Tulsa Law Review

Volume 47
Number 1 *Book Review Issue*

Volume 47 | Number 1

Summer 2011

Constitutional Identity and Change

Heinz Klug

Follow this and additional works at: https://digitalcommons.law.utulsa.edu/tlr

Part of the Law Commons

Recommended Citation
Heinz Klug, *Constitutional Identity and Change*, 47 Tulsa L. Rev. 41 (2013).

Available at: https://digitalcommons.law.utulsa.edu/tlr/vol47/iss1/5

This Book Review is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

CONSTITUTIONAL IDENTITY AND CHANGE

Heinz Klug*

RAN HIRSCHL, CONSTITUTIONAL THEOCRACY (Harvard Univ. Press 2010). Pp. 314. Hardcover. $45.00.

GARY JEFFREY JACOBSOHN, CONSTITUTIONAL IDENTITY (Harvard Univ. Press 2010). Pp. 388. Hardcover. $45.00.

MARK TUSHNET, WHY THE CONSTITUTION MATTERS (Yale Univ. Press 2010). Pp. 208. Cloth. $25.00. Paperback. $16.00.

A third wave of constitution-making in the aftermath of the cold-war expanded the debate over constitutionalism beyond the small core of countries whose politics were clearly defined by their constitutional structures and commitments in the post-WWII era. While this latter day embrace of constitutionalism has been celebrated as an internalization of a new global commitment to human rights and democracy,[1] it has also raised profound questions about the nature and effects of constitutions in law, politics, and society. The endeavor to address these questions requires defining the scope of constitutional effects, and determining the appropriate institutional locations and theoretical frames through which to explore these issues. Three recent books by Ran Hirschl,[2] Gary Jacobsohn,[3] and Mark Tushnet[4] offer significant contributions towards meeting this challenge, and provide an opportunity to reflect on earlier and alternative approaches to the broader questions of why and how constitutions matter beyond revered documents, courts, and judges.

All three books grapple with these large questions of constitutionalism yet adopt very different perspectives, providing a wide-angle view of the variety of ways we may approach these issues. Both Hirschl and Jacobsohn use a comparative methodology to explore the different questions they raise, while Tushnet's book is meant to be accessible to a popular audience and is focused more on questioning the prevailing tendency to understand the United States Constitution through the perspective of the judiciary and case law. Offering what he terms a "purely descriptive" political analysis,[5] Tushnet is in fact building on his earlier work on the idea of constitutional orders or regimes. Thus, instead of the dominant view that the Constitution simply establishes the architecture of

* Evjue-Bascom Professor in Law, University of Wisconsin Law School.

1. *See* Bruce Ackermann, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 785 (1997).
2. RAN HIRSCHL, CONSTITUTIONAL THEOCRACY (2010).
3. GARY JEFFREY JACOBSOHN, CONSTITUTIONAL IDENTITY (2010).
4. MARK TUSHNET, WHY THE CONSTITUTION MATTERS (2010).
5. *Id.* at 172.

government and guarantees rights, he argues that the Constitution matters because it structures politics, and it is change in the politics of the country that in turn shape the principles and institutions that form the basis of each new constitutional regime.[6] In comparison, Hirschl argues for the recognition of a new legal order, or at least a new legal form — constitutional theocracy. He argues this new order helps to understand the co-existence of constitutional systems and the rising tide of theocratic authority that has undermined the traditional notions of separation of church and state that lie at the heart of liberal constitutionalism. While the comparative scope and analysis Hirschl brings to the subject is majestic, his focus remains on the courts, constitutional courts in particular. Despite his fascinating analysis about the role of constitutional law and courts in bolstering secular forms of rule,[7] and his argument that there is "an intriguing conceptual affinity between constitutional law and religio[us] law, each with its own constitutive texts, interpretative hierarchies, and righteous morality alongside earthly interests,"[8] the most interesting question he posits seeks the source of conflict and change "within and between the religious and the constitutional domains."[9]

In challenging the tendency in academia and popular culture to resist a political understanding of either law or religion,[10] Hirschl points to the power of interpretation in both religion and law as a source of change while making the argument that understanding the "striking similarities" between these different symbolic systems may help us to understand how they evolve or "mutate to address social needs, economic interests, or political aspirations."[11] While individual and collective identities might seem central to such a symbolic view of law and religion, Hirschl argues against the assumption of "firm identities and fixed group affiliations,"[12] instead employing the facts of multiplicity in individual identities as well as intra-group or intra-faith divisions to emphasize the importance of politics, arguing that these markers of identity "may be brought to the fore or relegated to lesser status as coalitions shift, elites transform, and interests change."[13] This de-centering of identity contrasts earlier works, which either assumed that constitutions play a key role in the creation and evolution of national identities[14] or challenged the notion of a single identity and instead called for the recognition of a multiplicity of constitutional identities within particular constitutional orders.[15] James Tully's argument for the recognition of a multiplicity of identities within modern constitutionalism seems, in contrast, to resonate with Jacobsohn's conception of the "disharmonic constitution" in which there exists both "conflicting, even radically

