GARY J. JACOBSOHN

Apple of Gold

Constitutionalism in Israel and the United States

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Gary Jeffrey Jacobsohn

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FOR JOSEPH AND MATTHEW

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Apple of Gold

CHAPTER ONE

Introduction

> 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*

Two Declarations

On his trip from Illinois to Washington to assume the burdens of the presidency, Abraham Lincoln stopped to deliver a brief address in Philadelphia's Independence Hall. In it he declared, "I have never had a feeling politically that did not spring from the sentiments embodied in the Declaration of Independence."[1] Taken literally, this confession arouses, at the least, mild skepticism, as Lincoln surely must have had many political feelings that were in no discernible way spawned by the principles of the Declaration. But considering the occasion and the location of the remarks, and that Lincoln was obviously preoccupied by the nation's impending crisis, to be critical of the speaker for having indulged himself in this small way would be churlish and unseemly. Moreover, it is possible that Lincoln was already anticipating the extraordinary sacrifices yet to be incurred, in which case his noble sentiments may be seen as a manifestation of statesmanlike attributes that would one day be justly praised.

Skepticism in response to apparently inflated rhetoric is understandable, but it should not remain unquestioned. In speaking at the place where both the Declaration and the Constitution had been composed, Lincoln was giving voice to the most pervasive theme in all of his political reflections, the inextricability of those two founding documents. Thus for

[1] Roy Basler, ed., *The Collected Works of Abraham Lincoln* (New Brunswick, N.J.. Rutgers University Press, 1953), vol. 4, p. 240. It is recorded that this comment was greeted with great cheering.

Lincoln constitutional meaning was scarcely imaginable without the Declaration as ultimate source of interpretive guidance. As he had demonstrated in his debates with Stephen Douglas and in many public statements, those of his political feelings that pertained to constitutional matters—in other words, high politics—were indeed traceable to the sentiments embodied in the Declaration. The "apple of gold" metaphor, appearing in a brief fragment that was never used in any of Lincoln's speeches, beautifully illuminates the constitutional role of these sentiments. "Liberty to all," he maintained, is the principle that the Constitution—the "picture of silver"—was specifically intended to preserve.[2] Without it Americans could have established their independence, "but *without* it, we could not . . . have secured our free government, and consequent prosperity."[3] Constitutionalism in the United States in essence becomes a matter of determining the meaning of the Declaration and clarifying its principle of liberty.

In that same speech in Philadelphia, Lincoln pointed out that the Declaration was not only a gift to the people of the United States, it also offered "hope to the world for all future time."[4] Its principles were worth defending precisely because they were of universal applicability; after all, the "Laws of Nature and of Nature's God" were not apportioned according to national boundaries. For this reason the document has served as a source of inspiration for peoples around the world. The U.S. Constitution, too, has been profoundly important in influencing the direction of constitutional evolution in many countries. Some of this, to be sure, is attributable to certain features—for example, federalism—that have a particular appeal in places where local circumstances recommend emulation of the American model. But to the extent that Lincoln was correct in viewing American constitutionalism as a protective enclosure for the principles of natural justice, it is clear that much of the broad appeal of the U.S. Constitution is related to its perceived value in securing the realization of those universal principles.[5]

In many polities, the core of American constitutionalism, its ethos of

[2] Ibid., p. 169. The fragment alludes to the biblical proverb that "A word fitly spoken is like apples of gold in pictures of silver" (Proverbs 25:11).

[3] Ibid.

[4] Ibid., p. 240.

[5] I should make clear here that neither Lincoln nor the Declaration stipulate that the American form of government is necessary to secure inalienable rights. Government must derive its powers from "the consent of the governed," but it may be organized in whatever way is "most likely to effect [the People's] Safety and Happiness." There may, in other words, be different "pictures of silver."

individualism, is embraced with much less enthusiasm. One such polity is Israel, whose 1948 Declaration of Independence inaugurated the third Jewish commonwealth, thus ending 1,878 years of Jewish statelessness. Although the early Israeli Supreme Court minimized the significance of the document—saying that "the only object of the Declaration was to affirm the fact of the foundation and establishment of the State for the purpose of its recognition by international law"[6]—later judicial decisions, along with many commentators, have argued for its central place in Israeli politics. Today there is widespread acceptance of the sentiment expressed in David Ben-Gurion's observation that "the legal and democratic system we wish to fortify is designed to give effect and permanence to [the Declaration]."[7] Echoes may be heard of what Lincoln had to say in reference to the American Declaration, that its principled assertions were of no practical use in effecting a separation from Great Britain and were included not for that but for future use.[8]

But what of this future use? An underlying concern of this study is to address this question by focusing on the contrasting Israeli and American experiences with the theory and practice of constitutionalism. The point of departure is the alternative constructions of national purpose and vision embodied in the documents that mark the official beginnings of the two countries. These founding papers establish new memberships in the community of nations, but they do more; they affix a particular political-moral character to their respective polities. As such, they introduce and outline the intellectual contours for constitutional discourse about how these societies arrange their fundamental rules and governing practices. All of which leads to the simple Tocquevillian insight that serves as the architectonic principle of this book: interpretations of diverse constitutional experience must be anchored in an appreciation of alternative conceptions of (in this case democratic) politics.

