

any essay on those who suffered from and challenged the dominant economic arrangements of the nineteenth century. Labor, unions, and populists do not appear in the essays.

As noted above, the introduction attempts to find common ground among the essays. The essays, it tells us, focus on "law in actual practice: the social functions of the law, the cultural values embodied in law, and the meaning of the Constitution and law to the powerless." These are pursued "[i]nstead of examining formal lawmaking bodies and the development of doctrine." The past is understood on its own terms.

But of course, as the essays in the book illustrate, we see the past from the vantage point of the present. It cannot be any other way. Legal history is a great patchwork quilt.<sup>13</sup> Doctrine, formal lawmaking bodies, and the present meaning of the past are inevitably part of the picture, a picture enriched by fine essays in this book.

**APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND IN THE UNITED STATES.** By Gary Jeffrey Jacobsohn.<sup>1</sup> Princeton, New Jersey: Princeton University Press. 1993. Pp. 284. Cloth \$39.50.

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What is the difference between constitutionalism and constitution? Does constitutionalism embody universal norms that transcend differences in historical experiences and in political culture? Is adherence to constitutionalism possible without a written constitution? Can constitutions be transplanted from one political culture to another? These are important and topical questions in the wake of the dramatic contemporary turn towards constitutionalism and recent proliferation of constitutions.<sup>3</sup> Indeed, as more and more countries rush to embrace constitution-

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13. The metaphor is not mine, but I cannot recall where I got it.

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2. Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University; Co-Director Cardozo-New School Project on Constitutionalism. I wish to thank my colleague David Gray Carlson for his helpful comments.

3. Since the end of World War II, and especially since the collapse of socialist regimes in Eastern Europe and the former Soviet Union, constitutionalism increasingly appears poised to achieve a worldwide sweep. See Michel Rosenfeld, *Modern Constitutionalism as Interplay Between Identity and Diversity: An Introduction*, 14 *Cardozo L. Rev.* 497 (1993).

alism, one wonders whether its meaning is becoming so diluted as to transform it into a mere fashionable slogan capable of accommodating a broad array of disparate and even antagonistic ideals, norms and practices, or whether we are witnessing the advent of a global convergence towards a new democratic order. Moreover, as constitutionalism spreads, opportunities and temptations to transplant constitutions seem to multiply, while at the same time, an increasing diversity of home-grown constitutional arrangements vie for a lasting place in the political firmament.

The embrace of constitutionalism and the spread of constitutions call for the systematic examination of constitutionalism on a comparative basis. Under these circumstances, comparative constitutionalism becomes imperative for at least two important reasons: first, to assess whether, and to what extent, constitutions may be successfully transplanted from one political culture to another; and, second, paradoxically, to gain a better position from which to evaluate one's own constitutional order. Indeed, as the variety of constitutional norms and practices greatly expands, one becomes more prone to realize—and this is particularly urgent for Americans who, by and large, tend to focus exclusively on their own constitution<sup>4</sup>—that one's own constitutional solutions are by no means the only available ones or the only ones capable of meeting with success. Thus, by focusing on how foreign constitutional norms and practices fare in dealing with issues similar to those confronted at home, one can gain a broader and better vantage point from which to evaluate the virtues and limitations of one's own constitutional norms and practices.

Good work on comparative constitutionalism, however, is hard to come by, because it requires a solid grounding in at least two different constitutional orders and at least two political cultures. Accordingly, Gary Jacobsohn's rich and nuanced comparison of constitutionalism in Israel and the United States is a remarkable achievement, which provides scholars in the growing field of comparative constitutionalism with a framework for analysis that is well worth emulating. Moreover, Jacobsohn's focus on Israel and the United States is particularly felicitous, as it brings together not only a country with a written constitution and one without, but also two approaches to constitutionalism and two political cultures that yield an optimal mix of similarities, contrasts, and points of contact to shed useful light on the rela-

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4. Significantly, a perusal of the leading casebooks on American constitutional law used in law schools throughout the United States reveals that references to other constitutions are virtually non-existent.

tionships between constitution and constitutionalism, between constitutionalism and cultural identity, and between constitutionalism and democracy. In addition, because of the significant influence of the American constitution on Israeli constitutional thought and practice, Jacobsohn's focus on these two countries affords insight into the scope and limits of successful constitutional transplantation. Finally, Jacobsohn skillfully invokes the contrast between the United States' predominantly individualistic political culture and Israel's primarily communitarian one to sharpen our understanding of American constitutional developments.

