

Constitutional Identity: An Overview and Some Conceptual Concerns

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Synopsis

This critical review outlines and assesses Gary Jacobsohn's 2006 article, "Constitutional Identity."¹ I argue that although the study of constitutional identity may well prove fertile for comparative constitutional theorists (particularly in striking a middle ground between positivist and natural law approaches to the study of constitutionalism), the concept itself remains underspecified and difficult to distinguish from related phenomena.

Constitutional Identity: An Overview

For Jacobsohn, we cannot speak of comparative constitutionalism without tackling the elusive yet crucial concept of constitutional identity. Indeed, even if constitutional theorists are reticent to manifestly engage with the idea, constitutional courts seem to think that constitutional identity matters and regularly make reference to it. For example, in *Minerva Mills Ltd. V. Union of India* the Indian Supreme Court held that "[T]he Constitution is a precious heritage; therefore you cannot destroy its identity" (pg. 361). This argument – that one can uncover certain fundamental constitutional features that are unalterable – has its roots in German constitutional jurisprudence, "which had accepted the idea that there are implied and enforceable limits to constitutional change," an interest that is "historically obvious; as would the interest in individual identity of anyone who has been close to another whose personality appears at some point to have drastically changed for the worst" (pgs. 375-376). In Ireland, too, the Irish Constitution of 1937 explicitly places the family and Catholicism at the center of its constitutional identity, a fact that has been reaffirmed by the Irish Supreme Court. If only due to the many judicial references to constitutional identity, then, the subject appears worthy of further study. This is the central premise of Jacobsohn's contribution.

To define the concept of constitutional identity, Jacobsohn relies heavily on the philosophical writings of Edmund Burke:

"I argue, following Edmund Burke, that a constitution acquires an identity through experience, that its identity neither exists as a discrete object of invention nor as a heavily encrusted essence embedded in a society's culture, requiring only to be discovered. Identity emerges dialogically and represents a mix of political aspirations and commitments that is expressive of

¹ Jacobsohn, Gary. 2006. "Constitutional Identity." *The Review of Politics* 68 (3): 361-397.

a nation's past, as well as the determination of those within the society who seek, in some ways, to transcend that past. It is changeable but resistant to its own destruction, and it may manifest itself differently in different settings" (pg. 363).

Jacobsohn's Burkean approach lies in his emphasis on experience – on the notion that identity emerges from day-to-day practice and is consequently the opposite of an abstract theoretical concept (pg. 374). Thus constitutional identities emerge from a "dialogic process [...] through interpretive and political activity occurring in courts, legislatures, and other public and private domains" (pg. 370). Yet Jacobsohn emphasizes that one cannot reduce "constitutional identity to discovery alone," for day-to-day practice and legal norms may not accord with "certain attributes of the rule of law that are the necessary condition for constitutional governance" (pg. 374). Thus although "the guardians of the Soviet constitution were in a position to maintain its continuity, and to keep the document essentially the same over the many decades of its existence, [this] did not mean that it represented anything more than a cruel, if transparent, hoax in the lives of the Soviet people" (pg. 371). In other words, although constitutional identities lend themselves to plural, context-specific iterations, their existence is premised on their conformity to the ideal of constitutional government.

Jacobsohn proceeds to offer some illustrative case studies to further analyze the concept of constitutional identity. In the case of post-independence India, constitutional identity comes to the forefront in the seemingly paradoxical concept of the "unconstitutional constitutional amendment." The Indian Supreme Court's "basic structure jurisprudence," as articulated in the 1973 case of *Kesavanada Bharati v. State of Kerala*, articulates this approach thusly: "One cannot legally use the Constitution to destroy itself [...] The personality of the Constitution must remain unchanged" (pg. 376). Thus when in the mid 1970s Prime Minister Indira Gandhi sought to alter the constitution so as to retract the Supreme Court's judicial review powers vis-à-vis the promulgation of constitutional amendments, the Supreme Court held firm in striking down such efforts as unconstitutional (pgs. 377-378). The public sided with the Court, which managed to fend off a "blatant campaign to diminish its standing" and to diffuse "a much larger assault on the institutions of constitutional government" (ibid).

