitutional aspirations for a balanced budget amendment, as contrasted with the great aspirations of the generations of FDR and the Great Society. Playing devil's advocate, I argued that to conservatives, a balanced budget amendment stands for worthy aspirations to fiscal responsibility and to personal self-reliance as opposed to dependency upon government. I suspect that much of what Tushnet views as a chastening of aspirations has a similar flip-side heartening of conservative aspirations.

Three, I believe that we are right now witnessing the arousal of conservative aspirations for a more ambitious counter-revolution yet to take place, now that Justice Sandra Day O'Connor has been replaced by Justice Samuel Alito, and even more so if Justice John Paul Stevens retires and is replaced by George W. Bush appointees in the mold of Justices Antonin Scalia, Clarence Thomas, and Alito. Witness South Dakota's passage of an abortion law directly challenging *Roe v. Wade*¹⁰ and *Planned Parenthood v. Casey*¹¹—the commentary in the press indicating that anti-choice advocates could not wait for Stevens to retire or die!¹² In this regard, I take little comfort from Tushnet's analysis of the politics of appointments to the Supreme Court, which suggested that it would be difficult if not impossible for Bush to get counter-revolutionary conservatives like Scalia and Thomas confirmed.¹³ At the time Tushnet wrote, Bush's failed nomination of ultra-conservative Miguel Estrada to the United States Court of Appeals for the District of Columbia Circuit offered some reason to believe that he was right, and that the Democrats might have the commitment and fortitude to block at least some nominations of counter-revolutionary conservatives. But let us never forget the case of Clarence Thomas, who, after all, was confirmed by a vote of 52-48. And Samuel Alito, in the final analysis, had little difficulty being confirmed. Thus, I see no indication that Bush is likely to back away from nominating extremely conservative Republicans like Alito in favor of moderate Republicans like David Souter.

II. THE JURISPRUDENCE OF THE NEW CONSTITUTIONAL ORDER: MINIMALISM OR TRIUMPHALISM?

Tushnet argues that what Cass Sunstein calls judicial minimalism is the jurisprudence of the new constitutional order.¹⁴ This is Sunstein's idea that courts should decide "one case at a time," writing narrow opinions that

10. 410 U.S. 113 (1973).

11. 505 U.S. 833 (1992).

12. See Monica Davey, *South Dakota Bans Abortion, Setting Up a Battle*, N.Y. Times, Mar. 7, 2006, at A1.

13. Tushnet, *The New Constitutional Order*, *supra* note 1, at 96-112.

14. *Id.* at 130-38.

“leave things undecided” and thus open for democratic deliberation.¹⁵ Indeed, it seems that minimalism would be appropriate for a constitutional jurisprudence that aims to chasten constitutional aspirations rather than to usher in a constitutional counter-revolution. But let us ponder the question to whom minimalism would appeal. In what follows I mean to suggest doubts about whether minimalism is a positive jurisprudential program for a new constitutional order as opposed to a method of damage control, from both liberal and conservative perspectives, during a period of transition from one order to another.

One, it is understandable that minimalism would appeal to liberals and progressives like Sunstein during a period of transition from a moderately liberal court to a conservative court (and beyond that, to a genuinely new constitutional order where conservative aspirations literally hold court). After all, minimalism might serve as a jurisprudence of damage control for liberals and progressives during such a period: For we inevitably are going to face conservative judges and conservative decisions, but minimalism promises to moderate and minimize the damage wrought by them.¹⁶

Two, it is understandable that minimalism would appeal to pragmatic, Clinton Democrats like Justices Stephen Breyer and Ruth Bader Ginsburg during such a period. Their judicial temperaments and substantive constitutional sensibilities incline them to embrace minimalism.¹⁷

Three, it is also understandable that minimalism would hold some appeal for *preservative conservatives* like O'Connor, (sometimes) Anthony Kennedy, and Souter, as distinguished from *counter-revolutionary conservatives* like Scalia, Thomas, and (sometimes) Rehnquist (and now Alito and, I suspect, John Roberts). I am using a distinction between two types of conservatives—preservative conservatives and counter-revolutionary conservatives—corresponding to two senses of conservative in common parlance.¹⁸ Preservative conservatives for the most part preserve precedents rather than overrule them—even if, as an original matter, they might have decided the cases differently—though they may well take a “this far and no further” approach to precedents and drain them of generative vitality.¹⁹ Counter-revolutionary conservatives, on the other hand, believe that a liberal revolution has occurred (here, the “Warren Court revolution”), that it is their responsibility to bring about a conservative counter-revolution, and that they must purge the law of precedents

15. Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 4 (1996).