Jacobsohn's principal focus is on the comparison of particular features of the constitutional cultures of Israel and the United States, but his ultimate objective is more ambitious, as he aims "to contribute more broadly to an improved understanding of the nature of constitutionalism." In this latter endeavor, Jacobsohn is not entirely successful, as some of his generalizations are questionable, either because they are not sufficiently supported by the particular comparisons from which they are drawn, or because they are parasitic on concepts that remain undefined or underdefined, most notably the very concept of "constitutionalism."<sup>5</sup> In the last analysis, however, these shortcomings should not detract from the importance or the overall success of his subtle and incisive analysis. Even if one disagrees with some of Jacobsohn's conclusions, his comparative examination of Israel and the United States certainly provides the reader with a wealth of materials for fruitful thought and discussion on these crucial yet difficult subjects.

Jacobsohn's comparative analysis sharpens our grasp of many of the key issues confronting constitutions and constitutionalism. These issues include: the relationship among constitutions, citizenship, and national and group identity; the relationship among constitutionalism, liberal democracy, republi-

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5. While there is a great amount of discussion of constitutionalism throughout the book, Jacobsohn is not always careful to distinguish between "constitution," "constitutional" and "constitutionalism." See, e.g., p. 231 where he states that "the *raison d'être* of constitutional government is the preservation of liberty," but seems to mean, strictly speaking, that "constitutionalism requires the preservation of liberty." This lack of precision is unfortunate as the differences between these concepts may be significant. Thus, for example, whereas it is beyond question that since 1787 the United States has had a "constitutional government," in as much as slavery was condoned by the 1787 constitution, arguably the United States did not conform to the fundamental dictates of constitutionalism prior to its adoption of the Civil War Amendments. See Rosenfeld, 14 *Cardozo L. Rev.* 497 (cited in note 3), and David A.J. Richards, *Revolution and Constitutionalism in America*, 14 *Cardozo L. Rev.* 577 (1993).

canism, and pluralism; the tension between a constitution's mission to bind future generations and the broad interpretive latitude characteristic of the actual practice of judicial review; and, the important pedagogic function of the constitution and of judicial elaborations of the meaning of the constitution. Furthermore, taking good advantage of the particularly strong influence of American free speech jurisprudence on the elaboration of Israeli doctrine on this subject, Jacobsohn provides an in-depth examination of a concrete example of constitutional transplantation and explores the relationship between a transplanted constitutional norm and the evolution of constitutional doctrine to adapt the transplanted norm for use in its adoptive land.

It is of course impossible, within the scope of the present review, to do justice to Jacobsohn's discussion of all the above-mentioned issues. Consequently, I shall focus in the remainder of this review on the following subjects: the relationship among constitutionalism, pluralism, and identity; constitutionalism, constitution, and judicial review; and constitutional transplantation, constitutional norms, and constitutional doctrine.

## I

Constitutionalism makes little sense in the absence of any pluralism. In a completely homogeneous community with a single-minded collective purpose and without a conception of the individual as having any legitimate rights or interests separate from those of the community as a whole, constitutionalism—broadly conceived as requiring limitations on the powers of government, adherence to the rule of law, and the protection of fundamental rights—would be superfluous. Indeed, in such a community there would be no palpable need to separate the governors from the governed, or lawmaking from interpreting or enforcing the law, and the relevant normative universe would be exclusively based on duties rather than on rights.<sup>6</sup> By contrast, once pluralism enters the scene—in the broad sense of any division of the collectivity along the axes of self and other, whether in terms of ethnic, cultural, or religious differences or in terms of an individualism driven by the recognition of a multiplicity of values and objectives—constitutionalism not only makes sense but also looms as perhaps the best means to safeguard the integrity of the various parts in harmony with the pursuit of the objec-

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6. For an illuminating discussion of the contrast between a jurisprudence of right and a jurisprudence of duty, see Arthur J. Jacobson, *Hegel's Legal Plenum*, 10 *Cardozo L. Rev.* 877 (1989).

tives of the polity as a whole. With the advent of pluralism, however, identity tends to become problematic to the extent that the constitutional identity of the polity must remain distinct from the identity of the diverse groups that comprise the nation or from the pre-constitutional identity of the nation or of its people.<sup>7</sup>

Jacobsohn draws on the most salient contrasts between American and Israeli pluralism in order to provide a vivid illustration of how different conceptions of the relation between the individual and the group and between cultural and political identity bear on the shaping of constitutional identity. Both Israel and the United States are pluralist societies marked by differences that pit individual against group and that render the nation distinct from the state. Moreover, the particular brand of pluralism prevalent respectively in each of the two countries plays a critical role in determining the form, scope, and limits of constitutionalism in that country.