Constitutional experience is, for Tocqueville, mirrored in the "social condition" prevailing in a given society, a term intended to include the beliefs and ideas that help shape the political consciousness and identity of

[6] *Zeev* v. *Acting District Commissioner*, 72 (1) P.D. 85 (1948).

[7] David Ben-Gurion, *Rebirth and Destiny of Israel* (New York. Philosophical Library, 1954), p. 375. The point is made even more strongly by an Israeli legal scholar. "The Declaration of Independence is the formal source of legislative power in the State. This source, from which the entire system of government springs, is political and lies outside the Constitution." Eliahu Likhovski, "The Courts and the Legislative Supremacy of the Knesset," *Israel Law Review* 3 (1968): 346.

[8] Basler, *Collected Works*, vol. 2, p. 406.

a nation.[9] The revolutionary passages of Israel and the United States produced independence proclamations that reveal both the animating ideals of their respective regimes and the likely directions that their paths of constitutional development would take. Important differences are to be found here, but there is also considerable substantive overlap; the paths, in other words, are not destined to reach diametrically opposed constitutional destinations. Indeed, one of the reasons for choosing this particular comparison is that while the two polities present a sharp contrast in constitutionally relevant features of political culture, what they have in common not only makes a shared language of constitutional discourse possible, it offers the potential of using one approach to facilitate enhanced critical self-understanding within the other.

A preliminary analysis of the Declarations highlights the differences and similarities. In their opening lines the two documents establish contrasting emphases reflective of the thematic disparity underlying the revolutionary goals of their respective claims to independence. Unlike the American Declaration, which speaks in universalistic terms and in the abstract language of natural right, the Israeli counterpart commences with a simple affirmation of particularity: "The land of Israel was the birthplace of the Jewish people. Here their spiritual, religious and political identity was formed. Here they achieved independence and created a culture of national and universal significance." Not only are national values mentioned before universal ones (or at least values of universal significance), the latter are discussed in a national context, as creations of the Jewish people. The 1776 statement of course locates their source in the natural order of things, and in contrast to the Israeli version is essentially ahistorical. If the legitimacy of the Jewish state is ultimately rooted in the chronicle of a particular people, the claim of the American people to an independent state is based on principles that are notable for their timelessness.

It is not that history is absent from the American Declaration—the longest of its sections recounts in some detail the abuses perpetrated by the British king—but that it only illuminates the question of *why* the American people need to be independent, not *who* they are. Indeed, "American

[9] "Social condition is commonly the result of circumstances, sometimes of laws, oftener still of these two causes united, but when once established, it may justly be considered as itself the source of almost all the laws, the usages, and the ideas which regulate the conduct of nations: whatever it does not produce, it modifies If we could become acquainted with the legislation and the manners of a nation, therefore, we must begin by the study of its social condition." Alexis de Tocqueville, *Democracy in America*, ed. Phillips Bradley (New York: Vintage, 1945), p. 48.

people" is not the term used; instead there are references to "one people" and to "the good people of these colonies," bloodless designations fully consonant with the abstract quality of the document's revolutionary appeal to principles of natural right. In contrast, the one mention of natural right in the Israeli Declaration is, from the perspective of Western political philosophy, a curious one, as it refers to "the natural and historic right of the Jewish people" to establish a state. Accustomed as we are to thinking of natural right in the idiom of Lockean individualism, its association here with a people is somewhat striking. Thus, whereas the American Declaration emphasizes self-evident truths bearing directly on the status of *individuals*, the Israeli document refers to "the self-evident right of the Jewish people to be a nation, like all other nations, in its own sovereign State."

While the first and longest part of the Israeli Declaration affirms the historic connection of the Jewish people to the land of Israel, the second section includes a paragraph commiting the new state to a set of principles very much in the spirit of the Western liberal democratic tradition. That paragraph reads:

> The State of Israel will be open to the immigration of Jews from all countries of their dispersion, will promote the development of the country for the benefit of all its inhabitants; 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; will safeguard the sanctity and inviolability of the shrines and Holy Places of all religions; and will dedicate itself to the principles of the Charter of the United Nations.