6. *Id.* at 132-39, 151.
7. *See* HIRSCHL, *supra* note 2, at 50-51.
8. *Id.* at 249.
9. *Id.* at 17.
10. *Id.* at 208-11.
11. *Id.* at 239.
12. HIRSCHL, *supra* note 2, at 45.
13. *Id.*
14. *See, e.g.*, KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION ix (1989) (discussing "the past and potential contributions of American law, especially constitutional law, to the definition of our national community").
15. *See, e.g.*, JAMES TULLY, STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY 209 (1995).

inconsistent, ideas,"[16] but also a broader constitutional identity — consisting of "identifiable continuities of meaning within which dissonance and contradiction play out."[17] For Jacobsohn, the identity of any constitutional order is fundamentally dependent on the existence of constitutional disharmony, which serves as the catalyst of change.

All three of these books are premised on the idea that the constitution is not a particular historic document or even a legal structure but rather a broader regime that is constituted by a combination of legal commitments, institutions, and continuing political contestation over ideas and resources. They all offer extraordinary insights into the structure and functioning of these varied constitutional orders, and they struggle to elucidate the mechanisms and pathways that have led to either gradual or dramatic change in different constitutional regimes. It is this common notion of a constitutional order or regime that raises the question of scale and requires, I believe, further reflection before we embark on a discussion of the mechanisms of change these contributions explore. Is constitutionalism a concept best located in a purely philosophical or normative discussion of appropriate forms of governance, or should we recognize its historical and institutional dimensions as key aspects of our conceptualization and debates over the place and role of constitutions? Should our focus remain within the four corners of each constitutional document and the particular history and culture of the legal system in which it functions, or should we locate our discussion within the broader conception of constitutional orders and the political realms these orders constitute? In an earlier book, Mark Tushnet focused explicitly on the idea of constitutional orders, arguing that by "*constitutional order* (or *regime*)," he meant "a reasonably stable set of institutions through which a nation's fundamental decisions are made over a sustained period, and the principles that guide those decisions."[18] Despite their different foci it is this broader enquiry into the nature of constitutional orders and their changing character, through the formation of distinct constitutional forms and identities, that defines the scale of analysis common to all three of these texts.

The idea of a constitutional *order* or *regime* is particularly important to discussions over constitutional identity, as well as questions of diversity and conflict that might shape the trajectory of change from one regime to the next. Adopting and exploring the idea of changing constitutional orders, Tushnet advanced what amounted to a theory of constitutional evolutionalism in which changing political and social conditions give rise to more fundamental changes in the underlying constitutional order. In contrast to Bruce Ackerman's notion of constitutional moments, which views the founding, the post-civil war amendments, and the New Deal as periods of constitutional change outside of "normal politics,"[19] Tushnet's idea of a constitutional order, constituted by a "dominant set of institutions and principles"[20] allowed for an understanding of constitutional change through processes of gradual construction and transformation. Instead of being

16. JACOBSOHN, *supra* note 3, at 1, 3-4 (quoting and discussing Laurence H. Tribe, *The Idea of the Constitution: A Metaphor-morphosis*, 37 J. LEGAL EDUC. 170, 173 (1987).

17. *Id.* at 4.

18. MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 1 (2003).

19. *See* BRUCE ACKERMAN, WE THE PEOPLE: 1 FOUNDATIONS 58-59, 230-65 (1991).

20. TUSHNET, *supra* note 18, at 2.

imbued with moments of higher politics or revolutionary transformation,[21] Tushnet introduced a more dynamic notion of constitutional development in the United States. Furthermore, he rejected a purely court focused approach and instead adopted an inclusive institutional perspective, viewing political parties and other branches of the national government as part of a constitutional order. Key to his conception of a constitutional order, as opposed to a "mere[] political [order]," was the idea that the constitutional order is a combination of institutions and principles.[22]

