The return of the repressed: Constitutionalism, religion, and political pluralism

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Michel Rosenfeld’s book The Identity of the Constitutional Subject1 has the distinctive qualities of a delicate wine. It is intricate and multilayered, with additional hints of flavor and memory coming to the surface after the initial taste subsumes. This richness is also reflected in the intellectual sources upon which the book relies. Rosenfeld is as comfortable discussing the opinions of Justice Anthony Kennedy and Justice Antonin Scalia in Lawrence v. Texas,2 as he is drawing upon Hegel’s Phenomenology or Freud’s notion of displacement. The breadth and scope of Rosenfeld’s undertaking in this book is impressive. His study investigates the dynamics of producing and (re) inventing the constitutional subject (we the people) while maintaining its coherence over time.3 The discussion then turns to explore whether the constitutional subject can now go global.

Rosenfeld thinks it can: “a transnational constitutional subject, or even a global one, is indeed plausible, provided it is conceived as being plural and yet, in its own dialectical way, as being able to maintain its singularity while managing the gap between the universal and the particular.”4 This attempt to square the circle, or to reconcile “the universal and the singular through the plural,”5 is admirable. It is also inevitably fraught with difficulties because much depends on the actual contours and contents given to the notion of the plural or pluralism in its task of conceptually bridging the universal and the particular. It is this pluralism element, which is so central to the work, that I wish to engage in this short essay.

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1 Michel Rosenfeld, The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community (Routledge, 2010).
3 Rosenfeld, supra note 1, at 65.
4 Id. at 245.
5 Id. at 269.
But to set the stage—and in line with Rosenfeld’s invitation to draw on psychological concepts—it is important to begin by identifying the core questions that the book is structured to address. These are listed in the book’s introductory chapter as falling into three categories: “To whom should the [national or transnational] constitution be addressed? What should the constitution provide? And, how can the constitution be justified?” In addition to these whom, what, how queries, there is another salient issue that Rosenfeld raises in the book’s opening pages, almost as a preliminary hurdle—namely, “Whether to adhere to constitutionalism (e.g., constitutional democracy versus theocracy).” Interestingly, this last question gets dropped out of sight and is relegated beyond the parameters of the book almost as soon as it appears. Yet I suggest that it plays a far more central role than initially meets the eye. This is the case because it is difficult to understand Rosenfeld’s unflagging defense of Enlightenment-based constitutionalism8 unless it is contrasted with its never-fully-articulated “other,” which he defines in a mere footnote as “equivalent to an organized fundamentalist religion” and “the dictates of sects, cults, or non-theistic intransigent and non-negotiable ideologies.”9 Framed as an alternative to this “other,” constitutionalism is an answer to an existential dilemma: openness versus parochialism; cosmopolitan versus extremism; proportionality versus tyranny; and so on.

In this epic struggle, what “stand[s] against the transnational and potentially global expansion of constitutionalism . . . is another tendency that threatens to fragment, derail, and perhaps ultimately undermine the consolidation or maintenance of stable constitutional order . . . . This latter tendency is driven by what may be broadly termed ‘identity politics’—i.e., the group-based politics of a collectivity bound together by shared ethnic, religious, cultural, or linguistic heritage, which is to a significant degree conceived as fundamentally at odds with that of other relevant groups within the polity.”10

Identity politics and organized religion are clearly not the favored actors in Rosenfeld’s narrative, although he devotes relatively little time to articulating the alleged ills of these two culprits. This is partly explained by the avoidance of the whether question, which would have required articulating the relevant alternatives. This permits Rosenfeld to paint a rather fixed picture of comprehensive religions, ignoring the rich interpretative debates that are prevalent in Judaism, Islam, or Christianity, for example.11

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6 Id. at 10.
7 Id. at 3. See also RAN HIRSCHL, CONSTITUTIONAL THEOCRACY (Harvard, 2010).
8 Id. at 3.
9 Id. at 282, note 8.
10 Id. at 2.
11 The literature on these interpretive debates is too vast to cite in full. For illustrative examples, see MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES (4 volumes, Jewish Publication Society of America, 1974); LOUIS JACOBS, A TREE OF LIFE: DIVERSITY, FLEXIBILITY, AND CREATIVITY IN JEWISH LAW (Littman, 2000); MANSOOR MOADDI AND KAMRAN TALATOFF, CONTEMPORARY DEBATES IN ISLAM: AN ANTHOLOGY OF MODERNIST AND FUNDAMENTALIST THOUGHT (Palgrave Macmillan, 2000); DANIEL BROWN, A NEW INTRODUCTION TO ISLAM (Blackwell, 2004); THE ENCYCLOPEDIA OF CHRISTIANITY (5 volumes, Erwin Fahlbusch et al. eds., Eerdmans Publishing, 2008); W. H. C. FRENZ, THE RISE OF CHRISTIANITY (Fortress Press, 1984).
serious acknowledgement of the significant internal diversity and room for substantive debate within organized religions (some are dogmatic, others respond to changing social needs and circumstances). The reluctance to unpack or even to directly confront the implied concerns associated with the characterization of religions as equating comprehensive and non-compromising ways of life proves crucially significant in appreciating the book’s intellectual enterprise. Why? Because like “the return of the repressed,” it is often the unattended issues and the gaps exposed that are crucial for understanding the affirmed patterns and declared directions in which the book steers.