For many Israelis, this is the core of the Declaration, its "apple of gold." It appears to embrace the Herzlian vision of a secular democratic state, thus representing the fulfillment of the Zionist dream. But the one lesson to be gleaned from any comprehensive history of the Jewish people is that there are several competing Zionist visions: *the* Zionist dream does not exist. What this means is that the significance attached to this paragraph will vary in accordance with the degree of compatibility between the liberal democratic vision and any given Zionist understanding. How one sees the Jewish state—as a place of refuge for persecuted Jews, as a homeland for the Jewish people to revive and develop a distinctively Jewish culture, as a holy land where God's chosen people can live their lives in accordance with divine law—will be decisive in determining the extent to which the passage's liberal sentiments assume interpretive prominence.

The absence in Israel of a formal written constitution, one that might function, in Lincoln's terms, as a "picture of silver" to the Declaration's "apple of gold," is in part attributable to the potential, if not necessary, irreconcilability of these various understandings. That the state should be a haven for the Jewish people might be construed as the Israeli "apple of gold," but beyond this basic core there has always been a significant division on the principles that should underlie the regime. Fortunately, we need not here resolve the question of Zionism's essence in order to appreciate the complex constitutional implications of the Israeli Declaration. It is clear in a way that simply does not pertain in the American case, that even in the version that most closely approximates the American emphasis on universal rights (where the above paragraph exerts a powerful claim on Israeli self-understanding), the rights of individuals are in important and perhaps contradictory ways bound up with the organic nature of the community and its constituent parts. While the promise of "full social and political equality" for all citizens represents a clear and substantial commitment to democratic values, the concurrent guarantee of "full freedom of . . . culture" also makes it very likely that the achievement of liberal goals pertaining to individual rights will have to accommodate communitarian goals with which they will often be in conflict. Upon first glance this may seem a small point, but within the broader context of the document as a whole, it suggests that at a minimum there will be a tension between the respective claims of group and individual. Such tensions exist in all societies—liberal ones included—but here, where the Declaration itself identifies the state with the destiny of a particular people, they possess, as we shall see, a special significance for the subject of constitutionalism.[10]

Perhaps most important, this identification means that the political prin-

[10] Not all Zionists who are liberal democrats will accept the necessity of tension here. Horace Kallen, for example, the American philosopher of secularist cultural pluralism, maintained in 1919 that "the whole of the Zionist ideology" could be summed up "in a slight modification of the Declaration of Independence. all nationalities are created equal and endowed with certain inalienable rights, among these rights are life, liberty, and the pursuit of happiness." Horace M. Kallen, "Zionism and Liberalism," in *The Zionist Idea A Historical Analysis and Reader*, ed. Arthur Hertzberg (Garden City, N.Y. Doubleday & Co., 1959), p 529. This interpretation is indeed consistent with the guarantee of cultural equality in the Israeli Declaration, but even many liberals will concede that the officially declared Jewishness of the state ensures that in some sense (perhaps only minimally) one nationality is destined to be first among equals. For example, Amos Shapira, one of the authors of the much publicized and discussed draft constitution for Israel, said of his and his colleagues' efforts that they were "trying to raise in a dramatic gesture—by the adoption of a constitution—the traditional two flags of being a Jewish State and of being a Western-type liberal democracy, with all the

ciples that are also a part of the Declaration are of lesser consequence in providing substance to the identity of the nation than in the American case, where such principles are effectively the basis of nationhood. Samuel Huntington has argued, for example, that American national identity is understandable only in terms of the political principles of the Declaration, that Americans have nothing vital in common, no cementing unity, without the amalgam of goals and values that constitutes the American Creed. Thus he claims, "National identity and political principle [are] inseparable."[11] And we might add, they find their official expression in the Constitution, which in effect becomes, for Americans, the basis of community. For this reason it is nearly impossible to imagine the United States without a formal written constitution, and why, given the more organic, ascriptive quality of Israeli identity, it *is* possible to understand how Israel has developed without one.

Two Constitutions

It is a development, however, that has left many Israelis unhappy. Among them is the current president of the Supreme Court, who has expressed, both on and off of the Court, a strong preference for a formal written constitution.[12] Also unhappy is a highly respected former president,

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inconsistencies of the two." *Jewish Week*, May 13, 1989. For the religious Zionist perspective on the tension, there is this comment of Zevulun Hammer, then minister for religious affairs, in which he addressed himself to what he characterized as the foremost challenge of a Jewish state: "At Mt. Sinai the Almighty spoke of the community There is no Torah without a group. But he spoke in the singular: 'I am the Lord your God,' and, according to the midrash, was understood to have spoken to each individual. . . In drafting the details of the law we will have to contend with the intellectual and moral challenge of being jointly faithful to the group and the individual. The importance of the individual cannot be an impediment to the formation of the Jewish—spiritual character of the community. Our intention is not that liberal vision of a mass of separate individuals. The life of the community must blend with the honor of the individual." *Yediot Aharanot*, November 24, 1989.