American pluralism, as Jacobsohn emphasizes, is primarily individualistic in nature.<sup>8</sup> Israel's pluralism, on the other hand, is, in Jacobsohn's portrayal, primarily, though by no means exclusively, communitarian. Indeed, although the communitarian bonds embedded in the historical, cultural, and religious traditions of the Jewish people play a predominant role in defining the identity of the Israeli polity, commitment to civil rights also plays an important role in the constitutional aspirations of the state of Israel.<sup>9</sup> Moreover, notwithstanding differences in American and Israeli pluralism, both polities have experienced conflicts that have variously pitted the individual against other individuals, the individual against the group, and one group against another. The difference between the American and the Israeli brand of pluralism becomes manifest, however, in the ways in which their respective political and constitutional cultures approach such conflicts.

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7. Constitutional identity in a pluralist society must bridge not only the gap between groups with divergent ethnic, cultural, and religious identities but also the gap between the generation of the constitution makers and subsequent generations expected to regard the constitution devised by their ancestors as legitimate.

8. "Entrance into the mainstream of American political, economic, and cultural life presupposes a formal acknowledgment of the primacy of the individual to the group."

9. As Jacobsohn points out, the Israeli Declaration of Independence, which provides the framework for Israeli constitutionalism, charts a constitutional course poised to fuel a fundamental tension between the communitarian objectives of the Jewish people and the individualistic goals promoted through vindication of the civil and political rights of the citizen.

To take one of the most telling examples, that of the place of religion in the polity, the United States has dealt with the problems confronting a religiously pluralistic society in ways that are markedly different from those adopted in Israel. Thus, in the United States religious conflicts are handled through the relegation of religion to the private sphere.<sup>10</sup> Also, consistent with these constitutional constraints that lend support to America's pluralistic individualism, religious groups, as Jacobsohn notes, are required to function like voluntary associations rather than as largely autonomous self-governing communities. In Israel, on the other hand, religious groups do function much more as self-governing communities, and the Jewish religion occupies a predominant position. Moreover, although, as Jacobsohn notes, Israel is not a theocracy, religious groups not only play an important role in the public sphere but also retain considerable authority over their members, including those who are recalcitrant. Thus, there is no civil marriage in Israel, which means that individuals must turn to religious authorities to get married and that no provision exists for intermarriage between members of different faiths.<sup>11</sup>

America's individualistic pluralism steeped in an assimilationist culture blends with a constitutional identity dominated by the metaphor of the social contract. Modern social contract theory furnishes a model of political and constitutional identity that relies heavily on a rejection of history, custom, and tradition in favor of an ahistorical and atomistic individualism.<sup>12</sup> Consistent with a constitutional identity squarely grounded on adherence to social contractarian ideology, moreover, group claims and the collective interests of historically grounded communities would have to give way to the separate interests and pursuits of autonomous individuals. Also, under this view of constitutional identity, individuals are conceived as being externally bound to each other through the limited links of a consensual joint association committed to neutrality towards the competing beliefs, aims, and objectives of its members.

A social contractarian constitutional identity that exalts the individual over the group goes hand in hand with a strong com-

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10. See p. 28, where Jacobsohn cites Justice O'Connor's statement that "The Establishment Clause prohibits government from making adherence to religion relevant in any way to a person's standing in the political community." (citation omitted).

11. See Izhak Englard, *Religious Law in the Israel Legal System* 142 (Alpha Press, 1975).

12. See Michel Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 Iowa L. Rev. 769, 820-23, 847-56 (1985).

mitment to individual rights to the exclusion of group rights. Accordingly, particular ethnic, religious and cultural identities must be held in check and excluded from the public place to give way to the construction of a polity in the image of an assimilationist "melting pot." Significantly, as Jacobsohn stresses, in the United States the state precedes the nation and the Constitution provides the essential framework that enables culturally, ethnically, and religiously diverse individuals to combine into a coherent whole. Moreover, America's general hostility to group rights is so pervasive that even good-faith efforts to vindicate exceptional yet clearly recognized group rights, such as those of Native Americans, end up in failure. Indeed, as Jacobsohn emphasizes, Congress' attempts to protect the collective rights of Native Americans have been largely unsuccessful, as they run counter to "the prevailing model of constitutional and political pluralism."

In Israel, on the other hand, group identity plays a central role in defining the configuration of the polity. This is made plain by the stark contrast between the predominance of the Jewish people in the institutional order of the State of Israel and the marginal role reserved to Native Americans in the structuring of the American polity. But if Israel's pluralism is more group-oriented than its American counterpart, Israel's constitutional identity is by no means simply collectivist. Indeed, consistent with Jacobsohn's analysis, the Israeli experience reveals an unresolved tension between two different strains of collective pluralism, namely religious pluralism and ethnocentric pluralism, and also between collective values and individual choice.<sup>13</sup> Moreover, because it has failed to reach a consensus around any particular constitutional identity, Israel does not have a completed constitution but rather a constitution in the making. In other words, the unresolved clash between Israel's collectivist and individualist tendencies has both made it impossible thus far for it to settle on any particular constitutional identity and has shaped the constitutional problems and the constitutional solutions that have laid down the path for Israel's constitution in the making.

