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Apple of Gold: Constitutionalism in Israel and the United States

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APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES. By *Gary Jeffrey Jacobsohn.* Princeton: Princeton University Press. 1993. Pp. ix, 284. $39.50.

> The assertion of that *principle* at *that time,* was *the* word, *"fitly spoken"* which has proved an "apple of gold" to us. The *Union* and the *Constitution,* are the *picture* of *silver,* subsequently framed around it. The picture was made, not to *conceal,* or *destroy* the apple; but to *adorn,* and *preserve* it. The *picture* was made *for* the apple — *not* the apple for the picture.
> — Abraham Lincoln[1]

In his earlier work, *The Supreme Court and the Decline of Constitutional Aspiration,*[2] Professor Gary Jacobsohn[3] compared a number of modern theories[4] of constitutional interpretation with natural law premises such as Lincoln's theory that the Constitution cannot be interpreted without considering the goals of the Declaration of Independence.[5] He asserted that modern scholars' failure to "relat[e] the exercise of judicial power to the broader purposes and aspirations of the [American] polity"[6] was a weakness undermining the validity of their theories. Lincoln's theory, he argued, was more honest and more in tune with Professor Jacobsohn's own theories.[7] Jacobsohn concluded his work by encouraging judges to "ask themselves how it is possible for them, as judges, to interpret — understand and apply — our fundamental law if they reject, or simply are ignorant of, its presuppositions."[8] In *Apple of Gold,* an analysis of constitutionalism in Israel, he follows the attempts of the Israeli Supreme Court to develop its own constitutional interpretive theory and suggests that the

1. *Apple of Gold* begins with this quotation. P. 3. It is not the first time, however, that Professor Jacobsohn has used it. The "apple of gold" metaphor appeared in an earlier work that outlined his theory of constitutional interpretation. GARY J. JACOBSOHN, THE SUPREME COURT AND THE DECLINE OF CONSTITUTIONAL ASPIRATION ch. 6 (1986). The duplication of the reference is no accident, since *Apple of Gold* continues to expound upon Professor Jacobsohn's constitutional theory. *See infra* notes 2-8 and accompanying text. The quotation is attributed to Lincoln, even though he apparently never included it in a speech. P. 4; *see also* JACOBSOHN, *supra,* at 102-03. The reference is to a passage from the Bible: "A word fitly spoken is like apples of gold in pictures of silver." *Proverbs* 25:11.

2. JACOBSOHN, *supra* note 1.

3. Woodrow Wilson Professor of Government at Williams College.

4. Professor Jacobsohn critiqued the theories of Roscoe Pound, Ronald Dworkin, Raoul Berger, Thomas C. Grey, and John Hart Ely.

5. JACOBSOHN, *supra* note 1, ch. 7.

6. *Id.* at 10.

7. Professor Jacobsohn stands among other proponents of departmentalism such as Sanford Levinson and Stephen Macedo. SUSAN R. BURGESS, CONTEST FOR CONSTITUTIONAL AUTHORITY 13 (1992). Departmentalists argue that each branch of government has the right to develop its own, equally authoritative, constitutional interpretation. *Id.* at 12-13.

8. JACOBSOHN, *supra* note 1, at 140.

attempt, at least, comports with Lincoln's, and Jacobsohn's, natural law ideals.

Apple of Gold compares Israeli and American constitutionalism and evaluates efforts to transplant American principles to Israel. Professor Jacobsohn uses the Declarations of each nation to provide the framework for analyzing the similarities and differences between the two polities. The American Declaration of Independence embodies the "ethos of individualism" (pp. 4-5). In contrast, the 1948 Israeli Declaration of Independence affirms the existence of the Jewish people as a nation (p. 7). This contrast between individualism and national identity provides the framework for Jacobsohn's reflections.