[11] Samuel P. Huntington, *American Politics: The Promise of Disharmony* (Cambridge Harvard University Press, 1981), p. 24. For an insightful critique of Huntington's argument, see Rogers M. Smith, "The 'American Creed' and American Identity. The Limits of Liberal Citizenship in the United States," *Western Political Quarterly* 41 (1988): 225. Smith argues that ethnic and cultural factors have historically been important in understanding American national identity, and that Huntington exaggerates the significance of shared political ideas

[12] *Jerusalem Post*, March 19, 1988. (International Weekly Edition.) In a 1984 Supreme Court opinion, Justice Shamgar previewed his preference when he reflected on "the importance and value of a written constitution, and [that] its absence in our system is con-

Shimon Agranat (born and educated in the United States), who told an interviewer, "The trouble is that we don't have a constitutional bill of rights, that we don't have a constitution. If we had, the law would be constantly tested against it and the basic civil liberties of the individual would be guaranteed."[13] Their frustration, and that of thousands of others who have recently joined in demonstrations demanding constitutional reform, is traceable to the Declaration of Independence, which explicitly refers to "a Constitution to be drawn up by the Constituent Assembly." This promise went unfulfilled, and while the Supreme Court has often functioned in a way that could lead one to forget that historical detail, advocates of a constitution that includes an entrenched bill of rights will ensure that, by keeping it high on the public agenda, it will not easily be forgotten.

One of the most ardent among this group is Shulamit Aloni, the leader of the Citizens Rights Movement, who argues that "no true democracy can exist where a constitution does not make explicit the fundamental human rights, rights that are inalienable."[14] Her professed goal is to fulfill the aspirations of the Declaration of Independence, not simply with respect to the specific pledge regarding adoption of a constitution, but more fundamentally in terms of what she sees as its commitment to liberal democracy. Others, of course, disagree; an indication of the range of constitutional opinion in Israel is revealed in the response of the leader of one of the religious parties to a query about a proposed bill of rights: "In my opinion, the current version of the human rights bill imitates the bill of rights of those civilized nations—that club to which we like to flatter ourselves as belonging. But it is no secret that we are different from other nations of the world; we have defined Israel as a Jewish state. . . . This is made quite explicit in no less than the country's Proclamation of Independence."[15] While these two comments come from individuals who represent opposite poles of Israeli opinion on constitutional and other issues, their remarks in this instance fall well within the range of mainstream opinion; moreover, many people adhere to both positions, which is to say, they embrace the

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spicuous each time a constitutional issue arises in a legal proceeding." *Neiman and Avneri v. Chairman of the Central Elections Committee for the Eleventh Knesset*, 39 (2) P.D. 225, 237 (1984). Translation by Carmel Shalev. The case is included in an unpublished casebook, *Limits of Law*, edited by Aharon Barak, Joseph Goldstein, and Burke Marshall.

[13] *Jerusalem Post*, 6/6/87.

[14] *Jerusalem Post*, 10/13/84.

[15] From an interview with Avraham Ravitz, head of the Degel HaTorah party, in *Israeli Democracy*, Spring 1990, p. 23.

fundamental tension embedded within their founding document. Indeed, the dilemma over constitutional reform has been shaped by this tension.

Enter the U.S. Constitution. While the constitutional debate in Israel is not over the wisdom of embracing the American model, the latter's presence, particularly with respect to judicial review and the protection of individual rights, has been felt in important ways in the evolution of constitutional discourse in Israel. Unlike other examples of the influence of the U.S. Constitution abroad—most notably in the case of actual American interventions (e.g., the Philippines, Japan, West Germany)—the process in Israel has been fairly subtle, confined largely, although not exclusively, to the realms of adjudication and the legal academy. From these places American influence has radiated into the political arena; thus, for example, law professors, armed with American cases and jurisprudential theory, have played the catalytic role in mobilizing support for constitutional reform. Again, they have not been wedded to the American constitutional approach, but they have borrowed extensively from it (and to a lesser extent from other foreign systems).[16]

The process of constitutional transplantation is therefore a vital component of the constitutional reform debate and is similarly caught in the cross pressures of the Declaration's dual commitments. For my purposes, however, the subject of constitutional reform should be expanded beyond the various specific efforts that have been undertaken to codify a formal constitution, to include judicial decisions by the Israeli Supreme Court. This is because the Court has been a powerful actor in directing the course of constitutional development; its judgments are part of the constitutional fabric of the society. To take the principal example, in the absence of a formal bill of rights, the Supreme Court in Israel has created what commentators have characterized as a judicial bill of rights that in essence functions as part of the constitution of the state.[17] Primarily through cre-

[16] Borrowing legal concepts, ideas, and solutions from a foreign legal culture, what is sometimes referred to as legal transplantation, is not an area that has received a great deal of scholarly attention. One bibliographic study concludes, "What seems to be missing from legal literature, and is not common in historical, sociological, and anthropological literature, is a thorough study of legal ideas throughout their migration across political and cultural boundaries." Andrezej Rapaczynski, "Bibliographical Essay. Influence of the U.S. Constitution Abroad," in *Constitutionalism and Rights. The Influence of the United States Constitution Abroad*, ed. Louis Henkin and Albert Rosenthal (New York: Columbia University Press, 1990), p. 406.