The contrast between the United States' sharply defined individualist constitutional identity and Israel's problematic constitutional identity caught between strong communal and individualistic tendencies casts light both on Israeli and American constitutionalism. On the one hand, the contrast in question

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13. Jacobsohn refers to Shlomo Avineri's argument that the links between religion and nationalism in Israel are derived from the intersection of ethnicity and religion in Eastern Europe.

makes palpable the limits of Israeli receptivity to the importation of American constitutional norms. On the other hand, this contrast draws attention to the way in which America's strong constitutional identity inhibits the formation of any workable synthesis between any genuine communitarian ethos and the prevailing constitutional culture. In particular, Jacobsohn makes a persuasive case for the proposition that all of the recent attempts to revive or rethink republicanism to stir American constitutionalism towards a more communitarian course are bound to fall short. Indeed, given America's firmly implanted individualist constitutional identity, republicanism cannot generate sufficient appeal unless it is shorn of its anti-individualist features or complemented by strict adherence to fundamental liberal norms. In short, because of the constraints imposed by America's constitutional identity, the most that the revival of classical republicanism could hope to achieve is to temper the prevailing individualism rather than fomenting any major shift towards communitarianism.

## II

Focus on the nexus between constitutionalism, actual constitutions, and judicial review underscores some of the most fundamental and vexing issues confronting those who aspire to abide by the norms inherent in constitutionalism. Chief among these issues are: whether constitutionalism calls for a completed constitution or whether it is compatible with a constitution in the making; whether constitutionalism is essentially democratic or antidemocratic in nature<sup>14</sup>; and, whether authoritative judicial review of constitutional norms ultimately safeguards or threatens constitutional democracy—the so called countermajoritarian problem.<sup>15</sup> By relying on the contrast between the United States' written constitution and Israel's unwritten one, and between the apparent judicial supremacy in constitutional interpretation in the United States as against the kind of parliamentary supremacy prevalent in Israel, Jacobsohn presents many useful insights into these crucial issues. In particular, Jacobsohn suc-

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14. Compare Jon Elster, *Introduction*, in Jon Elster and Rune Slagstad, eds., *Constitutionalism and Democracy* 1, 2 (Cambridge U. Press, 1988) (“[c]onstitutionalism refers to limits on majority decisions”), with Stephen Holmes, *Precommitment and the paradox of democracy* in id. at 195, 197 (“constitutionalism and democracy are mutually supportive”).

15. For a systematic analysis of judicial review and the countermajoritarian problem, see Carlos Santiago Nino, *A Philosophical Reconstruction of Judicial Review*, 14 *Cardozo L. Rev.* 799 (1993).

ceeds in demonstrating how comparative analysis can broaden and deepen our understanding of these issues even if some of his specific observations and conclusions are—as we shall see—somewhat contestable.

Jacobsohn convincingly indicates, through his appraisal of the Israeli experience, that neither a written nor a completed constitution is necessary to the implantation of constitutionalism. Because the Israeli polity is caught between the conflicting principles of its Declaration of Independence, it cannot readily settle on a full-blown constitution and has, accordingly, opted, in Jacobsohn's term, "to grow" a constitution. Moreover, in as much as Israel lacks a strong democratic tradition, the Israeli Supreme Court has often selected constitutional solutions designed to promote democracy. Consistent with this, in at least some settings, constitutionalism appears to go hand in hand with democracy.<sup>16</sup>

Because of Israel's parliamentary supremacy and lack of a written constitution, one might think that its judges would be reluctant to generate a significant constitutional jurisprudence through judicial review. Paradoxically, however, the lack of textual constraints coupled with the knowledge that the Knesset has the power to overturn any judicially created constitutional norm to which it objects has had a powerful liberating effect on the justices on the Israeli Supreme Court. Accordingly, Israeli judges have had great latitude in inventing their constitution, leading Jacobsohn to regard them as co-authors of the constitution.

In contrast, since its early years, the United States has had a written constitution which its Founders envisioned as "the final legitimation of their Revolution, a revolution that gave birth to a new people." Nevertheless, the American Constitution was to remain at odds both with the American Declaration of Independence<sup>17</sup> and with the fundamental tenets of constitutionalism so long as it condoned slavery.<sup>18</sup> Moreover, while the Civil War Amendments rectified this glaring deficiency, in the long run these amendments—and more particularly the Fourteenth Amendment—have led the United States toward a brand of constitutionalism marked by a significant anti-democratic ten-

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16. For a persuasive argument that constitutionalism must be linked to democracy to become successful in formerly socialist Eastern and Central Europe, see Andrew Arato, *Dilemmas Arising from the Power to Create Constitutions in Eastern Europe*, 14 *Cardozo L. Rev.* 661, 685-87 (1993).