In the first two chapters, Professor Jacobsohn lays the foundations for his comparisons. In "Two Declarations" (pp. 3-9) and "Two Constitutions" (pp. 9-17), he describes the fundamental distinctions between the two political systems. The American Declaration provides for natural justice principles that "are effectively the basis of nationhood" (p. 9). Those principles, he asserts, officially achieve authority in the Constitution, thereby giving both documents a singular purpose (p. 9). The Israeli Declaration embodies a similar commitment to individual rights principles,[9] but they are not the sole vision of that document. Instead, they share space with the vision of the Jewish people as a nation. The competition between its two visions is why, Jacobsohn asserts, Israel has not achieved a written constitution (p. 9). Consequently, constitutional development has taken place in the courts and, on a parallel track, in the Knesset.[10] In "Alternative Pluralisms" (ch. 2), Jacobsohn argues that, although both states contain subgroups of diverse origins, the difference in national vision leads to divergent constitutional processes (pp. 18-54). The American process leads to assimilation, and the Israeli process begets stratification. Professor Jacobsohn poses "the one great American counterexample, Native Americans" as a comparison (p. 52). He describes the development of the Indian Civil Rights Act of 1968[11] as a noble effort, but one doomed to unsatisfactory results because it was "grounded on premises that ignored the essential fact that Native Americans were a minority who did not fit the prevailing model of constitutional and political pluralism" (p. 19). Protecting group autonomy, a "constitutional anomaly" in America, is the norm in Israel (p. 23). Not only

9. The second section of the Declaration includes the following:

> The State of Israel will . . . be based on the precepts of liberty, justice and peace taught by the Hebrew prophets; will uphold the full social and political equality of all its citizens, without distinction of race, creed or sex; will guarantee full freedom of conscience, worship, education and culture . . . .

P. 7.

10. The Knesset is the Israeli legislative body.

11. Pp. 18-25. The Act is codified at 25 U.S.C. §§ 1301-1303, 1311-1312, 1321-1326, 1331, 1341 (1988). *See generally* Donald L. Burnett, Jr., *An Historical Analysis of the 1968 Indian Civil Rights Act,* 9 HARV. J. ON LEGIS. 557 (1972).

does Israel recognize group identities, its government supports their continuing vitality. Accordingly, Israel has a strong sense of community (pp. 35-44) and departs from traditional American-style republicanism (pp. 44-52).

These themes provide the undercurrent for the next four chapters, in which Professor Jacobsohn describes the development of constitutionalism in Israel. In early efforts, the Israeli Supreme Court attempted to define who is a Jew. Jacobsohn infers that, in deciding that a Jew who converted to Catholicism is no longer a Jew for the purposes of the Law of Return[12] but the children of a Jewish father and a non-Jewish mother are,[13] the Court tried to balance the twin bases of Jewishness — religion and individual choice. Although the decisions appear somewhat contradictory,[14] they represented a compromise which chose an objective, secular definition of nationality (pp. 64-66). While the American perspective would demand this effort (p. 71), the Israeli vision rejected it[15] and refused to diminish the religious element of Jewish nationality.[16] Jacobsohn predicts, however, that since "secular, democratic aspirations" are one of the two competing fundamental visions in Israel, they will continue to surface in the debate.[17]

Chapter Four analyzes both Israel's failure to adopt a written constitution and the mechanisms developed in its place (pp. 95-135). Professor Jacobsohn suggests first that America's ability to produce a written constitution was possible because there was consensus on the "set of political principles that would serve as developmental guidelines of the nation" (p. 104). Israel, on the other hand, has multiple visions whose priority has not been settled (pp. 100-06). Thus, Jacobsohn perceives the ongoing constitutional debate as Israel's attempt to solidify its vision.

12. Pp. 63-69 (discussing Rufeisen v. Minister of Interior, 16(4) P.D. 2428 (1962), *translated in* SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL (SPECIAL VOLUME) 1 (Asher F. Landau & Peter Elman eds., 1971)) [hereinafter SELECTED JUDGMENTS]. *Rufeisen* is commonly known as the Brother Daniel case.

13. Pp. 70-80 (discussing Shalit v. Minister of Interior, 23(2) P.D. 477 (1970), *translated in* SELECTED JUDGMENTS, *supra* note 12, at 35). The halakic (orthodox) definition of a Jew is a person "whose mother was Jewish or converted to Judaism." P. 55 n.1. For commentary on *Shalit,* see Benjamin Akzin, *Who Is a Jew? A Hard Case,* 5 ISR. L. REV. 259 (1970).