[17] The actual source for the term is Justice Moshe Landau's opinion in *Vogel v. Broadcasting Authority*, 31 (3) P.D. 657, 664 (1976).

ative statutory interpretation, Israeli judges, consciously or unconsciously, are engaged in an ongoing process of constitutional reform. Their decisions regarding the applicability and appropriateness of foreign sources is the most important element in determining the scope of constitutional transplantation in Israel.

As the phenomenon of constitutional transplantation has mainly to do with the influence of one legal culture upon another, both its positive and negative dimensions need to be considered. Andrzej Rapaczynski writes in this context of "negative influence," referring to the process in which Country A's example is carefully considered and then rejected by Country B. As illustrations he cites the Indian decision not to include a due process clause in the Indian constitution, and the negative reaction of the French in the first half of this century to the American institution of judicial review.[18] In the Israeli-American context this phenomenon bears watching in light of the sociopolitical differences expressed in the Declarations of these two countries. How a particular constitutional solution will (or should) be received becomes a function of its compatibility with the abiding commitments of the regime. Thus the usefulness of American constitutional theory, practice, or precedent may be seen to vary with its potential fit within the political culture of the Israeli polity.

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. Too often comparative legal analysis of this subject proceeds in the absence of political understanding. Thus I begin in Chapter 2 by situating constitutionalism in the United States and Israel within the broader framework of their contrasting sociopolitical settings, each of which nourishes and sustains a constitutional government. The fact that these societies can reasonably be described as pluralistic only conceals the more significant fact that they represent different models of pluralism that may potentially affect the transferability of constitutional outcomes from one place to another. These two pluralisms are projections into the societal realm from the political ideas and aspirations of the two Declarations of Independence. Like these documents they have a good deal in common, but their differences speak directly to some basic assumptions of liberal constitutionalism.

First among them is the neutrality of public authority, with its policy of

[18] Rapaczynski, "Bibliographical Essay," p 408.

official blindness to such ascriptive characteristics as race, religion, and ethnicity. Rights inhere in the individual; the collective rights of groups are acknowledged only in the sense of a freedom to advance corporate interests through appropriate political channels. This contrasts with a model in which communitarian pressures are sufficiently compelling that they recommend establishment of quasi-autonomous centers of rule-making authority that need not operate in accordance with the premises of the liberal state. But it is also an approach in which the state's own autonomy is compromised by its identification with a particular community. To be sure, in the case of Israel, the official autonomy of designated ethno/religious groups is limited, and the compromise of the state's neutrality is not extensive. Nevertheless, we are confronted with a set of political assumptions that are, for the most part, alien to the American experience. In constitutional terms, it thus forces us to consider how much of American constitutional law and theory depends on an adherence to the ideal of neutral principles in the conduct and administration of power in the public arena.

These contrasting pluralist models manifest themselves in the approaches taken by their respective societies in addressing the fundamental regime question: membership in the political community. This is the underlying assumption of Chapter 3, which is an inquiry into Israeli and American conceptions of political identity. If there is in Israel any constitutional development that may be said to flow directly from the Declaration of Independence, that qualifies as a "picture of silver," it surely is the Law of Return, which guarantees to any Jew who desires it automatic and immediate citizenship. Others may of course become citizens, but the raison d'etre of the state as a homeland for the Jewish people ensures that citizenship and nationality will possess distinctive meanings and legal significance. In the United States, citizenship and nationality are basically indistinguishable, even if historically immigration policies have often discriminated on the basis of place of origin. Thus acquisition of citizenship status is not a function of personal status; rather, it is one of volition, specifically the applicant's affirmation of the principles in the Constitution. This too reflects the theoretical emphasis in the country's Declaration of Independence, in this case on the social contract's premise of consent. And because membership in the political community *establishes* nationality (just as, in Lincoln's words, the Declaration established a "new nation"), this creedal assent symbolizes a fundamental teaching of the Declaration, which is that political principles are at the core of American national identity.

Chapter 3 also clarifies the significance of history. Invocation of the Law of Return requires a standard for determining who is Jewish. Policy makers

must choose from a range of possible tests for those seeking citizenship under the law, from a subjective declaration of Jewish affiliation to compliance with Orthodox religious law. Within world Jewry this has been a much-debated question, occasionally leading to nasty divisions between Israelis and diaspora Jews, especially Jews from the United States. The position embraced by most of the Americans generally reflects their political experience, which is to say they prefer a solution in which their Jewish identity, like their status as Americans, approximates a model of membership as a voluntary association. Many Israelis share this view, although even they have often failed to comprehend the strength of the American attachment to it, or the reasons—particularly those that may be inspired by a different secular experience—behind it. Israeli Jews, both the religiously observant and the majority who are not, are connected to their Jewishness in more primordial ways than are their American counterparts. As such they have much in common with their non-Jewish countrymen, whose identities have also been forged on the historically linked anvils of religion, land, and ethnicity. In part this accounts for their acceptance (or at least understanding) of a more objective membership test, one that subordinates present intention to past affiliation.

