The Review of Politics 74 (2012), 127–184.

Book Reviews

CONSTITUTIONS AND NATIONAL IDENTITY

Gary Jeffrey Jacobsohn: *Constitutional Identity.* (Cambridge, MA: Harvard University Press, 2010. Pp. xvii, 368. $45.00.)

doi:10.1017/S003467051200006X

Over the last half century—actually since the end of World War II—many nations and peoples around the world have reconstituted themselves as constitutional democracies. Heavily influenced by developments in international human rights law, starting with the Universal Declaration of Human Rights adopted by the United Nations in 1948, their newly minted constitutions have empowered courts of law to enforce guaranteed rights as well as other checks on arbitrary power. With this sudden and startling elevation of judicial power around the globe, constitutional adjudication has evolved into a central feature of modern constitutionalism. As Vicki Jackson notes, "Having a national constitution, enforced by a court, has become the 'script' of modernity." By the end of the century, the highest courts of judicial review in nations as diverse as Germany, Canada, Hungary, India, Spain, and South Africa had created bodies of constitutional jurisprudence as impressive in volume and sophistication as the contemporary work-product of the United States Supreme Court. Aided by modern technology, comparative constitutional law is now a globalized phenomenon. Judges and justices are talking with one another across national borders and consulting one another's jurisprudence for guidance in the interpretation of their own constitutions. In the United States and Europe in particular, they are also meeting face-to-face in symposia and conferences to discuss common problems of interpretation under their respective constitutions.

Owing to these and related developments, comparative constitutionalism has evolved into a major field of study in legal academia and in a select number of political science departments with graduate programs in constitutional studies. Many courses and seminars in the field focus on comparisons of the constitutional case law of transnational and national courts of judicial review, a principal purpose being to map the similarities and differences in the approaches of these courts to constitutional interpretation, to illuminate the normative and factual assumptions of one's own constitutional system, and to consider the relevance of foreign models of judicial review in settling domestic constitutional conflicts. Other courses and seminars are devoted to the study of constitutions as "aspirational frameworks designed," to cite

Jackson again, "to help effectuate dramatic political transformations." A related approach that Gary Jacobsohn has explored, and which is the subject of this review, is the study of constitutions as expressions of national identity, an enterprise that might be said to view constitutions anthropologically. Just as the identity or character of an individual may be measured by the past (what I was), the present (what I am), or the future (what I aspire to be), the identity of a constitution may be discerned from a nation's formative experience, its current political culture, or the goals or aspirations set forth in its governing charter, or all of them together. In short, a constitution—whether in the form of a specific document or not—can often be studied for the window it provides into the nature of national selfhood or a people's self-definition, and for what it means to be a citizen of a given constitutional polity. Such questions have seldom been addressed by constitutional theorists within a comparative framework. Gary Jacobsohn has now narrowed this gap in a new work, appropriately titled *Constitutional Identity*. It is a formidable study in comparative constitutionalism.

The genesis of *Identity* is to be found in two of Jacobsohn's previous books, namely, *The Supreme Court and the Decline of Constitutional Aspiration* (Rowman and Littlefield, 1986) and *The Wheel of Law* (Princeton University Press, 2003). Together with *Identity*, these works represent an impressive and interconnected body of constitutional scholarship. The trio may be compared to a symphony of three movements, exhibiting a unity of design and detail that explores the theme of constitutional aspiration, first in the American and later in a comparative context. *Supreme Court and Decline* is a fresh exploration of the moral meaning of the US Constitution and its implications for the exercise of judicial review. It traces the Constitution's moral—or aspirational—content to the doctrine of natural rights underlying the Declaration of Independence. But in the interpretation of the Constitution, argues Jacobsohn, the Supreme Court has lost sight of this natural rights tradition, thus precipitating the decline of constitutional aspiration in our time. Instead, the Court has adopted alternative approaches to judicial review, ranging from modes of legal positivism and sociological jurisprudence to *contemporary* visions of a just society. Accordingly, *Supreme Court and Decline* frets over the question of judicial supremacy in constitutional interpretation, just as it finds significant deficits in the approaches to judicial review promoted by figures such as Ely, Pound, and Dworkin. Recalling the views of Lincoln in particular, *Decline* contends that constitutional policymaking is—or should be—an exercise in retrieving and applying the self-evident truths of the Framers, and that getting these truths right in the settlement of constitutional disputes is often a coordinate responsibility of both judges and legislators.