17. See Richards, 14 *Cardozo L. Rev.* 577 (cited in note 5).

18. See *supra* note 5.

dency.<sup>19</sup> Indeed, through reliance on the Fourteenth Amendment, most of the rights enumerated in the Bill of Rights as well as certain unenumerated rights have become enforceable against the various states.<sup>20</sup> Accordingly, time and again democratically enacted state legislation has been set aside in order to vindicate constitutional rights, pitting American constitutionalism against majoritarian policy and exacerbating the countermajoritarian problem posed by judicial elaboration of constitutional norms.

According to Jacobsohn, the moral consensus that informs America's written constitution legitimizes the Supreme Court's countermajoritarian role as authoritative interpreter of the constitution. Referring to the Supreme Court's shameful decision in *Dred Scott*, Jacobsohn insists, however, that the Supreme Court is not beyond error or willful distortion. Accordingly, Jacobsohn suggests that it is inappropriate for the Supreme Court to enjoy "an unqualified finality in constitutional interpretation."

Jacobsohn asserts that this latter proposition is not widely shared, but that claim is questionable, particularly in more recent years, ever since Attorney General Edwin Meese made his famous statement distinguishing "the constitution" from "constitutional law" and arguing that the Executive Branch is bound by the constitution but not by the constitutional interpretations issued by the Supreme Court.<sup>21</sup> Actually, while there is broad consensus that a Supreme Court constitutional decision is absolutely binding as to the rights and obligations of the parties before it, there is wide disagreement concerning the scope and limitation of the finality of Supreme Court constitutional pronouncements beyond that.<sup>22</sup>

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19. I am assuming for purposes of this discussion that democracy can generally be equated with majority rule. I am fully aware, of course, that most sophisticated conceptions of democracy entail complex relationships between majoritarian and antimajoritarian features. For example, in the context of a model of democracy as deliberative, antimajoritarian rights to present unpopular political views may well play a crucial role in the legitimization of majority rule. See generally Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (Kennikat Press, 1948). Nonetheless, since many of the antimajoritarian rights recognized as protected by the American Constitution are arguably not essential to the functioning of democratic self-government, such as most of the rights protected by the Bill of Rights, equating democracy with majoritarian rule will do both in terms of dealing with the contrast between Israel and the United States and with the countermajoritarian problem raised by judicial review of constitutional norms.

20. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968).

21. Edwin Meese III, *The Law of the Constitution*, 61 Tul. L. Rev. 979 (1987).

22. For a recent sampling of different positions on this issue, see, e.g., Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 Cardozo L. Rev. 43 (1993); Michael Stokes Paulsen, *The Merryman Power and the Dilemma of*

One may also object to the characterization (which Jacobsohn seems to endorse) of the Supreme Court's decision in *Dred Scott* as being in error. Indeed, whereas *Dred Scott* flies in the face of the fundamental tenets of constitutionalism, it is not inconsistent with a constitutional text that grants implicit recognition to the institution of slavery.<sup>23</sup> More generally, to the extent that, even in the United States, constitutionalism and constitution are not necessarily coextensive, and that controversies concerning constitutional interpretation in cases such as *Dred Scott*, *Lochner*, *Griswold*, or *Roe v. Wade* may be less a matter of error or of willful distortion than of the plausibility of contradictory interpretations of the written constitution, the counter-majoritarian problem in the United States and the determination of the ultimate authoritativeness of judicial interpretations of the Constitution may well pose more vexing and intractable problems than Jacobsohn's account would suggest.

Because they deal with a written constitution, American judges seem to be on firmer ground than their Israeli counterparts when it comes to the issuance of constitutional opinions. But because there is no parliamentary sovereignty in the United States and because the American Constitution is completely silent on the question who bears the ultimate responsibility for constitutional interpretation,<sup>24</sup> the role of American judges may in the end be more problematic than that of Israeli judges. Jacobsohn, however, underestimates the difficulties posed by the American type of constitutionalism, which relies heavily on judicial intervention to vindicate fundamental, anti-majoritarian constitutional rights. Indeed, while Jacobsohn is certainly aware of these difficulties, he overestimates the importance of having a written constitutional text. To be sure, Jacobsohn is right in as much as the existence of a written constitutional text seems bound to impose on judges many significant constraints which otherwise would not be present. Whether a written constitution imposes more constraints on judges than an unwritten one, however, depends ultimately on many different factors, including the nature of the relevant constitutional text and the particular elements that inform the constitutional identity and political culture

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*Autonomous Executive Branch Interpretation*, 15 *Cardozo L. Rev.* 81 (1993); David A. Strauss, *Presidential Interpretation of the Constitution*, 15 *Cardozo L. Rev.* 113 (1993); Michel Rosenfeld, *Executive Autonomy, Judicial Authority and the Rule of Law: Reflections on Constitutional Interpretation and the Separation of Powers*, 15 *Cardozo L. Rev.* 137 (1993).