It also helps to distinguish the contrasting paths of Israeli and American constitutional development. The fact that Israelis did not comply with their Declaration's stipulation about adopting a constitution is understandable in light of the tensions embedded in that document. In Chapter 4 I argue that for the United States, a new nation seeking to establish a distinctive identity, the codification of a formal constitution was a necessary and urgent step in the achievement of this important goal. Moreover, to the extent that this identity was bound up in a coherent set of principles, it was important to constitutionalize the vision embodied therein, and thereby affirm the very foundations of American nationhood. On the other hand, while there were a number of good reasons for an early Israeli adoption of a constitutional document, in the end they only added up to a case for its desirability, not its necessity. And because national aspirations were rooted less in philosophy and more in history, namely the creation of a homeland for the Jewish people, the case for delay could be framed in aspirational terms: the wisdom of postponing the ultimate constitutional decision until many more members of the nation had joined the state.

This postponement has led some to claim that Israel is without a written constitution, a claim that turns out to be at best a half-truth. What the country lacks is a formal bill of rights and judicial review over legislation, two features that together are often considered the sine qua non of constitu-

tional government. But here too things are more complicated than they may at first appear. There may be developing in Israel a kind of de facto judicial review, not entirely dissimilar to what emerged in the early days of the United States, where, as in Israel, no constitutional provision expressly authorized the practice. In fact what is emerging may turn out to be more consistent with the original spirit of *Marbury* v. *Madison* than the eventual path taken by the U.S. Supreme Court. In this regard, an analysis of the Israeli experience provides a splendid opportunity for a fresh examination of American arguments concerning judicial review that history has more or less left behind. So, for example, in Chapter 4 Hamilton's case against a bill of rights and Jefferson's defense of a departmental approach to constitutional interpretation are reconsidered as part of a broader inquiry into aspects of the contemporary debate over constitutional reform in Israel.

If there is one issue that dominates this debate it is the adequacy of current judicial safeguards of individual liberties. The recent history of the Israeli Supreme Court reveals an institution with a strong commitment to the pursuit of a rights-oriented constitutional agenda. The question is whether in the absence of a formal authority to enforce a list of constitutional rights against the actions of other governmental actors (particularly the legislature), a strong commitment is sufficient. Chapter 5 pursues this question by looking at the application of an American rights-based jurisprudential ethic to the Israeli constitutional environment. This application is evident in the increasing popularity of American constitutional theory and doctrine for those Israeli judges who explicitly view their role in terms of fulfilling the aspirations of the democratic component of the Declaration of Independence. They are aware of the potential conflict between this vision and the Declaration's other vision; however, their task, as they see it, is largely one of fulfilling the promise of the liberal part of the document, the part that enjoys considerably less priority elsewhere in the political system. What we will see is that, while there are very definite risks associated with an activist judiciary in Israel, such a role may actually possess greater structural justification in Israel than in the United States. In this institutional sense constitutional transplantation serves to enhance the appeal of the transplanted jurisprudence.

A critical dimension of this judicial role is its pedagogical mission. Judges committed to the democratic principles of the Declaration frankly acknowledge their obligation to articulate important political values as part of the process of educating their fellow citizens. In Chapter 6 I look closely at the area of constitutional concern (and hence political education) that has in Israel most heavily relied on American constitutional theory and

doctrine—freedom of speech. It is an area that is particularly promising for any analysis of the intersection of constitutional doctrine and political culture; with respect to the larger comparative argument of the study, it directly addresses the conceptual differences between the respective pluralisms of Israel and the United States.

In this constitutional context, however, I should emphasize that in discussing prevailing doctrinal orthodoxy on freedom of speech, one needs to distinguish between the pluralism of the American founding period and the pluralism of the present. The radically individualist view that culminates in the advancement of personal autonomy as the constitutional value most jealously to be protected, represents a dramatic extension (verging on transvaluation) of the liberal premises of the American Declaration of Independence. The broad libertarian consensus that today mandates a First Amendment stance of content-neutrality is distinguishable from the natural rights philosophy underlying the Declaration. One critical point of distinction is that the older understanding had a place for civility, a virtue that has, for the most part, been sacrificed upon the altar of personal autonomy. Heterogeneity in a pluralist democracy requires extreme tolerance, which, according to the modern American view, must take precedence over whatever concerns we might have for the sensibilities of groups. On the other hand, an Israeli pluralism in which communal integrity is an essential defining attribute of the polity provides, in theory, for a more hospitable environment for nurturing a habit of civility. To the extent, then, that American free speech doctrine is held up as a model for Israeli emulation, the constitutional transplantation that follows may not produce a comfortable fit with the broader premises of the regime. However, as we shall see, these premises may point to constitutional outcomes that, for different reasons, comport with the free speech solution embedded in the older liberal vision of the Declaration of Independence.