14. *Rufeisen* seems to hold that Jewishness is based on religion, yet *Shalit* finds Jewishness outside of religion. Justice Landau's concurrence in *Rufeisen* provides some consistency, suggesting that Rufeisen's religious decision "denied his *national* past." SELECTED JUDGMENTS, *supra* note 12, at 22 (emphasis added). Shalit's denial of Jewishness' religious basis apparently did not cross the *national* line.

15. After *Shalit,* the Knesset amended the Law of Return to require both the Orthodox definition of Jewishness, *supra* note 13, and nonmembership in any other religion. "In effect, then, the secular position on the separability of religion and nationality was rejected." P. 71.

16. "[U]nlike the American example, religion in Israel is more than an influence on national identity; it is a constituent part of that identity." P. 79.

17. "The challenge of balancing these commitments in a manner that retains respect for the constitutional sanctity of both of them will doubtless ensure the continuing presence of this issue on Israel's political and legal agenda." P. 80.

Additionally, Chapter Four analyzes the development of judicial review in Israel against the background of judicial review in America (pp. 110-35). Professor Jacobsohn depends heavily on an article by Robert A. Burt,[18] who "maintains that the emergence of judicial review in both countries is best understood as an institutional response to the presence of fundamental societal conflict" (p. 113). As examples of fundamental conflicts in American law, Jacobsohn cites the Federalist-Republican clashes preceding *Marbury v. Madison*[19] and the divisiveness of slavery leading to the Missouri Compromise and eventually *Dred Scott.*[20] In Israeli history, he cites the 1967 Six Day War as the conflict preceding the *Elon Moreh* decision[21] and the political party struggles surrounding the *Bergman* case.[22] However, while the U.S. Supreme Court used the written Constitution to establish judicial review[23] and judicial supremacy,[24] Professor Jacobsohn indicates that the absence of a written constitution led the Israeli Supreme Court to develop a position of judicial restraint (pp. 124-32). Although its decisions have been central in many divisive political issues,[25] the Court has intervened cautiously, preferring to leave many fundamental decisions to the legislature.[26] Without the certainty of a written document, Jacobsohn favors the prudence of the Court's chosen path.[27]

This position is consistent with the views Professor Jacobsohn introduced in his earlier work, *The Supreme Court and the Decline of*

18. Robert A. Burt, *Inventing Judicial Review: Israel and America,* 10 CARDOZO L. REV. 2013 (1989).

19. 5 U.S. (1 Cranch) 137 (1803).

20. Pp. 115-18 (discussing Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857)).

21. Pp. 113-15. In *Elon Moreh,* the Court invalidated the military seizure of Arab-owned lands. Dwikat v. Israel, 34(1) P.D. 1 (1980), *translated in digest form in* 15 ISR. L. REV. 131 (1980). Because the decision favored Arab property rights over Jewish settlers, it represented a bold move on the Court's part. *See* Burt, *supra* note 18, at 2071. Elon Moreh was the name of the settlement from which the Jewish settlers were evicted.

22. Pp. 124-29 (discussing Bergman v. Minister of Finance, 23(1) P.D. 693 (1969), *translated in* 4 ISR. L. REV. 559 (1969)). *Bergman* struck down the Financing Law of 1969, which only financed the election campaigns of candidates from parties already represented in the current Knesset. Justice Landau's opinion invalidated the provision because it conflicted with the entrenched Basic Law establishing electoral equality. P. 126. For reactions to the *Bergman* case, see Benjamin Akzin, Comment, 4 ISR. L. REV. 576 (1969); Peter Elman, Comment, 4 ISR. L. REV. 565 (1969); Claude Klein, Comment, 4 ISR. L. REV. 569 (1969).

23. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

24. Cooper v. Aaron, 358 U.S. 1, 18-19 (1958).

25. "[T]he Court has already become a principal player in the great issues that divide the body politic." P. 132.

26. Professor Jacobsohn argues that Justice Landau and others did not want to "inappropriately enmesh the judiciary in controversies more amenable to political resolution." P. 130. In this philosophy, one sees the equivalent of the U.S. Supreme Court's "political question" doctrine. *See* Baker v. Carr, 369 U.S. 186 (1962).

27. "[J]udicial restraint in Israel means avoiding judgments of finality in the absence of a final settlement of regime principles." P. 132.