16. James E. Fleming, *Securing Constitutional Democracy: The Case of Autonomy* 57 (2006).

17. See Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (2005); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185 (1992).

18. Fleming, *supra* note 16, at 117.

19. Tushnet, *The New Constitutional Order*, *supra* note 1, at 67; James E. Fleming, *Fidelity, Basic Liberties, and the Specter of Lochner*, 41 Wm. & Mary L. Rev. 147, 152 (1999).

manifesting liberal error at the earliest available opportunity. If they do not have the votes to overrule these precedents, they seek to reinterpret them so as to extirpate any generative force from them. To see the difference between preservative conservatives and counter-revolutionary conservatives, look at the clash between the joint opinion of O'Connor, Kennedy, and Souter in *Casey*, on the one hand, and the dissents of Scalia and Rehnquist in the same case, on the other, respectively.²⁰ Thomas is, of course, also a counter-revolutionary conservative. The same is true of Alito and, I suspect, Roberts. Rehnquist's counter-revolutionary conservatism was moderated somewhat by the fact that he was Chief Justice. The same may happen with Roberts. Minimalism may especially appeal to preservative conservatives in a time of 5-4 votes.

Four, it is even understandable that minimalism would appeal in some cases to conservative chief justices like Rehnquist and Roberts during such a period of transition. After all, in some cases they may not have the votes to overrule precedents manifesting liberal error, or to reject altogether certain "liberal" arguments. And so, in these cases, it may suit their purposes to vote with the "liberal" majority, to assign the opinion to themselves, and to issue a minimalist decision that controls the damage from their conservative perspectives. But I do not see minimalism holding much, if any, appeal for conservatives once they muster the votes, through new appointments, to move beyond a transition period of chastening liberal and progressive constitutional aspirations to a period of consolidating a conservative revolution or counter-revolution. And again, I do not see the Democrats in the Senate succeeding in blocking the appointment of counter-revolutionary conservatives or inducing Bush to nominate moderate, preservative conservatives. The case of Alito proved that.

Given Tushnet's previous excellent book, *Taking the Constitution Away from the Courts*,²¹ one might have expected him to argue (or give greater place to arguments) that hubris or what Linda Greenhouse has called triumphalism,²² not minimalism, is the characteristic jurisprudence of the Rehnquist Court. Commentators like Greenhouse and Larry Kramer²³ have decried the Rehnquist Court for its arrogance, its "activism" beyond the Warren Court's wildest dreams, and its impending counter-revolution. They do not see anything minimalist in the Rehnquist Court's decisions (although they do have to account for occasional minimalist crumbs from the table like *Romer v. Evans*²⁴ and *Lawrence v. Texas*,²⁵ protecting gays

20. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

21. Mark Tushnet, *Taking the Constitution Away from the Courts* (1999).

22. Linda Greenhouse, *Divining the Consequences of a Court Divided*, N.Y. Times, Dec. 17, 2000, at WK1.

23. Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 224-33 (2004); Larry D. Kramer, *No Surprise. It's an Activist Court.*, N.Y. Times, Dec. 12, 2000, at A33.

24. 517 U.S. 620 (1996).

25. 539 U.S. 558 (2003).

and lesbians, and *Grutter v. Bollinger*,²⁶ upholding affirmative action, which in their view are likely to become fewer and farther between).

Granted, minimalism and hubris are not necessarily incompatible: For example, a Court might insist on having the last or indeed the only word on every question, yet insist that its word be minimalist. And Tushnet makes numerous observations throughout *The New Constitutional Order* that show that he recognizes the hubris and triumphalism of the Rehnquist Court.²⁷ This applies even more so to his book *A Court Divided*.²⁸ But his account of the jurisprudence of the new constitutional order would be fuller and stronger if he analyzed more directly the relationship between minimalism and triumphalism. As it stands, the relationship, and evident tension, between the two remains underdeveloped.

