1987

Book Review. The New Right v. The Constitution; The Supreme Court and the Decline of Constitutional Aspiration

Stephen A. Conrad
Indiana University Law School, conrads@indiana.edu

THE NEW RIGHT v. THE CONSTITUTION. By Stephen Macedo.[1] Washington, D.C.: Cato Institute. 1986. Pp. xiv, 60. Paper, $7.95.

THE SUPREME COURT AND THE DECLINE OF CONSTITUTIONAL ASPIRATION. By Gary J. Jacobsohn.[2] Totowa, N.J.: Rowman & Littlefield. 1986. Pp. ix, 182. $29.50.

Stephen A. Conrad[3]

These two books are much of a piece. Both advocate a libertarian jurisprudence of "Natural Rights"; and the rights in question are, they tell us, *determinate* and *historic*. It is primarily this distinctive historicism common to both books that I take as an invitation to consider them as a pair.

I

Handsomely produced and vigorously promoted by the Cato Institute, Professor Stephen Macedo's *The New Right v. The Constitution* is, however, not really a book at all: it is a separately printed essay in the style of a manifesto. The presentation is uncomplicated to a fault, as Macedo virtually concedes by concluding with a reference to his forthcoming "longer project," in which he will elaborate his ideas. In this essay he is content to state the general principles he proposes to reestablish. These are principles of politics, albeit high politics—or, as he puts it, "politics . . . at its best."

Similar to, indeed, inextricable from, "politics at its best," constitutional law at its best is for Macedo necessarily a matter of "moral aspiration." Yet, by and large, he ascribes such aspiration to impersonal agents rather than to the American citizenry themselves. Above all, he dwells—rhetorically, but no less significantly for that—on "the *Constitution's* moral aspirations" (emphasis added). And when he recites what I take to be his canon of guiding authorities for an "aspirational" American constitutionalism, "the People" come last on his list—and even then only with a proviso that does not attach to the other authorities. For eventually we learn that Macedo's constitutional theory is an appeal to "the founding document, the Declaration of Independence, the ideas of

1. Assistant Professor of Government, Harvard University.
2. Professor of Political Science, Williams College.
3. Associate Professor of Law, Indiana University—Bloomington.

the Founders, and the moral aspirations of Americans *at their best*" (emphasis added).

Still, lest I seem to imply that the title of Macedo's essay is misleading, I hasten to point out that he is a proponent of what he terms "Principled Judicial Activism." This is, in fact, the title of the most prescriptive section of his essay. And how Macedo couches his prescriptions there, and throughout the essay, is mostly a matter of how he strenuously distinguishes the New Right's "agenda" from his own.

In a short introductory section he announces that he will focus "on a set of claims advanced by prominent New Right scholars and politicians—claims that . . . constitute the most distinctive and important features of the New Right's jurisprudence." He sets his sights on the jurisprudence of one New Right jurist in particular—Robert Bork—chiefly because "Bork's assault on the active judicial protection of individual rights draws on the strongest and most often used weapons in the conservative armory." These weapons, four in number by Macedo's count, are ideas that Bork, and the New Right in general, espouse as constitutional doctrines, but which Macedo sees as the "components" of "an ideology . . . deeply at odds with the Constitution." In a word, these four are "intentionalism," "majoritarianism," "skepticism," and "communitarianism."

Macedo turns to the first in a section entitled *The Framers of the Constitution v. Judge Bork*. The "weapon" at issue there is the so-called "Jurisprudence of Original Intent." Quoting and citing with approval both "liberals" and "conservatives," from Ronald Dworkin to Sotirios Barber, Macedo reiterates a number of familiar arguments against this interpretive approach, not only those arguments that question the possibility or practicality of ascertaining the framers' intentions, but also—and more important to Macedo—arguments that deplore the underlying "legal positivism" of this approach itself as a radical deviation from a Natural Rights tradition manifested in the text of the Constitution, in the history of the framing and ratification,[4] and in the ensuing "accumulation of thickly textured constitutional case law."

Macedo's libertarian animus comes to the fore in the next section, *The Majoritarian Myth*, where he addresses what he deems the

4. An aside: Macedo asserts that it was "James Madison and Alexander Hamilton . . . who were most prominent in framing and securing the ratification of the Constitution." This assertion should raise eyebrows at what it gratuitously claims for Hamilton as a "framer." That Hamilton was absent from Philadelphia throughout most of the Federal Convention is only part of the story. *See, e.g.*, C. ROSSITER, 1787: THE GRAND CONVENTION 165, 252-53 (1966).