Constitutional Aspiration, in which he theorized that "constitutional aspiration" requires the participation of all branches of government, not just the judiciary.[28] The example of Lincoln's opposition to the U.S. Supreme Court's *Dred Scott* decision resurfaces in *Apple of Gold,* where Jacobsohn compares Lincoln's actions (pp. 117-20) to the Knesset's responses to the early Israeli Supreme Court decisions.[29] He suggests that Lincoln's behavior was labeled as disobedient because Americans viewed their Court's power of judicial review as "fully settled" (p. 119). Because the Israeli review power has not been so entrenched, its citizenry viewed the Knesset's reactions as appropriate. Professor Jacobsohn patently favors the Israeli approach.[30] He even advises the American polity to follow suit, so that "they too can profit from a constitutional arrangement that allows them to achieve a higher level of clarity in the articulation, development, and application of constitutional principle" (p. 135). This is certainly a provocative call for action, but it is unlikely to change almost 200 years of established doctrine.[31]

Chapter Five's discussion of Israeli censorship law (pp. 136-43) and election law decisions (pp. 150-62) and Chapter Six's free speech analysis (pp. 177-227) serve as the background for Professor Jacobsohn's examination of the Israeli Supreme Court's selective use of American rights-based constitutional theory. Again, he returns to his two themes, the Declaration's dual aspirations and the absence of a written constitution, to validate the Justices' choices. When his advocacy of the Israeli Court's activist pursuit of individual rights appears at odds with his prior criticism of similar behavior by American jurists and scholars, he claims that the Israeli Court's activism is acceptable due to the shared nature of constitutional interpretation in Israel (pp. 143-62). "[T]he constraints imposed on the courts by the constitutional principle of parliamentary supremacy legitimates a more active role for the courts in construing the law."[32] Professor Jacobsohn further justifies the Israeli Court's rights-oriented activist role for its edu-

28. For a discussion of Professor Jacobsohn's "constitutional aspiration" theory, see Book Note, *Natural Law and the Constitution,* 101 HARV. L. REV. 874 (1988). Burgess, *supra* note 7, at 13-22, discusses the pros and cons of departmentalist theories, including Jacobsohn's.

29. The Knesset did not merely resist "wrong" Supreme Court decisions; it amended Basic Laws to overrule them. P. 71 (discussing amendment to the Law of Return following *Shalit*); *see also supra* note 15 and accompanying text. For one Justice's endorsement of these reactions, see p. 129 n.94.

30. "A Court pursuing the more libertarian aspirations of the nation's founding agenda can and ought to be checked by a Knesset that is more sensitive to the other parts of that agenda . . . ." P. 135.

31. This is not surprising, since it follows his own ideas. Professor Jacobsohn "[r]egrettably" recognizes that his "is not a widely shared view, mainly because . . . judges and scholars . . . embrace the teaching contained in the aphorism that the Constitution is what the judges say it is." P. 134. For more objective reasons why such views are not widely shared, see Burgess, *supra* note 7, at 19-22.

32. P. 152. The absence of a written constitution makes judicial legislation easier because

cational function.[33] Again, he asserts that the texts for this pedagogical task of the "republican schoolmaster" (p. 162) have been, and should be, borrowed *selectively* from America.[34] The educative role is particularly crucial and risky, he asserts, because the Court is *developing* and *interpreting* its constitutional text simultaneously (pp. 168-73). On a parallel track, the Knesset also adds "lessons" regarding the sanctity of Israel as a Jewish state.[35] Thus, the Court's desire to educate the populace on democratic individual rights theory must not overshadow the other aspiration of Israeli constitutionalism — the preservation of the Jewish state.

No issue demonstrates the differences between the American and Israeli constitutional visions more clearly than that of free speech. Chapter Six delves deeply into free speech cases from both nations to drive home the distinction (pp. 177-227). In particular, Professor Jacobsohn contrasts the American tolerance of the Nazi march through Skokie, Illinois[36] with the Israeli suppression of Rabbi Meir Kahane.[37] Whereas the American vision requires tolerance, "Israeli law, in its criminalization of various types of offensive speech, resists a Holmesian toleration of what we hate . . ." (p. 219). Viewed from the perspective of its fundamental vision, each nation's approach "can

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"[t]he judge there cannot be accused of rewriting a text (in the case of rights) that does not exist." P. 157. Nonetheless,

> to the inevitable charge that the Court in creating such a right is usurping the authority of the Knesset, it can simply be pointed out that it is a strange, or at any rate benign, usurpation that can last only as long as the victimized body accepts through its own inaction the act perpetrated against it.