This inclusive perspective was not limited to Tushnet's analysis of what constitutes a constitutional order. It extended to include the idea that the guiding principles of any particular constitutional order are reflected not only in the legal and philosophical principles articulated in judicial opinions, but also in the statutes and policies adopted and pronounced by the legislature and executive respectively.[23] Thus, he identifies Franklin D. Roosevelt's State of the Union message in 1944, the Civil Rights Act of 1964, the Voting Rights Act of 1965, and Medicare as defining the "guiding principles of the [New Deal-Great Society] constitutional order," which he argues prevailed in the United States from the 1930s to the 1980s.[24] In his discussion of "why the constitution matters," Tushnet takes this understanding of a constitutional order to its logical conclusion by arguing that the Constitution itself matters "because it provides a structure for our politics,"[25] and not because the Supreme Court has the last word on interpretation or that the fundamental rights and policies upon which most American citizens rely are either guaranteed by the Constitution or are the product of the Supreme Court's interpretation of the Constitution.[26]

While Tushnet makes a convincing argument for viewing the constitutional history of the United States as a dynamic process of change, he also acknowledges that it is more difficult to pin down the exact elements of any new order. In his 2003 book, *The New Constitutional Order*, Tushnet identified four possible constitutional regimes over the course of the twentieth century: two of these were historical, the pre-New Deal order and the New Deal-Great Society order, while the remaining two represent what Tushnet identified as the constitutional order of the "present" time and a potential future order. The identification of two new orders, present and future, provided a fascinating perspective on what seemed to be Tushnet's own internal debate over whether the "present" represented a consolidated constitutional order or a transitional period between the most recent past order — the New Deal-Great Society order — and a future order which he characterized as the Reagan-Gingrich-Bush order. Tushnet resolved this question, at the time, by arguing that the "present" may be identified as a specific constitutional order characterized institutionally by a "political structure center[ed] on a government divided between two ideologically opposed but internally unified parties," and governing principles that "are chastened versions of the principles of the New Deal-

21. *See id.* at 3.
22. *Id.* at 1.
23. *See id.* at 4-5.
24. *Id.* at 1, 4-5.
25. TUSHNET, *supra* note 4, at 1.
26. *See id.* at 1-17.

Great Society constitutional order."[27] While the challenge for Tushnet was to identify the particular mix of institutions and guiding principles that together constitute each particular constitutional order, the idea of successive constitutional regimes requires us to focus on the specific mechanisms of change that might drive these shifts.

Focused on how to resolve the problem of identifying a specific constitutional order, or each new constitutional order, Tushnet argued that it depended on the idea of consolidation. He noted at the time that by his own definition, constitutional orders "have to be reasonably stable"[28] and that determining that a new order has come into being requires the identification of a combination of "novel guiding principles with distinctive institutional arrangements."[29] Yet he also acknowledged that at any moment in time, different elements of past, present, and future orders are likely to co-exist. Most of *The New Constitutional Order* is focused on resolving this tension with Tushnet considering and distinguishing, to varying degrees, different theories and arguments suggesting either that a revolutionary change had taken place — in the form of a Reaganite revolution — or that the "present" represented a continuing yet unspecified transition, in which it was possible to identify both distinctive institutional characteristics and particular guiding principles which together would characterize the "present" as a distinctive constitutional order. Overcoming this inherent conceptual difficulty requires us to not only identify specific markers — institutions and principles — but to also grapple with the question of change itself.

In Tushnet's argument, change flows from shifting social, economic, and political conditions, which is surely true, but is also in tension with his more recent argument that the constitution matters because it provides a structure for politics. If constitutional regimes change as a consequence of shifting conditions and yet simultaneously structure politics — the very agency of changing social and economic conditions — then understanding the mechanisms of change from one constitutional regime to another becomes a challenge of central importance. It is this challenge that is taken up by Gary Jacobsohn in his brilliant new book *Constitutional Identity*. There he seeks to "clarify and elaborate the concept of constitutional identity," which he sees as the central challenge of constitutional theory.[30] The reason to take up this challenge is that it provides, in Jacobsohn's hands, a fascinating and highly sophisticated means of addressing the central question of constitutional theory: how do constitutional systems come into being and change over time? Aside from moments of constitution making or formal amendment, questions of constitutional identity and change often focus exclusively on the role of the judiciary in interpreting the meaning of the constitution in the process of deciding individual cases. While judicial decisions remain at the core of Jacobsohn's empirical analysis, it is his focus on the broader constitutional order that produces a deeper understanding of the "unique legal and political phenomenon"[31] that a constitution represents. In order to achieve this, Jacobsohn follows Tushnet's earlier

27. TUSHNET, *supra* note 18, at 111.
28. *Id.* at 96.
29. *Id.* at 8.
30. JACOBSOHN, *supra* note 3, at 33.
31. *Id.* at 2.

trajectory and makes an initial, and I would argue, essential distinction between a constitutional text and "a nation's constitution,"[32] which is a much broader realm that includes the text, institutions, and historical understandings that together constitute a particular society's constitutional order.