Wheel of Law advances aspirational constitutionalism to a higher and broader level of analysis. The book's subtitle, *India's Secularism in Comparative Constitutional Context*, announces its main theme. It is a highly nuanced study of India's 1947 Constitution and its transformative commitment to secular democratic governance in a society otherwise dominated

by powerful Hindu religious movements and deep-seated antagonism between Hinduism and Islam. Its major focus is the judiciary's role in maintaining and promoting India's secular identity in the face of countervailing pressures to elevate religious affiliation and discourse in the public sphere. In advancing this goal, the Supreme Court has found itself in the position of "embrac[ing] the social reform impulses of Indian nationalism in the context of the nation's deeply rooted religious diversity and stratification." The judicial role here, according to the author, has been one necessarily of mediating the tension between Indian and Hindu nationalism, a role he describes as an "ameliorative model" of judicial review. Jacobsohn illuminates this model of judicial review in the field of religious liberty by comparing it to the "assimilative model of American secularism" and the "visionary model" of constitutional adjudication in Israel. He describes the first—the American—as one that "manifests the ultimately decisive role of political principles in the development of the American nation" and the second as one that "seeks to accommodate the particularistic aspirations of Jewish nationalism within the constitutional framework of liberal democracy."

Wheel is taken up with describing and contrasting the three models of constitutional adjudication and the lessons they provide, or do not provide, for the resolution of church-state controversies in each of the three liberal democracies. Each of their constitutions commits the nation to religious liberty, and constitutional interpretation is ordained toward the achievement of this secular end. But the scope of this liberty—whether, for example, it is defined as negative, positive, or something in between—depends on the particular role that religion or the culture it represents plays in each nation. In India religion and society are interlinked. In the United States religion is mainly a voluntary activity confined to the private sphere. In Israel religious affiliation is politically important, for Judaism is constitutive of Jewish identity even for nonreligious Jews. But these models, Jacobsohn reminds us, are not "rigidly deterministic." The boundaries between them are fluid and constantly evolving, and the business of the judiciary is to temper its jurisprudence of religious liberty with the reality of religious behavior on the ground, but without sacrificing the constitution's secular goals of liberty and equality. In the remainder of his analysis, Jacobsohn demonstrates the utility of each of these models—ameliorative, assimilative, and visionary—and shows how elements of each model might be appropriated by each of the three high courts of judicial review to defend and promote religious liberty within the context of an otherwise vibrant secular constitutionalism.

Constitutional Identity continues the author's inquiry into American, Indian, and Israeli constitutionalism, but now for the purpose of exploring the idea of and reality behind the notion of constitutional identity. As with the inquiry in *Wheel of Law*, the focus remains broadly on moral issues within the framework of each nation's socioreligious environment. *Identity* adds Ireland to the mix (with major side glances at Turkey and South Africa). It is significant that each of these nations—United States, India, Ireland, and Israel—share a

history rooted in British administration and the common law. Yet their political cultures, reflected in their constitutions, are quite distinct. It is this combination of similarity and difference that makes the United States and the three "I's," as Jacobsohn calls them, perfect candidates for the comparative study of constitutional identity, a concept, he further argues, "that should be at the center of constitutional theory" (3)—mainly, one supposes, because it tells us legions about constitutionalism and the nature of constitutions more generally.

The three "I's" compel the author's attention because, while their governing charters seek to identify the essential character of their respective peoples, their real identities, like the models of constitutional adjudication in *Wheel of Law*, evolve over time, a reality deemed to be endemic to all constitutions. Israel is important because in 1948 its founders established a state for the Jewish people; India because the constitution sought to transform a society rent by sectarian division into what the preamble describes as a "sovereign, socialist, secular, democratic republic"; and Ireland because its constitution of 1937 proclaims the Catholic character of the Irish people, even invoking the "Name of the most Holy Trinity … to Whom all actions both of men and States must be referred." But each of these identities is under strain: Israel owing to the nation's continuing and unresolved tension between its Zionist aspirations and commitment to liberal constitutionalism; India for the overriding importance and depth of its Hindu culture; and Ireland in the face of its increasing secularization. In each case, comparisons are drawn with the situation in the United States. As in *Supreme Court and Decline* and *Wheel of Law*, the study emphasizes the judiciary's interpretive role, here in an attempt to mediate these tensions while adhering to the substantive core of the constitution. What makes *Identity* a seminal exercise in comparative constitutionalism is the author's ability to illuminate one nation's constitutional identity by reference to the constitutional experiences of the other nations under study.