P. 157. In America, Jacobsohn argues, the Court reigns supreme, and Congress cannot effectively restrain unwarranted excursions from the fundamental vision. Accordingly, judicial activism is potentially more dangerous. Pp. 152-57.

33. Pp. 162-73. "[T]he Court has a special obligation to articulate and explain political principles [because] . . . Israel does not have a strong democratic tradition." P. 163.

34. Pp. 164-73. Professor Jacobsohn suggests that Israeli judges appreciate and emulate American jurists' use of legal scholarship in their opinions. Particularly, "the extensive American literature in constitutional theory is a subject of more than casual interest." P. 146. One suspects that Professor Jacobsohn hopes *Apple of Gold* and its ideas are among those the Israelis import.

35. "[T]he scope of the course is not fully within the control of its teachers," because "the Court must now incorporate [the Knesset's enactments] into its own syllabus . . . ." P. 166.

36. "We live in a society that is very conscious of racial and religious differences, in which open discussion of important public issues will often require reference to racial and religious groups, often in terms which members of those groups, and others, would consider insulting and degrading." P. 177 (quoting Collin v. Smith, 447 F. Supp. 676, 691 (1978)). "[S]peech may not be punished merely because it offends." P. 177 (quoting 447 F. Supp. at 697). Frank Collin was the leader of a group of American Nazis who wanted to march through Skokie, a town densely populated with Holocaust survivors. P. 178.

37. "A near certainty that the feelings of a religious or ethnic minority be really and harshly hurt, by publication of a deviant speech, is enough to justify limiting that speech." P. 177 (quoting Kahane v. Broadcasting Auth., 41(3) P.D. 255, 295-96 (1987)). A digest of *Kahane* appears at 23 Isr. L. Rev. 515 (1989). Rabbi Kahane led the Jewish Defense League, whose anti-Arab platform advocated acts of terrorism, abusive commentary, and other provocative behavior. P. 178.

readily be assimilated into an argument for individual liberty rightly understood" (p. 227).

Professor Jacobsohn concludes as he began: with Israel's continuing tug-of-war over adopting a written constitution, especially a bill of rights (ch. 7). He infers that American critics who chastise Israel's ambivalence as false constitutionalism[38] have ignored once again the twin goals of Israel's political culture.[39] Consequently, Jacobsohn exhorts Israelis to remain deaf to the critics and continue their quest to forge a "picture of silver" that truly fits *their* "apple of gold."

In his introduction to *Apple of Gold,* Professor Jacobsohn proclaims two goals:

> What I have sought to do in this book is contrast particular features of the constitutional cultures of Israel and the United States that are relevant to an assessment of constitutional transplantation. While these two polities constitute the specific focus of the analysis, my hope is to contribute more broadly to an improved understanding of the nature of constitutionalism. [p. 12]

Professor Jacobsohn succeeds admirably in his first goal. His examples are thought provoking and reflect the depth of his research and the stellar sources to which he had access.[40] As a historical account of Israel's constitutional struggles, *Apple of Gold* is both educational and engaging. Regarding his second goal, whether Jacobsohn has succeeded in illuminating the current constitutional discourse depends on whether one finds his theory of constitutional aspiration persuasive. If it is persuasive, the Israeli experience serves as an example of how the exercise of constitutional development is properly shared between the courts, the legislature, and ultimately the people. If it remains unconvincing, one must applaud nonetheless *Apple of Gold's* energetic efforts to display Professor Jacobsohn's "republican schoolmaster" aspirations.

— *Cynthia A.M. Stroman*

38. "The raison d'etre of constitutional government is the preservation of liberty; whatever other goals it may have, a regime that identifies itself as constitutional, but fails to pursue this goal, is simply not what it purports to be." P. 231.

39. "[T]he presence or absence of such a document is not essential to a determination of whether constitutionalist claims are legitimate . . . . [especially] where a commitment to liberal democratic principles is to be reconciled with the establishment of the state as a homeland for a particular people." Pp. 235-36.

40. In addition to thorough historical and legal research, Jacobsohn interviewed, among others, six former or current Justices of the Israeli Supreme Court.