Jacobson Rejects the argument — which he says is exemplified by Lawrence Tribe — that constitutional identity "cannot be objectively deduced or passively discerned in a viewpoint-free way."[33] He instead argues that the key to understanding the evolving identity of a constitution is the concept of constitutional disharmony, which allows us to explore the "identifiable continuities of meaning within which dissonance and contradiction play out in the development of constitutional identity."[34] From his perspective, constitutional identity "emerges *dialogically* and represents a mix of political aspirations and commitments that are expressive of a nation's past, as well as the determination of those within the society who seek in some ways to transcend that past."[35] Noting that a "dialogical path may require reconsideration of the juri-centric model that has . . . dominated contemporary constitutional theorizing,"[36] Jacobsohn fleshes out two other sources of disharmony that may fuel the continuing transformation of constitutional identities. On the one hand he points to the tensions that are present within the constitutional text or structure itself — whether it is the relationship between different levels of government, federalism, inherent in the compromises made by constitution-makers, or through changing conceptions of specific elements, such as the idea of constitutional rights themselves. On the other hand, he concludes his chapter on "The Quest for a Compelling Unity" by exploring the "second dimension of contestation — confrontation between constitution and social order."[37] As a result, he concludes that whether it is contradictory aspirations or tensions between the evolving social structure and the framework of the constitution, "constitutional identity will be fashioned — and refashioned — through the struggle over constitutional identity."[38]

To understand this dynamic, Jacobsohn points to a distinction between what he terms preservationist and militant orientations inherent within constitutional texts. He argues that these orientations reflect the "preservative and transformative elements"[39] that are inherent within all constitutional orders, and in some cases constrain social change while in others provide a challenge to the existing social structure. Even the idea of continuity inherent in the preservationist or prescriptive form "embodies an adversarial component — 'continuities of conflict' — that connects it to the historical narrative within which it unfolds while preventing it from becoming moribund."[40] Thus, for example, Jacobsohn discusses the evolution of constitutional identity in Ireland, and argues that the changing status of religion in the constitutional order is a product of the

32. *Id.* at 4.
33. *Id.* at 3.
34. *Id.* at 4.
35. JACOBSOHN, *supra* note 3, at 7.
36. *Id.* at 109.
37. *Id.* at 134.
38. *Id.* at 135 (emphasis omitted).
39. *Id.* at 214.
40. JACOBSOHN, *supra* note 3, at 19.

"disharmonic tension" between these preservationist and transformative elements.[41] Using examples from Irish and Indian jurisprudence, Jacobsohn also explores the question of constitutional amendments and demonstrates how underlying political principles and the character of each constitution, as well as the particular conflicts, frame the relationship between continuity and change.

Finally, Jacobsohn turns to the relationship between the family and the state, showing how the institution of the family and its role in the formation of social identity is implicated in the disharmonic tensions that help to shape constitutional identity. He uses this lens to explore the deeply disharmonic tensions inherent in Israel's constitutional commitment to maintaining a Jewish and democratic state and its implications for citizenship, immigration, and claims for family reunification within the state. While Jacobsohn focuses on family law and religious commitments as examples of disharmonies that contribute to the formation of constitutional identities,[42] Hirschl focuses on the role of constitutional institutions, primarily the courts, in co-opting religion, or in the case of indigenous or customary law in South Africa, as an example of courts being used to co-opt or secularize "traditional" or collective identities that are inconsistent with "universalist" or dominant notions of rights.[43] The South African case provides an interesting way to explore the conceptual links between these different ways of theorizing the role of constitutions.

From the perspective of Tushnet's argument, there is no doubting the claim that the South African constitutions of 1993 and 1996, which enabled the democratic transition from Apartheid, were at their core a set of principles and institutions that structured the politics of post-apartheid South Africa. Yet, the ability of legal institutions, including the Constitutional Court, the Chapter 9 State Institutions Supporting Democracy, or even the Legislature to effectively corral the power of the dominant political party, the African National Congress, remains uncertain. At the same time, the 1996 Constitution may be clearly identified in Jacobsohn's terms as transformative, even as it maintains the existence of deeply disharmonic elements — including the protection of property rights and the duty to redistribute land, as well as gender equality and the recognition of traditional authorities and "indigenous" law. Hirschl, on the other hand, sees the Constitutional Court as a guardian of the civil religion of the constitution, working as a secularizing agent to co-opt these traditional elements. He concludes that the "Constitutional Court has consistently limited the scope and application of this once-unrecognized system of legal meaning creation."[44] These cases, involving family and citizenship in the new democratic state may, however, be better understood as reflecting Jacobsohn's disharmonic elements in that they serve both to challenge the pre-existing order as well as to pose potential limits on the transformational promise of the new constitutional regime.