"controlling" preference, or "real basis," of the New Right's jurisprudence: a commitment to construe "government powers and the powers of majorities broadly and individual rights narrowly." Again he invokes familiar arguments, borrowed from Madison, Hamilton, John Marshall, and even William Brennan. For example, in *The Federalist* and, indeed, in the language of the preamble and the ninth and tenth amendments, Macedo finds authentic grounds for a complex, balanced, and limited constitutionalism which he takes as proof against any historic legitimacy for the "simplistic," voluntaristic majoritarianism of the New Right.

In two later sections, on how the New Right wields its "moral skepticism" and its "communitarian critique of liberalism," Macedo tells us still more about the substantive ends he himself wants to reaffirm. Rejecting the "moral skepticism" of those New Right judges who profess deference to the power of "the majority" to constitute a "community" by defining and imposing "public morality" as it wills, he calls for a return to the natural law morality of Coke, Blackstone, and Locke, especially as their elevated moral concern was carried forward in "the American political tradition at its best," by the likes of Jefferson, Samuel Chase, Marshall, and Lincoln. At the exalted center of this tradition, Macedo posits an "individual rights-centered public morality" equally true to J.S. Mill's liberal individualism and to Durkheim's ideal of community realized though the "glorification" not "of the self, but of the individual in general."

If challenged that his whirlwind tour of his pantheon of classical liberalism takes us too far from the business of constitutional jurisprudence, Macedo would have the beginnings of at least one answer in his characteristic observation that "[t]he Ninth Amendment calls upon conscientious interpreters to reflect upon natural rights and so to engage in moral theory." And if, in light of the "dizzying variety" of his own pastiche of moral theory, Macedo were faced with one of his most provocative charges against Bork—that "rhetorical coherence" substitutes for "logical coherence"—I believe that the best defense of Macedo's essay would lie in the modesty of its pretensions. After all, it never presumes more than to reassert the "possibility" of a "principled judicial activism" in the service of a libertarian revival.

Such a revival would restore privileged historic respect for private property as the exemplary Natural Right, together with a corresponding regard for other historic liberties—all guaranteed under a Constitution to be construed as a declaration of every individual's *negative freedom*, a freedom to be let alone.

In sum, then, Macedo has given us an engaging mixture of libertarian credo and brief, laced with just enough arch vehemence to recall many a Cato of the past.

II

On the other hand, Professor Gary Jacobsohn's book is reminiscent less of Cato than of Livy: *The Supreme Court and the Decline of Constitutional Aspiration* is an extended historical elegy to the *mos* of our *maiores*.

Professor Jacobsohn's radical historicism, much like Livy's, is shaped by one simple but subtle formula of constitutional cosmogony, namely, that the entire universe of legitimate constitutional Ends must have been contained in The Beginning. And for Jacobsohn, even more than for Livy, The Beginning was a determinate, isolated moment that Itself had no past—and no future, except for what was "immanent" *in* and *from* The Beginning.

This is epic conservatism—but it is not without a modern program, for the business of constitutional jurisprudence thus becomes the task of continually reducing the American Constitution to its one Authentic Moment. Jacobsohn is confident we know enough about *The* Original American Constitutionalism, at The Moment of Its Founding, that we can rely on It completely for *everything* to which we now or ever will "aspire" as a constitutional polity. In a phrase, what It was *was, is* and *ever shall be* "the natural rights commitments of the framers." But more: those commitments constituted "a coherent and knowable . . . set of philosophic presuppositions" which were articulated in "*the* received opinion in the formative years of the constitutional system" (emphasis added). And that coherent, knowable, indeed, *known* orthodoxy of the Fathers was not really very elaborate or complex. It was, according to Jacobsohn's repeated emphasis, "a minimalist natural rights philosophy," in large part because Its "minimalist objectives" were "all ultimately deducible from the right of self-preservation."

Moreover, the Original "minimalism" cohered in "settled" definitions and evident priorities. For example, Jacobsohn tells us that this Founders' orthodoxy "defined . . . the public good in terms of individual liberty." Furthermore, important evidence "suggests that," within this elemental sphere of individual liberty, "economic liberty could easily lay claim to priority status in an eighteenth-century version of the preferred freedom doctrine."