As suggested, this study finds that a nation's constitutional identity turns out to be anything but fixed in time regardless of how the constitution defines a people or its polity. In an essay published in this journal in 2006—the insightful essay out of which *Identity* seems to have emerged—Jacobsohn states his thesis as follows:

> I argue … that a constitution acquires an identity through experience, that its identity neither exists as a discrete object of invention nor as a heavily encrusted essence embedded in a society's culture, requiring only to be discovered. Identity emerges dialogically and represents a mix of political aspirations and commitments … expressive of a nation's past, as well as the determination of those within the society who seek, in some ways, to transcend that past. It is changeable but resistant to its own destruction, and it may manifest itself differently in different settings.

Identity seeks to show that the definitional content of the constitutions under study have evolved in precisely this way. A nation may seek to codify its

identity in a charter of governance—be it secular, religious, equalitarian, republican, or libertarian—but all such charters are what the author calls "disharmonic" in the sense that they include incongruities or "dissonances" key to an understanding of identity. And if the disharmony is unclear from an examination of a single constitution, its salience obtrudes noticeably under the lens of comparative analysis.

As the experiences of the United States and the three "I's" show, constitutions include "alternative visions or aspirations that may embody different strands within a common historical tradition" and entail "a confrontational relationship between the constitution and the social order within which it operates" (133). The logic of constitutionalism, Jacobsohn tells us, leads to the adoption of universal values such as liberty, equality, and the rule of law, but constitutions are also "embodiments of unique histories and circumstances" (95). Accordingly, the argument runs, constitutional identity emerges from the clash of "alternative visions" in the constitution itself as well as from the "dialogue" that takes place between the constitution and the social order. These clashing visions and dialogic engagements work themselves out in the actions and decisions of judicial, legislative, and executive authorities and in the meaning that other interpreters, both public and private, give to the constitution. (Their settlement in the author's view cannot be the sole function of the judiciary.)

Two of this book's most interesting chapters—"The Conundrum of the Unconstitutional Constitution" and "The Quest for a Compelling Unity"—deal with the tendency of constitution makers to entrench their national identities in specified goals or aspirations and, relatedly, to write a charter of governance marked by the internal harmony of its parts. Such constitutions may be "acquiescent" or "militant," depending on whether they reflect the local culture, as in Ireland, or seek radically to transform the culture, as in India. Acquiescent constitutions, however, may take on the character of militancy in the process of adapting to new circumstances, as with the abolition of slavery in the United States in tandem with the adoption of the Fourteenth Amendment. But whether courts of judicial review should be empowered to declare constitutional amendments unconstitutional when they disavow or erode the essential core of a basic charter's value system remains a fascinating question that Jacobsohn explores in detail in the Indian, Irish, Israeli, and American contexts.

But as the author argues, the search for a "compelling unity" confronts the disharmonic nature of the constitution, where the job of the judiciary in particular is "to diminish the gap between actual conditions and the political ideals" (148) laid down in a constitution. Thus, in resolving the tension between particularism and universalism, courts increasingly look abroad for guidance in perfecting the constitution, underscoring what the author describes as "the permeability of constitutional borders." He underlines the fluidity of these borders by mapping the extent to which the United States and the three "I's" have relied on one another and other foreign sources for

insights into the meaning of their own identities. Focusing on freedom of speech, religious liberty, and privacy rights, he shows rather persuasively how the disharmonic nature of a constitution "provides opportunities for the dialogical engagement that drives the development of constitutional identity" (156). In putting the judges of the three "I's" in virtual conversation with one another, Jacobsohn revisits the vigorous American debate, on and off the Supreme Court, over the propriety of relying on foreign sources for interpreting the US Constitution.