23. See, e.g., U.S. Const. art. I, § 2, cl. 3; art. I, § 9, cl. 1; art. IV, § 2, cl. 3.

24. See Rosenfeld, 15 *Cardozo L. Rev.* at 137 nn. 1-2 (cited in note 22).

of the relevant country without a constitution. Thus, for example, the texts of such open-ended clauses as the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the American Constitution arguably constrain judges far less than would a constitutional identity and political culture reflecting an unwavering consensus on the sanctity of human life since conception and on the intolerable evil of racial apartheid.<sup>25</sup> In short, whereas the United States' constitutional identity is settled in a way that the Israeli is not, and whereas the United States' written constitution undoubtedly imposes numerous palpable constraints on the judges charged with its interpretation, the Supreme Court's constitutional jurisprudence over the last century—particularly in the fields of federalism and fundamental individual rights—amply justifies the conclusion that American judges are indeed the co-authors of an evolving constitution rather than the mere expositors of largely uncontroverted constitutional norms.

Especially when contrasted with the predominant concern of Israeli judges to emphasize the democratic aspects of constitutionalism, American judicial activism in constitutional law relates largely to the antidemocratic aspects of constitutionalism, thus exacerbating the counter-majoritarian problem. In Jacobsohn's view, "over the last twenty-five years or so a dominant school has existed in the United States, one advancing a model of the Supreme Court as a critical agent for principled social change of the sort that is measurable in terms of an expanding domain of individual rights." That model, however, may well be out of date. Not only have individual rights generally ceased to expand in the last two decades, but also in many cases they have been considerably cut back.<sup>26</sup>

Consistent with these observations, whereas it is hard to dispute that American constitutionalism possesses a distinct antidemocratic component, the controversy over the proper role of judicial review in constitutional cases seems to boil down to a dispute over the legitimate boundaries between the will of polit-

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25. Indeed, in the latter case, it would be inconceivable that judges would disagree over the existence of a constitutional right to abortion, as the United States Supreme Court Justices did in *Roe v. Wade*, or that they could interpret constitutional equality as being compatible with racial apartheid, as did the majority in *Plessy v. Ferguson*.

26. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (refusal to extend privacy rights to consensual homosexual relationships among adults); *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791 (1992) (significant curtailment of constitutional rights to abortion recognized in *Roe v. Wade*); *Paul v. Davis*, 424 U.S. 693 (1976) (previously recognized interest in reputation no longer held included in constitutional protection of "liberty").

ical majorities and the antimajoritarian constraints arising from the vindication of constitutionally sanctioned individual rights. In the context of that dispute, moreover, the textualists and the judicial conservatives display a strong proclivity against expansion of the Constitution's antidemocratic injunctions while liberal judicial activists tend to embrace a contrary approach with the aim of better securing individual rights against unwarranted majoritarian incursions. Contrary to Jacobsohn's suggestion, however, the textualist approach is not necessarily the preferred one in the context of a written constitution such as the American. Indeed, in spite of much of the prevailing rhetoric,<sup>27</sup> in the context of the many broad, general, and open-ended provisions of the American Constitution, textualists and judicial conservatives take on the role of co-authors of the Constitution as much as their most liberal counterparts.<sup>28</sup> In the last analysis, therefore, the nature and severity of the constraints which a written constitution is likely to impose on judicial constitution-making depends on the confluence of several factors, including the nature of the relevant socio-political context as well as the character and specificity of the constitutional text involved.

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27. A seemingly attractive line of argument is that democracy and majority rule are paramount except to the extent that the text of the Constitution clearly calls for protection of antimajoritarian rights. Moreover, when the text of the Constitution is unclear, judges should err on the side of democracy rather than on that of expanding encroachments on majority rule. So long as these prescriptions are strictly adhered to, judges—so the argument goes—should be deemed to “interpret” the Constitution rather than “making” or “co-authoring” it.