To the extent that the foregoing quoted remarks evince not only a reading of history but Jacobsohn's own political engagement as well—and I infer that to a great extent they do—then there is

reason to classify this book with the works of scholars such as Walter Berns, Nathan Tarcov, and John Agresto. And, in fact, Jacobsohn acknowledges important debts to all three.

Jacobsohn's chief contention is not merely that We *can* recur, for *all* of our constitutional principles, to the minimalist libertarian core of the natural rights philosophy of the late eighteenth-century framers. He goes further, insisting that we *must* do so—that is, if we "aspire" to preserve the Constitution at all. In order to vindicate this imperative *historically*—and for Jacobsohn, as for Livy, there is ostensibly no other way to vindicate it—Jacobsohn has to locate at least one historic and compelling reaffirmation of it that lies *outside* the definitive Original Moment Itself. Only in this way can Its "timeless" authority be exemplified.

Students of our constitutional history will not be surprised that Jacobsohn finds what he needs in the *Second* Great Moment in that history, the Civil War crisis. Indeed, for Jacobsohn, it is above all The Great Man of that Second Great Moment, Abraham Lincoln, who conclusively vindicated the eternal authority of the Original Moment—"precisely" because, in Jacobsohn's words, even in resolving the greatest crisis of the Republic, Lincoln embraced an "understanding of the Constitution [that] did *not* break new ground." In fact, Jacobsohn's book culminates with an effort to show that Lincoln's theory of the American Constitution is reducible to an "aspiration" to realize only one constitutional End: "ensuring that no person living under the authority of the document stood exposed to the imposition of arbitrary power upon his person."

Much like Macedo, Jacobsohn is pursuing what he sees as a middle way between, on the one hand, those Americans today—especially judges—who "depart from the original idea" of "constitutional aspiration" by "ambitiously" aspiring to ends beyond those of "eighteenth-century natural rights theory," and, on the other hand, those who, "partly in reaction to the perceived excesses of the first group," retreat into a "narrow interpretivism," thus "abandoning" the "notion of aspiration" altogether. And in order to set up a context of recent debate in which his libertarian reading of "the American creed" takes on all the virtues of the *aurea mediocritas* (commended by no less sage an authority than Livy's contemporary Horace),[5] Jacobsohn devotes most of his book to presenting his own views piecemeal, through a series of critiques of American constitutional theorists who serve him as foils.

5. *See* HORACE, *The Golden Mean* (Number X, Book II) in ODES (A. Campbell ed. 1953).

These include Roscoe Pound, Ronald Dworkin, Raoul Berger, Thomas C. Grey, and John Hart Ely—to each of whom Jacobsohn devotes an entire chapter of the book. Yet despite the impressive span of this list and the critical attention Jacobsohn devotes to other scholars of comparable stature, there are some dissatisfying, if excusable,[6] omissions.

I wonder, for example, how Bruce Ackerman's historical arguments in his 1984 Storrs Lectures[7] would, if addressed by Jacobsohn, challenge him to reformulate his own views, which depend so heavily on an approach to constitutional history *and* theory vastly different from Ackerman's. And I wince, both out of sympathy with Jacobsohn and at my own pang of disappointment, to see that Rogers Smith's recent attempt to rehabilitate Lockean individualism as constitutional theory,[8] though it elicits a nod of approval in an endnote, seems to have appeared in print too late for Jacobsohn to take it into account beyond that.

Nevertheless, Jacobsohn's endeavors at criticism are, in any case, largely but occasions for him to recapitulate his own libertarian imperative. This imperative—enjoining upon us the exclusive constitutional authority of "a particular theory of natural rights"—would seem to derive entirely from historical evidence, evidence that is aptly inspirational and reassuring: the self-evident truths of the Declaration of Independence as *Ur*-text, ratified and re-enacted, as it were, in the text of the Constitution, and explicated in the supplementary words of a few Great Books (for example, *The Federalist* and Locke's masterworks) and of a few Great Men (for example, Hamilton, Madison, James Wilson, Marshall, and Lincoln). Jacobsohn's criteria for selection can sometimes sound equally specific, even when baldly circular: for example, "a judge engaged in constitutional interpretation should be able to demonstrate that the extra-textual sources that he or she contemplates using are unambiguously illuminating of the principled commitments of the authors of the document."

I would argue, however, that the question-begging that many may notice in this book is largely beside the point. And much the same could be said of the myriad details about which Jacobsohn might be challenged in his arrangement of the voices of all his Great Men to sound in unison the single theme he evidently hears in them.