Early on in the book, Rosenfeld evokes Freud’s notion of displacement, which, as some readers will recall, suggests that expressions of repressed thoughts are made possible by redirecting their emotive intensity toward a target or object that bears a relationship of contiguity to the would-be target that is rendered inaccessible by repression. Rosenfeld explains this pattern with a lucid example: “if one’s unconscious hatred of an uncle who uses a cane cannot find conscious expression because of repression, such hatred may be displaced toward canes, resulting in a conscious aversion to canes.” This anecdote is revealing for our inquiry: we need to identify what stands as the cane in Rosenfeld’s analysis of constitutional identity.

I suggest, admittedly in a speculative and exploratory fashion, that the threat of extreme nationalism, religiosity, and identity politics of all kinds is far more influential than is acknowledged in the text, and operates much like the cane in the story of displacement. Thus, pluralism offers an answer to the unarticulated and repressed question: how to tame religion and other worldviews (or “comprehensive conceptions of the good”) that do not adhere to the emergent global expansion of Enlightenment-based constitutionalism. To address this elephant-in-the-room problem, Rosenfeld appeals to pluralism as a golden mean able “to promote the greatest possible diversity of conceptions of the good as a means to maximize human dignity and autonomy. Pluralism must combat intolerant religions claiming a monopoly on the truth.”

But what kind of pluralism is actually defended here? Rosenfeld provides us with several clues to guide our inquiry. For instance, he argues powerfully in favor of promoting diversity as part of the process of creating and sustaining a society’s constitutional identity. This is not an unrestricted license, however. Organized religions, in particular, are allowed to be “readmitted” to the realm of collective social life on the condition that they pose no threat to the constitutional order itself. The task that Rosenfeld entrusts to pluralism, then, is to permit religions or other expressions of identity politics to thrive, but only if they are sufficiently pacified and tempered so as never to challenge the lexical superiority of the society’s constitutional identity. In the process, religions and other comprehensive ways of life are “disarmed” so as to remove

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12 ROSENFIELD, supra note 1, at 54–55.
13 Id. at 47.
14 Id.
their potentially disruptive power to challenge the semisacred, high modernist stance of constitutionalism as a “civil religion” that generates the highest law of the land.\(^\text{15}\)

As political philosophers would put it, Rosenfeld’s resolution fits well with certain contemporary strands of political liberalism, although it does not sit equally well with “value pluralism,” as understood in moral theory. To clarify this last point, we need to step back and elaborate this distinction. In metaethics, debate centers around the core question of whether values are plural or monist. Those who adhere to the idea of value pluralism, in this tradition, reject the idea that apparently different values (liberty, equality, fairness, public order, and so on) can be reduced to a single “super” value, as monists would claim. A classic example of a supravelue is the place reserved for welfare or utility (“happiness” in older formulations) in utilitarian thinking. Human autonomy is another such supravelue, according to most Kant-inspired philosophers. Value pluralists postulate, however, that there is no supravelue or overriding governing principle, making it close to impossible to prioritize or compare among competing values; this is the concern with incommesurability—the lack of a “common currency” for resolving value conflicts.

This latter concern is not foreign to constitutional scholars or human rights advocates. However, instead of endless philosophical musings at the level of metaethics, humanistic social scientists, legal scholars, and jurists, facing the task of envisioning a just society, have appealed to political pluralism, which, as the name indicates, focuses on the political not metaphysical: elaborating the justifiable restrictions that governments, or constitutions, can place on the freedom of individuals to act alone or in association with others according to competing conceptions of the good.

Just as there are intense debates about whether political liberalism can be detached from a comprehensive doctrine, so in the context of our discussion, the main bone of contention is whether an Enlightenment-based constitutionalism—its immense sophistication and different national and potentially transnational models notwithstanding—is more akin to a so-called supravelue and governing principle (in certain parts of the book it comes close to serving a comprehensive doctrine) rather than reflecting a more radically pluralistic vision that would see the secular, human-made...