Jacobsohn brings the general thesis of "disharmony" into sharp focus in a concluding chapter on Israeli immigration policy, one that "denies an [Arab] spouse the privilege of moving to Israel to live with a citizen of the state as part of a family unit" (283). The problem arises from Israel's Basic Law on Human Dignity and Liberty; it describes the nation as both "a Jewish and Democratic State." The divergent opinions of two Supreme Court judges highlight the disharmony. Both are firm in their acceptance of the basic right to marriage and family life and both acknowledge its fundamentality in Israeli as well as in international and foreign law. But how to balance this commitment with the principle of Jewish statehood? One justice invalidated the policy for violating the liberal value of equality implicit in democracy. The other justice, representing the majority, sustained the policy. No less committed to liberal values or to the rightful influence of foreign constitutional law, he nevertheless saw the need, in the special circumstances of this case, to protect the Jewish state. The opinion appealed to the "narrative of survival so critical to Israeli self-understanding" (310). In this critical area of self-understanding, it was appropriate to borrow from the insights of foreign law but in this case, explained the judge, prudence demanded that the judiciary respect the judgment of the legislature in defining the nation's identity.

Readers take important lessons away from this book. One is that there is no such thing as a perfect constitution, just as there is no juri-centric right answer (à la Dworkin) to deeply contested moral or philosophical issues arising under a disharmonic constitution. A comparative perspective shows that all constitutions are blends of old and new, continuity and change, permanence and contingency, tradition and transformation. Accordingly, constitutional identities are never fixed. They evolve out of the tensions or incongruities within the framework of a single documentary text—usually, as with the US Constitution, a product of compromise and aspiration—or between the text and external realities. *Identity* teaches that the maintenance of a constitution depends on its adaptation to chance and circumstance over time. In short, identity evolves within the framework of the continuity without which constitutionalism cannot exist. As the United States experience has shown—dramatically illustrated in the conflict between North and South—*constitutional* identity-formation is a matter of conflict within consensus.

Perhaps the most important takeaway from this book is the illumination that the comparative perspective brings to studies of constitutional identity,

particularly in topical areas such as speech, privacy, religion, and equality. Courts should seek not to monopolize but to serve as collaborators with legislatures and executive authorities in defining identity. Finally, in defining rights and standards under one's own constitution, courts need to pay attention to what other constitutional courts around the world are saying. Much is to be learned from the experiences of other constitutional democracies. But as Jacobsohn notes throughout *Identity*, it is also important in an age of transnational constitutionalism for national courts of judicial review to pay attention to the identity-affirming decisions of other such tribunals around the world while insulating them against any mindless adaptation to foreign constitutional decision-making.

–Donald P. Kommers

FROM NATURE TO LAW

Gary L. McDowell: *The Language of Law and the Foundations of American Constitutionalism*. (Cambridge: Cambridge University Press, 2010. Pp. xvi, 409. $99.00. $32.99, paper.)

doi:10.1017/S0034670512000071

In this long-planned book, Gary McDowell presents a defense of original intent, legal positivism, and judicial restraint rooted in the thought of Thomas Hobbes, "the father of what would become liberal, modern constitutionalism" (57). McDowell portrays the American Constitution as constructing a government based on written law with a clear meaning that is, in the words of Joseph Story, "the same yesterday, today and forever."

McDowell's intent is clear. His cover features a portrait of the 1787 constitutional convention in Philadelphia, and his opening epigraph quotes Justice Benjamin Curtis's dissent in *Dred Scott*. McDowell dedicates the book to—among others—Walter Berns, Raoul Berger, Edwin Meese III, and Robert H. Bork. The Senate's rejection of Bork's nomination to the US Supreme Court in 1987 is to McDowell "an unforgivable political and constitutional sin" (1). His concluding chapter disparages the opinions in *Planned Parenthood v. Casey* and *Lawrence v. Texas* authored by Justice Anthony M. Kennedy, who possesses the seat denied to Bork.

McDowell traces contemporary departures from originalism to twentieth-century progressive academics such as Harvard's Christopher Langdell and Princeton's Woodrow Wilson and Edward Corwin. But the problem of law and language, McDowell argues, runs through premodern thought: medieval