Upon reflection, there are many difficulties with this argument. Suffice it to point out that, at least in the context of general, open-ended constitutional provisions such as the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment, the Framers may have constitutionalized antimajoritarian protections with deliberately indeterminate boundaries so as to enable each generation to adjust them to meet its own specific needs. From that perspective, a restrictive reading of the constitutional text would be a further elaboration of constitutional prescriptions in precisely the same way as an expansive reading of that text. Furthermore, even if one focuses exclusively on the issue of democracy, so long as the Constitution is viewed as the product of a qualified majority engaged in “constitutional politics” rather than in “normal politics,” see Bruce A. Ackerman, *Neo-federalism?*, in *Constitutionalism and Democracy* 153, 162-63 (cited in note 14), then a restrictive reading of a constitutional provision runs the same risk as does an expansive reading to contravene the will of the relevant majority.

28. For example, the (unenumerated) right to privacy is, strictly speaking, neither explicitly included in, nor explicitly excluded from, the set of rights that may be plausibly deemed to come within the sweep of the American Constitution. Accordingly, a judicial recognition of a constitutional privacy right is as much a further elaboration of the Constitution as an explicit judicial declaration that the Constitution does not protect the right to privacy. Compare the majority concurring and dissenting opinions in *Griswold*.

## III

The question of constitutional transplantation is complex enough to preclude a straightforward answer. Among other things, one must distinguish between the possibility and the desirability of constitutional transplantation. Moreover, even if a particular constitutional norm appears to have been successfully transplanted to a second home, it may occupy such a different position in the constellation of constitutional norms prevalent in its adoptive country than it does in the constitutional framework of its country of origin as to make it difficult to assess whether the transplantation was ultimately desirable or successful. Furthermore, even assuming that two countries had adopted identical sets of constitutional norms, their respective constitutional practices (e.g., the relative importance of judicial review) and constitutional doctrines may be sufficiently divergent as to render problematic any comprehensive assessment of the success of transplantation.

While keeping these difficulties in mind, useful insights into the question of transplantation can nonetheless be gained from a consideration of actual instances, such as those involving Israeli borrowings from the United States, particularly if one keeps in mind that these transplantations are embedded in the dynamics of evolving constitutional orders. As Jacobsohn emphasizes, the desirability of constitutional transplantation is to an important degree a function of political culture. Also, as Jacobsohn notes, one can gain a better sense of the phenomenon of constitutional transplantation if one considers both its positive and its negative dimensions.<sup>29</sup> Furthermore, the desirability and likelihood of success of a given transplantation depends on the respective constitutional identities of the two countries involved.

Focusing on the phenomenon of constitutional transplantation through concentration on the constitutional protection of freedom of speech seems particularly appropriate for at least a couple of reasons. First, broadly articulated freedom of speech provisions are included in constitutions throughout the world,<sup>30</sup> but, notwithstanding similarities in formulation, yield widely divergent scopes of protection to speech.<sup>31</sup> And, second, as al-

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29. The negative dimension of constitutional transplantation refers to "the process in which Country A's example is carefully considered and then rejected by Country B."

30. See Frederick Schauer, *Free Speech and the Cultural Contingency of Constitutional Categories*, 14 *Cardozo L. Rev.* 865, 868 (1993).

31. *Id.* at 868-71. According to Schauer, "so long as cultural differences are reflected in categorical differences, differences in the scope of constitutional protections can

ready mentioned,<sup>32</sup> American free speech jurisprudence has been particularly influential in Israel, a fact that is all the more interesting given the marked differences in political culture and constitutional identity between the two countries.

Both Israel and the United States are strongly committed to upholding freedom of speech as an important constitutional norm. Moreover, as Jacobsohn accurately notes, although there is a lack of consensus among American First Amendment theorists concerning the ultimate justification for, or objectives of, free speech, commitment to a content-neutral approach to speech remains a predominant and seemingly unshakeable feature of American free speech jurisprudence.<sup>33</sup> In Israel, however, content-neutrality is virtually unthinkable in the context of the expression of religious or racial hatred.<sup>34</sup> Given this important difference, it is surprising that Israel has thus far relied so much on American First Amendment jurisprudence, and all the more so since America's tolerance for racist speech is squarely at odds with the constitutional jurisprudence of most Western democracies.

Whether or not to tolerate extremist speech poses vexing difficulties for liberal democracies.<sup>35</sup> Nevertheless, it is plain from a consideration of their contrasting pluralisms, political cultures and realities, and constitutional identities, why Israel and the United States have reached opposite conclusions concerning racist speech. In the United States, individualistic pluralism tends to abstract the individual from the group to the point of downplaying the importance on individuals of injuries stemming from their group affiliations. In Israel, on the other hand, commitment to a more communitarian pluralism not only places far greater weight on group defamation but also casts injuries stemming from group affiliation as much more threatening to individual integrity and self-fulfillment. Furthermore, whereas the United States has experienced "pluralistic intolerance"—*i.e.*, a situation in which there is so much disagreement over the targets of intolerance as to minimize the threat to any particular group

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be expected to vary far more than might be expected merely by inspecting the relevant constitutional language." *Id.* at 879.