At bottom and at best, this is a book not of argument but of

6. Some of the chapters in Jacobsohn's book are substantially unrevised versions of articles published several years ago.

7. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013.

8. ROGERS SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW (1985).

illustration. And what it best illustrates is that the libertarian element in our constitutional culture has, like much else, a plausible historical authenticity for anyone who chooses to focus on it. Furthermore, the historic early American rhetoric of Natural Rights, even when it is not critically examined—and it is not critically examined in this book—retains considerable evocative force as self-authenticating suasion entirely in its own terms. There is no better example of this in Jacobsohn's book than when he eschews the terms of argument altogether, in favor of the syntax of a (rhetorical) question, the logic of self-evidence, the language of metaphor, and the posture of exhortation:

> If, for example, the egalitarian strand of creedal aspirations is weighted too heavily by the [Supreme] Court, so that the equilibrium of the whole is upset, then should there not be some institutional mechanism to give voice to the libertarian filament in our constitutional constellation? . . . [W]e must direct our energies to the support of those structures of interpretation that can best realize such lofty and consequential commitment. This may sound obvious, but, to paraphrase Holmes, education in the obvious is more important than elucidation of the obscure.

By this standard, which assigns priority to "education in the obvious" over and above "elucidation of the obscure," Jacobsohn's book is quite successful. And its measure of success in this respect is hardly diminished by Jacobsohn's disinclination to assume much critical distance from either the uncontextualized historical evidence he assembles or the unimpeachably authentic principles he expounds.

III

For the most part, however, I remain unpersuaded. Least of all am I persuaded by both authors' thoroughgoing historicism.

Macedo and Jacobsohn take it as a premise that historical inquiry yields knowledge—not merely an enhanced familiarity with the past, but "scientific" authority, indeed, "absolute" certainty. At times Jacobsohn does note that our "scientific and intellectual" culture at large now rejects this premise. But he tends to dismiss such enlightened prudence as the stuff of "trends" or merely the preference of "progressive-minded contemporary academics."

Even if I could countenance these authors' implicit philosophy of history and knowledge, I would still have deep reservations about their express conception of the nature of our republic. Both authors urge us to accept that We the People are so subservient to the eighteenth century Constitution that Our very aspirations are forever hostage to this Sacred Artifact created by and for Us *in illo tempore*. In Macedo's striking formulation, "The Constitution *declares itself*

to be supreme" (emphasis added). In Jacobsohn's subtler elaboration, Our Original "constitutional principles," and nothing but those principles, "*define us* as a people" (emphasis added).

This exaltation of the Constitution above the People seems to me not a faithful restatement but a radical inversion of Our "tradition" *ab urbe condita*—and I mean the first three words of *Our* Constitution and more: such an inversion contradicts the precept essential to republican government in general, that in the Republic the "supreme," "definitive," and "originating" political authority resides with the People. Nothing in Our late eighteenth century Founding compromised this article of faith. Indeed, James Wilson (one of Macedo's, and Jacobsohn's, and my preferred *Patres*) pleaded for Us never to forget that "the people are superior to our constitutions." And the Original provision for amending the Constitution—avowedly one of George Washington's favorite parts of the document—bore official witness to this faith by institutionalizing it. Thus, Jacobsohn's avowed distaste for the amendment provision would seem a curious but characteristic renunciation of the Faith of Our Fathers—in Us.

Ultimately, then, Macedo and Jacobsohn, despite their salutary reaffirmations, leave me with qualms that their historicist libertarianism would relinquish too much of what is indispensable in Our republican patrimony—Our faith in Ourselves.

HARD CHOICES: HOW WOMEN DECIDE ABOUT WORK, CAREER, AND MOTHERHOOD. By Kathleen Gerson.[1] Berkeley, Ca.: University of California Press. 1985. Pp. xix, 312. Paper, $9.95.

Mirra Komarovsky[2]

This is a study of the life histories of a group of women who were young adults in the late 1970s. As the subtitle indicates, the purpose of the research was to trace the processes underlying divergent patterns in the careers, marriage, and motherhood of these women, living during a period of accelerated social change.

The theoretical thrust of the study is presented in opposition to some current theories of gender: "social-structural coercion" and early childhood socialization. Professor Kathleen Gerson claims

1. Assistant Professor of Sociology, New York University.

2. Professor Emerita and Special Lecturer in Sociology, Barnard College, Columbia University.