In the last few years the Constitutional Court in South Africa has decided a group of cases that holds profound consequences for the hopes and aspirations of the majority

41. *Id.* at 214.
42. *See* JACOBSOHN, *supra* note 3, at 353.
43. HIRSCHL, *supra* note 2, at 185-95.
44. *Id.* at 187.

of South Africans. These cases include challenges to the "customary law of succession" on the grounds of gender discrimination;[45] the KwaZulu-Natal Pound Ordinance, on the grounds that it denied cattle owners rights of equality and access to the courts;[46] and the Land Claims Court's decision that a community claiming land under the Restitution of Land Rights Act had failed to prove that their dispossession was the result of discriminatory laws or practices.[47] In each of these cases, the decision of the Court held important consequences for the relations of power: between men and women living under indigenous law; between land owners (usually white) and landless or land- hungry stock owners (usually black); as well as between land owners and land-claiming communities whose claims did not self-evidently fall within the terms of the Restitution of Land Rights Act.

In both the *Bhe v. Magistrate, Khayelitsha* and *Alexkor Ltd. v. Richtersveld* cases, the majority of the Court acknowledged the constitutional status of indigenous law. In the first instance, the Court struck down a rule of customary law that discriminated on the basis of gender. In the second instance, the Court held that "indigenous law [is] an independent source of norms within the legal system," but like all other "law is subject to the Constitution and has to be interpreted in . . . light of its values."[48] The result in *Bhe* was for the Court to directly strike down — at least with respect to intestate succession — the "customary" rule of primogeniture held by many traditionalists and others to be a key element of the customary legal system. In effect, the Court's decision will have a profound impact on the rights of wives and daughters who, until now, relied upon the system of extended-family obligation historically inherent in indigenous law but long since disrupted by social and economic change. On the other side, the Court's decision in *Richtersveld* recognized indigenous law as a source of land rights, thus strengthening the claims of those who have argued that their land rights — including rights to natural resources — were not automatically extinguished by the extension of colonial sovereignty over their territories. Their dispossession — through means other than the direct application of specific, discriminatory, apartheid land laws — will thus also be recognized for the purpose of claiming restitution of their land rights. Even if it is not as broad in its impact, the symbolic value of this recognition of indigenous land rights makes an important contribution to legitimizing the new constitutional order among ordinary South Africans.

These and subsequent cases reflect a degree of incorporation but also highlight the tension between legal pluralism, alive in the recognition of tradition as a source of law, and the transformative promise of the new constitutional order in South Africa. While the existence of different symbolic systems represent the disharmonies that Jacobsohn argues will facilitate and shape the constitutional identity of South Africa, Hirschl hopes that the institutional resources of constitutionalism, particularly in the shape of a constitutional court, will provide a means to co-opt or tame the alternative systems of

45. *Bhe v. Magistrate, Khayelitsha* 2005 (1) BCLR 1 (CC) (S. Afr.), 2004 SACLR LEXIS 22, at *7-8.

46. *Zondi v. Member of the Exec. Council for Traditional and Local Gov't Affairs* 2005 (4) BCLR 347 (CC) at paras. 1-2 (S. Afr.), 2004 SACLR LEXIS 32, at *5-7.

47. *Alexkor Ltd. v. Richtersveld Cmty.* 2003 (12) BCLR 1301 (CC) (S. Afr.), 2003 SACLR LEXIS 79, at *8-13.

48. *Id.* at para. 51.

symbolic meaning that threaten the dominant vision of constitutionalism. The three visions of constitutionalism are remarkably consistent in their views of the political dynamic that underlies the existence of constitutional orders, yet have quite different notions of the effects that these orders might provide. For Hirschl, constitutionalism, with its "religion-like nature . . . might very well emerge, or perhaps has already emerged, as tomorrow's 'opiate of the masses.'"[49] For Tushnet, the constitution's structuring of politics offers an opportunity for popular engagement, and finally for Jacobsohn, the identification of contending elements within each constitutional order enables us to understand the role of constitutional identity in shaping processes of constitutional contestation. It is this latter view that I believe may provide the most effective tools for exploring the role of constitutions in both comparative and domestic contexts.

49. HIRSCHL, *supra* note 2, at 249.