32. See *supra*, p. 434.

33. For an example of a recent reaffirmation of content-neutrality in the context of hate speech and "fighting words," see *R.A.V. v. St. Paul*, 112 S. Ct. 2538 (1992).

34. Cf. Editorial, *Jerusalem Post*, Feb. 2, 1986 ("What could be more natural for a state that arose from the ashes of a racist holocaust than to declare incitement to racism a criminal offense?"), p. 181.

35. For a discussion of these difficulties, see Michel Rosenfeld, *Extremist Speech and The Paradox of Tolerance*, 100 *Harv. L. Rev.* 1457 (1987) (book review).

that encounters intolerance—Israel is prey to “focused intolerance” primarily against its Arab minority, which is a source of subjective and objective threat. Thus, whereas the United States may afford tolerating intolerance,<sup>36</sup> Israel could well threaten the continued viability of its polity by doing likewise.

Consistent with these observations, it would seem that Israel would have a very strong incentive to embrace a constitutional doctrine that is markedly different from its American counterpart, at least when it comes to dealing with racist speech. For example, Israel could have excluded racist speech from the *scope* of speech entitled to constitutional protection, thus carving out a content-based exception to the general rule that all political speech comes within the sweep of the constitutional right to free speech. Instead, as Jacobsohn notes, Israel has embraced American First Amendment doctrine by including racist speech within the scope of speech eligible for protection, and then proceeded to ban such speech by positing its potential for collective harm (and for harm to individuals on account of their group affiliations) as sufficiently serious to warrant suppression—this latter conclusion being in sharp contrast with the prevalent American conclusion that the injuries of racist speech do not justify suppression.

Israel’s puzzling insistence to embrace American First Amendment doctrine to reach a diametrically opposed conclusion on racist speech provides, consistent with Jacobsohn’s analysis, a vivid illustration of the vicissitudes of constitutional transplantation. As Jacobsohn sees it, Israel’s borrowings from American First Amendment jurisprudence do not result from the presence of overlapping needs or objectives. Instead, “[t]he significance of the frequent references to American sources is that they have contributed to the failure of the Israeli Supreme Court to develop a free speech jurisprudence that reflects the character of the larger pluralist democracy of which it is a part.” This failure, however, is not really one, according to Jacobsohn, to the extent that it has the salutary effect of promoting democratic values in the absence of a lack of consensus concerning a satisfactory reconciliation of constitutional doctrine and political culture. Accordingly, in this instance at least, constitutional transplantation amounts to both less and more than originally meets the eye. It amounts to less in that the similarities in doctrine mask more

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36. This view, however, is by no means universally shared. See, e.g., Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 Mich. L. Rev. 2320 (1989).

important differences concerning the respective modalities of analysis, constitutional objectives, and results, thus underscoring the need for a firmly grounded contextual approach to constitutional transplantation. But such transplantation can also achieve more than meets the eye in that the transplanted norms may have beneficial side effects, such as the long-term promotion of democratic values in a sociopolitical environment otherwise torn between democratic and anti-democratic tendencies. In short, constitutional transplantation may sometimes be desirable, but not necessarily for the reasons that one might expect.

In the last analysis, Jacobsohn's *Apple of Gold* makes a major contribution to the elucidation of some of the most important issues that confront the contemporary movement towards constitutionalism. To be sure, some of Jacobsohn's insights and conclusions are contestable, and his focus on Israel and the United States may be at times too narrow to support any definitive resolution of some of the problems which he addresses. Nevertheless, Jacobson's sharp and comprehensive analysis succeeds admirably in conveying an accurate sense of the complexity of the issues involved as well as in suggesting attractive hypotheses which may well be borne out by further comparative work encompassing other constitutions and other political cultures.

Above all, what emerges from Jacobsohn's excellent analysis is that comparative constitutionalism is a worthwhile and very useful, even if often difficult, endeavor which ought to be more widely embraced. Indeed, the relationships between constitutionalism, constitutional identity, political culture, and constitutional transplantation loom as neither transparent enough to allow for sweeping generalizations nor as opaque and uniquely idiosyncratic enough to justify giving up on comparative work. Based on Jacobsohn's comparison of the American and the Israeli experiences, these relationships are simultaneously shaped by the constraints of being embedded in a particular sociopolitical and historical context and by the aspiration to converge towards a cluster of commonly held or overlapping values. The more we learn about the interplay between particular constraints and general aspirations, the better we are bound to understand the scope and limits of the contemporary drive towards constitutionalism.