III. BEYOND THE NEW CONSTITUTIONAL ORDER?

In my observations so far, I have adverted to the possibility that the era of chastening of constitutional aspirations that Tushnet perceptively analyzes may be a transition period from a moderately conservative constitutional order to a counter-revolutionary conservative constitutional order. Here I want to address this possibility head on. Perhaps instead of boldly announcing that we have entered “the new constitutional order,” he should have presented his book as a diagnosis of “our present constitutional predicament” circa 2003. Granted, Princeton University Press might not have thought such a title and the focus it suggests would be as catchy, provocative, and publishable. By doing so, Tushnet could have postponed, until it is more ripe, the whole colloquy with Ackerman concerning whether we have entered a new constitutional order (without undergoing amendment or revolution) or instead are in a period of normal politics.²⁹ And he could have put off for a time the debate with Sandy Levinson and Jack Balkin concerning whether we have witnessed a revolution or a mere chastening of aspirations, and whether we should read Rehnquist Court opinions narrowly (as he has) or broadly (as they have).³⁰ Between the time Tushnet drafted much if not most of the book and the time he completed the manuscript, the political landscape of this country changed considerably. He grants this. In particular, we moved from a situation of divided government with a Clinton-induced expectation of moderate presidential leadership to a situation of unified Republican government with staunchly conservative presidential leadership, staunchly conservative control of both houses of Congress, and continuing conservative control of the Supreme Court. Even

26. 539 U.S. 306 (2003).

27. Tushnet, *The New Constitutional Order*, *supra* note 1.

28. Tushnet, *A Court Divided*, *supra* note 5.

29. See Bruce Ackerman, *We the People: Foundations* (1991) [hereinafter Ackerman, *We the People: Foundations*]; Bruce Ackerman, *We the People: Transformations* (1998).

30. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 Va. L. Rev. 1045 (2001).

more so now. Furthermore, in *Bush v. Gore*,³¹ as Ackerman has aptly put it, the Supreme Court packed itself.³² I speculate that the sting of this charge motivated O'Connor and Rehnquist not to retire during Bush's first term. Tushnet concedes that during a brief period of unified government much could change.³³ We will see between now and 2008 and beyond.

Events in the near future could prove Tushnet to be a prophetic seer or a fool. If the former, perhaps publishing the book will prove to have been worth the risk. If the latter, maybe no one would blame him for trying to make the best of a bad situation at a time when it may get even worse. In any case, as Tushnet acknowledges in *A Court Divided*, only the future will tell whether the (for now) chastening as opposed to revolutionary decisions will turn out to be the seeds for a conservative counter-revolution—it all depends on the future composition of the Court and what the justices make of these decisions.³⁴

I want to conclude by returning to the basic question for the conference: Are we as a people entering a new constitutional order? Well, we do not know yet. In the past, even when we have entered a new constitutional order, we have denied it. Take the Reconstruction Revolution—*The Slaughterhouse Cases* denied that any revolution had occurred.³⁵ Or take the New Deal Revolution—as Ackerman has pointed out, “myths of rediscovery” concerning the framers’ vision were conjured up to deny that a revolution had taken place.³⁶

What about today? Let me close by invoking a famous passage from Hegel: “When philosophy paints its grey in grey, then has a shape of life grown old. By philosophy’s grey in grey it cannot be rejuvenated but only understood. The owl of Minerva spreads its wings only with the falling of the dusk.”³⁷ We will not know whether we have entered a new constitutional order until after it occurs.

31. 531 U.S. 98 (2000).

32. Bruce Ackerman, *The Court Packs Itself*, Am. Prospect, Feb. 12, 2001, at 48.

33. Tushnet, *The New Constitutional Order*, *supra* note 1, at 100-01.

34. Tushnet, *A Court Divided*, *supra* note 5, at 9-12, 319-45.

35. *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 78 (1873).

36. Ackerman, *We the People: Foundations*, *supra* note 29, at 34-57.

37. G. W. F. Hegel, *Philosophy of Right* 13 (T. M. Knox trans., 1952).

Notes & Observations