In the Irish case, the purpose of the 1937 Constitution was to enshrine Ireland's Catholic, familistic cultural heritage rather than to inaugurate a new constitutional order following imperial rule. As such, the Irish Constitution contains a particularly strong "expressive component," namely (1) in the preamble's invocation of "the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both men and States must be referred," and (2) in Article 41, Section 1, which reads: "The State recognizes the family as the natural primary and fundamental unit group of Society and as a moral institution possessing inalienable and imprescriptible rights" (pgs. 385-387). Yet

whereas Irish constitutional identity is largely congruent with longstanding social values, the Irish case further serves as an example of the mutability of constitutional identity. Progressive social change away from a strict privileging of “Thomistic natural law,” combined with pressure from the European Court of Human Rights to further the rights of Irish women, has spurred a gradual and dialectical evolution of Ireland’s constitutional identity, particularly via a gradual, if circumscribed, accommodation of abortion rights (pg. 392). “In this story,” writes Jacobsohn, “a polity determined to accommodate significant social change seeks to do so under the restraining sway of the prescriptive constitution. What appear as discrete and occasionally inconsistent developments (e.g., privileging Thomistic natural law in one case, putting it in its place in another) are best understood as moments in a dialogical unfolding of identity refinement and calibration” (ibid).

This latter point is critical for Jacobsohn, for it reaffirms the Burkean foundations of his theory and serves to emphasize the creative potential of constitutional dissonance. In his 2010 book on the same subject,² Jacobsohn emphasizes this point more explicitly: “tensions – and sometimes outright contradictions” within constitutions “provide an incentive structure within which judicial actors may attempt to reconcile and accommodate the disharmonic elements of their constitutional circumstance” (2010: 22). Indeed, what is often ignored by constitutional theorists who prefer to view constitutions “at a level of abstraction that enables apparent tensions to disappear” (ibid: 4) is that constitutional development would seldom occur if the law were perfectly in harmony with itself and with social realities. This is the “promise of disharmony” that Jacobsohn borrows from Samuel Huntington’s treatise on American politics,³ and which he deems as the essence of all constitutions: “In this sense, constitutions are a lot like music: their disharmonies are intrinsic to their nature, conditioned by local circumstance and tradition, and necessary for the realization of the enterprise” (ibid: 355).

A Critical Evaluation and Some Conceptual Concerns

Jacobsohn’s scholarship on constitutional identity may prove particularly fertile as a rejoinder to natural rights theorists. Natural rights approaches posit that “our “natural rights” [extend] well beyond any list that could be set down in a Bill of Rights,” for they are universal and inalienable, and thus not contingent upon state authority for their existence (Arkes 1990: 65).⁴ The problem with this approach is that underemphasizes the degree to which all legal claims are themselves social constructions. As Clifford Geertz lucidly notes, legal claims “are not merely thing found lying about in the world and

² Jacobsohn, Gary. 2010. *Constitutional Identity*. Princeton, NJ: Princeton University Press.

³ Huntington, Samuel. 1981. *American Politics: The Promise of Disharmony*. Cambridge, MA: Harvard University Press.

⁴ Arkes, Hadley. 1990. *Beyond the Constitution*. Princeton, NJ: Princeton University Press.

carried bodily into court, show-and-tell style, but [are instead] close-edited diagrams of reality [...] part of a distinctive manner of imagining the real” (1983: 173). Jacobsohn’s concept of constitutional identity seems to strike a constructive balance between a positivist interpretation of the law - which can overemphasize the importance of the written law – and a natural law approach.

Yet since I take Jacobsohn’s contribution to be a conceptual piece, I find it appropriate to consider the ways in which Jacobsohn, while not quite engaging in the crime of conceptual stretching (Sartori 1970),⁵ needs to better specify the attributes composing the conceptual class of “constitutional identity” and to distinguish it from cognate concepts.