\(^{15}\) The phrase “civil religion” was coined by Jean-Jacques Rousseau in The Social Contract. In the United States, the tenets of civil religion have been studied extensively by sociologists, legal scholars, and political scientists. See e.g., Robert N. Bellah, Civil Religion in America, 96 Daualus 1 (1967); Sanford Levinson, Constitutional Faith (Princeton, 1988); Ran Hirschl & Ayelet Shachar, The New Wall of Separation: Permitting Diversity, Restricting Competition, 30 Cardozo L. Rev. 2535 (2009). The latter work draws on comparative constitutional jurisprudence to identify two different categories of judicial response to religious-based claims for recognition, accommodation, and exemption: 1) “diversity as inclusion”; and 2) “non-state law as competition.” It attempts to demonstrate that the former category of legal claims for accommodation (diversity as inclusion) stands a fair chance of success so long as the claims are not seen by courts as challenging the lexical superiority of the constitutional religion itself, whereas the latter (nonstate law as competition) is typically quashed by state authorities, especially where the legal challenge at issue is interpreted as raising doubts regarding which set of norms and institutions should have the final word in authoritatively resolving legal disputes within a given society.
The privileged position of the constitutional order finds its manifestation, for example, in the ability of its official interpreters (judges, legislatures, legal reforms, and so on) to resolve disputes authoritatively and in a binding fashion. A vivid illustration is the U.S. Supreme Court decision in *Employment Division v. Smith*, in which the question was whether a state could deny unemployment benefits to a person fired for violation of a prohibition on the use of peyote, even though such use was part of the religious ritual of the Native American Church to which the person belonged. The ruling upheld the state’s decision to deny unemployment benefits under these circumstances, a decision that, later on, was partly overturned by federal legislation. Beyond these specific facts, this scenario raises a principled and paradigmatic quandary: What are the guiding principles to be used in determining which practices and ways of life are to be tolerated, respected, accommodated, or granted exemptions from otherwise binding general laws that govern our collective social life, and which authorities or “high priests” are to be entrusted with the responsibility of addressing these thorny questions? For Rosenfeld, the answer ultimately lies in fidelity to, indeed faith in, the constitutional order—whether national in origin or global in reach.

Throughout the book, Rosenfeld emphasizes the problem of the “lack” that constitutional identity is set to answer, claiming that, in certain cases, constitutional identity serves “as an empty place holder, to be filled through a process of negation, deconstruction, reconstruction, reincorporation and recombination.” While open-ended, this process of providing meaning (or overcoming the “lack”) is not boundaryless. The outer limits are set to preempt organized religions or other expressions of comprehensive ways of life that resist the new rules of the game—those of toleration, openness, and, yes, of constitutional supremacy, too. On this account, the version of pluralism offered in the book is, at its base, monist, because it refuses to allow equal footing to any conception of the good that rejects the baseline values of Enlightenment-based constitutionalism. Rosenfeld is comfortable endorsing, and indeed encourages, a degree of diversity—or political pluralism—within the bounds of Enlightenment constitutionalism. This permission gives birth to supporting legal technologies that endorse pluralism in this political sense, such as the “margin of appreciation” developed by the European Court of Human Rights and the principle of subsidiarity or to supporting the specialized and increasingly transnational division of labor according to subject-matter segmentation (global-trade disputes to be addressed by the WTO, health crises by the WHO, and the like). At a more structural level, however, it is monism rather than value pluralism in the moral sense of the term that wins the day. Pluralism is permitted only within a *bounded* set of margins that are not incompatible with basic constitutional or human rights standards. Those conceptions of

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18 ROSENFIELD, supra note 1, at 244.
the good that offer divergent ideologies or comprehensive and uncompromising ways of life that may threaten the constitutional order are accordingly policed or put under restraint. It is this preemptive attempt to block a latent confrontation that represents the immense influence of the anticipated—though never fully articulated—threat of organized religion on Rosenfeld’s thinking, or the “return of the repressed.”

So we finish where we started. The book endorses pluralism but only of a particular kind. It permits expression of different ways of life and competing conceptions of the good so long as they operate within a confined set of normative limits that grow out of the legacy of the Enlightenment, aiming to mediate concepts of constitutionalism, human liberty, and equality. And this brings me to a final illustration of the bounds of pluralism in Rosenfeld’s analysis. Unlike the Hegelian insight of defining the subject in relation to and in interaction with the other—recall that in the Phenomenology we find an epic struggle for domination through which both sides (slave and master in Hegel’s narrative) eventually recognize one another as worthy of equal dignity and respect—Rosenfeld, like a concerned parent, is more protective of the constitutional order, shielding it from the possibility of such a direct showdown with the demons of religion and identity politics. Perhaps wisely, from a political point of view, Rosenfeld does not wish to accord non-Enlightenment comprehensive conceptions of the good a foothold in his vision of a new transnational constitutional order. This fits flawlessly in line with his overall endorsement of political pluralism, which is not to be confused with value pluralism. Rosenfeld’s systemic analysis does a great service in thinking about the interplay between the universal and the particular and in shaping new visions of citizenship and constitutional identity for an emergent global order. Yet the irony of highlighting the special place of constitutionalism as the supreme law is that it acquires, metaphysically, the qualities of a semisacred authority that is unchallengeable; in this sense, it begins to mirror those very religious orders against which it was set up as an alternative.