At the end of this book I return to our point of departure, consideration of the two founding documents, the two Declarations of Independence. We will have taken the measure of the important differences in these documents, but as the issue of free speech suggests, noted too their converging implications. Perhaps then it will be clearer that the study of comparative constitutionalism has its greatest heuristic potential when it culminates in the symbiotic engagement of contrasting systems. By this I mean that the familiar manner in which a subject like legal transplantation is presented—what can or does one system appropriate from another?—is often too narrowly conceived to permit an appreciation of the fact that the lessons of

comparative analysis proceed in two directions. My hope is that in the case of Israel and the United States, the juxtaposition of alternative pluralisms, the contrast of varying political sensibilities and commitments, will lead to a mutual enrichment of constitutional understanding.

CHAPTER TWO

Alternative Pluralisms

> Free institutions are next to impossible in a country made up of different nationalities.
> —*John Stuart Mill*

Pluralism and the Anomaly of Native Americans

Among the many reasons that the decade of the sixties will long exert a hold over the American collective memory is its association with the expansion and legalization of rights. Amid the violence and turmoil of that time, courts and legislatures dramatically accelerated the process of extending constitutional rights to all Americans. For those who were the beneficiaries of this activity, the various efforts undertaken by public authorities to provide for a more just distribution of rights signaled the welcome prospect of their full inclusion in the system of pluralist democracy. To be sure, there were many shadings of opinion regarding the extent to which formal recognitions of rights would translate into meaningful inclusion, but few among the supporters of justice for minorities did not share in the celebration of such achievements as the Civil Rights Act of 1964.

The reason for the widespread sense of satisfaction is clear: however much work remained to be done, these victories represented progress toward fulfilling the societal goal of guaranteeing equal treatment to individuals. Thus, while particular enactments and judicial decisions were appropriately seen as advancing the interests of this or that group of people, the specific result celebrated was the delegitimation of group membership as a criterion in the making of public decisions about individuals. Indeed, the underlying aspiration of the traditional American constitutional approach to protecting the rights of minorities is the replacement of ascriptive recognition with a universal standard of transcendent equality. Entrance into the mainstream of American political, economic, and cultural life presumes a formal acknowledgment of the primacy of the individual to the group.

There is, however, one glaring exception—Native Americans. In 1968

Congress passed the Indian Civil Rights Act, which extended many of the guarantees of the Bill of Rights and the Fourteenth Amendment to Americans of Indian descent. It was the culmination of a lengthy legislative effort engineered by its principal sponsor, Senator Sam Ervin of North Carolina. But unlike the other civil rights enactments of that time, this one produced a decidedly mixed reception, with most of the criticism coming from those who were its intended beneficiaries.[1] This was perhaps not altogether surprising in light of the fact that much of the impetus for the legislation came from outside of the Native American community. Moreover, the legislative history indicates that Congress was itself sensitive to the fact that an extension of rights in this instance would be seen as a mixed blessing. Senator Ervin eventually accepted compromises that, in deference to communitarian sensibilities, modified his original commitment to full assimilation of Indian practices to the notions of individual rights prevailing in the larger society.[2]

Many of the critics readily conceded that altruistic motives lay behind the campaign for Indian rights, although some less charitable in their interpretation of events charged that the 1968 act represented just another chapter in the dismal history of "cultural assault" perpetrated by the dominant culture on Native Americans.[3] The common theme in the concerns expressed by the critics was that the Indian Civil Rights Act 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. "Individual rights so zealously and formally guarded by a system evolving in the English tradition . . . may not be transferable to a different environment. Only to the extent that the Indian system is based on similar

[1] There are a number of accounts of this legislation. See, in particular, Francis Paul Prucha, *The Great White Father: The United States Government and the American Indians*, vol. 2 (Lincoln: University of Nebraska Press, 1984), Donald L. Burnett, Jr., "An Historical Analysis of the 1968 'Indian Civil Rights' Act," *Harvard Journal on Legislation* 9 (1972), and Note, "The Indian Bill of Rights and the Constitutional Status of Tribal Governments," *Harvard Law Review* 82 (1969).

[2] According to Burnett's account, Senator Ervin's experience in North Carolina initially limited his perspective in confronting the problem of Indian rights on a national level. The Indians of his state were, unlike the situation generally, well integrated into the life of the broader community, a fact that influenced his determination to repeat the North Carolina experience on a national level. Burnett, "An Historical Analysis of the 1968 'Indian Civil' Rights' Act," p. 576.