First, if constitutional identity emerges from a Burkean understanding of socially-grounded constitutional practice, then it is unclear why Jacobsohn often attributes said identity to the constitutional document and not to the people themselves. In essence, this is a question of *who owns* constitutional identity. In favorably citing the Indian Supreme Court’s reference to the “personality of the Constitution,” it seems as though Jacobsohn need not assess the social practices of the Indian people in order to discern the identity of the document itself. Rather, this identity could be discerned via the structure and substantive content of the text itself, with perhaps some reference to the intent of its founders, as in some strands of originalist constitutional interpretive theory (see Whittington 1999a).⁶ Indeed, elsewhere Jacobsohn explicitly refers to “the [Indian] constitution’s identity” – implying that ownership of the concept lies with the document (pg. 387). This conflation of a *constitution’s* identity with *constitutional* identity is surprising on Jacobsohn’s part, for a distinction between the two may underscore why we can only speak of *constitutional* identity given the existence of constitutional government. Specifically, only when checks on executive authority are combined with a modicum of democratic input and accountability can we reasonably link the “personality” of a constitution to the social practices of its citizens (for only then do the latter end up mattering in any meaningful sense, so as to leave their imprint on the text itself). The Soviet case is instructive in this regard: if the concept’s ownership lies with the document, then surely the Soviet constitution *did* have a distinct identity, albeit a statist, authoritarian one. In short, if constitutional identity lies within the *document* rather than with the *people*, then it is unclear why Jacobsohn dismisses authoritarian constitutions as outside the scope of his analysis. And if Jacobsohn does not intend to make this claim, then he should avoid referring to a “constitution’s identity” as though it were an attribute owned by the document itself.

⁵ Sartori, Giovanni. 1970. “Concept Misformation in Comparative Politics.” *The American Political Science Review* 64 (4): 1033-1053.

⁶ Whittington, Keith E. 1999a. *Constitutional Interpretation: Textual Meaning, Original Intent, And Judicial Review*. Lawrence, KA: University of Kansas Press.

It is equally unclear how Jacobsohn's conceptualization is distinct from similar phenomena already extensively discussed in the literatures on constitutionalism and comparative politics. First, Keith Whittington (1999a; 1999b⁷) has written that all constitutions are dual constitutions – in the sense that there exists a written text accessible via technical constitutional interpretation by judges and an unwritten constitution accessible via creative constitutional construction by citizens and the political branches of government. Akhil Amar has recently elaborated a very similar point.⁸ Along parallel lines, popular constitutionalists have long argued that constitutionalism is a process that is as much exogenous to courts as it is endogenous to the practice of judicial review, thus underscoring, as Jacobsohn does, the Burkean notion of day-to-day constitutional practice amongst the myriad actors within a constitutional system (see Ackerman 1991; Kersch 2004).⁹ This begs the question: to what extent is constitutional identity distinct from the concept of an unwritten constitution emerging from the popular practice of constitutional politics? Jacobsohn's focus on practice also renders it difficult to separate the concept of constitutional identity from other social norms – including norms of behavior vis-à-vis law, morality, and constitutional compliance (Cooter 2000).¹⁰ Finally, in Jacobsohn's discussion of the Irish case, it is unclear how constitutional identity is conceptually distinct from what comparative political scientists would refer to as national or cultural identity, particularly given that Catholicism and familism are not, in any conventional sense, “constitutional” qualities.

In short, although constitutional identity may well prove to be a fertile concept for comparative constitutional theory, it remains to be seen whether it is indeed a distinctive phenomenon worthy of its own conceptual class.

⁷ Whittington, Keith E. 1999b. *Constitutional Construction: Divided Powers and Constitutional Meaning*. Cambridge, MA: Harvard University Press.

⁸ See: Amar, Akhil Reed. 2012. *America's Unwritten Constitution: The Precedents and Principles We Live By*. New York, NY: Basic Books.

⁹ Ackerman, Bruce. 1991. *We The People: Foundations*. Cambridge, MA: Harvard University Press; Kersch, Ken I. 2004. *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law*. New York, NY: Cambridge University Press.

¹⁰ Cooter, Robert D. 2000. “Do Good Laws Make Good Citizens? An economic analysis of internalized norms.” *Virginia Law Review* 86(8): 1577-1601.