[3] This characterization belongs to Wilcomb E. Washburn, *Red Man's Land/White Man's Law* (New York: Charles Scribner's Sons, 1971), p. 191.

values will the application of such constitutional guarantees be appropriate."[4] "The ideology of civil rights," it was argued, "was anathema to the majority of Indians."[5] Not surprisingly, activists in the civil rights movement were deeply perplexed by the reluctance of an oppressed people to join them in a united campaign to achieve the American dream. For example, Indian representation at the 1963 March on Washington was notably, and to blacks and liberals distressingly, small. "Many liberals saw only the struggle for individual rights, and refused to consider the equally important fact of community existence and the corresponding legal right of a community to exist for its own sake."[6] The Anglo-American concepts of personal freedom and individualism, and the constitutional commitments extending from them, were seen as posing a threat to those Indian traditions and practices that rested on communitarian assumptions fundamentally alien to the broader American experience.[7]

For example, would equal protection standards as applied to sexual discrimination invalidate tribal determinations of membership based on patrilineal criteria? Would such standards eliminate the differential treatment of Indians that had allowed tribes to receive important hunting and fishing privileges? Would the ethnic integrity of the tribe be undermined in the face of statutory prohibitions against racial discrimination that could be interpreted to forbid unequal treatment of cultural outsiders? Would the political speech of the outsider be upheld over the claim of tribal sovereignty? And would the religious authority of the tribe collapse under the weight of establishment clause constitutional tests? In regard to this last issue, Congress chose not to disturb the theocratic nature of much tribal authority by deleting guarantees against establishment of religion from the act's list of protected rights. There was, as the Supreme Court later pointed out, a deliberate congressional policy of selective incorporation "to fit the unique political, cultural, and economic needs of tribal governments."[8]

[4] Ibid., pp. 174–75.

[5] Vine Deloria, Jr., *Behind the Trail of Broken Treaties. An Indian Declaration of Independence* (Austin. University of Texas Press, 1985), p 23.

[6] Ibid., p. 24.

[7] In general, see Vine Deloria, Jr., and Clifford M. Lytle, *American Indians, American Justice* (Austin: University of Texas Press, 1983). This has led one observer to argue, "As a matter of policy, Indians should be recognized as having a legitimate interest in maintaining traditional practices that conflict with constitutional concepts of personal freedom developed in a different social context." Mark S. Campisano, "The Indian Bill of Rights and the Constitutional Status of Tribal Governments," p. 1350.

[8] *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 62 (1978). For an excellent discussion of these unique needs, see Robert N. Clinton, "Isolated in Their Own Country: A Defense of

The fact that policy makers recognized the uniqueness of the Native American minority in formulating a civil rights policy is as interesting as the fact that many observers felt that the legislators had been insufficiently sensitive to all of the ramifications of this uniqueness. What is important is the anomalous status of Native Americans in American law and political theory, a status so exceptional as to emphasize the contrasting characteristics of the normal pluralist pattern of political relations in the United States.[9] The controversy over the Indian Civil Rights Act is not just another episode in the oft-observed tension in American life between the individual and the community; rather, it highlights the narrow parameters within which this struggle generally occurs, and suggests an alternative pluralism that is basically unfamiliar to the experiences and expectations of most Americans. Moreover, it challenges the way we are accustomed to think about constitutionalism.

It is widely understood that rights inhere in the individual, and that it is the purpose of constitutional government to respect and protect these rights. But the "quasi-sovereign" status of the Indian tribes casts a very different light on the question of rights and the concomitant role of government.[10] Native Americans are the only minority whose formal rule-making authority to regulate many of their own affairs is specifically recognized in law. As the Supreme Court has recently said, "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."[11] This enables the tribe to defend its cultural autonomy in the face of widespread pressures to conform to societal norms and behavior. While the Indian Civil Rights Act clearly limits this auton-

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Federal Protection of Indian Autonomy and Self-Government," *Stanford Law Review* 33 (1981). On the *Santa Clara* case, see John T. Hardin, "*Santa Clara Pueblo* v. *Martinez*. Tribal Sovereignty and the Indian Civil Rights Act of 1968," *Arizona Law Review* 33 (1979).

[9] This anomalous status in the law is reflected in the original Constitution. In Article I, section 8, Congress is given the power "to regulate Commerce with foreign Nations, and among the several States, and *with the Indian Tribes*" (emphasis added). Also, in Article I, section 2, the apportionment of representatives and direct taxes is based on a population that "exclud[es] Indians not taxed." Indians today do pay taxes, and they are counted in the census for purposes of determining representation in the House of Representatives. However, the diminished practical relevance of this constitutional reference should not obscure both its historical importance and its continuing theoretical significance in apprehending the unusual legal relationship between Native Americans and the polity as a whole.

[10] *Santa Clara Pueblo*, 436 U.S. at 71.

[11] Ibid., 65.